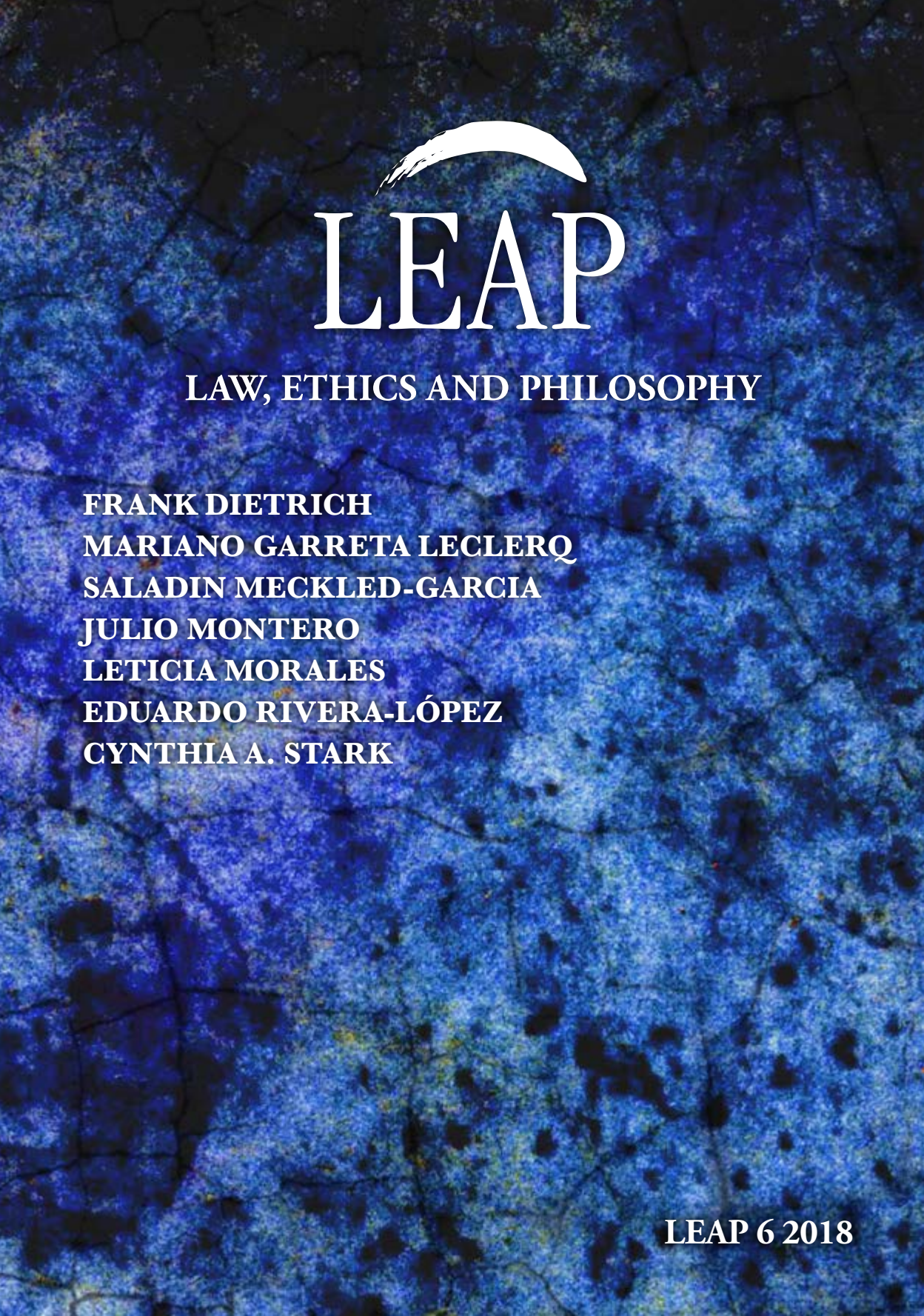
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The Presumption of Equality*

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ABSTRACT

Many distributive egalitarians do not endorse strict equality of goods. Rather, they treat an equal division as having a special status such that departures from equality must be justified. They claim, then, that an equal division is "presumptively" just. Though the idea that equality is presumptively just and that departures from it may be just has intuitive appeal, making a case for this idea proves difficult. I argue, first, that extant "presumption arguments" are unsound. Second, I distill two general philosophical morals: luck egalitarians have not adequately defended the presumption of equality and they face serious obstacles in doing so; Rawls has defended it, but only indirectly via the contract apparatus. This approach narrows the presumption's appeal. Third, I consider and reject two alternative ways of understanding the presumption of equality that might avoid the problems revealed by my examination of extant views. The first appeals to the idea of value pluralism. The second treats the presumption as a view about the burden of proof. I conclude, ultimately, that it is misleading to think of distributive egalitarianism as typically having the form of a presumption argument.

Keywords: equality, distributive justice, Rawls, luck egalitarianism.

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1. INTRODUCTION

Many distributive egalitarians do not endorse strict equality of goods.[1] Rather, they treat an equal division as having a special status such that departures from equality must be justified. They claim, then, that an equal division is "presumptively" just. Rawls, for instance, argues that inequalities in wealth are just only if they make everyone better off than they would be at a "benchmark of equality". Many luck egalitarians hold that distributive equality is the "moral default" and that departures from this default caused by brute luck[2] are unjust while those produced by choice are just.

Though the idea that equality is presumptively just and that departures from it may be just has intuitive appeal, making a case for this idea proves difficult. In this paper I first show that extant "presumption arguments", as I shall call them, are unsound. Some of the arguments I canvas are given in a critical vein, so not in all instances do I make an original case against the presumption. The point of this canvasing is to demonstrate the difficulties besetting presumption arguments. Second, I distill two general philosophical morals: luck egalitarians have not defended the presumption and they face serious obstacles in doing so; Rawls has, but only *via* the contract apparatus, which narrows the presumption's appeal. Third, I consider and reject two alternative ways of understanding the presumption of equality that might avoid the problems revealed by my examination of extant views. The first appeals to the idea of value pluralism. The second treats the presumption as a view about the burden of proof. I conclude that it is misleading to think of distributive egalitarianism as typically having the form of a presumption argument.

2. GETTING TO AND DEPARTING FROM EQUALITY

Here are the bones of the presumption arguments I will consider:

1. Equality is presumptively just because it eliminates the influence of luck on distribution. Departures produced by choice are just because they hold people responsible for their choices.
2. Equality is presumptively just because it distributes the effects of luck equally. Departures produced by choice are just because they hold people responsible for their choices.

1 I use "goods" here as a neutral term for whatever distribuenda particular theories endorse.

2 Luck egalitarians distinguish between brute luck and option luck. See Dworkin (1981: 293). Throughout my discussion, I will use "luck" to mean "brute luck".

3. Equality is presumptively just because it is demanded by the equal worth of persons. Departures produced by choice are just because they hold people responsible for their choices, which is necessary for recognizing their capacity for agency.
4. Equality is presumptively just because it contains no inequalities caused by morally arbitrary factors. Departures from equality are just when and because they increase everyone's wealth and maximize the wealth of the least wealthy.
5. Equality is presumptively just because it contains no inequalities justified by morally arbitrary factors. Departures from equality are just when and because they increase everyone's wealth and maximize the wealth of the least wealthy.
6. Equality is presumptively just because it is demanded by the equal worth of persons. Departures from equality are just when and because they increase everyone's wealth and maximize the wealth of the least wealthy.

Before outlining the arguments listed above, I must explain, in order to avert confusion, an idiosyncratic way in which "equality" is sometimes used by luck egalitarians. Ronald Dworkin (1981: 285-304), who is arguably the father of luck egalitarianism, maintains than an equal division of resources is not flatly equal but is, rather, one that meets the "envy test". According to this test, a division is equal if no one prefers someone else's bundle of resources – which includes both material goods and natural talents – to her own. This division, Dworkin states, ensures that each person pays the cost to others of her choices and is, to that extent, just.

One might think that changes over time to such an equal division are themselves just whenever people freely engage in production and exchange. However, Dworkin argues, this is not the case, for some will confront good luck and others bad, in particular with respect to their mental and physical powers – some will, luckily, have highly marketable talents and others less marketable talents. Because of the influence of luck, subsequent distributions will not be envy-free. Dworkin argues that those who suffer bad luck are owed compensation *via* a tax and transfer system, which is based upon a hypothetical insurance market, the details of which need not detain us. The point is that such a system is necessary to ensure that the distribution of resources in a market economy remains envy-free and, hence, equal and just.

Dworkin's argument is not a presumption argument because equality of resources is not *presumptively* just on his view – it is just full stop. Distributive justice is preserved, he thinks, so long as production and

exchange continually produce distributions that meet the envy test. I assume that "equality" in the presumption arguments I discuss below refers to flat equality and not to Dworkinian equality because Dworkinian equality is not, by the lights of luck egalitarianism, merely presumptively just.

2.1. Eliminating the influence of luck

Susan Hurley (2003: 146-58; see also Eyal 2005) has proposed that luck egalitarians endorse the presumption of equality because they believe that an equal division eliminates the influence of luck on distribution, which is required by justice. They then endorse departures from this division that are produced by choice alone, as these inequalities hold people responsible for their choices, which is also required by justice. But, Hurley notes, this argument does not work because an equal division of goods might also be a matter of luck. She reasons as follows. If we redistribute equally all the goods that people have acquired as a matter of luck, then what share people have is still a matter of luck, at least insofar as people do not have the share for which they are responsible. It follows that an equal division does not extinguish the effects of luck, it merely rearranges them. So, an equal division cannot stand as the moral default on the ground that it neutralizes the effects of luck.

Suppose that the luck egalitarian can, *contra* Hurley, found the presumption of equality upon the demand to eliminate the influence of luck on distribution. In this case, the luck egalitarian would, nonetheless, not have a sound argument for the presumption of equality.[3] This is because (re) distributing equally all the goods that people have gotten as a matter of luck would not create flat equality. The resulting distribution would instead contain inequalities produced by choice; people's shares would be composed of whatever goods they acquired through their choices and an equal portion of the luck-tainted redistributed goods. It is hard to see how this division should serve, for the luck egalitarian, (merely) as a moral default. By luck egalitarian lights, this division does not require departing from since it contains inequalities that are just, namely those caused by choice, and (*ex hypothesi*) it extinguishes the effects of luck.

There are two problems, then, with founding the presumption of equality on the idea that this will neutralize the influence of luck. The first is that equalizing the goods gotten by luck does not necessarily eliminate the influence of luck. The second is that even if it did, equalizing the goods

3 Though they would have a sound argument for Dworkinian equality, in which case, they would not be making an argument for a presumptively just division, but for a just division.

gotten by luck does not produce equality overall.

2.2. Equally distributing the effects of luck

Samuel Freeman (2007: 120-21, 151; see also Vallentyne 2003: 170, 177) has defended the luck egalitarian against Hurley's charge by suggesting that the luck egalitarian is justified in demanding that the influence of luck be equalized. If we assume, he says, that everyone's natural endowments are equally a matter of luck, then a principle of equity requiring us to treat like cases alike enjoins us to distribute the goods produced by our natural endowments equally rather than to let them fall into the hands of people according to their particular talents.[4] The default justice of equality is founded, then, not upon the aim to neutralize luck, but rather on the demand to distribute the effects of luck equally.[5]

The problem with this amendment is that it does not address the second of the two problems identified above. Redistributing the effects of luck equally does not produce a flatly equal distribution. It produces one in which the goods initially acquired by luck are distributed equally and the goods attributable to people's choices are distributed unequally. And so, according to luck egalitarianism, there is no obligation of justice to depart from this division.

2.3. Equal moral status and responsibility for one's choices

Critics of Hurley claim that she proposes the luck neutralizing aim as a possible ground for the presumption of equality because she confuses the luck egalitarian demand to eliminate the effects of luck on *inequality* with a demand to eliminate the effects of luck on *distribution* (Vallentyne 2003, 2006; Lippert-Rasmussen 2005; Cohen 2006; Segall 2012). For luck egalitarians, what should be neutralized is not the effects of luck but rather the differential effects of luck. It follows that if equality were caused by luck, it would not be unjust on that ground. In this sense, equality has a special status for luck egalitarians: it is immune from moral condemnation

4 Presumably this argument would hold *mutatis mutandis* for other instances of luck that tend to affect people's distributive shares, such as their class position at birth, their health, etc.

5 Cohen (2006: 445) holds a similar view, although he does not offer it as an argument for an egalitarian default. He says, "[s]uppose…that we could divide goods up into those for which people are responsible and those for which they are not responsible. Then…we might use only the goods for which people are not responsible as the currency of justice… If it is fair for people to keep, before any redistribution is set in train, what and only what they are responsible for, because they are responsible for it, then the same conception of fairness also requires that the rest be distributed equally, because to distribute otherwise is to benefit people in disaccord with their exercises of responsibility".

even if it is caused by luck. Hurley calls this approach "the equality default view", suggesting that this immunity is unfounded.

Kok-Chor Tan (2012: 89-90) counters Hurley's suggestion by providing a sketch of an argument for the presumption of equality and for departing from equality on grounds of choice. He reasons as follows: [6]

1) Persons have equal moral worth as agents.
2) Therefore, distributive equality is the "moral default": it is the distribution from which departures must be justified.
3) Departures from equality are justified when they are expressions of agency.
4) Therefore, departures produced by choice are justified.
5) "Distributive arrangements" that reflect luck and not choice fail to treat people as moral equals.
6) Therefore, distributions that reflect luck and not choice are unjustified.

As it stands, this argument is invalid: given that equality is a distribution that reflects luck (barring very unusual circumstances), it would, by the lights of this argument, be unjust and so it cannot be presumptively just. However, this version of the argument makes Hurley's mistake. It treats distributions as such, rather than unequal distributions, as susceptible to the luck egalitarian criterion. This problem can be solved with the following changes:

1) Persons have equal moral worth as agents.
2) Therefore, distributive equality is the "moral default": it is the distribution from which departures must be justified.
3) Departures from equality are justified when they are expressions of moral agency.
4) Therefore, departures produced by choice are justified.
5) Departures from equality that reflect luck and not choice fail to

6 Tan (2012: 89-90) claims that he is not in fact *arguing* for the egalitarian default. He says, "[i]n explicating what I take to be the implicit starting point of luck egalitarianism, that of equal moral agency and how that ideal is interpreted to support equal distribution as a default independent of luck but subject to choice, I have not provided any argument for it. I take this ideal of equal moral agency and its egalitarian entailment to be a basic and starting intuition common to most accounts of luck egalitarianism".

treat people as moral equals[7].

6) Therefore, departures that reflect luck and not choice are unjustified.

This version of the argument is valid but not sound. The ultimate reason for this is that the same principle that grounds equality also grounds departing from equality to inequality caused by choice. So, the argument provides no grounds for departing (or not departing, for that matter) from equality. To see this, notice that the equal worth of persons does not entail distributive equality. In fact, the equal worth of persons is compatible with a number of distributions, including a winner-take-all lottery, the division that recognizes persons' rights of self-ownership, and the division in which each gets what he deserves. Indeed, Tan's argument implies that the equal worth of persons is also compatible with the ultimately just distribution to which he believes we should depart. This is because, given that luck and choice exhaust the possible cause-types of inequality, premise 5) entails that inequalities caused by choice treat people as moral equals. So, both equality and inequality caused by choice have the virtue of treating people as moral equals. However, if both distributions recognize persons' equal moral worth, it is not clear, without further argument, why one is merely presumptively just while the other is completely or ultimately just.

Perhaps the further argument runs as follows: even though an equal division and an unequal division caused by choice both treat people as moral equals, the latter has the additional virtue of recognizing people's moral agency. So, an unequal division caused by choice is, in the end, just. The problem with this suggestion is that if recognizing people's agency is a distinct virtue from recognizing their moral equality, then it is not clear how departures from equality caused by luck fail to recognize people's moral equality, as Tan proposes. Indeed, it turns out that they do this by ignoring people's moral agency. Tan (2012: 89) states, "[f]or luck egalitarians, a distributive arrangement that reflects not agents' free decisions and choices, but the circumstances that are forced on them, such as their good or bad luck, fails to treat them as moral equals". The manner in which departures produced by choice succeed in treating people as moral equals, then, is by recognizing their moral agency and the manner in which departures produced by luck fail to treat people as moral equals is by ignoring their moral agency. So, in the end, that it treats people as moral equals is what justifies equality as the default and what justifies departures

7 Insofar as lotteries treat people as moral equals, this claim is false. Lotteries are not, as such, matters of option luck. They are only so if one has a choice about whether to enter them. If the state were to distribute the fruits of cooperation, say, each year, by a winner-takes-all lottery, the outcome would be a matter of brute luck and it would treat people as moral equals insofar as everyone had the same odds of winning.

from equality that are traceable to choice. Thus, the puzzle of why inequality based upon choice is preferable to equality remains.

(One might wonder, at this point, how it is that equality treats people as moral equals given that it fails to recognize people's moral agency due to its lacking inequalities caused by choice. I believe the luck egalitarian answer must be this: the egalitarian moral default is immune from any condemnation that appeals to what causes it: it is not unjust even if caused by luck (as we saw above) and it is not unjust even if caused by a failure to incorporate choice.[8])

To summarize, then, the problem with Tan's approach is that because the same principle grounds both the default and departures from it, there is no reason to think of the default as merely presumptively just and departures based on choice as just full stop.[9]

2.4. Morally arbitrary factors and mutual benefit

Another presumption argument can be found in Brian Barry's interpretation of an argument given by John Rawls that G.A. Cohen calls "the Pareto argument for inequality". Cohen contends that this argument, which is not only reconstructed but also endorsed by Barry, is in fact internally inconsistent (Rawls 1971: 60-75; Barry 1989: 213-34; Cohen 2008: 87-97, 151-168; see also Cohen 1995 and Shaw 1999).

Some background: Rawls offers the Pareto argument, which is distinct from his well-known social contract argument, to support the "difference principle". The difference principle governs the distribution of income and wealth and says that only inequalities that benefit everyone and maximize the income of the worst off are just. The argument identifies an equal division as a presumptively just "benchmark" and states that we should depart from this benchmark only when inequalities fulfill the difference principle.

Rawls assumes, in this argument, that there may exist strong Pareto improvements on equality so that it will be possible to increase the income of everyone if inequality is permitted. He assumes this on the ground that the sum total of wealth may be greater when inequality is permitted because these inequalities provide incentives for people to work more, or at harder tasks, than they would under equality. Rawls's aim in the Pareto argument is to single out the difference principle as the Pareto improvement on equality that qualifies as just. Though the reasoning is somewhat

8 For discussion, see Segall (2016: 48-73).

9 A related issue is whether the two "conjuncts" of the luck egalitarian ideal can be grounded in the same principle. These are the claims that departures produced by choice are just and that departures caused by luck are unjust. See Sher (2014: 2-19).

murky, it is clear that the idea that people's natural talents are "arbitrary from a moral point of view" and hence should not "improperly influence" their incomes figures prominently.

According to the Barry/Cohen interpretation, Rawls founds the benchmark of equality upon the morally arbitrary status of natural talents and he founds the difference principle upon the irrationality of prohibiting mutually beneficial inequalities. Rawls's reasoning for the benchmark, on this account, is as follows: inequalities in wealth that have morally arbitrary causes – including those caused by differences in natural talent – are unjust. Therefore, an equal distribution of wealth is *prima facie* just.[10]

Cohen identifies a problem with this inference: a division lacking inequalities with morally arbitrary causes will nonetheless contain inequalities with morally non-arbitrary causes (which, as Cohen sees it, are inequalities caused by choice). So, prohibiting inequalities caused by something morally arbitrary does not produce equality. So, it looks like the benchmark of equality cannot be grounded on the claim that inequalities with morally arbitrary causes are unjust.

Cohen concludes from this problem with Barry's reconstruction not that the reconstruction is wrong, but that Rawls must hold that differences in income caused by choice are not inequalities. So, the benchmark, Cohen says, is, for Rawls, not a flatly equal distribution. (As odd as this idea might seem to a Rawlsian, the notion that a division containing differences in shares produced by choice is an *equal* division has a precedent in luck egalitarianism, as we saw above. This may explain Cohen's willingness to regard Rawls's benchmark of equality as containing choice-produced differences in shares.)

Rawls reasons further, according to this interpretation, that it would be irrational to settle for equality if there exist (strongly) Pareto superior unequal distributions – unequal distributions, that is, that benefit everyone. Of these distributions, the one that maximizes the income of the least well off – who have (again, as this interpretation goes) the strongest complaint against inequality – is just. Hence the difference principle is just.

Cohen maintains that Rawls's case for the benchmark undermines his case for departing from it. If the benchmark is *prima facie* just on the ground that it contains no income inequalities with morally arbitrary causes, and if, as Rawls concedes, income differences that maximize the income of the least wealthy are caused by differences in natural talent,

10 This is Cohen's terminology. Rawls himself does not refer to the benchmark of equality as "*prima facie* just".

then the inequalities sanctioned by the difference principle are unjust. In other words, if equality is *prima facie* just on the ground that it is devoid of inequalities with morally arbitrary causes, then a Pareto improvement on equality that contains inequalities with morally arbitrary causes cannot be all things considered just.

Cohen's observation about Rawls argument is, though, trivial given the way in which he sets the argument up. Because differences in shares of wealth with morally non-arbitrary causes are, by definition, not inequalities, then inequalities are, by definition, differences in shares with morally arbitrary causes. So, on Cohen's account, Rawls's argument for the benchmark amounts to the claim that equality is just because it contains no inequalities. Naturally, any departure from the benchmark would be unjust on this account. Only if the benchmark is flatly equal and all differences in shares, regardless of their cause, count as inequalities, does Cohen's objection have force. For in this case, it would be a substantive claim to say that the difference principle is inconsistent with the justification for the benchmark on the ground that the difference principle allows inequalities that have morally arbitrary causes.

In summary, then, there are two problems with Rawls's argument as Cohen interprets it (*via* Barry). The first is that eliminating inequalities with morally arbitrary causes does not in fact produce equality. The second is that if eliminating inequalities with morally arbitrary causes did (somehow) produce equality, the ideal justifying equality would be violated by departures to the difference principle.

There is a way of avoiding this second problem, Cohen says, but it ends up vitiating the case for the benchmark. Suppose we interpret Rawls as claiming not that morally arbitrary causes make inequalities unjust but that morally arbitrary causes cannot make inequalities just. If this is the case, then, departures from the benchmark to the difference principle are indeed just: though the inequalities allowed by the difference principle are caused by differences in natural talent, they are not justified by their being so caused. They are justified by the fact that they maximize the wealth of the least wealthy.

However, Cohen argues, this approach provides no ground for the benchmark of equality. If what makes a distribution *prima facie* just is that it contains no inequalities justified by their morally arbitrary causes, then equality is not the only distribution that can stand as a benchmark. Indeed, the principle of utility, Cohen says, can be the benchmark on this account, for it justifies inequalities on the ground that they are necessary to maximize the sum total of goods. So, on this second reconstruction of the Pareto argument, Cohen claims, departures from the benchmark of

equality to the difference principle are justified but the benchmark itself is not.

However, the problem is not merely that the ideal justifying equality does not single out equality as the benchmark, as Cohen observes, it is that the difference principle can also qualify as the benchmark since it shares the virtue of containing no inequalities justified by the morally arbitrary. As Cohen sets up this second version of the Pareto argument, it seems that there is no reason to prefer departures from equality to equality, as long as those departures contain no inequalities justified by their morally arbitrary causes, because it is sufficient for qualifying as just (albeit, *prima facie* just) that a distribution contains no such inequalities.

This would make the problem with the second Pareto argument similar to the problem with Tan's account. On his view, recall, the same principle – the equal worth of persons – justifies both equality and departures from it and, therefore, there is no reason to see one distribution as presumptively just and the other as fully just. On this second Pareto argument, separate principles justify equality and inequality: equality is justified by the fact that it contains no inequalities justified by something morally arbitrary and inequality is justified by the ideal of mutual benefit. Hence it is not *as* clear as it is on Tan's account that there is no reason to see an equal division as presumptively just and see the proposed departure from equality as ultimately just; perhaps the ideal justifying inequality can defeat the ideal justifying equality.

Yet the second Pareto argument *is* vulnerable to Tan's problem, but for a different reason. The reason is that what makes equality just is the same thing that makes departing to the difference principle just: the absence of inequalities justified by their morally arbitrary causes. Indeed, that the difference principle shares the just-making property of equality is what keeps the second Pareto argument from making the mistake of the first Pareto argument. What we learned from that argument was that in order for a departure from equality to be just, the departure distribution cannot violate the principle that justifies the equal division. So, if equality is just because it contains no inequalities justified by the morally arbitrary, then the just unequal division must also contain no inequalities justified by the morally arbitrary. (If it contained such inequalities it would be unjust.) It follows that, on the second Pareto argument, it is not obvious how we can distinguish, from the point of view of justice, between the benchmark of equality and the difference principle because they both contain a property that is sufficient for making them just. Hence the second Pareto argument, like Tan's argument, appears not to be able to explain why equality is merely presumptively just while the proposed departure from equality is

ultimately just.

However, Cohen's second Pareto argument may be salvageable on grounds not available to Tan precisely because separate principles are invoked to justify the benchmark and difference principle inequality. Perhaps the argument Cohen has in mind is this: equality is, let us say, *sufficiently* just because it contains no inequalities justified by differences in natural talent, and so no inequalities justified by something morally arbitrary. Difference principle inequality is *more just* than equality because it also contains no inequalities justified by something morally arbitrary and, on top of that, it is mutually beneficial relative to equality. (Another option would be to say that difference principle inequality is not more just than equality but is in some other way morally preferable. This interpretation is suggested by Barry's claim that it would be irrational to insist on equality if mutually beneficial inequality that maximally benefits the worst off is available.)

On this interpretation, then, the second Pareto argument is stronger than Tan's argument but it is not immune from Cohen's original criticism of that argument, namely, that other divisions (besides equality) that lack inequalities justified by something morally arbitrary (though not the division to which we should depart) can qualify as the benchmark.

2.5 Equal moral standing and moral arbitrariness

A further problem with the first version of the Pareto argument outlined above is not noticed by Cohen. It is that if the benchmark of equality contains inequalities produced by choice, as Cohen claims it must, it is unclear why strong Pareto improvements on equality might be possible and it is unclear why departing from equality is required to avoid leveling down. After all, if people already have different shares of wealth at the benchmark that are produced by their choices about work, they do not need the promise of incentives inequality in order to work harder. The incentives inequality is already present at the benchmark. This observation suggests that the Barry/Cohen account of Rawls's presumption argument

is incorrect.[11] So, I offer below an alternative account of Rawls's argument for the benchmark of equality. However, before outlining that account, which is different in its structure from the arguments I have thus far examined, let me identify three general desiderata for constructing presumption arguments that can be gleaned from the analysis above. It turns out that these cannot be simultaneously fulfilled, so presumption arguments must have a different structure than those discussed above.

1. The thing that allegedly produces and justifies equality must actually produce equality. Otherwise genuine equality is not the default, and in some cases, it is not clear why the alleged default requires departing from.
2. The thing that produces and justifies equality must entail equality. Otherwise, it is not clear why equality is the default, rather than some other distribution, including in some cases, the distribution departure to which is recommended.
3. The unequal departure distribution must fulfill the principle that justifies equality. Otherwise, that distribution cannot be just.

The second two of these cannot be mutually satisfied. If what justifies equality entails it, then no departures can be justified. And if what justifies equality does not entail it, then departures can be justified, but equality is not uniquely justified as the default. As we will see below, this problem is traceable to the following feature of the above arguments: the presumptive justice of equality and the ultimate of justice of inequality are thought to hold in all circumstances. Rawls's Pareto argument, though not sound as it stands, avoids this problem. It runs (as I interpret it) as follows:

1) Persons have equal moral worth.
2) Therefore, an equal division stands as a "benchmark for measuring improvements".
3) Suppose strong Pareto improvements on equality (e.g., unequal

11 The idea that the moral arbitrariness claim is deployed by Rawls in the argument for the benchmark is not well supported by the text of the Pareto argument. But it may be supported by Rawls's reason for rejecting the bargaining theorist's use of the nonagreement point as the "status quo": "[i]t is to avoid the appeal to force and cunning that the principles of right and justice are accepted. Thus, I assume that to each according to his threat advantage is not is not a conception of justice. It fails to establish an ordering in the required sense, an ordering based on certain relevant aspects of persons and their situation which are independent from their social position and their capacity to intimidate and coerce". Rawls says, further, in a footnote to this passage, "[w]hat is lacking is a suitable definition of a status quo that is acceptable from a moral point of view. We cannot take various contingencies as known and individual preferences as given and expect to elucidate the concept of justice (or fairness) by theories of bargaining. The conception of the original position is designed to meet the problem of the appropriate status quo" (1971: 134).

distributions that increase everyone's share) are possible.

4) Then, of the two main candidates for the just strong Pareto improvement – laissez-faire and the difference principle – the one that minimizes the influence of morally arbitrary factors on people's income shares is just.

5) The difference principle minimizes the influence of morally arbitrary factors on people's income shares.

6) So, the difference principle is just.

This is merely a skeleton of Rawls's account, but the details are not important for assessing its form *qua* presumption argument. I wish to make two points about its structure. The first is that, as in Tan's case, the second premise does not follow from the first without further argument. As I have already observed, many distributions can be grounded in the equal standing of persons. Indeed, if this were not case, there would be little disagreement among theorists of distributive justice.

The second point about the structure of Rawls's argument concerns the status of the presumption. The sense in which equality is presumptively just is that it is just unless inequality can be mutually beneficial (Rawls 1971: 62,76; see also Cohen 2008: 156-60). For Rawls (1971: 78), it is an open question as to whether or not this is the case. The answer depends upon the plausibility of certain economic theories and on controversial ideas about human motivation – for instance, the claim that people, as a rule, will work less hard in the absence of incentives to acquire extra wealth.[12] At the end of the day, for Rawls, whether or not equality or the difference principle is just depends on the circumstances.[13]

For this reason, an entailment relation between the justifier of equality and equality, which Rawls does not provide and which is necessary to single out equality as the benchmark, does not prevent departures: we can say that justice demands equality, and only equality, in some circumstances and it demands a departure from equality in others. Compare this approach to Tan's. On his account, both equality and inequality generated by choice are just (in the way in which they are just) in any circumstance. The difference is in the way in which they are just – presumptively or ultimately.

This gives us a clue as to how we might salvage Tan's argument. It can be reinterpreted to have the same structure as Rawls's.[14] This interpretation

12 For criticism, see Cohen (1997).

13 For discussion, see Cohen (2003).

14 Thanks to Christopher Wellman for pointing out that the luck egalitarian argument might have this structure.

solves the main problem with Tan's view, which is that because the same principle grounds both equality and choice-generated departures from it, there is no reason to treat equality as merely presumptively just and departures generated by choice as ultimately just. If circumstances change, however, then the same grounding principle might entail a different distribution. It might be that equal moral worth demands equality if choices do not produce inequality and otherwise demands inequalities produced by choice.

Nevertheless, it is unlikely that this interpretation is what luck egalitarians have in mind when they invoke the presumption, because it commits them to the idea that it is an open question as to whether or not choice will produce inequality. But there are strong reasons to think that inequalities produced by choice are simply inevitable. This is because differences in shares based upon choice depend, not on complex theoretical claims or controversial empirical claims, but on nothing more than the laws of physics: if you and I have the same capabilities and are gathering nuts in the same place, if I choose to gather for ten minutes and you choose to gather for twenty, you will (*ceteris paribus*) have more nuts than I. If inequality produced by choice is inevitable, then it is implausible to treat the presumption as endorsing equality on the condition that choice might not produce inequality.

To summarize, then, Rawls's Pareto argument contains a plausible justification for departing from equality, to the extent that that departure precludes levelling down. (One may not agree with his account of which unequal distribution is just, but the idea that mutually beneficial inequality is, at least *pro tanto*, preferable to equality is reasonable.) However, Rawls's account fails insofar as it does not single out equality as the just benchmark.

We can now draw two general conclusions about presumption arguments. First, luck egalitarians have not successfully defended the presumption of equality, because their distinction between presumptively and ultimately just describes two different ways in which distributions are just, rather than two different circumstances under which distributions are just. They are therefore vulnerable to the dilemma identified above: whatever justifies equality must entail it, or else equality is not uniquely justified, but if it does entail it, all departures are precluded.

Second, Rawls (1971: 118-83) is entitled to the presumption of equality, but the Pareto argument does not do the necessary work. In order to move from the claim of equal moral standing to the benchmark, Rawls needs the contract argument. In this argument, he models the equal standing of persons in his description of the parties to the contract and in his description of the hypothetical circumstances (the "original position") in

which the parties deliberate about the distribution of wealth (among other "primary social goods"). The parties would opt for equality he argues, given their equal claim to social goods (derived from their equal status) and their lack of knowledge of their particular capabilities, unless they can all have more under inequality. In this case, Rawls argues, they would opt to maximize the wealth of the least wealthy, given their inability to predict their ultimate place in the distribution of wealth. While this approach arguably supplies a justification for equality as the benchmark (and, indeed, a justification for departing to the difference principle) it is controversial *qua* hypothetical consent argument.[15]

One last consideration: perhaps there are alternative ways of understanding the presumption of equality that I have not considered. Below, I briefly discuss two. I argue that neither is a strong candidate.

3. VALUE PLURALISM

The idea of value pluralism is frequently invoked by egalitarians, especially luck egalitarians.[16] This doctrine says that equality is one among many values that bear upon the assessment of distributive arrangements.[17] One proposal is that the presumption of equality is simply an expression of the notion of value pluralism. To say that an equal distribution is presumptively just is simply to say that, while there is something to be said for equality in assessing distributive arrangements, there is something to be said for other values as well and that these values permit or require deviations from equality. The presumption of equality, then, simply expresses the sensible view that equality is not the only thing that matters.

But notice that this way of putting the point presupposes the idea that

15 For discussion, see Dworkin (1975); Stark (2000); Enoch (2017).

16 Larry Temkin (2003: 63), for example, says, "any reasonable egalitarian will be a pluralist. Equality is not the only thing that matters to an egalitarian. It may not even be the ideal that matters most. But it is one ideal among others that has independent moral significance". See also, Temkin (2002); Parfit (2002); Segall (2007); Eyal (2007); Cohen (2008: 4).

17 There are several notions of value pluralism proposed by egalitarians and several contexts in which value pluralism is said to apply. Some theorists, such as Temkin, Parfit and Cohen, hold that equality is one among many values bearing upon the goodness or the badness of a distribution. Others, such as Segall, hold that distributive justice (understood as the fulfillment of the luck egalitarian ideal of equality) is one among many values bearing upon the justice of the design of social institutions. Segall holds, further, that justice is one among many values bearing upon the morality of institutional design. Another view, advanced by Eyal, claims that luck egalitarian equality is one among many values bearing upon both the moral and non-moral goodness of a policy of compensating victims of bad luck. (See the references in the previous footnote.)

equality has a special status. The proposal states that because equality is not the only thing that matters, we are sometimes justified in departing from it. But that assumes that equality has some sort of priority – it is the division that other values might justify deviating from. If equality really were simply one among many values pertinent to distributive ethics, then there are no grounds for positioning it as the distribution that other values might defeat. On a genuinely value pluralist view, we would take equally into account the ideals of, say, utility, mutual benefit and equality.[18] That is to say, we would not assign a special weight or status to any of these values. A genuinely pluralist approach, then, represents an alternative to the idea that equality is presumptively just. Hence this approach cannot stand as an interpretation of the presumption.

4. THE BURDEN OF PROOF

Another way to interpret the notion that distributive equality is presumptively just is as a claim about the burden of proof: the burden of proof, the argument goes, is upon those favoring an unequal division and not upon those favoring equality. Equality simply requires no justification.[19] As a preliminary point it is worth noting that as a matter of social practice, the burden of proof tends to be assigned simply to those who hold the more unusual view. For instance, vegetarians are often expected by meat-eaters to justify their refraining from eating animals, where meat-eaters generally do not see themselves as owing anyone a justification for their practice, in spite of the fact that their practice is arguably more harmful. Though most people may not believe in distributive equality, most political philosophers do.[20] Yet this would surely be a flimsy ground for assigning the burden of proof to the non-egalitarian.

So, let us assume that claims about the burden of proof can stand on sturdier ground than the mere prevalence of a view. To assess the idea that distributive equality demands no justification let us compare that claim to some views about the burden of proof that are widely accepted. One such view is the legal presumption of innocence in some systems of criminal law. Another is the idea that the atheist is not required to disprove the existence of God in order to be justified in believing that God does not exist. The notion that the burden of proof falls upon those who support distributive inequality, I argue, is relevantly different from these two cases.

18 See Parfit (2002: 87-88.)

19 Thanks to David Rondell for proposing this interpretation. See Gosepath (2011); Wollheim and Berlin (1955-56).

20 Many theorists of distributive justice are either Rawlsians or luck egalitarians.

So, we have reason to doubt the claim that distributive equality demands no justification. I argue, further, that even if the presumption of equality were relevantly similar to the presumption of innocence, the idea that equality should be presumed just demands justification, for those who say that the accused should be presumed innocent can offer reasons for their view. Yet providing a justification for the idea that distributive equality requires no justification is tantamount to providing a justification for the idea that equality should be presumed to be just. And, depending on how that argument goes, it will be subject to the pitfalls I identified above in arguments for the presumption.

Here is how the presumptive innocence of the accused differs from the presumptive justice of distributive equality: where the former is a strictly epistemic notion, the latter is not. The demand to presume the accused innocent says that we must treat the accused as though they are innocent until there is sufficient evidence of their guilt. That is, until we know whether or not they are innocent, we treat them as though they are. We are not required to believe that they are innocent, or, alternatively, we do not ascribe to them the property of being innocent. To presume that an equal division is just, however, is not to treat equality as though it is just until we have sufficient evidence to think it unjust. Rather it is to say that equality is just, but that its justice can be defeated by other considerations. The presumption of innocence tells us what we should do when we do not know what to believe. The presumption of equality tells us what we should believe, namely that equality is just in a certain circumstance or that equality is initially just.

Even if I am mistaken about this difference, however, it seems reasonable for someone to demand reasons for assigning the burden of proof in a particular way. And, in fact, proponents of the idea that the burden of proof should be borne by the prosecutor to establish the guilt of the accused have offered reasons for their view. For example, one line of defense appeals to the serious harm of wrongful conviction. Placing the burden of proof on the prosecution to establish the guilt of the accused tends to produce more improper acquittals than improper convictions. The improper acquittals are seen as the legitimate price of avoiding wrongful convictions given the power imbalance between the accused individual and the state and the serious consequences of wrongful conviction.

Another view, proposed by Hamish Stewart (2014: 410), is that the accused have a right to be presumed innocent simply in virtue of being persons. The basic idea is that the moral status of persons includes being "without reproach"; it includes the right to not be "…found to have done wrong merely on the basis being a person". Therefore, to judge someone

legally in the wrong that person must have done something legally wrong. So, persons have a legal right to be presumed innocent until proven guilty. The continuity between this argument and both Tan's and Rawls's arguments for the presumption of equality is striking and lends credence to the notion that the presumption in favor of distributive equality must itself be justified; it is not adequate to simply assert that distributive equality needs no justification.

The idea that the burden of proof falls upon the theist is similar in one respect to the idea that the burden of proof falls upon the non-egalitarian. Both are views about what one should take to be true. One should believe that God does not exist in the absence of evidence that he does exist and one should judge equality to be just in the absence of reasons that it is not just. However, the case involving God's existence hinges on the fact that the theist formulates the thesis that God exists in way that ensures that it cannot be disproved and then claims that the fact that God's existence cannot be disproved justifies belief in God. This is the point of Russell's teapot analogy. Russell says that if he were to claim that a china teapot, too small to be detected by the most powerful telescopes, is orbiting the sun, it would be ludicrous to claim that the teapot non-believer must disprove the existence of the teapot in order to be justified in believing in its non-existence.[21]

The dis-analogy between this case and the presumption of equality is plain. The theist says that because we cannot prove the non-existence of a thing the non-existence of which is virtually impossible to prove we must believe in the existence of that thing. This is indeed a strong reason for thinking that the burden of proof does not rest upon the atheist. Yet no such sleight of hand is present in the case of the presumption of equality. We cannot say that the burden of justification falls upon advocates of distributive inequality because those individuals have formulated their account of distributive justice in such a way that there are no reasons that count against it and then claim that egalitarians must accept their view on the ground that they (egalitarians) can provide no reasons against it. So, just as the presumption of equality is not analogous to the presumption of innocence, it is likewise not analogous to the presumption of the non-existence of God.

21 To this, theists claim that absence of evidence is not evidence of absence – even if evidence cannot be provided for the existence of something it might still exist. And, moreover, theists say, the basis for their belief in God is not the absence of evidence for his non-existence but rather evidence for his existence. Just as there *is* evidence that there is *not* a China teapot orbiting the sun, there *is* evidence that there is a God, for the postulate that God exists can explain e.g., the origins of universe, the complexity of life on earth and so on. To this the atheist replies that the things that the postulate allegedly explains can be explained without the postulate.

5. SUMMARY

The idea that distributive equality enjoys a special status such that departures from it require justification is indeed attractive. It allows us to endorse equality, in some sense, and, at the same time, avoid some major criticisms of equality, including the claim that it requires levelling down or fails to hold people responsible for their economic choices. Nevertheless, characterizing this special status and showing how it can be overridden or defeated proves difficult. I argued above that despite their endorsement of the presumptive justice of equality, luck egalitarians have not successfully shown equality to be presumptively just. This failure is due to the structure of their presumption arguments. In order to assign a special status to equality, then, luck egalitarians must fashion an argument that takes a different form.

Rawls, on the other hand, can assign a special status to equality. Its special status takes this form: it is the just division if, as a matter of fact, inequality does not increase the social pie in a way that benefits everyone. Otherwise it is unjust and the mutually beneficial division that maximizes the wealth of the least wealthy is just. To make this case, however, Rawls cannot rely upon the Pareto argument alone because that argument does not explain why equality stands as a benchmark. It explains only why departing from the benchmark to the difference principle is justified. Rawls must rely on the social contract argument to justify the special status of equality: equality is the benchmark because it is what people *who know nothing of their natural talents and initial social position* would choose (unless mutually beneficial inequalities are an empirical possibility). A weakness of Rawls's approach is that it is limited in its appeal, given the controversial nature of social contract arguments.

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Natural Resources, Collective Self-Determination, and Secession

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ABSTRACT

International law grants states, as representatives of their peoples, the right to use and exploit the natural resources located on their territories. The aim of this paper is to clarify how the doctrine of peoples' sovereignty over natural resources is related to their right to political self-determination. Three different perceptions of this relationship are examined. First, the view that peoples have collective ownership rights over the natural resources to be found on their territories is criticized and rejected. Thereafter, it is argued that instrumentalist reasons fail to explain why a people's right to political self-determination implies sovereignty over natural resources. Instead, it is suggested to consider sovereignty over natural resources a necessary component of a people's authority over the territory where their right to self-determination is realized. The proposed solution provides a sensible framework for dealing with practical issues, as can be exemplified by post-secession conflicts over natural resources.

Keywords: collective self-determination, global justice, harm principle, natural resources, secession, territory.

1. INTRODUCTION

In international politics it is widely accepted that states are entitled to use the natural resources which are located on their territories to their own benefit. The many conflicts over natural resources we currently witness typically concern specific issues, such as the precise national borders between two countries. That states have sovereignty over natural resources – or rather the peoples represented by states – is hardly called into question by relevant international actors. Furthermore, the assignment of special resource rights to territorially concentrated collectives has a secure basis in international law. Most notably, Article 1 of the two major Human Rights Covenants from 1966 recognizes the right of peoples to political

self-determination. This right implies, as stated in the same article, the entitlement to freely dispose of the natural resources which are found within the respective territorial units.

By contrast, the philosophical debate has been considering the principle of resource sovereignty mainly from a global justice perspective. Several authors have called into question whether peoples can establish special claims to spatially defined shares of the world's resources while excluding all other human beings. In their view, advantages gained from the unequal distribution of natural resources are morally arbitrary and in need of correction.[1] However, what has received much less attention in the recent philosophical debate is the rationale for seeing resource sovereignty as an important component of the right to collective self-determination. The aim of this paper is to examine in some detail how both concepts – collective self-determination and authority over natural resources – relate to each other. By clarifying this conceptual link at the theoretical level I also hope to contribute to a better understanding of various practical problems.

The argument is subject to two restrictions. First, within the scope of this paper I cannot address the fundamental objections global justice theorists have raised to the sovereignty rights of states or peoples. Instead I start out from the assumption that the right of peoples to political self-determination can be justified and try to elucidate how this right relates to resource claims. The argument will, however, show that recognizing peoples' authority over natural resources is in principle compatible with major demands of global justice.[2] Moreover, even the critics of the current state system may agree that attempts to establish global political institutions are not likely to succeed in the foreseeable future. Thus, a thorough analysis of the concept of political self-determination may prove to be helpful for reflecting on criteria of justice under non-ideal conditions.

Second, my argument relies on a rather conventional understanding of the term "natural resources". I take natural resources to be materials or substances of some economic value, which exist without the actions of human beings, such as fertile land, minerals, or water. This is not to deny that more sophisticated models that have been recently proposed, e.g. Tim Hayward's (2006) "eco-space conception" or Avery Kolers' (2012) "intentional conception", may provide important insights. Again, it would go beyond the scope of this paper to enter into the current debate on the adequate understanding of natural resources. Although I expect my

1 Criticism of the resource privilege of states or peoples has been offered inter alia by Pogge (2008: 202-221) and Armstrong (2015) and (2017: 132-149).

2 For an instructive discussion of how the ideal of global equality can be reconciled with the right of peoples to political self-determination, see Armstrong (2010).

discussion of the right to collective self-determination to be relevant for more refined conceptions, I cannot demonstrate this here.

The argument proceeds by three steps. In the second section, I will explore the development of the right of peoples to political self-determination – with a special focus on the doctrine of permanent sovereignty over natural resources – in international law. Thereafter, in the third section, I will discuss three possible explanations of how natural resources may be linked with a group's entitlement to independently decide on its common future. First, they may be seen as the common property of a people; second, they may have an instrumental value for the achievement of a people's collectively determined goals; or, third, resource sovereignty may be an essential component of a people's claim to a territory of its own. After having advanced my arguments for the latter view, I will, in the fourth section, dwell on some of its implications. More precisely, I will ask what the proposed interpretation has to say on the handling of competing resource claims, which may emerge in the wake of secession or state dissolution. Finally, in the last section I will briefly summarize the main findings of my analysis.

2. RESOURCE SOVEREIGNTY IN INTERNATIONAL LAW

The principle of people's permanent sovereignty over natural resources has its roots in the period of decolonization. Its development was characterized by a conflict of interests between colonial peoples and newly independent states on the one hand and the prosperous states of the West on the other hand. The former actors were anxious to gain political independence and, if achieved, to expand their ability to pursue common goals. Control over natural resources was, in their view, an important precondition for substantial self-determination and successful economic development (Schrijver 2010b: sec. C2). The (former) colonial powers, by contrast, worried about a possible shortage of raw materials and, consequently, detrimental effects on the global economy. Moreover, they feared that the decolonized states might nationalize foreign companies without offering sufficient compensation for their investments.

The emergence of the concept of resource sovereignty in international law was closely connected with the development of a right to collective self-determination. The first significant legal document mentioning the political self-determination of peoples was the Charter of the United

Nations in 1945.[3] Article 1.2 of the Charter states:

> "The purposes of the United Nations are: … to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."

There is wide agreement that at this time the self-determination of peoples had to be understood as a guiding principle for the peaceful coexistence of the community of states. However, in the years to come the principle of self-determination quickly developed into a legal right peoples under foreign rule could refer to. A crucial role in this process played Resolution 1514 of the United Nation's General Assembly (UNGA) from 1960, which called for bringing colonization to a speedy and unconditional end. In the so-called Decolonization Resolution the member states of the United Nations unanimously recognized a right of all peoples to self-determination. Although UNGA resolutions are not legally binding, they provide evidence of the predominant conception of international law.

The view that a right to self-determination is existent in common law has been further substantiated in the process of decolonization, as many colonial peoples were able to gain political independence by appealing to their right to self-determination. In 1966, when the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were established, the right to self-determination was provided with a secure foundation in international treaty law. Both Human Rights Covenants stipulated identically in their Arts. 1.1:

> "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[4]

In 1952 two UNGA resolutions for the first time linked the self-determination of under-developed countries or peoples with the right to exploit natural resources. Resolution 523 stipulated "that the under-developed countries have the right to determine freely the use of their natural resources." Resolution 626 stated "that the right of peoples freely to

3 The principle has been discussed at least since President Wilson's famous "fourteen points" and has been present in the thoughts of Lenin and Stalin but was not included in the regulations of the League of Nations.

4 Evidently, there is a tension between the right of peoples to self-determination and the right of states to territorial integrity as it is enshrined, most importantly, in Art. 2.4 of the United Nation's Charter. The entitlement of some part of a population, e.g. a colonial people, to freely determine its political status is difficult to reconcile with the inviolability of the established borders.

use and exploit their natural wealth and resources is inherent in their sovereignty and is in accordance with the purposes and principles of the charter of the United Nations."[5] For two reasons these resolutions met resistance by the USA, Great Britain, and other highly industrialized states. First, these states complained that the interests of prosperous economies to have access to raw materials were not sufficiently taken into account. Second, they were concerned about the resolutions' potential for legitimizing the expropriation of foreign companies and the annulment of concessions. This worry was fueled, most importantly, by the nationalization of the Anglo-Iranian Oil Company, enforced by the then socialist Iranian government in 1951 (Schrijver 1997: 37-49). The main reason for voting against resolution 626, given by the US delegation, was the lack of any provision for adequate compensation in the case of expropriation (Hyde 1956: 860).

The discussion on resource rights continued during the drafting process of the United Nations' two major human rights covenants. In 1958 the UNGA adopted resolution 1314, which confirmed "that the right of peoples and nations to self-determination … includes permanent sovereignty over their natural wealth and resources." By this resolution a special commission was established in order to "conduct a full survey of this basic constituent of the right to self-determination." The view that natural resources are a basic constituent of the right to self-determination was reaffirmed in the UNGA declaration 1803 on the permanent sovereignty over natural resources from 1962. Primarily two provisions prompted the Western states – with the exception of France – to vote in favor of this resolution. First, the declaration required of states which expropriate foreign holdings to pay the owner adequate compensation and, second, it stated that foreign investment agreements freely entered by signatory parties shall be observed in good faith (Schwebel 1994: 401-415).

The resolution on the permanent sovereignty over natural resources for the first time addressed an important aspect of internal self-determination, by commenting on the question of who is supposed to benefit from the extraction of resources. According to par. 1, the right to dispose of a country's natural wealth and resources must be exercised in the interest of "the well-being of the people of the state concerned". This is an important clarification, as experience has shown that in many cases the ruling elites

5 According to Schrijver (2015: 23-24), the term "natural wealth" refers to the resource basis as distinguished from the natural resources themselves. For instance, the forest and the fertile soil constitute (part of) a country's natural wealth, whereas the timber of the trees and the tea or coffee plants count as natural resources.

have commercially exploited the raw materials to their own advantage.[6] The resolution on peoples' permanent sovereignty over natural resources paved the way for the inclusion of resource rights in the two human rights treaties of 1966. Both the ICCPR and the ICESCR state identically in their Arts. 1.2:

> "All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence".[7]

In more recent debates on peoples' permanent sovereignty over natural resources two topics have come into focus. First, the right to extract and make use of natural resources has increasingly been placed in the context of environmental protection. In 1972 the Stockholm Declaration of the UN Conference on the Human Environment for the first time specified obligations entailed by peoples' resource sovereignty. Principle 21 of the Stockholm Declaration specifies:

> "States have … the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".[8]

While the Stockholm Declaration was mainly concerned with the prevention of external damage, later UN documents entertained a more comprehensive view of environmental protection. A crucial role for the development of international environmental law played the concept of "sustainable development", which was introduced by the so-called Brundtland Commission in 1987.[9] The goal of sustainable development has been cited in many international legal documents, thereby constraining the right of peoples to exploit their natural wealth and resources (Schrijver 2010a: 59-66). A telling example is the preamble of the UN Convention on

6 The moral responsibilities of other states with regard to governments who fail to manage natural resources in the interests of their peoples are discussed in Wenar (2008) and (2016: 281-334), see also Haugen (2014).

7 Art. 25 (ICESCR) and Art. 47 (ICCPR) state in unison: "Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources."

8 The wording of this principle is reiterated – with only one slight alteration – in principle 2 of the Rio Declaration on Environment and Development from 1992.

9 The Brundtland report defines sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."

Biological Diversity from 1992, where the contracting parties reaffirm "that States have sovereign rights over their own biological resources [and …] are responsible for conserving their biological diversity and for using their biological resources in a sustainable manner."[10]

Second, the intrastate allocation of the entitlement to exploit natural resources has become an important concern of international law. A growing body of legal documents has recognized that the doctrine of permanent sovereignty over natural resources applies to indigenous communities. Most importantly, the United Nations Declaration on the Rights of Indigenous Peoples from 2007 states in Art. 3: "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Furthermore, Art. 26.1 states: "Indigenous peoples have the right to lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired." It is now a widely shared view in international law that different peoples within one state may possess rights over different territories and the respective resources (Miranda 2012: 806-828, Pereira and Gough 2013: 20-34). Thus, states are not only obliged to manage the natural resources which are located within their borders in their citizens' interests; they must also take into account that the population may consist of several peoples, each with its own resource rights.[11]

3. RESOURCE RIGHTS AS BASIC CONSTITUENT OF COLLECTIVE SELF-DETERMINATION

The previous section has shown that international law conceives of resource sovereignty as an integral part of peoples' right to political self-determination. However, neither the relevant legal documents nor the drafting process that preceded their ratification make sufficiently clear how these concepts are connected with each other. In the following, I will discuss three possible explanations why an entitlement to collective self-determination might imply resource rights. First, I will deal with the understanding that self-determining entities have property rights (or similarly created sovereignty rights) to the natural resources of a given

10 A normative argument for the restriction of peoples' permanent sovereignty over natural resources by environmental standards is presented in Gümplová (2014).

11 As a further problem area one might mention resource sovereignty in occupied territories, which has been addressed by the International Court of Justice in several decisions, e.g. the Israeli Wall Advisory Opinion of 2004 and the Armed Activities Case (Congo v. Uganda) of 2005. For a detailed analysis, see Dam-De Jong (2015).

territory. Subsequently, I will explore instrumentalist accounts according to which a group's capacity to exert its self-determination right crucially depends on the availability of natural resources. After having outlined the main shortcomings of these views, I will argue for considering sovereignty over natural resources a necessary component of a people's authority over the territory where its self-determination takes place. Finally, I will discuss two objections that may be raised to my position.

3.1. Property and Quasi-Property Rights

The legal documents on peoples' self-determination rights, which I discussed in the second section, recurrently speak of "their" natural resources. The use of the possessive pronoun "their" might indicate the existence of a collective property right, which predates the right to political self-determination. According to this assumption, sovereignty over natural resources is not to be understood as an enabling condition for the exercise of the right to political self-determination. The exploitation (or conservation) of natural resources is rather within the scope of issues on which a people, by virtue of its ownership, is entitled to decide. Like an individual may determine the use of the goods she owns, the members of a people may jointly determine the use of their common possessions.[12]

An important challenge for an ownership account is to explain how collectives, such as peoples, acquire property rights over natural resources. In classical political thought, basically two mechanisms of how property rights come into existence – by first appropriation of previously unowned objects or by mixing one's labor with such objects – are discussed. The historic versions of both theories start out from the assumption that God has devoted his creation to the whole of humanity. The original common possession of entire mankind is then, by a series of individual acts, transformed into a system of private ownership. According to a first appropriation account, as defended for instance by Hugo Grotius, a person who is first to settle on a hitherto uninhabited area acquires a property right to the land and its natural resources. By contrast, the core idea of the labor mixing account, which was initially advanced by John Locke, is that from the very beginning everybody is the owner of herself. If a person invests labor in a natural good, she merges this good with a part of her body, which already constitutes her individual property. Thereby she significantly increases the value of the good concerned and excludes the

12 To be clear, a collective ownership right – as I understand the term here – does not entitle each member of the collective to use the goods concerned at her discretion. Instead the ownership right is held by the group as a whole: the individuals belonging to the group or their representatives must decide jointly – by a majority vote or some other procedure – on how to exercise this right.

rights of all other people to make use of it.[13]

From the perspectives of both theories only individuals are capable of acquiring property rights – either by first seizing previously unowned goods or by investing labor in them. Hence, the crucial question is how a people can come into the rightful possession of all natural resources located on the territory where it exercises its political self-determination. A possible answer is that the individuals who first acquired property rights over natural resources acted on behalf of the people. Think, for instance, of a ship's captain who discovers a previously unknown island and who declares, when going ashore, to take possession of this island in the name of, let us say, Spain.[14] Although a first appropriation of natural resources by a people's representative is conceivable, it can, at best, provide part of an explanation. The example of the ship's captain presupposes the existence of a Spanish state, which already has authority over a territory and its natural resources. Even if one admits that the ship's captain was entitled to seize the island on behalf of the Spanish people, it is still unclear how this people's claim to collectively own the natural resources of the Spanish heartland could be justified.

Another response to the here discussed problem is that the individual members of a people voluntarily transferred their property rights over natural resources to the collective. Seemingly, John Locke (1960 [1689]: II §120) comes close to such an idea when he declares: "By the same Act … whereby any one unites his Person, which was before free, to any Commonwealth; by the same he unites his Possessions, which were before free to it also." However, what Locke has in mind is – I think – that the persons concerned submit their property to the jurisdictional authority of the state. In his view, the individuals in the state of nature have strong reasons to enter into a political society in order to obtain protection for their possessions. Therefore, they are prepared to vest the state with as much jurisdictional authority as necessary (and as little as possible) for the performance of its protective function. It is, however, hard to see why the persons who join a political society should transfer their property rights over natural resources completely to the state, or rather to the people constituting the state. They have no reason to relinquish their property rights because it is precisely the secure enjoyment of their possessions what motivates them to establish a state in the first place. At most, they might grant the state limited rights of intervention, such as the competence

13 For a recent revitalization of Grotius' theory, see Risse (2012: 89-129); for a detailed examination of Locke's argument, see Simmons (1992: 222-306).

14 In a different context, Locke (1960 [1689]: II §28) admits the acquisition of property at the behest of another person by stating: "(…) the Turfs my Servant has cut (…) become my Property, without the assignation or consent of any body".

to raise taxes in order to finance police services. However, since they would not assent to substantial intrusions into their private property, the state would not obtain anything close to a collective ownership right.[15]

More recently, an argument has been advocated that may be understood as a culturalist modification of Locke's labor mixing approach. So called liberal nationalist authors, such as David Miller (1995: 21-27, 2007: 214-230 and 2012), Chaim Gans (2003: 97-123), and Tamar Meisels (2009), have pointed out to the formative influences the culture of a nation exerts on a territory.[16] The members of a national community employ specific forms of agriculture, build roads and ports, and establish particular settlement structures. These cultural activities leave a lasting imprint on the territory, which distinguishes it from other geographical places. Persons identifying with a national community typically have strong emotional bonds to the area they regard as their homeland. Since the territory is shaped by their culture and closely connected to the nation's history, they cannot imagine realizing their collective self-determination anywhere else.[17] By analogy with Locke, it has also been argued that the national community put the piece of land it traditionally occupies to an efficient use. Over time, the various cultural activities of the group add material as well as symbolic value to the land (Meisels 2009: 97-112 and Miller 2012: 257-262).[18]

From a liberal nationalist perspective, the above considerations – cultural formation, emotional attachment, value enhancement – legitimize the claims of nations to "their" territories. It is important to note that, contrary to Locke's account, territorial rights are not conceived of as collective ownership rights. Instead, national communities are thought to have an entitlement to exert jurisdictional authority over their traditional

15 For a critical examination of Locke's property theory of territorial rights, see Beitz (1980).

16 It may be worth noting that the above-mentioned theorists speak of "nations" or "national communities" instead of "peoples". For the question under discussion – the link between collective self-determination rights and sovereignty over natural resources – this terminological difference seems, however, irrelevant.

17 As regards personal attachment, Miller (2007: 219) states: "The case for having rights over the relevant territory is (…) straightforward: it gives members of the nation continuing access to places that are especially significant to them, and it allows choices to be made over how these sites are to be protected and managed".

18 The theory of resource rights advocated by Cara Nine (2012: 137-141) borrows from different aspects of Locke's political thought. In her view, a group acquires resource rights when it uses the resources concerned in a value-generating way, whereby she considers the achievement of political justice the relevant value.

areas of settlement.[19] The liberal nationalist's argument has the advantage of avoiding the problem with which Locke's appropriation theory has to grapple. Since the labor, which needs to be "mixed" with the land, is understood as the joint activities of a culturally defined nation, the creation of a collective right seems more plausible. It is not the work of particular individuals but the common and ongoing efforts of a nation that shape some piece of land and, thereby, establish a claim to it. Hence, the culturalist reinterpretation of Locke's account need not explain how individual rights can be transformed into collective rights of a nation or a people.

The liberal nationalist's argument for sovereignty over natural resources faces, however, a serious problem. It needs to be shown how the cultural activities of national communities, on which their territorial claims depend, bear on natural resources. To be sure, the agricultural and settlement practices of national communities may shape the surface of the land and create strong feelings of belonging. Moreover, certain natural resources, such as coal or diamonds, and the transgenerational project of their exploitation may play an important role for a national culture (Miller 2012: 263-264). However, a people's sovereignty over natural resources is generally understood to comprise the whole range of raw materials that are situated within the relevant territory. Evidently, the members of a nation neither invest labor in every natural resource nor are they emotionally attached to every natural resource. For instance, the wood of an unmanaged forest and the water of a small, untouched river are not subject to any cultural activity. Furthermore, it is hard to see on which grounds a people might claim a right to the future use of still undiscovered resources. The above-sketched reinterpretation of Locke's appropriation argument cannot extend to resources into which no cultural labor has been invested.

In sum, the here discussed account may, at best, justify the claim of national communities to exert their right to political self-determination on a particular territory.[20] However, even if territorial rights can be established in principle, the question which competences these rights include still has to be settled. In the philosophical debate it has been widely taken for granted that the justification of a territorial claim encompasses the whole

19 The jurisdictional authority of a people includes the competence to establish and modify a system of property rights on the territory concerned. Thus, a people (or its political representatives) may decide to nationalize natural resources or to allow private property rights. For an important critique of the conflation of "property rights" and "sovereignty rights" in current nationalist debates, see Fleischacker (2013).

20 For a critical examination of the liberal nationalist's justification of territorial claims, see Dietrich (2011: 87-89).

set of rights conventionally attributed to states.[21] But the reasons that can be given for the substantiation of a territorial claim do not necessarily apply to each of its standard components. The liberal nationalist's argument fails to explain why a group's right to political self-determination entails an entitlement to dispose of (the full range of) natural resources.

3.2. Instrumentalist Arguments

As set out in the second section, the right of peoples to political self-determination emerged in the period of decolonization. At this time the freedom of newly created state communities to decide on their economic, social and cultural development was high on the agenda. Against this background, important legal documents refer to natural resources as means for the achievement of peoples' independently chosen goals. Most notably, Articles 1.2 of the ICCPR and the ICESCR state: "All peoples may, *for their own ends*, freely dispose of their natural resources". This formulation points to the instrumental value of natural resources for the exercise of the right to collective self-determination. Contrary to the interpretation discussed above, peoples do not acquire property rights (or similarly created jurisdictional rights) over natural resources by the work they invest on a given territory. Instead, they can claim authority over natural resources because their right to political self-determination would be void if an adequate material basis were lacking.[22]

The capacity of a people to make significant choices with regard to its common future depends, at least in part, on its prosperity. Roughly speaking, the more affluent a collective is, the more goals are attainable between which its member can freely decide. The revenues, which can be generated from the exploitation of natural resources, will normally enhance a people's set of options. It seems, however, plausible to assume that the right to political self-determination only requires the availability of a minimum amount of alternatives. In order to make collective decisions, a people must be capable of choosing between different economic, social or cultural goals. Meaningful self-determination does not require a particularly extensive set of options and is consistent with considerable

21 For a standard definition of territorial rights that encompasses authority over natural resources, see Simmons (2001: 306).

22 A different instrumentalist argument for the permanent sovereignty of peoples over natural resources was presented by John Rawls (1999: 38-39) in "A Law of Peoples". According to Rawls, a sustainable management of natural resources can best be achieved by assigning territorial rights to specific agents. If a people has exclusive responsibility for a certain piece of territory, it will be interested in the long-term exploitation of the resources concerned and refrain from overexploitation. Since Rawls is mainly concerned with the preservation of the environment – rather than the economic preconditions for collective self-determination – I will not discuss his argument in more detail.

wealth disparities between the right-holders. In this context, it should be recalled that Articles 1.2 of the two human rights covenants state: "In no case may a people be deprived of its means of subsistence". The reference to the means of subsistence supports the view that the relevant regulations of international law focus on the basic prerequisites for the exercise of the right to self-determination.

Evidently, the instrumentalist interpretation must rely on an empirical assumption about the significance of natural resources for a people's economic welfare. The research literature on the comparative development of resource-rich and resource-poor countries casts, however, doubts on the correctness of this thesis. To begin with, it seems questionable whether control over natural resources is necessary for achieving a minimum level of economic prosperity. There are other important factors, such as technological knowledge and the stability of political institutions, which contribute significantly to a people's wealth.[23] Thus, even a political community that widely lacks valuable raw materials may be able to generate the necessary economic means for exerting its self-determination right. Moreover, in the case of developing countries natural resources, such as oil and gemstones, have often proved to be a serious obstacle to economic progress. High resource income tends to increase government corruption and to help authoritarian regimes to ward off pressure for democratic reform. Competition for resource revenues is also likely to trigger violent intrastate conflicts, which impede a country's economic development. In sum, what has become known as "resource curse" speaks against a positive correlation between wealth in resources and a people's capacity for self-determination.[24]

On a more theoretical level, the here considered interpretation of peoples' permanent sovereignty over natural resources faces three closely related problems (Armstrong 2017: 142-143). First, what the instrumentalist account can establish is, at best, that self-determining collectives are in need of a certain amount of economic means. It fails, however, to give any reason why peoples have special claims to the natural resources that can be found on their respective state territories. Of course, it may appear obvious to specify the right holders' claims in accordance with the existing state borders. But it is not the instrumental value of natural resources for the right to political self-determination that explains the link to a particular territory. The precise location of the natural resources a people has at its

23 John Rawls (1999: 113-120) restricted duties of international assistance to the building of stable institutions because he deemed this to be the most important precondition for a country's economic development.

24 The term "resource curse" has been introduced by Richard Auti (1993); an overview over recent research is given, for instance, in Ross (2015) and Venables (2016).

disposal is largely irrelevant for its capacity to take its own decisions. In principle, people A could be enabled to exercise its right to self-determination by granting it a claim to the resources of people B's territory, and vice versa.

Second, I have argued above that the right to political self-determination should be understood as a threshold concept, requiring only the availability of a minimum amount of choices. If this is correct, the instrumentalist view can only succeed with explaining why peoples need natural resources (or other sources of income) to an extent necessary for realizing a basic set of options. It provides, however, no reason for granting self-determining collectives authority over the total amount of natural resources that are located on their territories. The claims of peoples to natural resources, which are, strictly speaking, not indispensable for exercising their rights to self-determination, must rely on a different justification.

Third, natural resources and the chances of profiting from their exploitation are very unequally distributed across the globe. According to the instrumentalist interpretation, peoples are entitled to the natural resources necessary for exercising their rights to political self-determination. This implies that each right holder should have access to a certain amount of valuable raw materials, even if the territory under its control lacks significant deposits. The instrumentalist account thus mandates the reallocation of natural resources, or of the revenues derived from their exploitation, in order to enable less well-equipped peoples to exert their rights to political self-determination. As a consequence, it cannot provide a general justification for peoples' permanent sovereignty over the whole set of natural resources located on their state territories. Peoples who have authority over more commodities than required for their self-determination are duty-bound to share their resource wealth with less fortunate right holders.

3.3. Territorial Rights

A more promising interpretation of peoples' permanent sovereignty over natural resources is suggested by the efforts of colonial peoples to effectively end their domination by Western states. The independence movements were particularly concerned that the former colonial powers would continue to exert a strong influence on their newly established states. Sovereignty over natural resources was a sensitive issue insofar as foreign state or private companies had made significant investments in their exploitation. The colonial peoples considered their political self-determination to be substantially impaired if other actors had decision-making powers over (some part of) the natural resources situated within

the borders of their designated state territories. Their misgivings about a continued domination find, inter alia, expression in Par. 2 of UNGA resolution 1803:

> "The exploration, development and disposition of … resources, as well as the import of the foreign capital required for these purposes should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities".

The colonial peoples' demand for non-domination draws attention to the crucial interest the right to political self-determination aims to protect. By granting this right in international law, the collectives concerned are supposed to be enabled to take independent decisions on their common future. However, a people cannot freely pursue its particular social, economic and cultural goals unless it has control over some piece of territory. It needs a clearly defined space where it can – undisturbed by other actors – implement its political decisions. If third parties pursuing conflicting goals were entitled to decide on the use of the territory concerned, a people might be unable to accomplish its common objectives. The territorial dimension of the right to political self-determination provides the key for understanding the conceptual link to the principle of resource sovereignty. Since a people's right to political self-determination implies authority over some territory, it necessarily extends to the natural resources that are located within its borders (Moore 2015: 173-176).

To illustrate the argument outlined above, it may be helpful to imagine a situation when a people's right to self-determination would not comprise full authority over a defined territory. Think, for example, of an international company or some global institution having decision-making power over the extraction of coal within the state boundaries. The members of the people living on the territory may predominantly oppose coal mining, as it contradicts their own values, plans and projects. They may, for instance, attach great importance to the protection of the environment and the preservation of traditional settlements in the mining area. However, a majority decision to declare the region a natural reserve would be impossible to effectuate if some other actor were permitted to access the coal deposits. Consequently, assigning the right to decide on the exploitation of natural resources to a third party would seriously impair a people's capacity for self-determination.

The here proposed interpretation has important consequences for the specification of the resource rights to which a self-determining collective is entitled. A people cannot exercise its right to political self-determination in a meaningful way unless it has authority over some piece of territory.

Therefore, it must have decision-making power over the exploitation (or conservation) of the natural resources located on the territory concerned. However, a people's right to political self-determination does not imply a claim to the total earnings that can be derived from the natural resources. Thus, contrary to the conventional view in international law, a people's right to political self-determination entails control rights over natural resources but fails to justify (the full set of) income rights.[25]

Restricting the scope of peoples' permanent sovereignty over natural resources to control rights allows for reconciling this doctrine with demands of global justice. Thomas Pogge (2008: 210-214), for instance, has proposed to introduce a "global resource dividend" as a mechanism for reducing the unequal distribution of wealth within the world population. According to Pogge, states should be permitted to make sovereign decisions on the exploitation of the natural resources that are located on their territories. However, if they decide to extract oil or other raw materials, they are required to transfer some percentage of their revenues to the global poor. Since the "global resource dividend" does not deny the control rights of self-determining collectives, it is fully compatible with the above-sketched understanding of peoples' permanent sovereignty over natural resources. It is important to note that I do not intend to make a case for the theory of global justice defended by Pogge or some other author. Within the scope of this paper, I cannot argue for or against a moral duty to redistribute wealth across national boundaries. I merely wish to point out that there is no fundamental contradiction between demands of global justice and the resource sovereignty of peoples.

Since control rights are at the core of the here defended view of resource sovereignty, it seems worthwhile to elaborate on their content and scope.[26] The right of peoples to political self-determination has to be understood as a prima facie right which can be trumped by conflicting moral considerations, such as the harm principle (Schuppert 2014: 76-77, Angeli 2015: 98 and Stilz 2016: 100). By way of illustration, imagine a state that tests nuclear weapons in a desert region in close vicinity to a densely populated neighboring country. Clearly, the people's right to take independent decisions on its defense policy does not include an entitlement to endanger the life and health of third parties. Since control rights over natural resources are closely connected to the ideal of political self-determination, they must be subject to the same restrictions.

25 The distinction between control rights and income rights over natural resources has also been emphasized by Angeli (2015: 131-132) and Moore (2015: 173-176).

26 I am grateful to an anonymous referee of this journal for urging me to clarify the concept of control rights.

Consequently, peoples lack authority over natural resources if their exploitation (or conservation) inflicts harm on persons living outside the country.[27] Of course, decisions on the extraction of raw materials normally do not cause immediate damage to third parties, as in the example of the nuclear weapons test. The use of natural resources can, however, substantially worsen the living conditions of other persons in an indirect manner. A people may, for instance, significantly contribute to the devastating effects of global warming by authorizing the deforestation of rainforests or the extraction of fossil fuels.

In order to determine the restrictions that need to be placed on peoples' control rights over natural resources more precisely, two goals have to be considered. First and foremost, third parties must be protected from the harm self-determining collectives may inflict on them. The right to political self-determination includes neither a permit to damage other communities nor to expose them to serious risk. Second, a people's capacity to realize its specific social, economic and cultural ambitions should be maintained to the widest possible extent. If there are two or more options of how the control rights of a people can be effectively constrained, the one that has the least negative impact on its political autonomy should be adopted.

For a proper understanding of the first goal, it is necessary to dwell on the concept of harm. Joel Feinberg (1986: 145-146, original emphasis) proposed to

> "think of harming as having two components: (1) It must lead to some kind of adverse effect, or create the danger of such an effect, on its victim's *interests*; and (2) it must be inflicted wrongfully in violation of the victim's *rights*".

Regarding the first component, a curtailment of individual or collective autonomy can only be justified if the neglect of other parties' interests is significant.[28] As the self-determination of an individual would be overly reduced if it were not allowed to pose relatively small risks on other actors, e.g. by driving a car, the political self-determination of a collective would be unduly diminished if it were required to rule out any possible negative externalities. Of course, it is difficult to state with any precision what extent of risk and damages other persons or groups must accept. It seems, however, to be clear that every assessment of the harm peoples may inflict on third parties has to take three aspects into account. The evaluation has

27 Moreover, the right to political self-determination does not license a people to violate the basic interests of minority groups who live within the state boundaries.

28 According to Barboza (2011: 99-102), it is generally accepted in international law that an imposition of minor risks and damages has to be tolerated by the states concerned.

to consider the magnitude of the damage, the likelihood of its occurrence, and – in cases of several actors sharing responsibility – the contribution of a specific people. The higher a people's resource utilization scores on these criteria, the stronger is the argument for limiting its control rights.

Regarding the second component, Feinberg (1984: 218-221) emphasized that individuals often pursue competing goals, which they cannot realize without thwarting the interests of other parties. For instance, the successful sales strategy of shopkeeper A may cut the profits of shopkeeper B who loses a great number of customers. A's conduct is, however, fully legitimate – she does not wrong B – and fails, therefore, to violate the harm principle. Likewise, state decisions placing other actors at a competitive disadvantage normally do not constitute harm in the relevant sense. By way of illustration, think of a country C that hitherto has been the only exporter of a valuable raw material. If another country started to extract and sell the same resource, C would not be wronged, although its economic situation might deteriorate as a result of falling prices.

Finally, one may wonder whether peoples who refrain from extracting resources can inflict harm on third parties. The standard case of harm involves an action of party A that has a negative effect on party B, e.g. by causing an injury. Omitting an action, such as the extraction of resources, leaves the living conditions of other persons unchanged and does not worsen their situation. However, it is widely accepted that A's omission of an action can harm B if A is obliged to perform this action. Think, for example, of a physician who fails to provide a patient with an urgently needed treatment because she does not want to be late for her dancing class. In this case, the patient is put in a worse position compared with the counterfactual scenario in which the physician had fulfilled her duty (Feinberg 1986: 148-150). Consequently, a people could harm third parties by abstaining from the exploitation of natural resources if it had a duty to make these resources available.[29]

As regards the second goal, it has to be examined more closely how the different forms the restriction of its control rights might take can affect a people's capacity for self-determination. Above all, two aspects – the content of the limitation and the kind of competences which are conferred on other actors – need to be discussed. First, it makes an important difference whether a people is obliged to preserve or to extract (some part of) the natural resources located on its territory. The forced conservation

29 One may think of a duty to provide the world economy with scarce resources (see section 2) or a duty to transfer resource revenues to the global poor. The substantiation of any such duty can, however, be expected to be much more controversial than the justification of the harm principle.

of natural resources confines a people's space of action but normally leaves many other options open. If a people is, for example, prohibited from exploiting a coal deposit, it still can take independent decisions on the use of the area concerned. Typically, there will be several possibilities – declaring a natural reserve, erecting new settlements, establishing an industrial zone – the political representatives can choose from. By contrast, the forced extraction of natural resources requires a specific action that may exclude every other option. In particular, large-scale projects, such as coal mining, profoundly affect the relevant area and allow of no additional usages a people could decide on.

Although prohibitions on the extraction of natural resources are usually less detrimental to peoples' capacity for self-determination, it should not go unnoticed that their impact can vary greatly. The forced conservation of raw materials tends to weaken the political autonomy of developing countries much more than those of highly industrialized countries. In many cases, the export of natural resources provides an important source of income for the inhabitants of developing countries. If they are banned from selling valuable raw materials, their revenues and consequently their set of options will be significantly reduced. By contrast, technologically advanced societies normally have other possibilities to generate the financial means in order to pursue important collective goals. Therefore, the imposition of a duty to preserve (some) natural resources has to take the economic situation of the peoples concerned into consideration. If their potential for self-determination is impaired to a greater degree, prohibiting the exploitation of natural resources requires a stronger justification.[30]

Second, a people's political autonomy also depends on the kind of competences that are conferred to other actors. On the one hand, some global or multilateral institution could be authorized to establish rules regulating the use of raw materials. Thereby, it would have decision-making power over the exploitation or conservation of the natural resources in question. The agents of the institution would, however, not be allowed to implement or enforce its regulations within the territory of a people. On the other hand, some external authority could be entitled to directly access the raw materials over which it enjoys control rights. In this case, its agents would be free to enter a people's territory and to organize

30 Although Armstrong (2017: 233-238) is not much concerned with the political self-determination of peoples, he makes a similar point regarding the welfare of their members. Poor societies who are required to leave (part of) their natural resources unexploited can, in his view, legitimately claim compensation for the loss of development opportunities.

the extraction of natural resources or to safeguard their preservation.[31]

Granting some global or multilateral institution the right to operate on the territory of a people would have the most negative impact on its capacity for self-determination. The application of norms regulating the use of natural resources normally leaves the political representatives of a people with some scope of discretion. This residual decision-making power would be lost if an external authority were directly responsible for the exploitation (or conservation) of the raw materials in question. Moreover, the right to manage part of the natural resources on a people's territory may entail additional competences in other policy fields. For instance, in order to successfully run a coal mining project it may be necessary to develop the transport infrastructure and to admit skilled workers. Arguably, an external actor who is entitled to initiate the extraction of coal must also have a say in a country's transport and migration policy. As a consequence, the self-determination of a people would be restricted in a number of spheres only indirectly related to the use of natural resources.

If the relevant international authority is prohibited from entering a people's territory, much depends on how its regulations are formulated. Peoples who have to conform to general standards typically enjoy some degree of discretion, whereas peoples who have to follow more specific instructions widely lack decision making power. For instance, a country, which is required to produce a certain amount of natural gas per annum, may still be able to take independent decisions on the development of deposits or the prohibition of drilling technologies. Likewise, a country, which is obliged to preserve eighty percent of its rainforests, can freely determine the areas where a protection zone shall be established. Since general norms allow for different specifications, they enable (to some extent) the political representatives of a people to bring important collective goals and values to bear. By contrast, more detailed directives of an external authority deprive peoples of the possibility to decide in accordance with their own preferences.

In sum, restrictions of control rights necessarily diminish a people's political autonomy and require, therefore, a sufficiently strong justification. The most widely accepted reason for constraining control rights is provided by the harm principle, which prohibits a people from damaging third parties. Arguments for (or against) the limitation of control rights have to consider the seriousness of the harm *and* possible impacts on a people's capacity for self-determination. As explicated above, the forced extraction

31 In addition, Schuppert (2014: 87-94) has proposed to establish an International Court of the Environment authorized to make binding judgements on disputes concerning the use of natural resources.

of natural resources tends to reduce a people's decision-making power to a greater extent than the forced conservation of natural resources. Consequently, regulations imposing an obligation to exploit natural resources must be supported by stronger harm-related reasons. Conferring to an external authority the right to access natural resources directly has the most negative impact on a people's capacity for self-determination. Such a curtailment of a country's territorial integrity can only be justified in exceptional cases when peoples are constantly unwilling or unable to comply with international norms.[32]

3.4. *Two Objections*

Finally, I will discuss two objections that may be raised to the here defended interpretation of peoples' sovereignty over natural resources. A weakness of the above given argument may, first, be seen in the fact that I have characterized the right to political self-determination as a threshold concept. In subsection 3.2, I have maintained that the members of a self-determining collective only need a minimum amount of alternatives between which they can freely decide. If a people lacks authority over the exploitation of (part of) the natural resources on a given territory, its set of options is thereby restricted, but it may still be able to choose between a variety of competing goals. Therefore, one may object that my understanding of the principle of resource sovereignty is compatible with assigning quite extensive control rights to other actors. Even restrictions, which do not protect third parties from harm, may appear to be justified as long as they remain below the critical threshold.[33]

Here it is important to note that the right to collective self-determination – like the right to individual self-determination – consists of two elements. The right holder must, first, possess a sufficient number of options and, second, be free from external coercion.[34] For instance, the self-determination right of a patient would be seriously violated if a physician forced her to undergo a certain treatment. This would also be true if she were able to choose between many qualitatively different options outside the medical context. Likewise, granting a third party authority over natural resources may leave a people with the opportunity to decide many other social, economic and cultural issues. However, the entitlement of some

32 For a brief examination of "ecological interventions", see Schuppert (2014: 84-85).

33 A related criticism is discussed and rejected in Banai (2016: 17-18).

34 As regards the violation of individual autonomy, Raz (1986: 377) states: "Coercion diminishes a person's options. It is sometimes supposed that that provides a full explanation of why it invades autonomy. It reduces the coerced person's options below adequacy. But it need not. One may be coerced not to pursue one option while being left with plenty of others to choose from."

foreign actor to control the use of raw materials located on the territory of a people runs contrary to this people's right to collective self-determination. For instance, thwarting the goal to preserve natural habitats or traditional buildings by mandating the extraction of coal clearly amounts to a form of alien domination.

A second objection that may be raised to the here proposed concept of resource sovereignty concerns the hogging of natural resources. Peoples enjoying self-determination rights may decide against extracting raw materials that could be used to alleviate poverty in other world regions. In view of the plight of destitute persons, one may doubt whether peoples who control valuable resources should be entitled to abstain from their exploitation. In response to this concern I would like to emphasize that my understanding of resource sovereignty does not preclude a duty to extract natural resources. Given the adverse effects of such a duty for the political autonomy of the people concerned, its imposition has to be supported by weighty reasons. Whether or not the forced extraction of natural resources can be justified ultimately depends on issues of global justice I cannot discuss within the scope of this paper.

Moreover, it should be noted that my concept of peoples' sovereignty over natural resources is in principle compatible with theories of global justice, which call for the taxation of resource ownership. Most importantly, Hillel Steiner (1994: 266-282 and 2011) argued that states whose inhabitants appropriated more than an equal share of the world's natural resources owe compensation to states whose members under-appropriated the world's natural resources. These states are required to pay a tax to a global fund, which shall be based on the rental value of their territories.[35] Evidently, the authorization of a global fund to levy taxes on resource ownership would interfere with peoples' self-determination rights. However, the political representatives of a people would not be obliged to effect the extraction and sale of any raw materials located on the relevant territory. Provided that they had other sources of income enabling them to pay the tax, they could still opt for the conservation of natural resources.[36]

It seems, however, worth noting that the establishment of a global fund, as proposed by Steiner, meets with two criticisms. First, to what extent a tax on resource ownership would diminish a people's capacity for self-determination depends very much on its economic situation. For poor

35 According to John Locke's theory of just appropriation, the tax disregards any improvements of the land and the natural resources located on it, which have been achieved through the investment of labor.

36 For a proposal to combine Pogge's and Steiner's theories by taxing the use and the ownership of natural resources, see Casal (2011a and 2011b).

peoples it may be difficult, if not impossible, to pay the tax unless they exploit (part of) their natural resources, whereas rich peoples may still be able to decide in favor of resource conservation. Hence, in terms of self-determination destitute peoples would be unfairly burdened by a global fund. Second, the imposition of a tax on consumption, as advocated by Pogge, would provide sensible incentives for a sustainable use of natural resources. By contrast, a tax on resource ownership would not encourage peoples to refrain from the exploitation of natural resources. Consequently, establishing a global fund would fail to meet the challenges of environmental degradation and global warming (Casal 2011a: 317-320 and Pogge 2011: 336-337).[37]

4. HOW SECESSION AFFECTS THE SOVEREIGNTY OF PEOPLES OVER NATURAL RESOURCES

In the preceding section, I have argued that the territorial interpretation of the permanent sovereignty of peoples over natural resources is not in contradiction to demands of global justice. If duties of assistance can be justified on a global scale, nothing stands in the way of reducing present inequalities by taxing resource-rich countries. A problem that has attracted much less interest in recent philosophical debates concerns the distribution of assets (and debts) after the break-up of states. Although in the past three decades a rich literature on the normative assessment of secession has emerged, the process of "political divorce" has not been discussed in much detail.[38] In order to clarify whether and to what extent separatist states are entitled to the natural resources found on their territories, the distinction between control rights and income rights proves to be helpful again. This distinction suggests a morally more plausible approach to post-secession conflicts than the concept of unlimited sovereignty over natural resources on which international law currently relies.[39]

A state, which results from a legitimate secession, must be granted

37 For a rejection of this criticism, see Steiner (2011: 332-333); for a response to Steiner's defense, see Casal (2011b: 354-355).

38 The few authors who have dealt with questions of distributive justice that arise in the wake of secession have not specifically elaborated on natural resources (Dietrich 2014 and Catala 2017).

39 According to the Vienna Convention on State Succession of 1983, agreements of the predecessor state and the newly independent state regarding state property (Art. 15.4) or state debts (Art. 38.2) "shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources". See also Zimmermann (2007).

control rights over the natural resources that are found within its borders.[40] If the rump state still had decision making power over the use of these raw materials, the self-determination right of the newly constituted people would be seriously impaired. For the reasons given above, the population of a separatist state might be unable to pursue its specific aims if a third party would be entitled to require the extraction or preservation of natural resources located within its borders. However, income rights are not a precondition for collective self-determination and, therefore, not implied in peoples' sovereignty over natural resources. Contrary to international law, a newly created state is not necessarily entitled to the full amount of intakes, which can be generated from the natural resources located on its territory.

By limiting the concept of resource sovereignty to control rights, important interests of the rump state's population can be taken into account. Both parts of the now divided country may have made large investments in the development of raw material deposits situated in the break-away region. If the exploitation of resources was made possible by joint efforts of the "divorcees", the population of the rump state has a legitimate claim to benefit from the gains. Consequently, the inhabitants of the separatist state are bound to share their resource revenues in a fair manner with their former fellow-citizens. The duty to transfer an appropriate part of the resource revenues to the rump state is, however, limited in two respects. First, the citizens of the rump state are not entitled to benefit from the utilization of raw materials that were still undeveloped or undiscovered at the time of secession. Since their claim to receive some part of the earnings is based on their contribution to the exploitation, it cannot extend to these resources. Second, the duty of the separatist state to share its resource revenues with the rump state will presumably decrease over time. The exploitation of raw materials requires ongoing investments in the technological equipment and the infrastructure that need to be maintained and modernized. The higher the expenditures of the separatist state are, the more diminishes the relative weight of the rump state's former contributions. Hence, the share of the resource revenues to which the citizens of the rump state are entitled will usually shrink in the course of time.[41]

To the first-mentioned qualification it may be objected that the citizens

40 Of course, the question of what requirements a secession must meet to be considered legitimate is a matter of dispute. Different views are expressed, for instance, in Buchanan (2004: 331-400), Miller (1995: 81-118) and Wellman (2005).

41 Since it will be difficult to exactly determine the changing shares of the resource revenues, the second qualification is best understood as a normative guideline for a negotiated settlement of both parties.

of the rump state had a legitimate expectation to benefit in the future from the exploitation of still undeveloped or undiscovered raw materials located on the separatist territory. Therefore, one may argue, they should receive an appropriate share of the earnings that will be generated from these resources. Here it is important to recall that I only consider cases when the population of the break-away regions had a moral right to create an independent state. Although the inhabitants of the remaining regions may not have reckoned with the secession, they have not been wronged by it. Generally speaking, the expectation of an actor A that some other actor B will not choose an option to which she is entitled cannot ground a moral claim against B. A may perhaps have good epistemic reasons, given her experience or knowledge, not to anticipate B's decision. However, A is not normatively justified in expecting B to forego a morally permissible action.[42] Hence, if the secession was legitimate, the rump state's population cannot substantiate a claim to benefit from the exploitation of undeveloped or undiscovered resources.

Finally, the question needs to be addressed whether a separatist state has compensatory duties even if it terminates the exploitation of profitable resources. The citizens of the rump state may have made large financial contributions to the development of some raw materials and may, therefore, feel entitled to a fair share of the revenues that would have been generated had the secession not occurred. In my view, in the situation described compensatory claims are for two reasons unwarranted. First, the separatist state might be compelled to continue the exploitation of resources in order to be able to meet its financial obligations. The forced extraction of natural resources might make it extremely difficult, or even impossible, to realize important societal goals. Consequently, the self-determination right of the newly constituted people would be severely undermined by the rump state's monetary claims.[43] Second, it is generally assumed that sovereign states may reassess and change their energy policies over time. Thereby they do not incur compensatory duties against taxpayers for lost profits, although they may have contractual duties towards private investors. Given that the secession was legitimate, the same moral criteria must apply to the newly independent state as to any other state. Hence, the separatist state can be under a duty to share its resource revenues (to a diminishing degree) with the rump state, but it need not make compensatory payments if it decides to end the extraction and to forego potential gains.

42 For a brief discussion of the distinction between justified epistemic and justified normative expectations, see Meyer and Sanklecha (2014: 370-372).

43 As explicated in section 3.3, the forced extraction of natural resources is likely to have a more negative impact on a people's capacity for self-determination than the forced conservation of natural resources.

In sum, the here proposed interpretation of peoples' permanent sovereignty over natural resources enables the international community to respond to post-secession conflicts in a balanced way. By granting the separatist state substantial control rights over the natural resources located on its territory the political self-determination of the newly created people can be effectively protected. By restricting the resource-related income rights of the separatist state the justified demands of the rump state's population can be taken into account. The separatists' duty to share their resource revenues with the rump state's population has the additional advantage to provide sensible incentives. Although this duty is qualified in two important respects, it will tend to discourage secessions, which are primarily motivated by economic reasons. Hence, the concept of the permanent sovereignty of peoples over natural resources defended above promises a stabilizing effect on the international order.

5. CONCLUSION

In the penultimate section, I have examined three possible explanations for the close connection between a people's right to political self-determination and its permanent sovereignty over natural resources as established in international law. I have, first, argued against the attribution of property rights (or similarly acquired jurisdictional rights) to the collectives concerned and I have, second, criticized an instrumentalist view of the relationship between natural resources and political self-determination. Instead, I have proposed to understand peoples' sovereignty over natural resources as an aspect of their territorial authority, which is a necessary precondition for actualizing the right to political self-determination.

Based on this interpretation, an important distinction between control rights and income rights can be established. A self-determining people is – within the limits set by the harm principle – entitled to decide on the utilization or conservation of the natural resources located on its territory. However, it has not necessarily a claim to the full amount of intakes that can be generated from the exploitation of these resources. The restriction of income rights allows for reconciling the permanent sovereignty of peoples over natural resources with demands of global justice. In addition, as I have shown in the last section, the here defended interpretation provides a sensible answer to resource conflicts that may arise in the wake of secession. If the population of a rump state has made a significant contribution to the development of natural resources situated in the

breakaway region, it can be granted a claim to a fair share of the separate state's revenues.

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Symposium on the philosophy of social and economic human rights

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The Philosophy of Social and Economic Human Rights

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The essays included in this volume are the result of a series of workshops organized by the United Kingdom-Latin America Network for Political Philosophy (UKLAPPN). The Network is sponsored by the British Academy of the United Kingdom and brings together academics from Argentina, Brazil, Chile, Colombia, Costa Rica, Mexico, Spain and the United Kingdom, who work in the field of contemporary political philosophy. As the title suggests, the main topic the volume addresses has to do with the nature, justification and implementation of socioeconomic human rights.

The normative relevance of socioeconomic human rights cannot be overlooked. According to the World Bank, 736 million people are situated below the poverty line of USD 1,90 per day and many of them die every year due to poverty-related causes (World Bank 2015). Severe poverty is thus one the most serious threats to human dignity of our time and the aim of socioeconomic human rights is precisely to conquer that threat.

International human rights law proclaims a wide array of socioeconomic rights, including rights to nutritious food, shelter, medical care, housing, education and social security (UN 1966). In the academic literature, there is some consensus that the fulfillment of these rights is essential if we want individuals to flourish as human persons. The reasonable assumption underpinning this view is that someone who is starving, illiterate or seriously ill becomes materially unable to make a valuable use of her freedoms and to lead a distinctively human life. So if we think that individuals have a fundamental right to develop their agency, we have decisive moral reasons to care about the satisfaction of their socioeconomic needs.

In spite of this consensus, there are also deep controversies about the normative justification of socioeconomic human rights. Some think that they are not genuine human rights because they are not universal: individuals can only claim them against modern political institutions and they would have no clear addresses in alternative scenarios. Instead, other authors insist that the list of socioeconomic rights proclaimed by current instruments is too demanding. In their opinion, people may have a human

right to the resources they need for subsistence but they should not be recognized rights to the highest attainable standard of physical and mental health, free higher education, maternity leave or periodic holidays with pay (UN 1966). International instruments may have gone too far by placing societies under extremely burdensome or even unfeasible obligations. Finally, some liberal theorists argue that socioeconomic rights are secondary and less important than other categories of rights.

From a legal point of view, socioeconomic human rights enjoy the same status as civil and political ones. As the 1993 Vienna Declaration sustains, all human rights are indivisible, interdependent and equally important (UN 1993). In consequence, governments cannot pick and choose; they have a strict legal obligation to satisfy all our human rights at once. However, there are a number of crucial theoretical issues that must be urgently addressed if we want socioeconomic human rights to live up to their aspirations. Fundamentally, this is because international instruments provide no clear guidelines as to what States must do in order to honor their responsibilities in this respect. The 1966 International Covenant on Economic, Social and Cultural Rights defines its party's obligations in the following terms:

> "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively, the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures" (UN 1966, Article 2).

The evident problem with this key article is that the idea of progressive realization up to the maximum of available resources is extremely opaque. What are the resources available to a state? Does this clause only refer to its annual budget or it also includes all the resources governments could potentially collect through more progressive fiscal schemes and the full use of their natural resources? In practice, this vague language became a major obstacle for the effective realization of socioeconomic human rights as it makes almost impossible to decide when states have done enough to honor their commitments under the Covenant.

In a number of additional documents, the UN Committee on Economic, Social and Cultural Rights tried to specify the extent of states' obligations. In its General Comment 3 (1991), it establishes the existence of a "minimum core obligation" to ensure the satisfaction minimum essential levels of

each of the rights:

> "Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*" (#10).

Nevertheless, the notion of a "minimum core" is once more presented as dependent on the availability of resources:

> "By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned" (#10).

Finally, the Committee's analysis of the clause of "progressive realization" is considerably abstract and offers no operative orientation as to how to make sense of such requirement:

> "It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources" (#9).

Unfortunately, the Committee never spells out what may count as a legitimate reason to postpone the satisfaction of socioeconomic rights or to justify the adoption of retrogressive measures.

In the specialized literature there is also an intense ongoing debate about the judicial enforcement of socioeconomic rights. Many authors argue that courts lack the legitimacy and the technical expertise required to make decisions about the allocation of scarce resources. Their claim is that socioeconomic human rights are not rights in the technical sense; they should rather be regarded as non-justiciable standards that governments must observe when designing their public policies and economic plans.

In recent years courts have developed some interesting strategies to deal with the difficulties that motivate these objections. In its influential sentence *Government of the Republic of South Africa vs. Grootboom and Others*, the Supreme Court of South Africa sustained that the housing program implemented by the local government of Cape Town was unsatisfactory (Constitutional Court of South Africa 2000). Its main

argument was that while the government was investing a significant amount of resources in the program, the plan included no special measures to address the situation of those people who lacked even a precarious shelter for their families. Two aspects of the sentence make it particularly interesting. First, the Court recognizes that resources are limited and that judges have no authority to make decisions about their allocation. Second, the sentence does not order the government to provide any particular individual with immediate access to housing, but simply insists that the Executive should develop an alternative program that incorporates its recommendations.

The Grootboom sentence is certainly innovative. It shows that courts have some promissory resources to enforce the satisfaction of socioeconomic rights without invading the competences of democratic institutions. Yet, many critics object that the strategy adopted by the Court was too weak both because it established no clear standards for policy makers and because it failed to provide immediate relief to thousands of people living in miserable conditions.

As we see, socioeconomic human rights raise a number of questions of critical import for human rights theory and practice: what concrete measures must nations undertake to fulfill the socioeconomic rights of their inhabitants? When can a state legitimately claim that it is promoting their satisfaction up the maximum of its available resources? To what extent can their effective implementation be monitored by courts and what specific judicial techniques should they apply when supervising the conduct of governments? Can courts force elected functionaries to advance certain public policies instead of the plans supported by the people through electoral processes? Do they have the authority and skills to supervise the social programs chosen by democratic governments?

The essays in this volume explore some of these issues from a philosophical perspective. Mariano Garreta Leclercq argues against the constitutionalization and judicial implementation of socioeconomic human rights. In his view, when courts or expert committees unilaterally implement complex economic plans that are not approved through democratic mechanisms, they undermine the autonomy of the citizenry. This conclusion is backed by three general assumptions. The first one claims that there are deep controversies about the kinds of policies that could maximize the satisfaction of socioeconomic rights; the second one asserts that if those policies go wrong they could impose significant costs on the population and may even have a negative impact on the satisfaction of the essential needs of thousands of individuals; and the third assumption claims that treating persons as fully autonomous agents implies refraining

from imposing risks on them, unless the potential victims have freely agreed to undertake those risks. As a result, it is up to the people to decide what concrete measures to implement in order to bring about the satisfaction of socioeconomic human rights.

The essays by Eduardo Rivera López and Saladin Mackled-García investigate the normative structure of socioeconomic rights and human rights in general. Eduardo Rivera López claims that socioeconomic rights differ from classical liberal rights in a relevant aspect. The normative core of liberal rights is composed by "deontological constraints" not to treat people in certain ways. In this sense, the government cannot infringe the freedom of expression of an individual just by arguing that this will maximize the overall satisfaction of that same right. By contrast, socioeconomic rights are sensitive to aggregative considerations: governments may legitimately refuse to satisfy my right to an adequate diet if this implies that more people will have access to nutritious food in the immediate future. According to the author, this conceptual asymmetry between liberty rights and socioeconomic rights has important implications in terms of their enforcement by courts. In essence, while judges can protect individuals from discriminatory policies or order that some particular individuals be granted access to certain goods or services, they should refrain from sanctioning or recommending the implementation of specific public policies aimed at maximizing the overall fulfillment of socioeconomic rights.

In turn, Saladin Meckled-García sustains that all categories of human rights involve two distinct kinds of obligations: "decisive obligations" and "weighting obligations". Decisive obligations are obligations not to take certain considerations into account when we decide how to treat an individual. So governments have a decisive obligation not to curtail people's access to certain public services or freedoms based on their gender, religion or ethnic origin. On the other hand, weighting obligations are obligations to give a fair weight to the needs and interests of separate persons. For example, when deciding what to do in order to promote my right to medical care, the government must balance my interest in enjoying that service versus the interests of other members of society in not paying higher taxes. The conclusion of the paper is that because human rights cannot be reduced to purely decisive obligations but also involve weighting ones, then any plausible account of human rights must include concrete principles as to how burdens and benefits must be distributed among members of a human community. Otherwise, the view would be seriously incomplete as it would fail to guide the action of political institutions.

Finally, Leticia Morales develops an original argument in favor of

adopting a universal basic income scheme that allows people to satisfy their most essential needs. Her main ambition is to show that this kind of policy is valuable and morally mandatory not because it promotes the freedom of individuals, but because it improves the legitimacy of democratic institutions. The reasonable assumption that underlies this claim is that poverty constitutes a major obstacle to political participation and seriously discourages it. As a result, the implementation of a basic income scheme is not only a plausible strategy to advance the fulfillment of socioeconomic rights; it is also an integral component of a well-ordered democratic society.

In sum, the essays in this volume offer a comprehensive introduction to the philosophy of socioeconomic human rights and try to come up with concrete answers to some of the most important questions they raise. Our hope is that these contributions will stimulate the debate about their nature and precise implications and ultimately contribute to their universal realization.

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Socioeconomic Human Rights, Autonomy and the Cost of Error

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ABSTRACT

One of the most influential strategies to justify human rights available in the specialized literature is centered on the notion of autonomy. Such a strategy assumes that civil and political and socioeconomic human rights are equally essential to lead a minimally autonomous human life. This article examines whether the ideal of autonomy can really provide support to the view proclaimed in the Covenant that socioeconomic human rights must be realized progressively, according to "the maximum of available resources". To do so, I focus on the conceptual relation between the ideal of autonomy and a fundamental dimension of moral deliberation which is often overlooked in the debate, namely: the cost of error in decision making. In a nutshell, I argue that once this key variable considered, it becomes evident that any measures governments may implement to promote the realization of social and economic human rights must be subject to democratic control.

Keywords: economic and social human rights, autonomy, progressive realization, cost of error, democratic legitimacy.

1. INTRODUCTION

One of the most common philosophical strategies used to justify human rights – including both civil and political rights (CPHR) and socioeconomic ones (ESHR) – appeals to the notion of autonomy. Cécile Fabre provides a

particularly persuasive example of such strategy (Fabre 1998),[1] which may be applied to the normative justification and juridical interpretation of the UN Covenant on Economic, Social and Cultural Rights (1966).[2] Her ultimate aim is to prove that socioeconomic rights must be constitutionalized because both socioeconomic human rights and civil and political ones perform the very same normative function: they preserve the value of personal autonomy.

Following authors such as John Rawls (1993), Joel Feinberg (1972) and Gerald Dworkin (1988), Fabre insists that in spite of its obvious liberal origins, the principle that individuals have a fundamental interest in personal autonomy may be accepted by people holding the most diverse doctrines of the good. In her own words:

> "Autonomy captures an essential characteristic of human beings, which distinguishes them from other beings, namely their ability rationally and morally to decide what to do with their life, and to implement these decisions, over long periods of time, so as to lead a meaningful existence and through it develop an awareness of the kind of persons they are" (Fabre 1998, 265).

So we have reason to respect people's autonomy because autonomy is an essential component of the human condition: only autonomous persons can fully develop their human nature. In this vein, Fabre sustains that civil and political rights have normative importance precisely because they are necessary to preserve our autonomy: freedom of expression, freedom of conscience, freedom of association and freedom of movement are obviously crucial to enjoying control over one's own life. In fact, when such freedoms are not protected, individuals become unable to choose and revise their own life-plans in the most fundamental sense. The same is true of political rights:

> "If it is important that I have some degree of control over my life, then surely it is important that I have some degree of control over the social and political environment within which I lead my life: electing representatives in Parliament, voting in referenda and running for office myself are means to acquire that control" (Fabre 1998, 266).

1 Although human rights can undoubtedly be derived from other normative ideals, Fabre's argument is particularly relevant. This is because autonomy, under different formulations, has played a central role in liberal thought from Kant and Mill down to the most significant thinkers in the 20th Century, with John Rawls' theory of justice (1971 and 1993) in the front line. On the other hand, the notion of autonomy has played a crucial role in the specific field of human rights justification: the theories of Alan Gewirth (1982) and James Griffin (2008) are excellent examples.

According to Fabre, the above considerations explain why civil and political rights must be constitutionalized and protected from majoritarian decision making. Importantly, Fabre insists that socioeconomic rights are equally important to preserve the autonomy of individuals:

"Giving these resources –income, education, housing, etc.– to people is important because without them they would be unable to develop the physical and mental capacities necessary to become autonomous. If we are hungry, thirsty, cold, ill and illiterate, if we constantly live under the threat of poverty, we cannot decide on a meaningful conception of the good life, we cannot make long-term plans, in short we have very little control over our existence" (Fabre 1998, 267).

The main goal of this paper is to suggest that even if socioeconomic human rights are relevant to preserving the autonomy of individuals, there are cogent autonomy-based reasons to resist their constitutionalization. Of course, this does not mean that the satisfaction of socioeconomic human rights should not be regarded as a political priority by democratic societies. It simply means that any specific decisions about their implementation must remain under ordinary democratic control: neither courts, nor experts are authorized to make unilateral decisions to ensure their fulfillment under the clause of progressive realization according to the maximum of available resources. In this sense, the paper provides support for one particular understanding of what specific obligations governments have under current international law: while the fulfillment of subsistence needs is certainly a high priority mandate, they cannot be enforced by courts or public policy experts. How to implement them must be decided by the people.

The paper is structured as follows. In section 2 I discuss a demanding interpretation of article 2 (1) of the Covenant and explain why it is problematic, at least if we accept that human rights are grounded on the value of autonomy. In section 3 I develop an original argument in favor of adopting a more modest interpretation of state's commitments under present International Law. Such argument sustains that when our actions involve serious risks for the interests of others, they cannot be implemented unless their implementation is authorized through democratic or representative mechanisms. Otherwise, the autonomy of those affected by our actions is seriously compromised. In section 4 I discuss an important objection to my view, according to which lack of expert knowledge on the part of citizens may render democratic authorization unpalatable in the context of extremely poor societies. Finally, in section 5 I present some concluding remarks.

2. AUTONOMY AND THE PROGRESSIVE REALIZATION OF SOCIOECONOMIC HUMAN RIGHTS

The view that value of autonomy may justify the authority of both civil and political human rights and at least some socioeconomic ones, appears to be plausible in principle. In this vein, the 1966 UN Covenant proclaims human rights to adequate food, decent housing, fair and just conditions of work, health and education. Nevertheless, because in present conditions their immediate satisfaction may be unfeasible, the Covenant also asserts that their realization should be *progressive* and that states must invest the *maximum* of their *available* resources to achieve their realization. This is how article 2(1) is framed:

> "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures".

As we see, article 2(1) constitutes and attempt to re-articulate the idea that socioeconomic human rights are of major normative importance even in contexts where resources are scarce: although some states may lack the resources required to bring about their immediate realization, they must nevertheless use all the resources at their disposal to ensure their satisfaction in the shortest period of time. Otherwise, they would be failing to live up to their international commitments. However, the very notion of progressive realization according to the maximum of its available resources is opaque. It can be interpreted in a number of ways.

On a demanding interpretation, article 2(1) implies that states must devote all their resources to promoting socioeconomic rights, unless this implies undermining the satisfaction of other human rights, such as civil and political ones. In the context of developing countries, this account is vulnerable to two interrelated objections. The first objection is that it may seriously undermine the political autonomy of citizens. To see why, imagine that a government elected by a majority of votes proposes to implement a number of political reforms in order to improve the economic performance of the country. The nation is poor and the government wants to achieve a reasonable level of economic development. If the plan is incompatible with the progressive realization of ESHR in the terms mandated by the Covenant, then it will be indefinitely blocked, even though it is supported by a majority of citizens. Of course, this does not imply that economic development is more valuable than ESHR; rather, the

point is that on the demanding interpretation, the Covenant may erode the political autonomy of the people, understood as their freedom to make collectively free decisions about their social environment. Predictably, such restriction of political agency will have a negative impact over individuals' personal autonomy as their capacity to control important aspects of their lives would be curtailed.

The second problem has to do with the burdens that bringing about the realization of ESHR may have over the population. On the demanding interpretation, governments are obliged to use all the resources they can find to ensure their progressive satisfaction. In many cases, this will force them to impose heavy taxes on their most productive sectors at the expense of economic growth. So even if such measures increase the present capacity of the government to deliver on socioeconomic human rights, this strategy may nevertheless render the society poorer in the long run. Furthermore, there are persistent disagreements as to what measures can most effectively promote the realization of ESHR. Most likely, liberals, social democrats and socialists will propose alternative programs to achieve that goal and insist that the rival strategies are problematic as they may end up eroding the very values they aspire to promote. As a result, the demanding interpretation of article 2(1) is seriously incomplete as societies have no clear orientation about the exact policies it calls for.

3. AUTONOMY AND THE COST OF ERROR

The above considerations point to another problem which is often overlooked in contemporary debate: in scenarios where the costs of undertaking mistaken courses of action are particularly high, the ideal of personal autonomy involves some particularly stringent demands. To see this, consider the following example:

> Imagine that two scientists, A and B, plan to carry out some experiments that prove necessary for the development of different technological applications of a particular theory. The chances of success are identically high in both projects. The scientists' work is not moved by prudential reasons, but by moral ones: both are persuaded that the result of their work will imply a significant improvement in the quality of life of their community. Assume also that A and B have equally sound reasons to make such moral judgment. Therefore, they both have a fallible moral knowledge that provides a *pro tanto* reason to act. There is, however, an important difference between both cases: the cost of error. If A's research fails, this poses no substantial costs to the wellbeing of third parties. The situation is very different in B's case: should her

research fail, it will cause serious and irreparable harms to a substantial number of people – say, B's research requires a kind of experimentation, which may be extremely dangerous for the environment and for people's health.[3]

This thought experiment suggests that when a moral agent deliberates on how to act, she must not only make a moral assessment of the various courses of action at her disposal; rather, she must also consider the cost of error each alternative involves – such as those of making a false moral or factual judgments.[4]

So how are we to interpret the situation of scientists A and B from a moral perspective? Both are in similar conditions to think that they know – albeit fallibly – that the following statement is true: "Proceeding with my research is the best alternative from a moral point of view, since the result of such decision will bring about a significant improvement in life-quality for members of the community." Consequently, they also seem to be equally morally justified to act on the basis of such judgment and continue their work on their research projects. The latter statement, however, is deeply problematic: there are cogent reasons to believe that while A is effectively justified to act on the basis of her factual and moral knowledge, such is not the case with B.

The above conclusion may be thus backed. It is obvious that A is morally justified to act based on her knowledge. From an epistemic perspective, A is justified in subscribing the factual and moral tenets we attribute to her, and they constitute enough reason to act accordingly. Should something go wrong, neither A nor any other persons involved would endure any damage. Yet, the analysis varies as we move to a context in which the costs of error are drastically high. To see this, imagine for a moment that one aspect of B's situation is different from what we described above: error-cost is very high but it only concerns the scientist's welfare, not that of third parties. Although B firmly believes that her research will be successful, she is aware that in cases of error her experiments could be dangerous for her own wellbeing. B might decide that it is not worth running the risk, even if the chances of failure are very low; or she might alternatively decide to run the risk and proceed with his research. Both courses of action appear equally acceptable from a moral perspective. But what happens when, as in the original example described, other people could be seriously harmed

[3] This example, applied to the moral field, is modeled after some well-known cases in the epistemological debate around contextualism and pragmatic encroachment: DeRose's bank case, Cohen's airport case and Fantl and McGrath's train case. See DeRose (1992), Cohen (1999), and Fantl and McGrath (2002).

[4] Interesting exceptions to the tendency to overlook the relevance of the cost of error in the process of moral deliberation are Thomson (1986), McKerlie (1986), Lockhart (2000), Hansson and Peterson (2001), and Hansson (2003).

if B is mistaken? B may research further and try to diminish the probability of error. However, since time is limited examining all potential sources of mistake is impossible.

From an epistemic perspective, there is no way out of this situation. No matter how solid the arguments and evidence displayed by B, those who could be harmed have the right to refuse taking the risk: B is not entitled to decide in their name as this would undermine their equal moral status. In other words, in case B did so, she would fail from a moral perspective in her relationship with those agents. Why should B arrogate herself the special prerogative of deciding in the name of others, without their consent or some kind of authorization? Why might B deprive these people of their right to make a decision that may prove crucial for their lives? If B neglects such fundamental moral right, she would be treating those involved as mere instruments for the achievement of her own goals, rather than agents whose interests and projects have a weight of their own and are irreducible to interests and projects of other individuals. In essence, if B acted unilaterally in the way she judges best from a moral perspective – despite having good reason to presume her judgment is correct – she would infringe the autonomy of the potential victims – in Fabre's terms, this would entail depriving them of holding significant control over their existence.

With this in mind, we can now reexamine the problem of implementing ESHR. As we saw, it is plausible to hold that the moral reason why ESHR must be fulfilled is that they prove just as indispensable as CPHR to respect people's autonomy. However, in view of the large amount of economic resources required – particularly within unfavorable contexts – complying with ESHR demands launching dangerous economic experiments; and in case of error, this may bring about substantial damage to the people (both those who lacked the chance to have access to the resources necessary to enjoy those rights and those who did have access to them prior to the implementation of the necessary redistributive policies). So as in the case with scientist B, when the state unilaterally decides to enact risky economic measures, it undermines its citizens' autonomy. Consequently, at least at first sight, we have reached a dead end: while ESHR are grounded on respect for people's autonomy, implementing them in contexts such as those described proves incompatible with such very grounds, namely: respect for the autonomy of individuals.

Fortunately, there is a solution to the paradox. Let us assume that B manages to persuade all the potential victims to allow her to proceed with her research: they all decide to voluntarily run the risk, having received sufficient information about its potential costs. In such case, should B decide to carry out her experiment she will not be acting unilaterally, nor

violating the autonomy of others. She is not running the risk in their name; all share responsibility for the decision. Similarly, it is reasonable to hold that, under certain conditions, democratic resolutions with a high level of legitimacy may have the same result. We can imagine in this vein that B's decision to proceed with her research results from a free and open deliberation process in which all the relevant information was circulated, all those concerned were part of the process, and the decision was backed by a majority.

Whenever these conditions obtain it is reasonable to say that, through their participation in the political process, all those concerned have authorized the decision – or, at least, none can protest that the decision was arrived at with no previous consultation. Of course, the kind of authorization provided by democratic procedures may not amount to unanimous consent. Yet neither unanimous consent nor the effective consent of all concerned is expectable within the context of ideological pluralism that pervades contemporary democratic societies. But it is generally accepted that a democratic procedure governed by majority rule is an adequate substitute of unanimous consent – at least when it complies with stringent legitimacy standards.

Now if we admit the legitimacy of the democratic system in general, then we must also accept that such system offers an appropriate instrument of authorization, both in the case of scientist B and, more broadly, in the selection of public policies in which the cost of error is significantly high. A committee of experts, or members of a tribunal, may certainly believe that a certain policy will promote the welfare of the people better than the others. However, if the cost of error is highly significant, they will not be morally justified to act unilaterally based on their (fallible) knowledge. For if they did so, they would be deciding in the name of others, thereby undermining their autonomy and their status as independent moral agents. In cases where fallibility is combined with the high cost of error for the wellbeing of those concerned, knowledge is not enough to justify action from a moral point of view. By contrast, the situation is radically different when that kind of decision results from an inclusive democratic process: even if not everyone agrees, implementing the policy that receives a majority vote is not comparable to a unilateral decision. In sum: if we assume that democracy is a valuable political system, we must also accept that it constitutes an adequate tool to authorize the implementation of risky measures in way that respects the autonomy and equal status of individuals.

Similar considerations apply in the case of decisions about the amount of resources to be devoted to comply with the ESHR included in the Covenant. If the measures to put them into practice are the end result of a

process of democratic authorization with high levels of legitimacy, the cost of error will not have the moral implications described above. Plus the fact that it cancels the plausibility of the notion that implementing ESHR, no matter how risky, violates the autonomy of those concerned.

4. DEMOCRACY, POLITICAL AUTONOMY AND SCARCITY

There is an important potential objection I need to tackle before concluding.[5] The argument I am suggesting is grounded on a connection between autonomy and democratic deliberation. However, it could be countered that although such connection is plausible in conceptual terms, it is nevertheless unrealistic in the context of most developing nations. This is because citizens of such nations may lack the capacities or resources to engage in sophisticated economic debates. As a result, their autonomy could perhaps be better promoted through alternative means, such as decision making by courts or technical experts. In the example of the scientists, it was argued that B has no right to decide in the name of others because this would be incompatible with honoring their equal moral status. Yet one may recognize the equal moral status of individuals while at the same time insisting that they have no capacity to understand or contribute to complex technical debates.

So if scientist B enjoys genuine expertise on the subject matter, she may legitimately refuse to take into account the views of others. Along the same lines, it could also be argued that when basic human needs are not secured and people lack adequate education and reasonable access to information, democratic debate and democratic authorization may not be the best option to promote the autonomy and wellbeing of individuals.

Nevertheless, the argument I have offered precludes the kind of epistocratic view underpinning this objection. As David Estlund points out, epistocracy tends to rely on three fundamental tenets:

> The Truth Tenet: there are true (at least in the minimal sense) procedure-independent normative standards by which political decisions ought to be judged.
> The Knowledge Tenet: some (relatively few) people know those normative standards better than others.
> The Authority Tenet: The normative political knowledge of those who know better is a warrant for their having political authority over others. (Estlund 2008: 30)

5 I am thankful to an anonymous reviewer for Law, Ethics and Philosophy for raising this key objection.

The case of the scientists accepts the first two tenets, which look more or less plausible. It accepts the second tenet because it assumes that scientist B enjoys some privileged expert knowledge by virtue of which she knows that a certain course of action is the better one; and it accepts the first tenet as the claim that B's knowledge is independent of any particular decision making mechanism. However, my account firmly rejects the Authority Tenet: since knowledge is in principle fallible, and the experiment involves high costs in case of mistake, then B is not morally allowed to act on her own personal assessments of merit. This is because even though her potential victims may lack relevant technical knowledge, they have a fundamental right to veto any unilateral decisions on the part of B. To enjoy such right they just need to know that the costs of a mistake are high for themselves and that the chance that the scientist is mistaken is significant. Thus, the only solution is to achieve the consensus of those who may be potentially affected by the experiment or, alternatively, to setup reliable mechanisms of democratic authorization. The same is true of citizens living in poor countries: they are entitled to resist any unilateral decisions adopted by epistemic elites, ranging from courts of justice to expert policy makers.

On the other hand, it is worth emphasizing that, contrary to what the objection appears to presuppose, these kinds of decisions hamper the *moral* autonomy of individuals rather than just their *political* autonomy. If scientist B unilaterally decides to go on with her experiment under the assumption that this will significantly benefit her community, she not only undermines the political autonomy of the potential victims but also fails to respect their status as separate moral persons endowed with an intrinsic dignity. And the same is obviously true of an elite of experts who make unilateral public policy decisions that may compromise the interests of those in their power.

To illustrate the point, imagine that after considering a set of alternative economic policies – P1, P2, P3 – a group of economic experts concludes that P1 is the best option. If P1 is successfully implemented, it will considerably improve the life prospects of the people. Yet, if the strategy fails, it will have a devastating impact on low and medium income classes. It is evident that in such case the experts are not morally allowed to impose their views on the citizenry. For even if the experts know that P1 is the best policy, they have a fundamental moral duty not to impose serious risks on others or decide in their name on matters that may seriously compromise their vital interests.

Of course, the existence of a minimally legitimate democratic system requires that at least the most basic socioeconomic needs of the people are

fulfilled. In this sense, the duty to satisfy certain ESHR is supported by distinctively democratic considerations: such rights are preconditions for a genuine democratic deliberation. In fact, when people lack adequate education and are deprived of the means of subsistence, political autonomy is a chimera. Yet, even if the satisfaction of ESHR constitutes a political priority, this does not imply that courts or experts can make unilateral decisions as to how to implement them. Since any such decision would presumably involve considerable risks, they call for democratic authorization. Naturally, when a nation is desperately poor, or when minimally reliable democratic frameworks are absent, we may have to consider other options. But in most present developing democracies, it is up to the people to figure out what specific policies must be implemented in order to promote their satisfaction and honor their commitment with human rights instruments.

5. CONCLUDING REMARKS

The conclusion of my argument is that even if we admit that ESHR are essential to the development and enjoyment of genuine autonomous agency, their unilateral implementation by governments or courts may be morally unjustifiable in many contemporary societies. Fundamentally, this is because in view of the extreme costs their implementation may involve, unilateral implementation violates the autonomy of individuals. It is important to emphasize, however, that this implies no skeptical view about the feasibility of ESHR or about their normative status. On the contrary, the account I propose suggests that governments and citizens are morally obligated to engage in democratic conversation about what measures to undertake in order to fulfill ESHR and grant this issue a privileged role in public debate. Within such political processes, people must compare rival interpretations of the "progressiveness" and "maximum available resources" clauses and their precise implications. Yet, if they want their human rights policies to be legitimate, they must result from democratic decisions about what risks the political community is willing to run to fulfill them.

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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.[1] 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."[2] 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)

2 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 ben 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 wrongly 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).[3] 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).[4] 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),[5] 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.[6] 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.[7] 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.[8] 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

8 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.[9] 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.[10]

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.[11]

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 or 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 polies 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 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 the 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.[12] 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).[13]

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.[14] 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.[15] Suppose there is a governmental policy that provides some service to the population, say

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

14 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.

15 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.[16] 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".[17] 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

16 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).

17 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).[18] 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.

18 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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Two (Different) Types of Human Rights Duty

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ABSTRACT

In this paper I introduce a (new) distinction in human rights theory, between two types of genuine obligations corresponding to human rights: a) obligations that require us to rule out specific considerations for treating people in a certain way, such as the obligation not to consider Jane's skin color when deciding whether she should be permitted to enter a shop or the obligation not to take political expediency as a consideration relevant to whether political opponents should be silenced, and b) an obligation to give some weight to different interests: those interests people have in enjoying certain conditions and those of people who must carry burdens to create these conditions, when deciding what must be done for rights holders. For example, we must weigh the interest Jane has in seeing certain improved access to secured health care versus the interests of other members of Jane's society in not facing significantly-increasing tax burdens, or seeing reduced social opportunities for their ends, as these will impact on their abilities to pursue their own personal life projects. Both types of interest matter, so to resolve how much health provision Jane is entitled to have we need to know how to weigh them against each other – we need an index. These different types of obligations, with their basis in different forms of reasoning, cut across categories of human rights and can both exist for any one human right. Accepting the distinction means accepting that we must pay careful attention to how a human right is given content in the form of obligations. It also re-introduces conceptions of distributive justice as a necessary component in solving how conflicting interests should be weighed an "index" for such weighing.

Keywords: human rights; responsibilities; obligations; conflicting interests; weighing; categorical reasons; excluded reasons; distributive justice; fairness.

1. INTRODUCTION

A slogan adopted by the United Nations, echoing an account by Henry Shue, says that the duties corresponding to human rights are to "respect, protect, and fulfil" those rights (Shue 1996: 52; CESCR 1999a: s. 15; CESCR 1999b: s. 46; CESCR 2000: s. 33). This, of course, means the duties are to respect, protect, and fulfil people's secure enjoyment of the content or objects of those rights as described in international instruments. However, a problem with these headings is that they do not explain how we should allocate the burdens of these different types of duties and justify the allocation for those that will execute them or bear the costs of their execution – ultimately the citizens of each society.

In this paper, I introduce a different categorization of duties. This cuts across, rather than underpinning, traditional distinctions between types of human rights – such as Civil and Political (CivPol) rights versus Economic and Social (EcoSoc) rights, liberty rights versus benefit rights, or even rights with positive obligations versus those with negative obligations, distinctions that have been debated in the literature.[1] This new categorization is not intended to map onto debates where authors defend or dispute that such distinctions exist or use a categorization to undermine the importance of any specific group of rights. Instead, the argument lies within the sphere of genuine obligations. It neither challenges the existence of the two categories of obligations I set out, nor questions the rights to which they give substance. Indeed, for many traditionally understood rights in either of the above CivPol or EcoSoc categories, both of my types of duty will apply. The point of the distinction I introduce is rather to help us think about what it means to satisfy obligations and when it is appropriate to satisfy an obligation in one way rather than the other. The distinction focuses practically on how to adjudicate or claim different elements of a right, given the different obligations it can imply. As will become clear, when I set out the two different types of duty, adjudicating what it means to act on these two types of duties or to breach them amounts to very different things, implying very different tests.

The distinction I have in mind is between a) obligations that require us to rule out specific considerations for treating people in a certain way, such

1 The Civil & Political v Economic & Social distinction is a *de facto* description of rights appearing in different instruments of the UN Bill of Rights (ICCPR v ICESCR); liberty v goods and benefits rights is a terminology introduced by Onora O'Neill (1996:131 ff.); Negative v Positive rights are discussed in (Bedau 1979); and positive v negative duties later by Shue (1996: 35 ff.); other attempts to distinguish human rights that are thought genuine from those that are not include the justiciable versus non-justiciable distinction, Justice Sachs (2000); see also Christiansen (2007).

as the obligation not to consider Jane's skin color when deciding whether she should be permitted to enter a shop or the obligation not to take political expediency as a relevant consideration to whether political opponents should be silenced; and b) an obligation to give some weight to different interests people have in enjoying certain conditions and those interests of the individuals who must carry burdens to create such conditions. For example, we must weigh the interest Jane has in seeing certain improved access to health care secured versus the interests of other members of Jane's society in not facing significantly-increasing tax burdens, as these will impact on their abilities to pursue their own personal life projects.[2] Both types of interest matter, so to resolve how much health provision Jane is entitled to have we need to know how to weigh them against each other – that is, we need an index.

Consider an example. In 2015, the government of Greece was criticized review of the Committee for Economic Social and Cultural Rights (*CESCR*) of the UN for failings in its EcoSoc rights provisions, such as basic health provisions (CESCR 2015: e.g., paras. 19 & 20). Specifically, provision of health resources and access to them had been curtailed by government policy during an economic emergency, principally reflected in a sovereign debt crisis. The Greek government responded that it did not have the resources to keep those EcoSoc provisions at the prior level given the conflicting priority of floating the economy. Critics of Greece point out that it had options as to where to find resources to address the crisis: health provision was not the only one. It could have increased taxation of the affluent instead as a concrete response that is more specific than the CESCR's chide that the government could "do more". However, a question arises as to what the right way to understand the duty to fulfil the right might be, in terms of how burdens can be allocated to resource that provision without being unreasonable (imposing unacceptable levels of burden). Answering that question, I will argue, requires us to adopt the second model of obligations (b) above in that it calls for an index in weighing different and conflicting interests none of which are disqualified as irrelevant considerations to what we should do. That is a different question from the categorical one of whether the Greek government was appealing to unacceptable, irrelevant considerations, in distributing burdens the way it did.

In part 2 below, I set out this distinction in types of duties more clearly.

2 Throughout this paper I refer to "duties" and "justified burdens" as comprising the costs that people may have to shoulder to secure the satisfaction of certain interests for others. Duties are just one type of burden, whereas lost opportunities (opportunity costs) involving no obligatory action are another, thus the need to specify both elements. I also use duty and obligation interchangeably.

In 3, I focus on the second obligations model, underpinned as it is by reasons relating to how one should weigh competing but legitimate interests and which I call 'Weighing reasons'. In 4 I return to the other model of obligations, those based in what I call 'Decisive reasons'. In 5 I show why some key objections to this distinction between the two models and its application to human rights duties do not work.

2. THE DISTINCTION

Another way to frame the distinction among types of duties I have in mind is in terms of reasons and actions.[3] On the one hand, we consider a specific action type in terms of the considerations for it and whether there are reasons to rule out those considerations – and with them the action. This might also work with omissions where a specific action should not be omitted for certain considerations.[4] The government omitting to distribute food aid because it does not want to develop an aid plan for the poor, viz. poor citizens will not generally bring electoral dividends, makes it wrongfully neglectful of those citizens. In such cases, we have reasons to rule out the consideration, the electoral calculations, supporting the omission and with it the omission itself.[5] However, ruling out omissions requires ruling out the positive considerations entertained in favor of wrongfully omitting the action. On the other hand, we have reasons to give a certain weight to some considerations when determining what action should be carried out, given the different competing considerations. The proposal to increase contributions towards educational provision must be considered by weighing the benefits the provision brings to those who can access it against what it requires in burdens for those who must, say, be taxed to finance it. We do not have a categorical reason to provide a given amount of education for any person, in this case, until we have found a

3 For one theorist, a practical reason is something "that counts in favour of some attitude or action" (Scanlon 2004: 231). For clarity in the text when referring to "reasons" I shall exclusively be referring to obligation-generating moral considerations, and by "considerations" I shall mean any candidate reasons (in Scanlon's sense), moral or non-moral, for acting or omitting to act.

4 I make no fundamental distinction between actions and omissions (the failure to perform a given action) in this paper. One can have an obligation to perform specific actions as well as an obligation not to perform certain specific actions (to omit).

5 The idea that there are special moral reasons that indicate considerations we can *disqualify* or *exclude* as reasons in moral deliberation is present in a number of authors (Dworkin 1984; Waldron 2000: 302 ff.; Dworkin 2010: 330). Scanlon identifies a special brand of 'complex reasons': those reasons we have to not take certain other considerations into account. These can include reasons not to weigh or promote a given aim (Scanlon 1998: 50 ff.). The general idea that moral reasons can 'silence' other considerations is present in John McDowell (1998, originally published in 1978: see 92).

justified way to weigh the different interests against each other and arrived at the amount that is mandated by this weighing.

We can call the first kind of reasons "Decisive":

> **Decisive**: No considerations within a range, R, such as considerations a, b, or c, etc., is admitted as a (*pro tanto*) reason in deciding how to treat someone. Actions based on those considerations are ruled out.

Considerations can here include people's interests, which can be disqualified as having no weight in our deliberations. For example, consider a state claiming an interest for itself or its citizens in allowing slavery to take place. That interest should be given no weight because it demeans and diminishes human beings, treating them as objects of ownership. Weighing the interests of one group (the slavers) versus another (the potential victims) is itself decisively ruled out because of what the pro-slavery interest implies about other human beings.[6]

Where we have reason to weigh interests against each other, we can call this "Weighing":

> **Weighing**: For a range of beneficial outcomes O that persons might enjoy, such as p, q, r, etc., the securing of which depends on others persons limiting their enjoyment of a range of outcomes, S, such as t, u, v, etc., we must assign a certain weight to these outcomes such that we know how much curtailment of S-type outcomes it is justified to assign to those that will experience the curtailment, given the O-type outcomes this will produce.

Simply, "Weighing" assigns obligations according to some idea of appropriate weighing and balancing between certain benefits for persons and those burdens required to produce/secure the benefits. I will come to what such weighing amounts to and how it might be done below. For now, consider that the fact that we can increase street lighting by 50%, and with it personal security by 5%, does not by itself tell us whether we should do so. First, we must look at the costs, in terms of lost opportunities or outcomes to others. A proposal to reduce road traffic speed limits down to 20mph on all roads, even if it improves safety outcomes gained, has to be weighed against the losses it would bring in many other areas of life; and that weighing, done right, might indicate that a global 20mph speed limit

6 By "interest" here I mean an element of people's wellbeing, in the sense of what does or can make their lives go better if satisfied. Some theorists claim that one cannot have an interest in unjust things, and that is why some "interests" do not count for the purpose of grounding rights (Tasioulas 2015: 49). However, if we are justifying human rights this would be circular, appealing to a right (justice) to explain a right. Not only that, there is an important sense in which interests relate to a person's life plans, even mistaken life plans, rather than what is good *per se*.

constitutes too much of a loss in ways that matter for people's lives, even if it would avoid a certain amount of death-risk on the roads. The weighing must be done to determine what we should do. We would not, however, accept similar reasoning when considering killing of one's unhelpful boss, say, such that we weigh the benefits to us against her personal losses, assign weights to each on some scale, and then calculate what to do. Rather, entertaining that very calculation smacks of psychopathy – we have a compelling reason not to treat such considerations as operative reasons at all, because treating people as part of such a calculation is excluded by their status as persons. Secondly, where weighing is appropriate we need to introduce *a way* to weigh the securing of this range of people's interests given the costs of doing so to others. That might be done by introducing a certain index to do this weighing, such as that for every gain X, a certain amount or type of cost Y is acceptable for others, but no more. I will shortly come to how to weigh.

Weighing reasons allow both that the amount of provision towards satisfying a given interest for *each* person is determined according to the fair burdens that can be imposed on others in providing it. It might also allow that the numbers of persons having access to that provision are also limited, according to the fairness of the required burdens, as where people in the worst conditions are prioritized given what can fairly be imposed in the form of taxes at a certain juncture. Fairness is a value that itself needs setting out, and there are different accounts. Some see fairness as equivalent to reciprocity, others to focusing on the least well-off.[7] For now, I am using it to indicate what burdens people may be expected to accept given the benefits, where no reason exists to cancel out the burdens as a valid consideration in deciding the correct course of action. The question of how we should weigh costs against benefits works along both axes (individual provision/numbers of individuals provided for). I will leave open the question as to along which axis balancing is permitted, in the sense set out above. If one accepts a basic equality restriction that no person can receive less provision than any other – which would require a special justification – then only one kind of balancing will be permitted. I am also leaving aside the question of weighing or deciding what to do when rights themselves (as opposed to the interests underpinning rights claims) clash. For my case that two types of reasons exist it is enough that

7 Whilst Rawlsian fairness may have started out as Hartian reciprocity, it is not clear that Rawls' theory of distributive justice, and especially his "difference principle", is a reciprocal version of fairness. The original position models fairness in terms of what people would reasonably accept as a potential outcome for them: "…the idea of fair terms of cooperation: these are terms each participant may reasonably accept, and sometimes should accept, provided that everyone else likewise accepts them." (Rawls 2001: 6).

sometimes we must weigh competing interests and sometimes competing interests are silenced.

Decisive reasons are *pro tanto* moral reasons or obligations. That is, there may be circumstances where one is forced by other moral reasons or obligations to go against these reasons. That would not, however, be a case where the reasons were extinguished. So, suppose a police officer was forced to act in a racially discriminatory way in order to prevent a murder (thus mollifying the murderer until backup arrived): that would not render the reasons to not racially discriminate invalid in such a case. There are other overriding reasons all-things-considered take priority in these circumstances. This is important because the mere existence of potentially overriding reasons all-things-considered, as in the above example, does not turn all Decisive reasons into Weighing reasons. That would be the case if Weighing reasons were only, or principally, triggered where we had to adjudicate between *pro tanto* obligations. But Weighing reasons exist where no *pro tanto* moral obligations exist, mandating us to act, but where *valid considerations* are nevertheless weighed and balanced. No obligation survives this balancing or weighing, all-things-considered, and we wrong no one by fairly adjudicating between the competing interests. Thus, consider the benefits of university education and the cost of taxes to provide it. If we decide on a certain amount of taxation, and resulting university provision is acceptable, we are not thereby deciding to breach a pre-existing *pro tanto* moral reason not to tax. The question of whether we should tax or not is always posed in relation to the benefits that might be derived from taxation. The interests people may have against taxing at this level may be outweighed by the interests in university provision. In which case, we would have a resulting reason to tax, which is a *pro tanto* reason, not a group of separate *pro tanto* reasons.

The focus on disqualifying considerations in Decisive reasoning may be thought to imply that reasoning is wholly about intentions, versus the objective features of the actions themselves; indeed that has been raised as an objection to one version of this approach (Möler 2009: 762 ff.). The objection poses a dilemma: either we focus on subjective states in pursuing an action or we focus on objective reasons of the action. Focusing on subjective states is problematic because we may be unable to determine them, and part of what one can acceptably intend will anyway depend on what an action objectively does – intentions deriving their moral acceptability form the actions they intend. Focusing on objective effects, however, will focus on how interests are affected and that goes beyond the specific reasons the agent may have for carrying out the action. For my purposes, here we can refuse the dilemma. The objection runs together

"intention behind" with "reasons for". We can consider what can best explain the action in its context in terms of the considerations that might support it, the reasons for it, and decide from those if any could plausibly render the action permissible because they are not disqualified considerations but genuine reasons. Indeed, some types of action are already differentiated by their inherent incorporation of a certain kind of purpose that can never be an acceptable consideration for acting. The action of enslaving a person inherently incorporates extreme purposes with regard to human instrumentalization such that they cannot be divorced from a proper interpretation of the action. Below I will identify the kind of moral basis one might cite to exclude reasons of this kind; but for now, we can see that it is not the subjective intention, but the publicly defensible interpretation of an action and its plausible supporting reasons that matters for Decisive reasons.

Now, it might be objected here that there are moral theories that not only permit weighing, but endorse it, in *all* cases, meaning the cases I have described as Decisive are only ever provisionally decisive. Some forms of consequentialism, such as those incorporating an unconstrained wellbeing-maximizing instruction, might indeed assign weights to the option of murdering my boss, as well as reducing speed limits on the road. They arrive at both conclusions about what can or should be done by weighing. A significant attraction in rights thinking, however, which is also present in the aspirations for human rights standards, is to limit that kind of reasoning. Rights are seen variously as limits, side constraints, or as invoking interests that are "qualitatively" different from other interests that can be simply weighed against each other.[8] How, or why, such qualitative limits exist depends on one's theory of individual-centered imperatives, but one thing any such theory would need to do is explain certain considerations as peremptory, such that certain considerations, including those relating to satisfying other people's interests, cannot count against them even in very large numbers. To do that, those other considerations must have a weighting of zero in confrontations with these interests. Examples of such, *pro tanto*, weightless considerations would be justifying the political exclusion of others on the basis of race or the sacrifice a person's life on the grounds that it brings satisfaction in terms of (whatever number of) other people's life projects. To be able to do this, we need a reason to set the relevant considerations to zero in these confrontations, and that kind of reason needs explaining beyond an appeal to an unexplained terminology of qualitative differences between

8 For latter see Waldron (1989: e.g., pp. 509, 512, & 519).

interests.[9] If one accepts that there are such rights, then one needs that reason-based explanation.

Now, if this is right, it means that, whilst Decisive reasons focus on what counts as an acceptable consideration for an action (or omission), Weighing reasons are index-focused. They concern what should be weighed against what and on what basis, as an index for negotiating between different and valid competing interests, in order to arrive at normative conclusions about what can or should happen.

Decisive reasons are more straightforward. Key human rights or basic rights include rights not to be arbitrarily detained, arbitrarily killed, tortured, or enslaved, for example.[10] It is important to note that what is ruled out by such rights relates to certain types of treatment, distinguishable not simply by the interests that they affect, but also by the basis for the treatment. We must not simply look at the impact on certain interests of being detained to determine whether it is morally acceptable, but must also consider whether it is arbitrary: meaning there is no compelling reason for it. If the non-arbitrariness test is passed, then detention can be permissible. It is also possible that negative impacts on interests such as one's interest in being free from coercive force, from having one's bodily integrity attacked, or from having one's life threatened are not by themselves the basis for ruling out certain actions. Killing in self-defense, forcibly coercing a detainee to prevent them carrying out a crime or from escaping justice, would both seem to be compatible with human rights standards. Killing for personal advantage, coercing someone with the aim of convenience, interfering with bodily integrity for material advantage or for no good reason, are all ruled out. With some human rights, the disqualified purpose is already built-into the description of the right. So, torture incorporates the purpose of using attacks on a person's wellbeing (infliction of grave pain) to either break their resolve in order to extract something from them against their prior conviction, such as information, punish them, or enjoy their suffering. Slavery incorporates the notion of ownership or control such that one person's exercise of her will in directing her life and person is subordinated to the aims of another. The attack on the interests in question, on being free from pain or being free from restraint or free to do as one wishes, is not by itself obviously prohibited. One might legitimately apply very serious pain to prevent an attacker harming another person, and that would not constitute a violation of a

9 Waldron, for example, never explains the notion of 'qualitatively' different interests that he takes to underpin rights (*op cit*).

10 These are clear core candidates for moral human rights, also reflected in international instruments (viz. *ICCPR* 1966/1978: Arts. 9, 6, 7, 8).

human right, even *pro tanto*. This indicates that it is the way that interests are attacked – on the basis of what consideration or purpose that this is done – that determines the acceptability of the actions.

Here, one could object that the interest in question is the interest in being free from slavery, for example, such that it is an attack on these and not the considerations behind the attack that matters. That way, the effect on interests, and not the reasons behind the action affecting them is what matters in explaining human rights obligations. But not only is this an ad hoc move, introducing sui generis interests identified by type of treatment; this response still needs to explain why some interests are special, in the sense of being capable of disqualifying other considerations and not merely outweighing them. The slave owner's interest in holding slaves should have a weight of zero in deliberating on what to do if many slave owners are not to skew the figures on whether slavery is acceptable. In which case, we need a reason to disqualify them and the interest taken on its own will not explain that reason.

It is worth emphasizing here that Decisive reasons do not only exclude actions. Their focus is on disqualifying certain types of considerations as relevant to deciding how to act. They can also disqualify consideration that apply to omissions – as when a government neglects the safety of its citizens. Decisive reasons cut across negative-positive rights or even negative-positive duties distinctions because they are reasons to disqualify considerations; and they rule out actions or omissions in so far as they are supported by disqualified considerations. These can include considerations that fail to sufficiently take into account the effect of a policy on citizens, and thereby imply neglect of their interests. Decisive reasons do not only apply to CivPol rights as traditionally understood. They can apply to considerations in the way EcoSoc rights are distributed. A state that prevents Jay from accessing a hospital because of her race or gender, where the hospital is not dedicated to group-specific ailments, will thereby breach a Decisive reason. Such considerations are disqualified when determining how to distribute social goods. What Decisive reasons cannot tell us is how to fairly determine the balance between interests, benefits and burdens when weighing these is appropriate, and consequently how much of a given social good is to be provided. That question concerns the correct index for weighing these interests against each other in determining what to do, implying a different kind of moral consideration.

Weighing reasons are more complex because considerations against providing certain outcomes for people can include interests that are not easily dismissed or disqualified as inherently invalid, yet do not themselves ground decisive reasons. So, for example, the human right to health or

education are often taken as entitling people to fulfilment in the form of a certain amount of benefit provision in these categories of (health and education) interest (CESCR 1999b: s. 47; CESCR 2000: ss. 33, 36, 37, & 44; Also Bilchitz 2007: 195). But it cannot be the case that a person has a claim against grounding an unconditional duty for others to provide N amount of health provision or N* amount of educational provision, given that providing these requires those others to take on burdens to do so that would represent personal costs in pursuing life aims. Consider a level of resource requirement, n, needed to achieve educational provision N, that imposes on fellow citizens a duty to give up pursuing any personal life aims not dedicated to advancing n, but instead to adopt life-shaping aims around achieving n. They would have to decide their career choices and personal goals in terms of a personal commitment to what better achieves n. Achieving n might require citizens to further restrict their personal lives, limiting their friendships in number so as to maximize resource and time towards contribution. Untrammeled, obligatory dedication to n would reach deep into their lives as separate persons that would otherwise be guided by a sense of their own projects and pursuits. These requirements are unreasonable in the sense of undermining one of the points of a liberal and egalitarian morality: individuals living the lives according to their values and best lights. Unlimited instrumentalization should be an unreasonable demand, even for egalitarians.[11] So, we need some clear sense of the limits of reasonableness. Whilst many authors mention reasonableness as a limit, or concede that no "excessive", "unreasonable", or "overly burdensome" requirements can be expected, these views always leave the criteria for reasonableness or excessiveness un-specified. Nor do they even supply a decision-procedure or principle that we might use to arrive at such an answer.[12]

In addition to reasonableness problems, there are also matters of fairness. Demanding large contributions from some citizens, even if these demands are consistent with allowing them to choose and pursue personal

11 In the words of G. A. Cohen, they would turn each person into an "engine for the welfare of other people" or "slaves to social justice". Cohen says that this requirement would be "excluded by a legitimate personal prerogative [that] grants each person the right to be something other" than this (Cohen 2008: 10).

12 Viz. whilst Cohen, *supra*, accepts a balance between other-regarding contributions and a personal prerogative (11), but gives no indication on how to determine the proper and just balance between the two (other than to claim we intuitively understand it [6 ff. and 354 ff.]). Other examples of accepting limits but giving no account include Buchanan (2004: 89, 92, 94 n.8), Stemplowska, who concedes duties to provide resources apply "if such resources can be provided at a reasonable cost to the provider"(Stemplowska 2009: 468), and Gilabert, who also acknowledges there are limits to contribution but gives no account of those limits (Gilabert 2012: 47).

aims, can still be unfair. That is because one can ask whether allowing the burdens to fall unevenly on some citizens treats those citizens with equal concern. Allowing some citizens more opportunities, or fewer burdens, to exercise their capacity to pursue their personal goals means treating them differently, and the differences have consequences for how they can pursue distinct lives. The need for fairness requires a positive account of how interests – both basic ones and those in pursuing distinct lives – can be balanced so that citizens are treated with equal concern, and thus fairly. An account of how to weigh interests fairly is, however, different from an account that disqualifies certain considerations for action.

Of course, there may be circumstances where fairness considerations are not pertinent. It might be argued that one ought to save a drowning child, even if one has saved many such children recently – just because one is confronted with the drowning child. Introducing fairness here is out of place. However, what precisely matters about the interests in play in the cases I have identified is that they are not rescue cases triggered by special circumstances of direct confrontation with the jeopardy of specific sufferers. Rescue cases are most plausible when considerations relating to a reasonable dispensation to prioritize one's own aims to guide one's life are absent, and so are considerations focused on the fair distribution of opportunities to pursue one's life aims. This is reflected in the number of authors working on rescue that look for characteristics to demarcate these cases in terms of the specificity of the circumstances – such as "being confronted" with another's plight, or being in the "proximity" of someone in peril.[13] Certainly, any attempt to generalize from the mere fact that someone lacks basic interest satisfaction in a specific rescue case to a duty to contribute to basic interest satisfaction for all who need it, will introduce the need for a Weighing reasons model.

3. ACCOUNTS OF WEIGHING REASONS

If my above analysis is correct, then there are two types of duties, and two types of reasons that underpin them, corresponding to human rights standards. The point of this distinction is not to reject either type of duty but rather to invite reflection on what these duties demand, in the form of theories that give them content. The distinction is also not intended to rule out either duty model as relevant to human rights, in the way that perhaps debates on whether human rights are (technically) rights are intended to

13 What triggers rescue duties is a matter of dispute. A number of theorists propose proximity, (Miller 2010: 23 ff.; Kamm 2007: 379) while others focus on 'confrontation' with a specific person's case (Dworkin 2010: 277 ff.) as the defining feature.

do (Cranston 1973; Bedau 1979). I deal with the question of whether this disjunctive analysis challenges the status of human rights as rights below. For now, if there are genuine Decisive and Weighing reasons, then they will generate obligations. Given the nature of the two types of claims, and any one human right will need both types of reasons and obligations to give it a well-articulated content.

By introducing the complexity of types of duty and the reasons that underpin them I also introduce some necessary complexity in our understanding how human rights can or should be claimed. Where the matter is simply one of Decisive reasoning, certain actions or omissions are categorically ruled out because of the character of the considerations that support them. Where Weighing reasons are appropriate, adjudication will need more information about what it would take to provide different levels of provision, and it will also need a *principle* for weighing the provision against the cost. This can only mean that an account of distributive justice is required.

For states seeking to comply in a principled way with their human rights obligations, determining a principled (reasonable and fair) way to carry out this balancing will be indispensable. That involves having a clear sense of what fairness can demand, in the form of a justifiable principle of fair distribution of benefits and burdens (a principle of distributive justice). Whilst there is little or no literature on fairness for human rights, the literature for principles of distributive justice is much richer and more advanced.

A rare exception to the lack of attention to, or even recognition of, this problem in human rights literature is David Bilchitz, who argues that we should accept a "core obligations" model prioritizing certain demands for fulfilment of interests, and progressive taxation as a means to resource the provisions (Bilchitz 2007: 88-89). Bilchitz's basic idea is that the more wealth people have, the more diminished are the returns on that wealth as utility for those that enjoy it (ibid). Thus, requiring contributions from those with more wealth is a less demanding (and a more marginal) burden than from those at other income levels. This, he argues, supports a progressive taxation solution to the supply question. But, whilst it is commendable that Bilchitz at least recognizes that there is a problem to be addressed, his response does not solve it.

While the response explains where to prioritize contributions, it either fails to explain what constitutes a fair contribution or it implies an implausible account of fairness. To take contributions at the margin – i.e., from the better-off first – does not indicate any limit on how much should be contributed. It is possible, on this instruction, to simply keep on taking.

If there is no limit with an accompanying justification, then this not an account of fair contribution so much as an account of the order in which to collect contributions. One could come up with a limit, say of a certain level of wealth, but that would require justification as the right account of fair cost distribution. It would also imply that taking more was wrong, because unfair, and correspondingly right holders could only claim what was achievable with this level of contribution. Bilchitz does not supply an account of this kind of fairness. But we can consider some alternatives.

Perhaps, implicit in the progressive tax idea is the view that people must contribute up to that point where their own rights are threatened. That is, they are allowed to keep enough resources to be marginally above basic interest satisfaction. However, it is unclear why that is what constitutes a fair contribution. Bilchitz himself focuses on basic interests as setting a threshold of 'core obligations' for EcoSoc human rights.[14] But that threshold seems too low to act as the bottom limit to which contributions can acceptably take a contributor, as a matter of fairness – it gives little or no weight to the value of respecting people developing and pursuing distinct life-shaping aims. It would imply that where some people were below the threshold because of a deficit in resources, potential contributors would always forfeit opportunities to personally work towards obtaining resources to advance their life-shaping projects and aims. This seems to rule out the prospect of pursuing a meaningful life through one's work and effort. It yokes the life of each individual, in the sense of developing and pursuing projects and goals that are one's own, to the sole aim of achieving a certain wellbeing level for others. Of course, the claim is not that people have unlimited rights to this pursuit, it is rather that it should have some fair weight.

It is important to parse out the issues here. There is a level of treatment for people that is prohibited, and would be covered by an account of Decisive reasons. That does not set a level of provision or contribution, except in so far as it rules out certain considerations (including some considerations about contribution or cost) as relevant to provision. When considering behavior such as the enslavement of others, cost considerations

14 Bilchitz defines minimum core in terms of interest fulfilment that secures near bare survival (Bilchitz 2007: 221). It is worth noting that Bilchitz distinguishes implementation duties, what he calls "unconditional rights", from the content of the rights themselves, which he calls "conditional rights" because their requirements being categorical depends on context and resources (77 ff. & 220 ff.). The latter, somehow, symbolically go beyond what is required at any one time by unconditional rights. This distinction is troubling in my view, given that the *normative content* of a right is precisely a matter of what can justifiably be demanded from others, and a right considered distinctly from its normative content seems a mysterious idea. However, in this paper I am only concerned with the justification of types of duty.

(of spurning slavery) to those doing the enslaving are irrelevant. However, when considering Weighing reasons, we must find a way to balance interests and determine fair limits for those contributing towards the fulfilment of human rights. The limits here are not the same as in Decisive reasons – they are not set as limits on the kind of considerations that can count, but by deciding how much of one set of acceptable interests it is fair to give up for another set – and so what can fairly be expected of contributors. However, the proposal that we should set the limits on contribution at the point at which "basic" or "core" interests are affected indicates that no one has a right to pursue a distinct life of their own so long as they can contribute more towards others reaching the satisfaction of those basic or core interests, however many people may be in that position. Here, reasonableness can still be preserved by not requiring people to prioritize the project of contributing to the raising of each and everyone's wellbeing levels, as one's life aim. That would be an illiberal consequence that made a person's conscience and life aims an instrument for the improvement of wellbeing. But even avoiding that, it challenges fairness to require each potential contributor to limit their pursuit of personal aims (save those that benefit overall interest fulfilment) to zero until all others have their basic interest satisfaction secured. It means no one is permitted to pursue resource opportunities, for their personal goals, that diverge from contributing to that goal, which is a challenging conception of fairness given that it does not give any weight to the interest in living a distinct life.

One could try to define the baseline differently, so that it captures those resources and opportunities needed to live a meaningful life, say. This might also solve associated problems, such as that in today's world the above measure of contribution might consign everyone to a life where they cannot pursue any aims that require resources above those necessary for basic interest satisfaction. People, on that approach, should give up any resource that places them above the core interest satisfactions, so long as richer people were the first to give up their resources. This is a worrying implication. I am assuming that the advantages above basic interest satisfaction that people have are not all or even mostly due to exploiting or oppressing those below the basic interest satisfaction level, so we are not considering those more straightforward cases of just rectification for wronging others. In which case, the yoking of individual life opportunities solely to the aim of increasing wellbeing for others implies they cannot legitimately pursue meaningful purposes of their own.

The only solution to this problem seems to be to allow that the limit on contribution is set so it allows enough resources to live a meaningful life. But that raises a set of serious problems too. Any attempt at settling an

objective definition of a meaningful life that overrides subjective conceptions of what people find meaningful, will be illiberal in that it demands the state adopts a conception of a meaningful life for all, even those that reject the one proposed by the state. One could try to develop a conception at such a level of abstraction that it can encompass very many conceptions, say by focusing on a certain level of autonomy or reason-sensitivity in guiding one's life.[15] But such abstract conceptions are compatible with a wide variation in life projects and, consequently, a wide variation in the resources people should have the opportunity to pursue to put towards those goals. The idea of a compelling general conception of a meaningful life that inherently sticks to the resources needed to pursue it seems implausible. The alternative, of simply taking subjective understandings to define a meaningful life, is even less likely to establish a specific resource threshold to which they all subscribe.

Of course, in the sphere of debates about distributive justice theory, which is effectively where we find ourselves presently, there are views that seems to focus on a threshold as the basis for justice. Sufficientarianism suggests we can have a threshold of resource distribution where each person has "enough", and permits anyone above that level to have as much as they can obtain that is still compatible with everyone having at least as much as the threshold.[16] Importantly, however, these views do not limit sufficiency either to a fixed point, or at the level of basic interest satisfaction. The idea is that people should have enough for a decent human life, and what that implies can vary and expand depending on one's social circumstances (See Casal 2007: 313 ff. & 323 ff.). If sufficiency views simply asserted the threshold of sufficiency as basic interest satisfaction and mandated unconditional redistribution down to that, they would offer a categorical account of Weighing reasons. But that approach would suffer from the very problem to which we are trying to respond – the unfairness of yoking everyone's life aims and opportunities solely to the aim of increasing wellbeing up to certain level for everyone. Instead, space for pursuing a meaningful life is needed. Sufficientarian views also do not seem to offer a useful account of that (see Casal 2007: 313 ff.).

Note that in now considering fair arrangements, and accounts of distributive justice, I have departed from the simple rights view justifiable on the Decisive reasons model. For fair arrangements, we need a justified principle of distribution (within what Decisive reasons permit). That is: we are engaged in considering the fairness of different possible principles

15 E.g., see Sher's reason-sensitivity view (Sher 1997: esp. Chapts. 3 & 4).

16 E.g., Sufficientarianism in distributive justice (Frankfurt 1987; Crisp 2003) and as applied to human rights (Brock 2009: 62 ff.).

according to which relevant agencies can arrange benefits and burdens, opportunities and obstacles. These are typically defined and pursued through the allocation of socially recognized rights and duties to citizens, by an agency that can legitimately make such allocations. Societal fairness here asks according to what principles should authoritative agents create cooperative arrangements between contributors and beneficiaries using allocations of rights and duties.[17] Where Weighing reasons are appropriate, the principles do not mandate outcomes for beneficiaries at all possible costs, but instead offer principles for deciding what costs are acceptable in exchange for which benefits. The literature on such principles is rich and varied, and interestingly it has been significantly ignored by people proposing theories of human rights. Yet, as we now see, if Weighing reasons do characterize the content of well-known human rights duties, such as duties to fulfil, addressing the problem of how to weigh interests is unavoidable. I will consider some arguments for avoiding that model below. For now, I look at the implications of treating this as part of distributive societal justice theory.

A significant category of principles of distributive justice address the above problem of a fair opportunity to pursue a meaningful life, even whilst redistributing to assist those who have less opportunities. Some of these views allow certain freedoms and opportunities to pursue increased access to resources, but *conditionally*. People can pursue and achieve certain personal, resource-requiring goals on the condition that these opportunities and achievements are simultaneously of benefit to people with less opportunities to pursue resources for their own aims. These views differ from proposals that require contributions up to the point in which contributors' own basic interests will cease to be satisfied because the latter exclude people pursuing additional resources over and above the basic threshold. Conditional opportunity theories condition the opportunity to pursue such aims including by pursuing resources on their simultaneously contributing to the social good. So, opportunities to pursue extra resources towards advancing a musical or artistic project would only be permitted in so far as these pursuits also contribute to social benefits – in the form of redistribution of a component of their resources. For example, a Rawlsian maximin principle requires social institutions to permit people to pursue inequality-producing resource aims, but only

17 I am not here limiting distributive justice to these institutional considerations, but rather stating an important role that distributive justice must play, and indeed does in the accounts of theorists as varied as Rawls, Dworkin, and G. A. Cohen. For an extensive discussion of the distinctive role of the concept of distributive justice see (Meckled-Garcia 2016).

where this helps the least advantaged in society.[18] Similarly, Dworkin's account of justice as equal concern, and in turn of societal equal concern as equality of resources, allows people to pursue distinct life projects so long as society aims to guarantee equal starting resources for all to pursue their projects, and everyone who can, contributes to social insurance for those that might meet difficult resource circumstances (Dworkin, 2000: pp. 73 ff.).

Accepting that some human rights duties or justified Weighing reasons must apply, has the upshot that whilst the principles for weighing different interests will remain the same, their application will vary according to which interests are in play to be weighed against each other in any one context. Fairness demands different things where pursuit of a personal end will simultaneously contribute to the social good compared to where that pursuit has no social dividend. The principle is the same in both cases, but the interest distribution and relation differs. With Decisive reasons, one is not relating interests that might differ but rather determining what kind of considerations are acceptable or relevant to a course of action. Moral reasons should be able to rule out a range of these *a priori*, and with them the actions they support. Distributive justice principles, because of their conformity to the Weighing reasons model, do not have this *a priori* consideration and action-focused component.

Of course, here I do not propose to support or advance any one theory of distributive justice. A whole range of candidate principles exist in the literature that try to answer the fairness problem, including utilitarian, egalitarian, prioritarian, and sufficientarian views. Some function by introducing more specific opportunity-focused, resources-focused, welfare-focused, access-to-welfare-focused, maximin-focused, etc., frameworks. For my purposes, it is only necessary to highlight that the kind of distributional problem best framed in terms of Weighing reasons is already recognized by a significant body of literature. That literature recognizes different facets that matter to distributive justice – including personal responsibility for opportunities, the significance of choices and abilities, the important role of a distributive agency, and the space for pursuing one's own ends or meaningful projects. Yet that literature (and the problems to which it responds) are not recognized as core discussions in human rights theory. One motivation for this might be the belief that human rights do not engage with Weighing reasons but rather with categorical requirements. I consider arguments for this below.

18 Rawls' maximin principle is described in his *Theory of Justice* (revised edition) (Rawls 1999: 72); some critiques of this view have questioned this permission as un-justified (Cohen 2008: 151 ff.).

For now, if human rights obligations include both Weighing reasons and Decisive reasons, then these must be parsed out when deliberating over the content of people's entitlements as a matter of right. To give content to obligations that engage Weighing reasons, some account of distributive fairness will be crucial.[19] Bilchitz's (unsuccessful) attempt to provide such an account highlights that we need this kind of framework in settling the content of some human rights duties, such as those to fulfil.

So, returning to the example of the Greek government, taxing affluent people is perfectly justified to protect crucial health provisions for the most vulnerable in society. A variety of principles of distributive fairness might support this. A maximin principle would say that where the wealth of the affluent does not improve the condition of the worst off, and the simple existence of affluent people did not do that for health in Greece, contributions must be made by those who have greater advantages, but opportunities to pursue resources are nevertheless permitted only as long as pursuing them brings dividends to the least advantaged. There are no limits on what can be pursued that has this characteristic and taxation must not make the beneficial opportunities impossible. If, on the other hand, one were obliged to fulfil others' basic interests at whatever cost, globally, allowing people to pursue additional resources would be ruled out, as they can be expected to work to fulfil global basic interests regardless of any opportunity to obtain resources for their aims (Cf. Cohen 2008: n. 10). Treating human rights duties as unconditional requirements to fulfil basic interests misses this complexity.

If the above is right, then when resolving the duty content of rights and adjudicating specific cases, we need to be aware of the different kinds of reasons that it makes sense to take into account. Trying to apply Decisive reasoning where Weighing reasons are appropriate will create problems of resource and contribution sensitivity that Decisive reasons do not tell us how to solve. Treating human rights as generating categorical obligations also hides these differences leading to similar tangles. International standards recognize the need for resource sensitivity, as we shall soon see, but supply no principle for adjudicating these questions. When duty bearers appeal to lack of resources in fulfilling a right, a compelling response will need to appeal to a fair principle of distribution.

Weighing reasons are important for fulfilment duties because Decisive reasons give no positive account of how much of any important provision or benefit people must supply. To be pertinent in any context, we must be

19 Some theorists see human rights as a subset of justice, and distributive justice as on a par. They thus miss the possibility of these different types of duty and the different consequences of applying them (e.g., Tasioulas 2010: 654 ff. & 659).

faced with valuable aims, in the form of interests that matter for persons, as well as countervailing, though legitimate, considerations in the form of the aims and pursuits of those who would have to forego those pursuits to satisfy the valuable aims. Those two models of reasoning about considerations are pertinent to duties corresponding to both CivPol and EcoSoc rights. There is a difference between discriminatory or even neglectful considerations in deciding how police protections are to be distributed, and the question of how much police protection everyone should have, given the costs in a particular social context. The pertinence of both types of reasoning is as true of police protection budgets as of the decision over how many dialysis facilities a society should have.

4. DECISIVE REASONS

Whilst I have given some examples, I have not set out a general account of the kind of moral consideration that can constitute a Decisive reason in the sphere of human rights. These are reasons to disqualify a given range of considerations as relevant to how a person should be treated – thus also ruling out a Weighing reasons type deliberation on the basis of these considerations. That a person has important interests is not sufficient to establish reasoning as to the relevance or irrelevance of a consideration because that importance does not explain the kind of categorical decisiveness that can disqualify a consideration. The importance of an interest might, under certain circumstances, simply outweigh other interest considerations, depending on the numbers of interests in play. Thus, the need to improve road safety can outweigh road users' interests in efficient travel. However, to rule out or disqualify some considerations as relevant to how we ought to treat a person, we need reasons or values that are categorically superior so that other considerations do not count against them. That must be the case however many considerations of the disqualified kind could be stacked against this value. That an interest is important for a person's wellbeing, even hugely important, does not have this categorical character unless one has a special reason to promote it categorically. An example of such a consideration might be the inherent value in a person being respected in exercising her capacity to adopt goals and commitments, to develop these, prioritize amongst them, and to pursue them as personal life projects – projects that give direction to and shape her life. To value that capacity is to respect it, and to respect it means not seeking to usurp its exercise, impose conditions on it exercise, or undermine the possibility of its exercise. Failure to respect the sovereign exercise of this capacity in persons, for any reason other than upholding

this very same respect, is wrongful because it treats their living distinct lives as subordinate to aims and priorities that are not their own.

Actions like enslavement and torture are in this way categorically wrongful; they disrespect a person as having sovereignty over the exercise of this capacity. The actions of slavery subordinate a person's capacity to adopt, prioritize, and pursue her ends to the priorities, and pursuits of the slave owner. Torture uses a person's sense of wellbeing (in her aversion to pain) to alter her priorities and commitments – e.g., the commitment not to disclose the location of her colleagues, thus subordinating her capacity to prioritize and pursue these commitments to the aims of the torturer. Imposing pain on someone may under certain circumstances be permissible, as in self-defense. There the permission to intervene is not a failure to respect self-sovereignty but rather an expression of it: upholding that it be respected for others. The value itself sets limits on its own exercise. Where the considerations for imposing pain on another or constraining her freedom fail to respect this self-sovereignty value, they are discounted as having no weight; and the actions they support are ruled out as (*pro tanto*) wrongful. With the race-based exclusion case, mentioned at the beginning of this paper, the literature contains a number of theories of discrimination and though some of those analyses overlap with this question they are not limited to it (Viz., Wasserstrom 1995; Lippert-Rasmussen 2006; Gardner 2018). But the key question here is the narrower one of what kind of reason can not only outweigh, but also disqualify a race-based consideration for exclusion? Some accounts focus on the demeaning of the target, others on thwarting of a key interest (Hellman 2008; Moreau 2010). Some views focus on treating groups as less worthy of decent treatment (Shin 2009). However, to disqualify the consideration itself even as an interest that should be balanced with others in a weighing exercise, we simply reflect that it mistakenly uses the characteristic of race as grounds to dismiss the value in people exercising their capacity to form, develop, prioritize, and pursue commitments as the determinant of how they should be treated. The mistake disqualifies the consideration as having any weight against treating people in light of the capacity. Where countervailing considerations are not open to disqualification in this way, but have independent importance as people's interests, then the Weighing reasons model is appropriate.

5. OBJECTIONS

As I mentioned above, the Decisive reasons versus Weighing reasons distinction – and certainly the notion of principles of distributive societal

justice – are not commonly appealed to as sources for the content of human rights standards. One reason for this may be a tendency to treat the analysis of duties and justified burdens associated with human rights as categorical obligations, meaning they unconditionally demand a certain outcome for each person and would thus rule out Weighing reasons as part of their analysis. I now respond to some arguments for this view.

5.1. Weighing reasons as Decisive reasons

The first objection is that we can and should re-describe human rights duties in categorical terms. In saying people have a right to a certain amount of health care we are saying that this is obligatory in some non-negotiable sense. One way this could be done is by introducing obligations that are categorical but worded in a conditional way.[20] In fact, the use of conditional wording is present in international legal documents associated specifically with fulfilling EcoSoc rights.[21] The resources and infrastructure that should be present to fulfil these rights make the associated duties difficult to word unconditionally. Instead, resource sensitivity is introduced in the form of a duty to "progressively realize" them. In carrying out progressive realization, states are charged with taking all "appropriate steps" and employing "all available resources" towards the goal of fulfilling these rights.[22] Thus, instead of a categorical obligation to supply certain outcomes, which would be resource insensitive, we have a duty to move towards those outcomes when certain conditions are met, which is thus sensitive to the resources that a state has available to it.

A categorical reading of the fulfilment duties associated with EcoSoc rights might imply an obligation to supply an outcome O that requires R resources. A duty to progressively realize O means that a state at any time t only has an obligation to realize O to the extent, nO, that is possible with the resources, nR, that the state has available to it at t. There is a firm and categorical obligation here; yet it is not the obligation to fulfil the right, only to partially fulfil it to the extent, nO, possible at t. The duty to entirely fulfil the right, categorically, would only occur at a point t^, where R resources were available to it. So, the duty is conditional on resource availability at any one time. If this analysis is correct, we should not have

20 Cf. Bilchitz's distinction between conditional and unconditional rights, (Bilchitz 2007: 78 ff.).

21 There is an important inconsistency in that EcoSoc rights are explicitly subject to such conditionally in the UN documents, such as *General Comments 3, 10, 14* (*CESCR* 1990; 1998; 2000) where PolSci rights are not, or at least not systematically, yet protection and fulfilment duties associated with the latter clearly should be as I have stressed above.

22 For "appropriate steps" see (CESCR 2000: ss. 11 & 49); for "available resources" see (CESCR 1990; 1998; 2000).

to resort to Weighing reasons to resolve how to resource the provision of human rights fulfilment. We can instead re-describe those duties in categorical, albeit conditional, terms in terms.

The problem with this response is that the notion of "available resources" is being used as a descriptive term, when it could only be a normative concept. This is because what counts as "available" for a state to use depends on what it can legitimately extract from those who work for or within it. This will take the form of taxation, work contributions, or the configuring of property relations. Any physical or natural resource will need to be turned into exchangeable or useable resources; any already exchangeable or useable materials that are owned will need to change ownership. That means a state will need to make decisions about appropriate levels of taxation, ownership, wealth, property rights, and even labor in order to decide what resources are genuinely "available" to it. Of course, one could try restricting the notion of available resources to what a state has in its possession, or revenue, at any one time, to avoid these problems; but that would be an arbitrary choice given the point of using these resources. The plausible notion of an available resource will, then, depend on the burdens that a state can *justifiably* impose on people leading to benefits for others in terms of basic interest satisfaction. Consequently, it is clear that the level at which we set availability depends on what citizen contribution level is justified – a moral normative question. Some human rights literature takes a step in that direction by appealing to the concept of "reasonableness" in assessing what resources are "available" (Chenwi, 2013). But no account of reasonableness has been provided to address the essential question of how to weigh conflicting interests in assigning burdens. This is the Weighing reasons question: at any one time, t, what counts as a duty will depend on available resources, which in turn depends on the Weighing reasons that apply to the fair social distribution of benefits and burdens.

A component of the progressive realization doctrine that might be used to try to prescribe categorical requirements for states is the idea that EcoSoc rights include "core obligations" associated (CESCR 200: ss. 43 ff.). As I have said, my concern here is not with duties associated only with EcoSoc rights but with obligations cutting across those kinds of distinctions. So, the claim some EcoSoc obligations might be categorical does not threaten my analysis of two types of reasons at the heart of human rights obligations. However, if the claim is that a scheme for fulfilment provisions in which there are certain mandated outcomes is a categorical requirement, this does conflict with the view of duties and justified burdens I have proposed. The international doctrine associated with core obligations,

however, either highlights rights that are easily accounted for as Decisive reasons – based on the distinction I have proposed – e.g., that EcoSoc services should not be provided in a discriminatory way, or would need to be somewhat sensitive to resource availability (Bilchitz 2007: 220 ff.).

5.2. "Rights" versus Weighing reasons?

Some theorists associate human rights with a technical notion of "rights" that conceptually implies an entitlement to a specific content – whether it is an outcome or form of treatment – that must be known in advance. The Weighing reasons analysis does not give us any definite content for the entitlement, only for the principle that will be employed to determine it in any specific case. So it seems to undermine human rights as rights (see Bilchitz's worry, ibid). In itself, this is not a strong point. For there is no reason to think that human rights have to be rights in that very technical sense, as opposed to important obligations states have towards their citizens.[23]

A feature more centrally associated with human rights, however, is their universality. Some authors interpret this as human rights encompassing justified claims that can be claimed by all persons and claimed equally, regardless of circumstances or social membership (O'Neill 1996: 130 ff.). Onora O'Neill uses this premise to argue that rights to goods and services cannot be human rights: to be able to claim them justifiably, and – for the purposes of this paper – fairly, one must claim them from a certain infrastructure with specific types of responsible agents (O'Neill 1996: 130-136). Importantly, a state must have fairly allocated the duties to supply the content of the rights. However, what exactly a person is entitled to have as a matter of fulfilment of their rights, depends on what it is in any given context fair to impose as a burden on others. Given that this may differ with context, the claim cannot be justifiably and equally made by all persons, regardless of circumstances or social membership. That, in turn, implies the right is not universal, so that on this view it is not a human right.

Yet, this objection does not deny that protection or fulfilment claims can ever be justifiably made. It simply says they are not universal in the right sense. Institutional orders can be set up such that justifiable, fair, claims can be made. So, why is universality, in this particular sense of universality, essential to defining human rights? Universality of this formal kind is just one dimension that might pick out what is special or distinctive in human rights; a different trait might be their importance or

23 James Griffin, for example, rejects the need to use the technical sense of a right to analyze human rights (Griffin 2014: 210).

urgency, or even their ability to place limits on the legitimacy of political institutions. There is no obvious reason why all human rights should apply independently of institutional context – in fact, that very condition is challenged by "political theories" of human rights (e.g., Beitz's theory, Beitz 2008). Whatever the right answer as to the defining feature/s of human rights standards, the claim is not that standards based on Weighing reasons, and thus lacking the requisite universality, fail to be normative standards at all. If it is admitted that such standards exist and under the right conditions they can justify normative claims, then whether we call these human rights or not seems more a matter of nomenclature than significant substance.

5.3. Does this weaken EcoSoc human rights?

A final objection I will consider is that this approach, with its two models of reasoning underpinning different types of obligations, weakens EcoSoc human rights claims. EcoSoc rights rely more heavily on fulfilment as their core mission. Which is to say that whilst there are cases where taking EcoSoc opportunities away – e.g., by intentionally or negligently destroying a source of water – is a violation and one consistent with a Decisive reasons approach, the key question for EcoSoc rights is how to fulfil certain EcoSoc conditions for people. By introducing Weighing reasons, and with them the idea that an infrastructure of distribution that is capable of fairness is needed for these rights to apply, I would seem to have made EcoSoc rights less easily claimable and less practically useful outside certain specific societal contexts.

Whilst this may be true, it is important to point out that any alternative formulation of the duties and justified burdens associated with human rights will suffer similar or equivalent problems. Re-describing the duty to fulfil as a categorical requirement still faces the problem of how these requirements are to be supplied and by whom. One could indeed abandon the idea that there are countervailing considerations such that we must engage in Weighing. But that means giving up an essential component of reasonableness and fairness in practical and political reason. It would be a victory by stipulation only, not one responding to the practical problem of the existence of legitimate conflicting considerations. If we accept the need to adjudicate between these different considerations, then Weighing reasons do not weaken human rights duties but provide the only kind of solution that will give a significant portion of them some rational content.

6. CONCLUSION

In conclusion, I have identified two types of reasons – or two models of reasoning – when determining the content of certain human rights obligations and justified burdens. The Decisive reasons model offers us a way of understanding categorical duties, whereas the Weighing reasons model is engaged when we must consider interests and considerations that need to be balanced. Provisions and interpretations that are compatible with both models are present in international human rights documents, although these documents do not explicitly recognize the need for either model, or any model altogether. I have argued that these models are, however, both necessary to make sense of, and give content to, different types of human rights responsibilities. I stress, these two types of reasoning are not designed to undermine any one type of right or duty – instead, they cut across different traditional distinctions between types of rights (Economic and Social versus Civil and Political); and they are both ways of explaining the duties as genuine obligations. Yet, without sensitivity to these forms of reasoning, trying to give content to our human rights obligations will lead to troubling confusions. Not all human rights duties are categorical and we need an account of how to determine those duties when they are not.

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The Democratic Case for a Basic Income[1]

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ABSTRACT

While most of its advocates justify the right to a basic income because it promotes individual freedom, autonomy and human development, an alternative line of argumentation insists that a universal basic income is a core component of a well-functioning democratic society. In this article I examine the democratic case for a basic income by engaging with the work of Carole Pateman and Michael Goodhart. More concretely, I argue that although their proposals offer interesting insights, they ultimately fail to properly justify the importance of a basic income on democratic grounds. I develop an alternative argument based on the right to political participation and explain why a universal basic income scheme may promote such right.

Keywords: democracy, political participation, material preconditions, social rights, income security, basic income.

1. INTRODUCTION

The right to income security poses something of a conundrum. While it is universally accepted that income is very important for the lives of human beings, the main international human rights treaties do not explicitly recognize a right to income security. Neither the Universal Declaration of Human Rights nor the International Covenant on Economic, Social and Cultural Rights directly proclaim a right to income security. However, they appear to do so indirectly through the right to social security, the right to

1 Previous versions of the paper were presented at the 8th Summer-School in Political Philosophy & Public Policy (University of Minho), the 17th BIEN Congress in Lisbon, the Seminario Austral de la Universidad Austral de Chile, and the 2nd International Conference of the UK-Latin America Network for Political Philosophy (UKLAPPN) in Mexico City. I am grateful to the audiences at these events and to Jurgen De Wispelaere, Felicitas Holzer, Julio Montero and two anonymous referees for this journal for helpful comments and suggestions.

an adequate standard of living and the right to work.[2]

Income security can be established in various ways (De Wispelaere and Morales 2016). The most common view links income to a wage obtained from work, social security payments or other state benefits, often subject to certain eligibility criteria and past contribution. In recent years, however, the proposal to grant each individual citizen a regular cash payment, without insisting on a means test or work requirements, has become popular in both academic and public policy debates (Van Parijs and Vanderborght 2017). The advocates of "basic income" – as the proposal is most commonly known – argue that granting each citizen or long-term resident an unconditional cash payment is the most effective way to ensure income security for all.

Unsurprisingly, this proposal is regarded as deeply controversial and there intense debate about its normative justification is ongoing. The most influential view tries to ground the right to basic income on the ideal of individual freedom. In this vein, Philippe Van Parijs – one of the pioneers in the basic income debate – famously sustained that basic income is a condition for securing real freedom, understood as the freedom to do whatever one might want to do (Van Parijs 1995; also Van Parijs and Vanderborght 2017). While freedom-based justifications have dominated the debate for years, some authors have emphasized the limitations of this approach. Such dissenters do not necessarily object to basic income as such; they merely reject the freedom-based justification because they think it fails to take into account some key structural features of contemporary societies.[3] One such view proposes that, instead of freedom, we focus on democracy as the political value that could justify an unconditional basic income (Pateman 2002, 2003, 2004; Goodhart 2007, 2008; Van Damme, 2017).

In this article I explore the relationship between basic income and democracy. I start my analysis by focusing on the critique of Carole Pateman and Michael Goodhart against freedom-based justifications and

2 The Universal Declaration of Human Rights (UDHR) recognizes the right to social security (art. 22), the right to work (art. 23), and the right to a standard of living (art. 25). The International Covenant on Economic, Social and Cultural Rights (ICESCR) establishes the right to work (art. 7), the right to social security (art. 9), and the right to a minimum standard of living (art. 11).

3 Although some have argued *against* basic income on precisely such grounds. See, for instance, Gourevitch (2016).

their attempt at grounding a democratic case for basic income.[4] The writings of Pateman and Goodhart offer many interesting insights but in my view end up conflating a number of different democratic arguments. A first task of this article is to disentangle the strands of their argumentative web and separate out what I believe are importantly different mechanisms through which basic income could have a democratic impact. Upon reflection, it turns out not all of these different pathways to a democratic justification of basic income are convincing. I offer a two-fold critique of Pateman and Goodhart by first suggesting that both authors are unnecessarily wedded to an over-expansive ideal of democracy and, secondly, arguing that a basic income in many cases would fail to deliver on the democratic outcome they anticipate. The final section of this article constructs what I believe to be a more plausible democratic case for an unconditional basic income. Adapting a line of argument already found in Pateman and building on my earlier work on the democratic justification for social rights (Morales 2016), I examine the extent to which basic income constitutes a material precondition for the effective political participation of all citizens.

2. BASIC INCOME: FROM INDIVIDUAL FREEDOM TO DEMOCRACY?

A basic income is usually defined as an individual entitlement to receive a regular payment, independent of other sources of income, employment or willingness to work, or living situation (see Van Parijs and Vanderborght 2017: 5). It is very tempting to articulate the main value of such a basic income in terms of expanding a person's individual freedom as advocated most forcefully by Philippe Van Parijs (Van Parijs 1995). Of course, some authors reject Van Parijs' particular conception of freedom; instead, they value basic income because it promotes Republican freedom (Pettit 2012b; Taylor 2017), Rawlsian political liberalism (Birnbaum 2012), or "Independentarian" status freedom (Widerquist 2013). However, all these views share a crucial feature: they ground basic income on a certain account of individual freedom.

Carole Pateman – a leading democratic theorist – embraces the idea of an unconditional basic income, but firmly objects to the dominant

4 One restriction of this article is that I deliberately focus on the democratic case for basic income within a single state. In contrast to Goodhart (2007) I remain agnostic on the need to establish a global basic income or the role of basic income within single polities as a mechanism to further global democracy. The reason for this restricted focus is my emphasis on the role of democratic participation in the political system as typically represented in electoral democracies.

freedom-based justification (Pateman 2003; 2004).[5] Her main concern is that because this justification is entirely focused on social justice, liberal autonomy and individual freedom, it overlooks the impact a basic income may have on fundamental democratic values:

> "Little attention has been paid in recent academic debates to the democratic significance of […] a basic income. Participants have tended to focus on such questions as social justice, relief of poverty, equality of opportunity, or promotion of flexible labor markets, rather than democracy" (Pateman 2004: 91).

At the core of a democratic society, Pateman holds, lies the idea that "all citizens, women and men alike, have full standing and enjoy democratic rights and individual freedom" (Pateman 2003: 130). However, the reference to individual freedom should not be misinterpreted; it refers to self-government or autonomy and explicitly denotes "a political form of freedom in contrast to an economic form of freedom as individual opportunity" (Pateman 2003: 132). Pateman insists that political freedom must be prioritized: while individual opportunity has an important place within a democratic society, it is nevertheless "insufficient for *democratization*, the political process through which all citizens obtain full standing, and become first-class democratic citizens" (Pateman 2003: 132, added emphasis). By focusing on self-government and political freedom and its capacity to bring about the "necessary social and political change to create a robust democracy for all citizens" (Pateman 2003: 136), Pateman moves the justificatory goal posts away from excessively individualist approaches and towards a more structural perspective. In fact, her decisive objection against freedom-based justifications insists that "individual self-government depends not only on the opportunities available but also on the form of authority structure within which individuals interact with one another in their daily lives" (Pateman 2004: 91).

How does basic income feature within this democratic theory? I believe Pateman provides a patchwork of distinct arguments to answer this question. In the remainder of this section I briefly distinguish four of them.

First, Pateman highlights the democratic significance of a universal basic income by analogy to the historical and institutional role played by universal suffrage. Suggesting that basic income and the right to vote are comparable, she writes "a basic income should be seen as a fundamental

5 At the time, Pateman's focus was primarily on Van Parijs (1995) and the debate his work inspired in political philosophy. Pateman's critique thus predates the "new wave" of freedom-based justifications of basic income, such as Pettit (2012b) or Widerquist (2013).

or democratic right, like universal suffrage" (Pateman 2003: 131). Universal suffrage means that every member of a polity is entitled to participate in the electoral process, perhaps subject to certain minimal qualifications, such as age or residence. The key aspect here is that any barriers that make it harder for citizens to demonstrate their qualification to vote – e.g., cumbersome voting registration laws – are deemed undemocratic. Similarly, Pateman sustains that all citizens must be entitled to a basic income because they are adult members of the polity (Pateman 2003: 146).[6] The right to basic income and the right to vote are analogous in the sense that both are entitlements that every citizen must enjoy as such. When their enjoyment is subject to further conditions they turn into a *privilege* rather than a right (Pateman 2003: 146; 2004: 102). In Pateman's view, just like adding strict voting registration requirements frustrates access to voting, adding work requirements or means testing hampers access to the basic income citizens are entitled to.

Second, Pateman suggests that a basic income is necessary because it "provides the lifelong security that helps safeguard other rights" (Pateman 2004: 94). Michael Goodhart has defended this view in more detail. His starting point is a justification of social and economic rights – including a right to guaranteed subsistence – as essential to secure emancipation and the enjoyment of other basic rights (Goodhart 2007: 94, 2008). He maintains that the fundamental right to guaranteed subsistence requires the social provision of a basic income (Goodhart 2007: 106) and insists that such income is an integral part of a democratic perspective because "its primary justification is its role in achieving and securing emancipation for all members of society" (Goodhart 2007: 107). In Goodhart's view, basic income therefore is a desirable scheme because it "satisfies the fundamental economic right to a guaranteed subsistence that democracy demands" (Goodhart 2007: 109).

Third, Pateman insists that democratic citizenship requires equal social standing, understood as a relational notion that captures "the form of authority structure within which individuals interact with one another in their daily lives" (Pateman 2004: 91). Democratic standing informs both how individuals perceive themselves in relation to others and how they perceive others. In this respect, Pateman (2004: 94) finds inspiration in the writings of sociologist T.H. Marshall (1950), who divides citizenship into three different components – civil rights, political rights and social rights – and maintains that social citizenship involves an equality of status which requires "a direct sense of community membership based on loyalty to a

6 In many proposals children and adults are covered by slightly different schemes (Van Parijs and Vanderborght 2017).

civilization which is a common possession" (Marshall 1950: 40-41). Basic income presents an appealing way to guarantee equally social standing: unconditionally securing a basic income to everyone avoids a person who would otherwise be subject to a controlling sanctioning welfare regime to be treated as "second-class citizens".

In a similar vein, Pateman argues that a universal basic income is valuable because it helps "to remove the temptation for some citizens to see others as less worthy of respect, and so as lesser citizens, because of their lack of economic resources" (Pateman 2003: 146). Pateman famously extends this idea of democratic citizenship to emphasize its potential in advancing the freedom and full social standing of women (Pateman 2004: 90). This implies revisiting the social institutions of family, marriage and employment, and the extent to which these traditionally frustrated "the standing of wives as citizens" (Pateman 2004: 98). Critically, a basic income "is a crucial part of any strategy for democratic social change" by virtue of its capacity to "break the long-standing link between income and employment and end the mutual reinforcement of the institutions of marriage, employment, and citizenship" (Pateman 2004: 90). In other words, for Pateman, basic income plays an important democratic role by promoting full social standing of citizens in general, and women in particular, in the different spheres of life.

Fourth, Pateman argues for the democratic potential of a universal basic income by reference to an important opportunity it creates, namely the freedom not to be employed (Pateman 2004: 92). The reason why basic income has a significant democratic potential is that it improves the capacity of individuals "to refuse to enter or to leave relationships that violate individual self-government or that involve unsafe, unhealthy, or demeaning conditions" (Pateman 2004: 96). Furthermore, basic income also promotes citizens' participation in collective self-government by opening up "opportunities for citizens to develop their political capacities and skills" and ensuring "that participation in social and political life would not require heroic efforts on the part of any citizens" (Pateman 2004: 96).[7] The focus on increased opportunities allows Pateman to explicitly link basic income with the ideal of democratization:

> "by opening up this range of opportunities and uncoupling income and standard of life from employment, a basic income has the potential both to encourage critical reassessment of the mutually reinforcing structures of marriage, employment, and citizenship and to open the

7 Pateman (2004: 97) writes: "a basic income would allow individuals at any time to do voluntary or political work, for example, to learn to surf, to write or paint, to devote themselves to family life, or to have a quiet period of self-reassessment or contemplation."

> possibility that these institutions could be remade in a new, more democratic form" (Pateman 2004: 97).

In sum, the democratic case for basic income, as outlined in the writings of Carole Pateman (2003, 2004) and Michael Goodhart (2007, 2008) can be understood as the mutually reinforcing combination of four distinct arguments. Together these paint a picture by which an unconditional basic income represents the *economic analogy of universal suffrage* which, by securing the *equal enjoyment of fundamental human rights,* promotes the *full social standing* and equal range of *political and social opportunities* for all citizens.

3. DEMOCRACY AND BASIC INCOME: A CRITICAL ASSESSMENT

Pateman and Goodhart justify basic income from a democratic perspective by assuming a substantive conception of democracy. However, substantive conceptions of democracy often fail to appreciate "value pluralism by neglecting the constitutive role of democratic decision-making processes for groups of individual agents who try to determine how they should act together" (Peter 2009: 2-3). A set of valuable outcomes is posited in advance and constrains the decision-making process (e.g., Goodhart 2008: 150), neglecting other alternative goals that citizens may reasonably want to advance. As Waldron (1999) has forcefully pointed out, this view fails to take deep political and moral disagreement seriously. Furthermore, substantive conceptions of democracy also blur the lines between democracy and social justice, failing to give proper due to democratic legitimacy as a distinct political value (Pettit 2012a: 59; Morales 2015).

Michael Goodhart insists that because substantive conceptions of democracy highlight the democratic importance of human rights, they contribute to the revival of "democracy itself, which in its atrophied electoral and procedural forms can seem like a fairly moribund and uninspiring ideal" (Goodhart 2007: 98). But in order to avoid the kind of "atrophied" democracy represented by procedural models of aggregative democracy that give primacy to the formal right to vote and Schumpeterian elite competition, it is not necessary to turn democracy into a substantive conception of social justice with predetermined social outcomes. As Phillip Pettit explains:

> "Normative thinking about legal, political, and social institutions has been dominated over the past quarter century or more by the ideal of justice, in particular social or distributive justice. This focus on justice

> is unfortunate, because it has suggested that there is only one basic ideal that we need to think about in our normative projects. It is unfortunate, in particular, because it puts out of the picture the very different sort of ideal to which I give the name of legitimacy — specifically, political legitimacy" (Pettit 2012a: 59).

Michael Goodhart, for instance, clearly adopts such an unfortunate position when he suggests that democracy is only instrumentally justified as a means to achieving emancipation through the enjoyment of fundamental rights (Goodhart 2007: 103; 2008: 150). In the next section I propose an alternative democratic model centered on political participation that avoids atrophied proceduralism without collapsing political legitimacy into social justice.

The Pateman-Goodhart approach to democratization is also problematic because they explicitly extend democracy to the family, the workplace and the economy (Pateman 2003, 2004). Goodhart holds that "certain institutions are more democratic than others, precisely because they are instrumental in securing fundamental human rights"; yet this also implies that "many rights can be secured differently in different contexts" (Goodhart 2008: 150). Unfortunately, this view overlooks that democracy is mainly a framework for collective decision making within a political system: its fundamental aim is to ensure that collective decisions are legitimate (Peter 2009).

These theoretical difficulties pose a practical and strategic problem: the sort of basic income scheme required to satisfy the goals that Pateman and Goodhart have in mind may be too radical or too demanding under present-day socio-economic conditions. The more moderate basic income schemes currently under consideration around the world are not likely to have the democratic impact Pateman and Goodhart are hoping for. To illustrate this problem, I re-examine the four arguments outlined in the previous section.

To begin with, the analogy between a universal right to vote and a universal right to basic income has some initial plausibility.[8] However, these rights differ in important aspects. The right to vote is often explained through the egalitarian formula "one person, one vote". Similarly, basic income may also be articulated through the formula "one person, one basic income". But is there any deeper reason to accept the analogy between both rights? Pateman observes that "universal suffrage is the

8 Pateman, along with many others, views basic income as a *right* but see the discussion of why conceiving basic income as a right is problematic in De Wispelaere and Morales (2016).

emblem of equal citizenship", which is further explained by reference to "an orderly change of government through free and fair elections" (Pateman 2004: 94). It is generally accepted that a person cannot be a citizen without the right to vote (King and Waldron 1988). Along similar lines, Pateman tries to argue that "a basic income is the emblem of full citizenship", because "basic income as a democratic right is necessary for individual freedom as self-government" (Pateman 2004: 94-95). However, it is dubious that granting people a modest basic income will suffice to ensure the kind of equal citizenship Pateman proposes. Even though basic income offers a floor (Van Parijs and Vanderborght 2017), it may fail to block the vast differentials in income and wealth – and, therefore, of *power* – that characterize contemporary societies (Casassas and De Wispelaere 2016).

Second, Pateman and especially Goodhart maintain that basic income is meant to help to secure the equal enjoyment of universal human rights across different social spheres, including the family, employment and citizenship. Through the secure enjoyment of human rights, basic income helps to change the structure of oppressive institutions. Yet the kind of basic income that could secure the enjoyment of fundamental rights – "the minimum necessary to secure rights and emancipation" (Goodhart 2007: 105) – would most likely be unfeasible under current conditions.[9] However, the tenet that a basic income may promote the emancipation of women within the family is subject to considerable debate (e.g., Robeyns 2001; Zelleke 2011). Some Feminist authors argue that a basic income may end up reinforcing traditional gender roles as it may cause women to disproportionately exit the labor market (Robeyns 2001: 100-102).[10] Similarly, the view that basic income will emancipate workers has also been challenged (Gourevitch 2016; Birnbaum and De Wispelaere 2016). The argument advanced by Pateman and Goodhart relies on basic income improving the bargaining position of workers *vis-a-vis* employers by granting workers an exit option. But on realistic assumptions of how

9 Additionally, Goodhart's democratic argument appears to be circular. If all fundamental basic rights must be achieved in order to obtain emancipation, and if basic income's failure to protect one right means no single right is protected (because of their interdependence), then the securement of other fundamental rights never could be justified if not by a democratic decision-making process where the fundamental basic right to participation is secured. But for Goodhart the right to participation can be left aside if there is another political organization that can guarantee other rights, such as an absolutist government, destroying the very notion of interdependent fundamental rights.

10 Robeyns concludes that basic income does not reduce gender injustice, and it is necessary for it to be "supplemented with other social policy measures that liberate women", including "the transformation of certain cultural and social patterns, like gender roles and gender hierarchies, which are now constraining individuals in their freedom" (Robeyns 2001: 103).

contemporary labor markets work, "an exit strategy might end up worsening rather than strengthening the opportunity set and bargaining position of the most vulnerable workers" (Birnbaum and De Wispelaere 2016: 61).

A democratic case for basic income that relies on basic income being able to substantially secure a set of fundamental rights in order to promote genuine emancipation and democratization appears too tall an order for a realistic basic income scheme to satisfy. This puts Pateman and Goodhart at risk of being caught between the rock of downgrading the fulfillment of fundamental rights and the hard place of insisting on an utterly impractical basic income ideal.[11]

Third, as I have already mentioned, Pateman views democratic citizenship as a form of social standing. Building on the work of T.H. Marshall allows her to extend citizenship into the economic sphere by arguing that social and economic rights play a constitutive role in the equal standing of citizens. Being denied this equal standing amounts to a person being relegated to second-class citizenship or even denizenship (Standing 2012). Importantly, equal social standing requires independence and freedom from oppression and domination within the prevailing institutions of marriage, family, and employment. Once more, this idea is problematic because the sort of basic income policy that would promote such genuine independence would be unfeasible under current conditions. Without a clear sense of what level of basic income would be deemed sufficient to ensure the required independence it is difficult to assess whether a feasible basic income scheme contributes to democratization in the desired manner.

Finally, Pateman insists that basic income promotes a bundle of social and political opportunities, including those that follow from the freedom not to be employed. This includes opportunities to support individuals' political participation in the decision making-process, opportunities for citizens to develop their political capacities and skills, and opportunities to do political work. These are all very relevant and important opportunities that directly connect basic income with democracy. However, two problems remain. On the one hand, Pateman offers no clear account of how precisely a basic income would improve political participation or democratic skills. What social or institutional levers does basic income

11 Goodhart appears to bite the bullet when proposing basic income not as a welfare or poverty reduction program, but rather as a democratic entitlement that "costs more and delivers more; the value of what it delivers is ultimately a measure of our political commitments" (Goodhart 2008: 155). Of course this does not make basic income politically feasible.

pull and how does this impact on democratic opportunities? On the other hand, for Pateman basic income appears to impact primarily by granting workers the opportunity to refuse employment. As mentioned before, recent research casts doubt on whether basic income is able to achieve such a robust "right to exit" or even have any meaningful impact on the democratic nature of employment relations (Birnbaum and De Wispelaere 2016). But even if that were the case, there is something fundamentally flawed about a view that depends on freedom from employment as a mediating mechanism to make a democratic argument stick. What about the democratic impact of basic income on workers' political opportunities? If indeed freedom from work was the main pathway through which basic income secures democratic values and objectives, this would surely reduce its scope and democratic impact.

When considered together, these objections suggest that in spite of its initial plausibility, the freedom to exit the labor market may make no real contribution to individual self-government. What we need is an argument that explains why a basic income may improve individuals' opportunities to participate in the political process that does not exclusively depend on the freedom to exit employment. I provide such argument in the next section.

4. THE DEMOCRATIC ARGUMENT FOR BASIC INCOME REVISITED

In this final section I offer a democratic argument for basic income that builds on the work of Pateman but avoids the pitfalls I have discussed previously. Collective decisions are considered legitimate if they result from a decision-making process that satisfies the necessary formal and material conditions that secure the participation of all citizens (Peter 2009: 4). On this view, political participation is the foundation of legitimate political authority because it respects the equal moral agency of each citizen. Political citizenship essentially refers to the right to political participation in the decision-making processes of the polity (Waldron 1999).

This right must be universally realized: no citizen should be excluded either on formal or material grounds (Morales 2015, 2017). Formal exclusion occurs when institutional rules prevent some citizens from exercising their right to political participation. Material exclusion takes place when citizens fail to participate because they lack certain material resources even if no formal rule prevents them from doing so. In liberal democratic theory, the right to political participation is typically interpreted in formal

terms. However, the legal recognition of a formal right to political participation is insufficient to guarantee the effective political participation of all. This raises a fundamental question: why must a citizen accept the authority of a political decision when she is materially unable to exercise her formal right to participate? Why should citizens accept political authority in cases where they are formally included but practically excluded from participation in the decision-making process? Real life examples of such a disjunction between formal and material right to political participation are plentiful, especially regarding the right to vote. Some political systems impose burdensome requirements of voter registration, which effectively disenfranchise otherwise eligible voters. Other systems may facilitate registration but many voters are unable to reach the polling booth because of a lack of transport or inability to take time off work. A formal interpretation of the right to vote – understood as a subset of the broader right to political participation – appears too weak to establish the legitimacy of a political system.

The tenet that democratic decisions are legitimate because every citizen has an effective opportunity to participate in the decision making process does not imply that individuals must be treated equally in all domains of life – be it the family, the workplace, or the marketplace. Although all domains of life can be considered as *political* – as Feminists such as Pateman have rightly argued – there are relevant differences between the political domain and other social spheres. Several arguments may justify a more extensive or generous conception of equality in the social and economic realm; yet this is fully compatible with thinking that the political system is where legitimate processes of collective decision-making take place under conditions that must ensure the political participation of all citizens. Importantly, this view implies no commitment to the sort of atrophied electoral proceduralism that Pateman and Goodhart have criticized.

Legitimate political participation is not restricted to voting in a formal election, campaigning for a candidate, or having the opportunity to run for public office, as Schumpeterians maintain. The concept of political participation must be broadened to include a host of other political acts provided they are "structurally embedded in the political system" (Cicatiello, Ercolano and Gaeta 2015: 448-449). Thus, the actions of public interest groups, civil organizations or social movements aimed at lobbying political decision-makers are rightly regarded as instances of political participation. Even acts of civil disobedience and protest at the margins of the social order – such as boycotts or the occupation of public offices – can be considered forms of political participation, for they too are aimed at

directly or indirectly influencing decision-makers.[12] What unites this wide range of political activities is that they all contribute to the democratic process "by which citizens can communicate information about their interests, preferences and needs to the government" (Bovens and Wille 2010: 395). Adopting a broad view of political participation that includes both "conventional" and "unconventional" forms of political action (Cicatiello, Ercolano and Gaeta 2015) situates my account of political democracy between advocates of a Schumpeterian electoral democracy and the more expansive emancipatory democratic model advocated by Pateman and Goodhart.

The intermediate model I propose implies that a genuine democracy must ensure that citizens have access to the full range of political participation activities, not merely a right to vote or stand in an election. Contestatory measures such as access to courts to challenge legislation or to engage in social protest are equally important (Pettit 2012b). That said, since most citizens engage in unconventional participation when they feel excluded from conventional forms of participation – e.g., people protest when they feel they have no real voice in an election – we should focus on conventional political participation in the first instance. Securing access to unconventional political participation is a second-best solution to a political system that has failed to include all citizens in conventional politics. With these building blocks in place, let us now examine the role of an unconditional basic income.

The democratic case for basic income depends on establishing a firm link between basic income and its expected impact on political participation. The idea that citizens need a guaranteed income to effectively participate in the legitimate democratic process is hardly a novel thought:

> "Almost all of the great theorists of citizenship [...] have believed that in order to be a citizen of a polis, in order to be able to participate fully in public life, one needed to be in a certain socio-economic position. [...] People, it was said, could not act as citizens at all, or could not be expected to act well in the political sphere and to make adequate decisions, unless some attention was paid to matters of their wealth, their well-being and their social and economic status" (King and Waldron 1988: 425-426).

Contemporary democratic societies do not restrict the formal political

12 Political participation at the margin of the social order may skirt what is deemed legal at any given time. The legality of protest and other unconventional political acts is a complicated matter.

participation of poor or economically disadvantaged people any longer: political rights are accorded to all citizens equally and no one can be politically excluded on the basis of social and economic status. Nevertheless, lack of money or income inequality continue to affect political participation even today.

Should income be regarded as a material precondition for political participation? The role of money in politics is indisputable: "money is an important political resource for any group, but it takes special significance for people who live at or near poverty levels" (Verba, Schlozman, and Brady 1995: 288-303). A recent study confirms this view: "[t]he higher (lower) individual income is, the higher (lower) individual engagement in conventional and unconventional political activities is" (Cicatiello, Ercolano and Gaeta 2015: 451). In fact, "income may be considered the most important individual-level determinant of political participation; all political activities are costly because resources (time, money, skills) must be invested in order to carry them out" (Cicatiello, Ercolano and Gaeta 2015: 450). Of course, the relevance of money should not lead us to underestimate other important structural obstacles to political participation.[13] A universal basic income may be unable to eradicate many structural barriers that continue to exist in contemporary societies – including those related to religion, ethnicity, or gender. Basic income is only a partial solution to practical disenfranchisement in contemporary politics. Still, poverty and income inequality are also important structural obstacles that prevent those at the bottom of the income distribution from exercising their equal right to political participation. To the extent that poverty and income inequality undermine political participation, the democratic case for a basic income is a promising avenue to explore.

The main question is why money matters more for the political participation of those living at or near poverty, which presumably is where we would expect a basic income scheme to have its most pronounced effect? In other words, what is the mechanism that allows basic income to impact on a citizen's ability to participate in political life? First, we might expect basic income to have a *direct* effect on the sort of costly actions that active citizens must engage in. For instance, basic income may help people afford the costs of voting registration or transport to the polling booth. Likewise, it may help to finance political campaigns: Obama's presidential campaign was famously funded through numerous small donations from poor supporters. In spite of this, we might ask why a basic income is the best response to the reduced participation of the poor. Perhaps more targeted policies, such as subsidized registration or free public transport

13 I thank a referee for this journal for pressing me to clarify this point.

during the election day, are better. Furthermore, when resources are scarce, using money to promote participation involves significant opportunity costs for the poor because such money could be invested in providing them secure access to nutritious food, housing or medical care. Finally, any moderate basic income scheme will most likely not suffice to support a number of important instances of political participation, thereby failing to fully satisfy the requirements of political inclusion. So it seems that when it comes to direct costs, more targeted solutions may perform better than a universal basic income.

The democratic value of a basic income is better appreciated when we consider the *indirect* effects that (the lack of) money has on political participation. For instance, a basic income may create incentives to participate through conventional channels because citizens will most probably want to defend a public policy that benefits them (Campbell 2003). In other words, a basic income might politicize citizens because it gives them a stake in society (Dowding, De Wispelaere and White 2003). Relatedly, those who cannot "live the lives of a civilized being according to the standards prevailing in the society risk marginalization and shame", which translates in political distrust and subsequently in reduced participation (Soss 2005: 306, citing Marshall 1964: 72). Unlike highly selective and conditional programs, a basic income would avoid negative experiences with case workers and other "representatives" of the state, therefore boosting political participation (Soss 2005; Bruch, Ferree and Soss 2010).[14]

In addition, "the daily struggle to make ends meet leaves individuals with little time or energy to follow the public debate, participate in political organizations, or hold elected representatives accountable" (Soss 2005: 306). Recent research has even suggested that poverty implies a genuine "scarcity mindset" with cognitive bandwidth restricted to survival activities (Mani *et al.* 2013). Finally, political decision-makers respond differently to distinct "target populations", such that "policies for disadvantaged groups will isolate or stigmatize their targets, setting them apart from the majority as an object of pity or scorn" (Soss 2005: 294). One expected effect of the universalism of a basic income policy is that it might escape such easy targeting by decision-makers.

In sum, through a variety of pathways basic income could have indirect positive effects on poor citizens' political participation by freeing up time, energy and "cognitive bandwidth", and by positively affecting their status

14 However, a recent study of the Bolsa Familia program in Brazil suggests much also depends on how selective programs themselves are framed (Hunter and Borges Sugiyama 2014).

and beliefs about themselves and others. The democratic hope is that basic income can generate a *virtuous circle*, through which an increased participation of the poor will bring about more responsiveness to their plights; and this will in turn reinforce participation.

5. CONCLUSION

In this article I have examined the democratic case for basic income. The idea that basic income should be justified not by reference to individual freedom but because of its impact on democratic citizenship was pioneered by Carole Pateman and developed by Michael Goodhart. However, I find that their approach fails to establish a robust case for basic income on democratic grounds. One major issue is that neither Pateman nor Goodhart offer a clear account of the pathways by which a basic income produces democratic value. Another major obstacle is that the kind of basic income their expansive model of democracy calls for is unfeasible under present conditions. I sustain that a more modest model of democracy that prioritizes broad and effective political participation in decision-making processes, offers a more plausible democratic case for a universal basic income. Recent research by political scientists has established a number of mechanisms through which low income and poverty negatively impacts on political participation. Granting each citizen an unconditional and secure basic income is a promising remedy to rectify this problem.

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