Social Rights, the Welfare State and European Austerity

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# Introduction

Social rights have become a major focus for public law scholars in recent years. Such attention is important, albeit, perhaps, a little belated. Following the inclusion of social rights in the Universal Declaration of Human Rights in 1948, the world witnessed a significant rise in their inclusion in domestic constitutions.[[1]](#footnote-1) But it was not really until the jurisprudence of the new Constitutional Court of South Africa at the turn of the century that the widespread interest of constitutional lawyers in social rights was achieved. Since then, however, there has been an exponential rise in this scholarship.[[2]](#footnote-2)

Much of this work has focused on the developing world and emerging democracies,[[3]](#footnote-3) inspired by the thought that social rights in domestic legal form may prove to be transformational. Perhaps, it is thought, social rights can offer a voice to the poor in the face of neglect.[[4]](#footnote-4) Maybe, it is hoped, they will catalyse the reform of welfare policies that sustain gross material inequalities.[[5]](#footnote-5) Thus case studies have emerged from a wide array of countries,[[6]](#footnote-6) including: Angola,[[7]](#footnote-7) Argentina,[[8]](#footnote-8) Bolivia,[[9]](#footnote-9) Brazil,[[10]](#footnote-10) Colombia,[[11]](#footnote-11) Hungary,[[12]](#footnote-12) India,[[13]](#footnote-13) Indonesia,[[14]](#footnote-14) Malawi,[[15]](#footnote-15) Nigeria[[16]](#footnote-16) and, most of all, South Africa.[[17]](#footnote-17)

From this initial focus on the developing world, however, an interest in the role of social rights in the constitutions of developed nations too has now emerged,[[18]](#footnote-18) not least because the global economic crisis of 2008 impacted on a broad range of economies, directly threatening a roll back of social welfare provision.[[19]](#footnote-19) Might social rights, then, in addition to carrying hopes of transformation in the global south, prove ‘fit for purpose’[[20]](#footnote-20) in offering protection for existing provision in the global north?

It is in this latter vein that this collection of essays was conceived. The core of the book comprises case studies of five ‘old’ European states: France, Germany, Italy, Spain and the UK. Each study examines welfare policy reform in the “age of austerity”,[[21]](#footnote-21) as it has been called, focusing particularly on the period around the global financial crisis of 2008. The studies then explore and assess the attempts to use public law rights to counter these austerity reforms. Additional contributors reflect on the case studies from a range of perspectives in order to develop theory and to deepen our understanding of social rights.

Our focus on ‘old’ Europe, then, offers something of a contrast to the original thrust of the social rights literature and an interesting comparator for social rights research. The selection of the case studies additionally produces an element of variation within Europe. It does so in three main respects: legal traditions in relation to social rights, social welfare traditions, and the impact of the great financial crisis on the national economies. As regards legal traditions, our five case studies are spread across what have been described as three ‘models’ of constitutional incorporation of social rights within Europe:[[22]](#footnote-22) the ‘liberal’, where constitutional incorporation has been eschewed (the UK); the ‘southern European’, where extensive social rights have been included within the constitution (Italy and Spain); and the ‘moderate’, which combines liberal tendencies with social state provisions that operate as policy objectives (Germany and France). As regards welfare state regimes, our five countries fall into three of the four welfare state regimes[[23]](#footnote-23) of developed nations that are commonly depicted in the social policy literature: the liberal (the UK), the corporatist (France and Germany) and the Southern European (Italy and Spain). Finally, as regards the impact of the global financial crisis on national economies, our five case study countries, as Adler and Terum’s chapter in this volume demonstrate, have had different experiences. The challenges experienced by Spain and Italy, not least by way of the pre-requisites of international financial assistance, may be contrasted with the comparatively less burdensome experiences of France, the UK and, most of all, Germany.

In this introductory chapter we offer an overview of the main themes and concerns of the social rights literature to date. Having done so, we then point to what we believe are gaps and vulnerabilities in the existing research agenda, especially in relation to industralised nations such as our European case studies. In particular, we argue that the study of social rights will benefit from an approach that contextualises them within the wider study of public law’s relation to welfare. Equally, we argue that it is important to acknowledge that constitutional social rights are just one aspect of the wider welfare state and, accordingly, should be understood and explored against that background. A focus on the welfare state permits one to contrast the relatively recent attention towards social rights from constitutional law scholars with an older socio-legal tradition of empirically examining the front-line operations of the welfare state. Our suggestion is that the study of social rights needs both. We conclude our introduction with a summary of the chapters that follow in the remainder of this volume.

# Legal Research on Social Rights

Constitutional law research on social rights has quickly become rich and eclectic, often drawing on comparative enquiry. Nonetheless, despite its variety, the literature, we suggest, ultimately revolves around five basic research questions, albeit ones that connect to each other and overlap:

* How do social rights come to be included in constitutional settlements?
* What does the concept of a social right entail?
* How do courts adjudicate social rights?
* How should courts adjudicate social rights?
* How effective are social rights?

## Social rights and constitutional settlements

This research theme focuses on the reception of social rights into constitutions (and sometimes their failure to be received),[[24]](#footnote-24) asking why and how they have attained their status as fundamental rights. Although such work is, by definition, historical, the specificity of the historical enquiry varies. Some have adopted a case study approach, focusing on one or two countries.[[25]](#footnote-25) Others have taken a broader sweep, focusing on regions rather than countries.[[26]](#footnote-26) More ambitiously, a general theory has been proffered about the rise, on a global scale, of domestic constitutionalism, including social rights. Law and Versteeg have posited that such constitutionalism is somewhat parasitic on the growth of human rights instruments in the international arena.[[27]](#footnote-27)

As we can see, Law and Versteeg approached the question at a macro level. However, the more focused, micro-level research has perhaps been more illuminating, touching on issues of motivation and ambition, revealing the social and political realities of constitutional settlements. We can observe that while for some constitutional actors, the inclusion of social rights may represent a transformational political agenda, for others it might reflect ambitions that are far more conservative – much more profane than the notion of fundamental rights as “values for a godless age”.[[28]](#footnote-28) The articulation of social rights is often the result of constitutional bargaining between parties who approach the task with competing visions of the good society and how to achieve it. Social rights, then, might carry hopes of preventing something deemed more radically progressive: a buffer, for example, against socialism, as was the case in Ireland in the early 20th century,[[29]](#footnote-29) and in Germany in the late 19th century, as Lembke’s case study in this volume reminds us. Equally, they may be a kind of trade for the purpose of preserving property rights protection, an “insurance swap” as Dixon and Ginsburg[[30]](#footnote-30) have framed it. As we shall see below, this complicates, to some extent, the question of social rights’ effectiveness.

## The concept of a social right

The starting point for this second research theme is the historical observation that social rights have come to prominence at a later stage of modernity than civil and political rights.[[31]](#footnote-31) The theoretical enquiry, as Ferraro’s chapter in this volume reminds us, is about whether a distinction between so-called ‘first’ and ‘second’ generation rights is meaningful at a conceptual level too. Given the normative status of civil and political rights in common understandings of the good society, the claim that social rights are conceptually indistinct from civil and political rights, or that they complement one another, [[32]](#footnote-32) would be a powerful one.

The view that there is no real conceptual difference between civil/political rights and social rights has now become a kind of orthodoxy in the literature, particularly amongst those who retain some level of faith in the transformational potential of social rights. Suggestions that civil and political rights require governments to refrain from action, whereas social rights require them to undertake action – a contrast between negative and positive obligations – have been countered by the observation that the enjoyment of civil and political rights is secured by an infrastructure created and sustained by government.[[33]](#footnote-33) Likewise, the notion that social rights are distinct in requiring public expenditure is challenged by evidence of the financial costs associated with systems of civil and political rights, as Albanese in this volume affirms.[[34]](#footnote-34) Differences might exist, then, regarding the degree of financial commitments involved, but these do not touch on basic conceptual structure, it is suggested.[[35]](#footnote-35)

This orthodoxy, however, is not without its detractors. Perhaps, it is argued, given that social rights impose higher costs on government, welfare duties create distinct challenges for adjudication, making decisions comparatively harder for judges.[[36]](#footnote-36) More radically, perhaps to permit the adjudication of social rights at all is to commit a category error, one that fundamentally subverts their social potential. Atria, for example, has argued that adjudication transforms and reduces social rights (in)to “bourgeois” law, de-socialising them in the process and robbing them of their socialist potential.[[37]](#footnote-37)

As we can see, then, the theoretical debate about the concept of social rights is rooted in a real-world concern for the welfare of the poor. To some extent at least, it is about the appropriate form through which social rights may realise their deemed transformational potential.

## How do courts adjudicate social rights?

This third research stream also focuses on the concept of social rights, but from a doctrinal perspective. By analysing constitutional jurisprudence, often using comparative methods, scholars have built up quite a complex picture of the ways in which constitutions across the globe may or do articulate social rights as a matter of positive law and constitutional style. In particular, the approach of the South African Constitutional Court, whereby social rights are conceived as giving rise to policy programme objectives, the pursuit of which may be subject to reasonableness review, has received much attention.[[38]](#footnote-38) In turn, this approach might be contrasted with that of the Indian Supreme Court, which Khosla[[39]](#footnote-39) describes as a ‘private law’ model of social rights jurisprudence.[[40]](#footnote-40) Equally, these conceptions might be contrasted with the ‘minimum core’ approach to social rights advocated by international human rights bodies[[41]](#footnote-41) and adopted in countries such as Colombia.[[42]](#footnote-42)

Such variations within global jurisprudence have triggered attempts to reduce the multiplicity of adjudicatory approaches to meaningful categories or types. Thus, in an analysis that quickly produced some terms of art, Tushnet contrasted the ‘strong-form’ judicial review tradition of the USA with the weaker-form traditions of other commonwealth jurisdictions.[[43]](#footnote-43) Young,[[44]](#footnote-44) however, offers a more sophisticated typology with a global reach. She begins with the different interpretive postures adopted by courts: (a) peremptory; (b) managerial; (c) experimentalist; (d) conversational; (e) deferential. From these interpretive styles, focusing on the combinations employed by courts, she produces a typology of constitutional dynamics observable in social rights adjudication: (1) catalytic; (2) engaged; (3) detached; and (4) supremacist.

## How should courts adjudicate social rights?

Doctrinal analysis, of course, rarely restricts itself to describing what is, quickly embracing discussions of what should be. Thus, in normative terms too, a minimum core approach to social rights[[45]](#footnote-45) might be contrasted with a proportionality approach,[[46]](#footnote-46) a reasonableness approach,[[47]](#footnote-47) and so on. Such discussions are informed by a familiar, though complex, weave of ideas and concerns. Debates focus both on the needs of the poor and those of the polity. Thus, arguments about the necessity of protecting a basic minimum of social provision for the sake of the poor,[[48]](#footnote-48) particularly in times of crisis,[[49]](#footnote-49) come up against concerns regarding how best to resolve reasonable disagreements within the polity about how to meet competing needs in society.[[50]](#footnote-50) Issues of democratic legitimacy, judicial expertise and polycentric policy problems encounter moral imperatives to meet the threshold needs of society’s most vulnerable.[[51]](#footnote-51) Strategies of judicial incrementalism,[[52]](#footnote-52) meaningful engagement[[53]](#footnote-53) and institutional dialogue[[54]](#footnote-54) are amongst the suggested ways by which courts might appropriately meet these challenges.

## The Effectiveness of Social Rights

For many scholars within the legal academy, the internal study of law as a hermetically sealed system of ideas is a barren enterprise that overlooks the nature of law as a social institution. This is, perhaps, especially the case for social rights scholars. A concern with the real-world effectiveness of social rights is, accordingly, a major theme within the literature too.

Yet, the research agenda within this stream is somewhat skewed, we would suggest. For understandable reasons – good, politically progressive reasons at that, we should stress – effectiveness research tends towards a conception of social rights whereby their purpose is to protect the poor’s wellbeing. But as we saw above, the inclusion of social rights within constitutional settlements can be somewhat Janus-faced. For some it is about the promise of change, carrying hopes of social transformation. For others it is about securing the status quo, soothing fears of a greater and unwanted social upheaval. We expand on these observations below when we situate the study of social rights within the broader welfare state, noting that social welfare has traditionally been underpinned by quite mixed ambitions, being as much about the collective needs of the capitalist economy as about the individual welfare needs of the poor. And as the chapters of Bilancia and Christodoulidis & Goldoni in this volume demonstrate, recent experiences in Europe have brought this dynamic into sharp relief.

Even amongst those who share a sense of social rights being somehow about the poor’s welfare, the methodological question “effective in doing what?” does not produce uniform answers. As we saw above in reviewing the normative doctrinal literature, some regard the purpose of social rights as being about securing a minimum core of provision for the poor. For others it is about catalysing and supporting healthy democratic deliberation about the needs of the poor, and so on.

Accordingly, we suggest that this research agenda could be more nuanced and balanced, with greater exploration of the more diverse group of ambitions that are ascribed to social rights. For the time being, however, we explore work that focuses on the effectiveness of social rights in securing the welfare of the poor.

Much of the legal research takes a qualitative case study approach, focusing on one or two countries,[[55]](#footnote-55) in contrast to some political science research, which includes large-scale quantitative work.[[56]](#footnote-56) A number of legal scholars have suggested helpful schemes for analysing the effectiveness of social rights. Such schemes generally set out pertinent features of the social world surrounding social rights litigation. The contention is that these features make a difference to whether, or the extent to which, social rights matter for the poor in a given society. Thus, Brinks *et al*[[57]](#footnote-57) point to legal mobilisation, judicial response, compliance and follow-up. Gloppen[[58]](#footnote-58) focuses on marginalised groups’ voice, courts’ responsiveness, judicial capability and authorities’ implementation. Yamin and Gloppen, in relation to health issues, highlight processes of claims formation, adjudication, implementation and social outcomes. Young and Lemaitre,[[59]](#footnote-59) similarly in relation to the right to health, suggest judicial doctrine, judicial roles, financing backdrop and civil society.

As we can see, there is a degree of similarity within these schemes, focusing, broadly speaking, on the generation and resolution of litigation, followed by the implementation of the judicial mandates. A notable gap - or, at least, an insufficient stress - in these analyses, however, is the issue of the poor’s take up of welfare provisions. Policy implementation does not exhaust the process of translating legal victories into the real-world enjoyment of welfare. Although trite, it is worth reminding ourselves that welfare provisions are only worthwhile if taken up by those who need them. As Roman demonstrates in her chapter in this volume, there are a number of reasons why the poor fail to claim or receive their entitlements. This is an issue that we return to below in discussing more broadly the operations of the welfare state. Before we do so, however, we must first explore the importance of situating the study of social rights within an understanding of public law generally.

# Social Rights and Public Law

The argument of this section is that the study of social rights will be enriched if we locate it within broader understandings of public law more generally. Perhaps the most obvious reason for this is that not all constitutions have entrenched social rights. The UK, one of our case study countries, is an example. Given its commitment to the doctrine of Parliamentary sovereignty, it lacks a codified constitution. But this is not to say that it does not have social rights. It simply lacks *constitutionally entrenched* social rights.[[60]](#footnote-60) The UK, as is well known, has an extensive system of social welfare rights that are contained in primary and secondary legislation. These, surely, are as worthy of study as the welfare entitlements in other jurisdictions that are variously underpinned or supported by constitutionally entrenched social rights.

But the UK case study offers us a more important observation. As Meers’ chapter demonstrates, although the UK lacks constitutional social rights, this has not precluded the evocation of other features of constitutional law in the struggle to protect social welfare.[[61]](#footnote-61) And as the case studies of France, Germany, Italy and Spain further demonstrate, the UK is not unusual in this regard. As Utrilla discusses in relation to Spain, for example, such public law rights can be more effective in challenging austerity welfare reforms than the entrenched social rights provisions of Constitutional texts. So, although constitutional social rights may now be legion, they are not yet everywhere. And even where they are present, they are not the only game in town.

## Austerity Constitutionalism within Europe

A wider perspective on public law and its relationship to social welfare also offers us an additional insight that might at first seem to be counter-intuitive. In countries that enjoy mature welfare systems, we have become used to the image of constitutional law as having the capacity to act as a kind of shield, protecting the poor from excessive governmental incursion into their welfare (or at least seeming to promise to do so). Yet, as the chapters in this volume suggest, constitutional law is also capable of acting more like a sword, undercutting welfare spending. A constitutional concern with social welfare comes up against constitutional mandates for budgetary balance and propriety.

Europe offers a particularly fertile laboratory for such an enquiry, despite (or perhaps because of) the European Union’s aspirations towards a ‘Social Europe’. As Giubboni sets out in his chapter in this volume, this was a project that promised a transnational dimension to social solidarity, captured in the notion of European citizenship. Much, however, has been made of the fading of this dream in recent times,[[62]](#footnote-62) even of its death,[[63]](#footnote-63) and some of the chapters in this volume continue in this vein. According to Giubboni, for example, the direction of travel seems grim in relation to social welfare within Europe. He sees a creeping return to the logic of the *Poor Laws*: a post-modern rediscovery of the expulsion of the undeserving poor whereby they are sent back to their place of origin from the countries where they claim assistance.

The role of European and domestic constitutional law in hastening the death of a Social Europe and in undercutting social welfare spending is a theme taken up by other contributors too. The case studies by Albanese (discussing Italy) and Utrilla (discussing Spain), for example, recount how rapid constitutional amendments were made in relation to budgetary and financial ‘stability’ following financial assistance from the ‘Troika’ (the European Commission, the European Central Bank and the International Monetary Fund). These provisions cast a dark constitutional shadow over public spending, particularly social welfare spending (which constitutes a large proportion of national budgets), and weaken the purchase of entrenched social rights. But Bilancia suggests in his chapter that such developments are best regarded as instances of a wider and longer trend whereby neoliberal economics has been constitutionalised within the European Union. He builds on work that sets out the precise means through which austerity has been constitutionalised.[[64]](#footnote-64) In addition to substantive constitutional rules about balanced budgets, such as those mentioned above, such means also include various institutional changes establishing independent fiscal councils to undertake analysis of public finances from a position a step away from ordinary politics, and various innovative procedures for the allocation of public resources, most notably through the development of spending reviews.

The result of the constitutionalisation of austerity within Europe is that European law and certain aspects of domestic constitutionalism enable a shift towards a different character of, and function for, welfare policy within the overall economy. Welfare policy comes to serve capitalism in a different way. The welfare state and capitalism have always, of course, been locked into a mutual dynamic. As Garland has recently stressed,[[65]](#footnote-65) the welfare state, as a rationality of government, has always been Janus-faced, being both about the welfare of the poor *and* the health of capitalism. It is, he argues, a fundamental feature of any industrialised society, a necessary means of regulating capitalism’s inherent capacity to self-destroy:

the welfare state is an essential basis for human flourishing in capitalist society and an essential basis for capitalist flourishing in human society.[[66]](#footnote-66)

But the particular dynamic between these two concerns seems to have shifted in recent decades, supported by the constitutionalisation of austerity. Under the ‘golden age’ of the welfare state in the decades following the Second World War, the welfare of the poor was protected through public spending so that capitalism would flourish. Under the more recent neoliberal welfare state, however, the logic around public spending has shifted: the welfare of capitalism is more likely protected through a containment of welfare spending. Christodoulidis and Goldoni, in their chapter in this volume, suggest that such is the price to be paid when so much of State finance is dependent on the financial markets. States, they suggest, must demonstrate austerity in order to please the markets and their ruling institutions.

Of course, there is room for debate about the precise impacts of neoliberalism and austerity constitutionalism on the character and generosity of social policy spending within Europe – a debate that King takes up in his chapter in this volume. This empirical question is complex and difficult to answer definitively. But the larger, methodological point to take from all this is that we should think carefully about the core research concern of ‘social rights’ scholarship. Our suggestion is that we should resist the temptation to focus too narrowly on constitutionally entrenched social rights. The risk to be avoided here is that we fetishize them and thus lose sight of the broader and more complex dynamics between public law, poverty and welfare.

# Social Rights and the Welfare State

The argument of this next section, which runs in parallel to the argument above, is that the study of social rights will be further enriched if we locate them within broader understandings of the operations of the welfare state. This is particularly the case for Western Europe, the geographical focus of this volume, where welfare states are mature.

## Macro-Level Change in the Welfare State

The first benefit of framing constitutional social rights as just one aspect of the broader welfare state is that we gain a better perspective on their significance relative to other aspects. It offers a clearer sense of scale that, in turn, offers a deeper understanding of the limits of constitutional social rights. And as we will see, the macro perspective on the welfare state additionally permits us to better contextualise the great financial crisis of 2008 on which this volume focuses.

According to Garland, the welfare state as a form of modern government - a set of governmental practices that differs from and replaced those of the previous *laissez faire* regime - has been remarkably resilient since its inception. It persists to this day, despite claims to the contrary.[[67]](#footnote-67) Economic crises, including the recent global crisis of 2008, have done nothing to alter this. But this is not to say that the character of the welfare state remains immutable. Though its core existence is essential to the functioning of capitalism, the precise nature of its social policies is subject to change in the ideological contests over what is a good society and how to achieve it under capitalism. Thus Garland suggests a distinction between what he terms ‘welfare state 1.0’ and ‘welfare state 2.0’.[[68]](#footnote-68) The key change, approximately four decades ago, is marked by the coming to prominence of neoliberal ideas about how best to manage the economy.[[69]](#footnote-69)

With this longer view of welfare state developments, we might suggest that it is mistaken to frame the ‘age of austerity’ as having been triggered by the great financial crisis of 2008. The better view is that austerity is a feature of the welfare state 2.0. Indeed, as our case studies demonstrate, austerity policies were well established prior to the 2008 crisis. The specific austerity responses to the 2008 crisis, then, are better regarded as a chapter in the neoliberal phase of the welfare state, rather than as a major rupture.

This is the backdrop against which social rights adjudication in ‘old’ Europe has taken place. This is significant because, in many senses, social rights represent the economic philosophy that was replaced by neoliberalism. Social rights are like gravestones for an economic orthodoxy that has passed on. As Couso[[70]](#footnote-70) notes in relation to international treaties articulating social rights:

International human rights law embodies an economic policy ‘frozen’ in time from the mid twentieth century (in the form of social-democratic, social-Christian, or ‘New Deal’ thought). This philosophy has been ‘transported’ into our time by the social and economic provisions of the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, which are now incompatible with some of the core principles of contemporary mainstream economic thinking.

Social rights litigation, accordingly, represents, in some senses, a clash of economic rationalities. In some countries, such as Colombia[[71]](#footnote-71) and Hungary,[[72]](#footnote-72) the clash has been distinctly combative, with policy being stopped in its tracks. In old Europe, however, our case studies suggest that the encounter has been more cordial and genteel - more like a PhD supervisor cautioning her student to think carefully. The case study of Germany in this volume captures the dynamic especially well. Lembke notes that, despite recognising a fundamental right to a subsistence minimum, the Constitutional Court has held that the articulation of the right’s content is a matter for legislative discretion. In Europe, it seems, the courts are speaking softly, without at the same time carrying any big sticks.

Of course, for some scholars, including King in this volume, the value of the court may lie precisely in such soft power, its ‘weaker’ forms of review.[[73]](#footnote-73) He argues, on grounds of constitutional legitimacy and judicial expertise, amongst other things, for ‘judicial incrementalism’, a cautious and contained constitutional stance on the part of the courts. Amongst scholars who stress the importance of soft power, constitutional courts largely have an expressive role to perform in relation to the needs of the poor and the nature of poverty.[[74]](#footnote-74) In articulating the constitutional significance of social rights, the courts catalyse, it is hoped, meaningful deliberation about these issues.[[75]](#footnote-75) But the consequence of such a position is that it is important not to expect too much from social rights adjudication in mature welfare states,[[76]](#footnote-76) particularly when social rights, as an economic imperative, are being pitched against a very powerful and pervasive mode of normative and instrumental thinking about economic management. Under these conditions, the courts are whispering into the wind. Sometimes the whispers are heard, but often they are not.

We must stress again, of course, that there is plenty of room here for disagreement about how we should assess this in general normative and specifically constitutional terms. And we see elements of these debates in the other chapters of the book that are summarised below. But before we turn to the chapter summaries, we must first draw attention to the benefits of an empirical perspective on the operations of the welfare state.

## Empirical Perspective on the Operations of the Welfare State

Our argument here is that an empirical concern for the ‘law-in-action’, in addition to the ‘law-in-books’,[[77]](#footnote-77) is crucial to our understanding of social rights. It pulls us down from the heights of constitutional doctrine and debate to the depths of social policy delivery. It also draws our attention towards the wider context of the day-to-day operations of the welfare state, encouraging us to attend to social rights, first as creatures of positive law and policy (not merely of constitutional texts), and then as the empirical outcomes of social policy implementation processes.

This latter move is particularly important, we suggest. It offers us a more grounded sense of the concept of social rights. We might borrow a basic insight here from the policy implementation literature: namely, that the ‘ultimate policy-makers’ are the bureaucrats who work on the frontlines (at ‘street-level’),[[78]](#footnote-78) as opposed to those who draft the policy manuals and guidelines.[[79]](#footnote-79) In other words, policy is what is delivered, not what is written.[[80]](#footnote-80) In the same way, we might suggest, social rights, ultimately, are not to be found in constitutional texts, not even in the texts of legislation or policy documents, but, rather, in the actions of the frontline workers of the welfare state. The study of such actions is, therefore, essential to a full understanding of social rights.

In addition to ‘street-level bureaucratic theory’,[[81]](#footnote-81) there is a relatively long history of socio-legal work examining the fate of social welfare law in the routines of frontline agencies,[[82]](#footnote-82) including explorations of the factors that mediate the impact of court decisions on bureaucratic behaviour.[[83]](#footnote-83) This is a rich seam of scholarship for those concerned with social rights. In keeping with street-level bureaucratic theory, socio-legal scholarship has similarly stressed the significance of officer discretion,[[84]](#footnote-84) routinization,[[85]](#footnote-85) working conditions,[[86]](#footnote-86) and culture[[87]](#footnote-87) to the nature of law-in-action produced at the frontline.

The issue of discretion is worthy of particular note. The existence of at least some discretion in implementation work is unavoidable,[[88]](#footnote-88) though as Meers’s study demonstrates, many aspects of the welfare state, including welfare conditionality, are explicitly discretionary. Street-level discretion within the welfare state is something of a double-edged sword. On the one hand, it offers some flexibility whereby welfare officers can be responsive to the needs of individual citizens.[[89]](#footnote-89) Yet, on the other, it offers a space into which cultural morality may flow. Street-level law is, accordingly, as much a cultural as a legal phenomenon.[[90]](#footnote-90) It can become, in Hawkins’ words, a “morality play”.[[91]](#footnote-91) Law can enable as well as constrain cultural morality. And as the case studies of Meers and Roman suggest, such cultural morality can be highly objectionable, with perceptions of moral desert and appropriateness infusing the exercise of welfare discretion.[[92]](#footnote-92) Such is, to some extent, an expressive feature of neoliberalism under the welfare state 2.0, perhaps as significant as its more tangible, instrumental aspects. Whereas social rights express the importance of meeting the needs of the poor in society, neoliberalism tends towards an association of welfare needs with social deviance, at least in relation to mainstream unemployment. It is a cultural narrative that stresses individual responsibility more than collective solidarity, whereby poverty is better explained by reference to agency as opposed to structure.

This narrative of poverty not only has an effect on the character of local discretion, however: it also produces social stigma. And in turn, as Roman notes in her chapter in this volume, social stigma can effect people’s decisions about whether to claim their welfare entitlements. This is an important finding of the literature that has examined the realities of poor people’s engagement with welfare bureaucracies.[[93]](#footnote-93) Psychological impediments to the enjoyment of entitlements must be considered alongside the more practical and cognitive barriers to take up.[[94]](#footnote-94) These are important issues for the study of social rights; ones that require continued research and discussion.

We conclude our introduction to this volume with a summary of the chapters that follow.

# Chapter Summaries

The next five chapters of the book comprise the case studies of the ‘old’ European nations: **Roman** discusses France; **Lembke** focuses on Germany; **Albanese** explores Italy; **Utrilla** presents Spain; and **Meers** examines the United Kingdom. In each chapter, the national rapporteur: sets out the constitutional position of social rights in the country; examines recent changes, under the rubric of austerity, to areas of law and policy that pertain to social rights; then explores the attempts through litigation to use public law rights to protect the welfare of the poor against austerity reforms. As we hinted above, despite differences in legal traditions, welfare state traditions and economic challenges after the great crisis of 2008, a broadly similar set of dynamics might be observed: austerity reforms have often pre-dated the crisis of 2008, though continue after it; attempts to challenge welfare austerity in litigation have drawn on a range of public law norms and rights, not simply on constitutionally entrenched social rights; and although there have been some notable victories in litigation, especially in relation to asylum seekers, the *general* dynamic within our case studies is that the courts deny themselves jurisdiction to intervene substantively in questions of social rights.

Following the case studies, and building upon them in different ways, the remaining chapters address the topic of social rights from perspectives of political and legal theory. **White** begins by picking up an observation of many of the case studies, that welfare conditionality is a key feature of neoliberal policy within Europe. He addresses the question of its justifiability and explores a case for an unconditional minimum income, thus connecting to both doctrinal and theoretical work on what the concept of a social right entails. White argues that, while conditionality may be justified under appropriate circumstances, there is always a significant risk that the relevant conditions will not hold, rendering conditionality unjust. In this important sense, he stresses, the justice of conditionality is itself conditional. Moreover, he notes, the dangers from unjust conditionality can be severe. He proposes a pluralistic response to this context of risk and danger within which one element is to work to diminish conditionality and to shift towards an unconditional minimum income.

**Ferraro** continues the exploration of the concept of social rights. The starting point of his enquiry is an acknowledgement of the fragility of social rights in times of economic crisis. The aim of his enquiry, however, is to challenge the view that such fragility emerges from any presumptive difference in the nature of social rights when compared to civil rights. He suggest that neither a contractualist understanding of social rights – which allows for their conditionality – nor an allegedly different structure of social rights exposes them to being emptied of their original meaning and neutralized by crisis-driven policies. Instead, what exposes social rights to negative effects in times of crisis is the democratic option of resource allocation and the social dimension of all fundamental rights, both civil and social, due to a prevailing tacit ideology favouring an unrestricted free market.

**King** shifts the focus from the concept of social rights to the role of the courts in promoting and protecting welfare through social rights jurisprudence. Accepting the general finding of the case studies – that European courts’ role in protecting welfare after the crisis has been limited - he raises the important question of how, as legal scholars, we should feel about this. King argues for the attractiveness of what he describes as “judicial incrementalism” as a constitutional strategy in times of economic crisis.  Its attractiveness arises, he suggests, not from its capacity to vindicate fundamental social rights in a context of financial crisis, but rather because it is the best one can (ordinarily) hope from constitutional judicial review in times of economic crisis.  To ask for more, he suggests, is to risk more than one should reasonably expect to gain.  Yet, at the same time, judicial incrementalism, he argues, may humanize the way in which sweeping reforms are rolled out, and keep social rights values in play as political values that may orient political debate in a helpful direction. As King notes in his final sentence, contrasting his approach to those of the chapters that follow, this still amounts to the glass being “half full”.

The next three chapters, while continuing to explore social rights from the perspective of legal theory, do so specifically within the European context and consider the significance of European law and constitutionalism for the fate of social rights. **Christodoulidis** and **Goldoni** begin their essay with a challenge to the traditional province of constitutional scholarship on social rights, including the likes of King. Their assertion is that, rather than exploring the question of whether social rights are better protected through legislative, judicial or administrative means, constitutional scholars should instead face the reality that social rights constitutionalism has been all but defeated. It is, they suggest, the first victim of the regime of economic austerity rolled out to contain the sovereign debt crisis within Europe. European integration, they argue, has been a process of encroachment on social rights: first, market integration and the influx of financial products established market rationality as the main arbiter for managing welfare systems, part of a general restructuring of the global political economy; second, the single currency project was founded on the assumption that, in the absence of a lender of last resort, self-imposed frugality would ensure that the Euro would function smoothly. In an interesting twist and macro perspective on welfare conditionality, they suggest that all this has forced States into the contraction of public expenditure in order to appear as virtuous actors before international financial markets. We have thus witnessed a transformation of the role of the state *vis-à-vis* social rights because the state itself has to resort to financial markets in order to fund social services. In this way, they conclude, the decoupling of social rights from European citizenship has been fully realised.

**Bilancia**, in his chapter, continues the theme of the constitutionalisation of austerity within Europe. He argues that economic policies within Europe have become increasingly juridified in the wake of the financial and sovereign debt crisis that began in 2008. National governments are no longer permitted to deal with social and economic questions in isolation. In order to manage national government deficits and debt and promote financial stability, states can only use traditional counter-cyclical policies to alter revenues and expenditures, including welfare spending. Across the Eurozone, this leads to an asymmetric reduction of public expenditure in order to control the different levels of public deficit and debt. In turn, this causes asymmetric levels of guarantees of social rights, breaking constitutional solidarity within the EU. Within the Common Market, he concludes, a fragmented European territory is being constructed - especially fragmented at the level of enjoyment of fundamental rights and equality in the delivery of social services. The consequence is that we are witnessing European citizens attempting to exercise their rights of free movement in order to seek more generous social rights provision – countered, of course, by national governments’ attempt to inhibit them.

**Giubboni** takes up the theme suggested by Bilancia’s analysis – the spectre of a territorial ‘shopping’ of welfare guarantees and its significance for the notion of European citizenship. He argues that the dream of transnational solidarity exemplified by the free movement of economically inactive persons is now becoming something of a nightmare. The crisis of 2008, he suggests, has destroyed any propensity of northern-European Member States to host EU foreigners in need in their (still relatively) generous welfare systems. Instead, he observes the emergence of two forms of citizenship within the EU: first-class citizenship is reserved, he suggests, for those who are active in the internal market or who can prove their economic self-sufficiency; second-class citizenship, essentially devoid of any transnational protective status, is for the indigent. This amounts to an erosion of the constitutional meaning of European citizenship.

In the final chapter of the volume, **Adler** and **Terum** return to the topic explored by White – the conditionality of welfare - though they take an empirical, rather than a theoretical, approach. They explore whether, within the case study countries of this book (with the addition of Sweden), they can observe any meaningful relationship between the extent of the impact of the 2008 crisis and the development of their conditionality policies. Although, as Adler and Terum themselves note, we must exercise caution in the interpretation of their data,[[95]](#footnote-95) their conclusion is that conditionality policies have not developed in a way that correlates with the countries’ experience of the 2008 crisis. Thus, conditionality should not, on the basis of their data, be framed as a feature of austerity post-2008. Rather, it should be thought of as a feature of austerity over a longer time frame. This suggestion chimes well with a core suggestion of this introductory chapter – that austerity is better regarded as a doctrine of neoliberalism, with the crisis of 2008 being understood as a chapter of this era and not a major rupture.

1. \* We are very grateful to Ros Dixon, Jeff King and Theunis Roux who offered feedback on an earlier draft of this chapter.

 Some constitutions contained social rights prior to this point, of course. But the exponential rise occurred in the second half of the 20th century. See DM Brinks, V Gauri and K Shen, ‘Social Rights Constitutionalism: Negotiating the Tension Between the Universal and the Particular’ (2015) 11 *Annual Review of Law and Social Science* 289-308; D Law and M Versteeg , ‘Evolution and Ideology of Global Constitutionalism’ (2011) 99 *California Law Review* 1163-1258, especially at p 1195 for figures showing that the ‘phenomenon of rights creep’ regards both negative and positive (social and economic) rights. [↑](#footnote-ref-1)
2. This is true of the English-speaking world, at least. Social rights legal scholarship has a longer pedigree in Latin America: see JA Couso, ‘The Changing Role of Law and Courts in Latin America: From an Obstacle to Social Change to a Tool of Social Equity’ in R Gargarella, P Domingo and T Roux (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Aldershot: Ashgate Publishing, 2006). [↑](#footnote-ref-2)
3. E.g., V Gauri and DM Brinks (eds) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge: Cambridge University Press, 2008) [↑](#footnote-ref-3)
4. See, e.g., R Gargarella, P Domingo and T Roux (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Aldershot: Ashgate Publishing, 2006) [↑](#footnote-ref-4)
5. E.g., D Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford: Oxford University Press, 2007) [↑](#footnote-ref-5)
6. On social rights generally see, e.g., M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008); on the right to health specifically, see AE Yamin and S Gloppen, *Litigating Health Rights: Can Courts Bring More Justice to Health?* (Cambridge: Harvard University Press, 2011) [↑](#footnote-ref-6)
7. E.g., E Skaar and JOS Van-Dunem. ‘Courts Under Construction in Angola: What Can They Do for the Poor?’ in R Gargarella, P Domingo and T Roux (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Aldershot: Ashgate Publishing, 2006) [↑](#footnote-ref-7)
8. E.g., G Maurino and E Nino, ‘Economic and Social Rights and the Supreme Court of Argentina in the Decade Following the 2001-2003 Crisis’ in A Nolan (ed) *Economic and Social Rights after the Global Financial Crisis* (Cambridge: Cambridge University Press, 2014) [↑](#footnote-ref-8)
9. E.g., P Domingo, ‘Weak Courts, Rights and Legal Mobilisation in Bolivia’ in R Gargarella, P Domingo and T Roux (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Aldershot: Ashgate Publishing, 2006) [↑](#footnote-ref-9)
10. E.g., J Reinaldo de Lima Lopes, ‘Brazilian Courts and Social Rights: A Case Study Revisited’ in R Gargarella, P Domingo and T Roux (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Aldershot: Ashgate Publishing, 2006); FF Hoffmann and FRNM Bentes, ‘Accountability for Social and Economic Rights in Brazil’ in V Gauri and DM Brinks (eds) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge: Cambridge University Press, 2008); OLM Ferraz, ‘Harming the Poor Through Social Rights Litigation: Lessons from Brazil’ (2011) 89 *Texas Law Review* pp. 1643-68. [↑](#footnote-ref-10)
11. E.g., RU Yepes ‘The Enforcement of Social Rights by the Colombian Constitutional Court: Cases and Debate’ in R Gargarella, P Domingo and T Roux (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Aldershot: Ashgate Publishing, 2006); D Landau, ‘The Promise of a Minimum Core Approach: The Colombian Model for Judicial Review of Austerity Measures’ in A Nolan (ed) *Economic and Social Rights after the Global Financial Crisis* (Cambridge: Cambridge University Press, 2014); KG Young and J Lemaitre, ‘The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa’ (2013) 26 *Harvard Human Rights Journal*, 179-216. [↑](#footnote-ref-11)
12. E.g., A Sajo, ‘Social Rights as Middle-Class Entitlements in Hungary: The Role of the Constitutional Court’ in R Gargarella, P Domingo and T Roux (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Aldershot: Ashgate Publishing, 2006); K L Scheppele, ‘A Realpolitik Defense of Social Rights’ (2004) 82 *Texas Law Review* 1921-61 [↑](#footnote-ref-12)
13. E.g., R Sudarshan, ‘Courts and Social Transformation in India’ in R Gargarella, P Domingo and T Roux (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Aldershot: Ashgate Publishing, 2006); S Shankar and PB Mehta, ‘Courts and Socio-Economic Rights in India’ in V Gauri and DM Brinks (eds) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge: Cambridge University Press, 2008); M Khosla, ‘Making Social Rights Conditional: Lessons from India’ (2010) 8(4) *International Journal of Constitutional Law*, 739-65 [↑](#footnote-ref-13)
14. E.g., B Susanti, ‘The Implementation of the Rights to Health Care and Education in Indonesia’ in V Gauri and DM Brinks (eds) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge: Cambridge University Press, 2008) [↑](#footnote-ref-14)
15. E.g., S Gloppen and FE Kanyongolo, ‘Courts and the Poor in Malawi: Economic Marginalisation, Vulnerability and the Law’ (2007) 5(2) *International Journal of Constitutional Law* 258-93 [↑](#footnote-ref-15)
16. E.g., CA Odinkalu, ‘The Impact of Social and Economic Rights in Nigeria: An Assessment of the Legal Framework for Implementing Education and Health as Human Rights’ in V Gauri and DM Brinks (eds) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge: Cambridge University Press, 2008) [↑](#footnote-ref-16)
17. E.g., J Dugard and T Roux, ‘The Record of the South African Constitutional Court in Providing an Institutional Voice for the Poor: 1995-2004’ in R Gargarella, P Domingo and T Roux (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Aldershot: Ashgate Publishing, 2006); R Dixon, ‘Creating Dialogue about Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited’ (2007) 5(3) *International Journal of Constitutional Law*, 391-418; J Berger, ‘Litigating for Social Justice in Post-Apartheid South Africa: A Focus on Health and Education’ in V Gauri and DM Brinks (eds) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge: Cambridge University Press, 2008); D Davis, ‘Socioeconomic Rights: Do They Deliver the Goods?’ (2008) 6 *International Journal of Constitutional Law*, 687-711; R Dixon and T Ginsburg, ‘The South African Constitutional Court and Socio-Economic Rights as ‘Insurance Swaps’’ (2011) 4 *Constitutional Court Review*, 1-29; A Pillay, ‘Towards Effective Social and Economic Rights Adjudication: The Role of Meaningful Engagement’ (2012) 10(3) *International Journal of Constitutional Law*, 732-55; KG Young and J Lemaitre, ‘The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa’ (2013) 26 *Harvard Human Rights Journal*, 179-216; A Pillay and M Wesson, ‘Recession, Recovery and Service Delivery: Political and Judicial Responses to the Financial and Economic Crisis in South Africa’ in A Nolan (ed) *Economic and Social Rights after the Global Financial Crisis* (Cambridge: Cambridge University Press, 2014) [↑](#footnote-ref-17)
18. E.g., M Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2008); K Young, *Constituting Economic and Social Rights* (Oxford: Oxford University Press, 2012); J King, *Judging Social Rights* (Cambridge: Cambridge University Press, 2012); J King, ‘Two Ironies about American Exceptionalism over Social Rights’ (2014) 12(3) *International Journal of Constitutional Law*, 572-602. [↑](#footnote-ref-18)
19. C Kilpatrick and B De Witte, *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights’ Challenges* (Florence: EUI Working Paper, Law 2014/15); C O’Cinneide, ‘Austerity and the Faded Dream of a ‘Social Europe’’ in A Nolan (ed) *Economic and Social Rights after the Global Financial Crisis* (Cambridge: Cambridge University Press, 2014); N Lusiani, ‘Rationalising the Right to Health: Is Spain’s Austere Response to the Economic Crisis Impermissible Under International Human Rights Law?’ in A Nolan (ed) *Economic and Social Rights after the Global Financial Crisis* (Cambridge: Cambridge University Press, 2014) [↑](#footnote-ref-19)
20. A Nolan, ‘Not Fit for Purpose? Human Rights in Times of Financial and Economic Crisis’ (2015) *European Human Rights Law Review*, pp. 360-71 [↑](#footnote-ref-20)
21. The notion of the “new age of austerity” was popularized in the UK by its then Prime Minister, David Cameron, in a speech in early 2009: see Deborah Summers, ‘David Cameron warns of a “new age of austerity”’ *The Guardian*, 27th April 2009. [↑](#footnote-ref-21)
22. M.E. Butt, J. Kübert, C.A. Schultz, ‘Fundamental Social Rights in Europe’ (European Parliament L-2929 Luxembourg, 2000) [↑](#footnote-ref-22)
23. G Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton: Princeton University Press, 1990); M Ferrera, ‘The “Southern Model” of Welfare in Social Europe’, (1996) 6(1) *Journal of European Social Policy*, pp. 17–37. [↑](#footnote-ref-23)
24. E.g., CR Sunstein, ‘Why Does the American Constitution Lack Social and Economic Guarantees?’ (2005) 56 *Syracuse Law Review*, 1-25. For a counter to the American exceptionalism thesis, see J King, ‘Two Ironies about American Exceptionalism over Social Rights’ (2014) 12(3) *International Journal of Constitutional Law*, 572-602, and H Hershkoff and S Loffredo, ‘Tough Times and Weak Review: the 2008 Economic Meltdown and Enforcement of Socio-Economic Rights’ in A Nolan (ed) *Economic and Social Rights after the Global Financial Crisis* (Cambridge: Cambridge University Press, 2014) [↑](#footnote-ref-24)
25. E.g., MB Vieira and FC da Silva, ‘Getting Rights Right: Explaining Social Rights Constitutionalisation in Revolutionary Portugal’ (2013) 11(4) *International Journal of Constitutional Law*, 898-922 [↑](#footnote-ref-25)
26. E.g., JA Couso, ‘The Changing Role of Law and Courts in Latin America: From an Obstacle to Social Change to a Tool of Social Equity’ in R Gargarella, P Domingo and T Roux (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Aldershot: Ashgate Publishing, 2006) [↑](#footnote-ref-26)
27. D Law and M Versteeg , ‘Evolution and Ideology of Global Constitutionalism’ (2011) 99 *California Law Review* 1163-1258 [↑](#footnote-ref-27)
28. F Klug, *Values for a Godless Age: The Story of the United Kingdoms’ New Bill of Rights* (London, Penguin Books, 2000) [↑](#footnote-ref-28)
29. T Murray, ‘Socio-Economic Rights Versus Social Revolution? Constitution Making in Germany, Mexico and Ireland, 1917-1923’ (2015) 24(4) *Social & Legal Studies*, 487-508 [↑](#footnote-ref-29)
30. R Dixon and T Ginsburg, ‘The South African Constitutional Court and Socio-Economic Rights as ‘Insurance Swaps’’ (2011) 4 *Constitutional Court Review*, 1-29. [↑](#footnote-ref-30)
31. See TH Marshall, *Citizenship and Social Class and Other Essays* (Cambridge: Cambridge University Press, 1950) [↑](#footnote-ref-31)
32. See C Fabre, *Social Rights Under the Constitution: Government and the Decent Life* (Oxford: Oxford University Press, 2000) at pp. 45-49. [↑](#footnote-ref-32)
33. E.g,. M Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2008); J King, *Judging Social Rights* (Cambridge: Cambridge University Press, 2012) [↑](#footnote-ref-33)
34. See also S Holmes and C Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: WW Norton & Co, 2000) [↑](#footnote-ref-34)
35. D Garland, ‘On the Concept of ‘Social Rights’’ (2015) 24(4) *Social & Legal Studies*, 622-28 [↑](#footnote-ref-35)
36. G Arosemena, ‘Retrieving the Differences: the Distinctiveness of the Welfare Aspect of Human Rights from the Perspective of Judicial Protection’ (2014) *Human Rights Review* 16, 239-55 [↑](#footnote-ref-36)
37. F Atria, ‘Social Rights, Social Contract, Socialism’ (2015) 24(4) *Social & Legal Studies*, 598-613 [↑](#footnote-ref-37)
38. See footnote X above [↑](#footnote-ref-38)
39. M Khosla, ‘Making Social Rights Conditional: Lessons from India’ (2010) 8(4) *International Journal of Constitutional Law*, 739-65 [↑](#footnote-ref-39)
40. From a UK perspective, the approach Khosla describes might be better described as one of legitimate expectations being respected. [↑](#footnote-ref-40)
41. See UN Economic and Social Council, Committee on Economic, Social and Cultural Rights, Report on the Fifth Session, Supp, no. 3, Annex III, UN Doc. E/1991/23 (1991); D Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford: Oxford University Press, 2007); K Young, ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content’ (2008) 33(1) *Yale Journal of International Law*, 113-75 [↑](#footnote-ref-41)
42. See footnote X above. [↑](#footnote-ref-42)
43. M Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2008) [↑](#footnote-ref-43)
44. KG Young, ‘A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review’ (2010) 8(3) *International Journal of Constitutional Law*, 385-420 [↑](#footnote-ref-44)
45. D Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford: Oxford University Press, 2007) [↑](#footnote-ref-45)
46. X Contiades and A Fotiadou, ‘Social Rights in an Age of Proportionality: Global Economic Crisis and Constitutional Litigation’ (2012) 10 *International Journal of Constitutional Law*, 660-86 [↑](#footnote-ref-46)
47. C Steinberg, ‘Can Reasonableness Protect the Poor: A Review of South Africa’s Social Rights Jurisprudence’ (2006) 123 *South African Law Journal*, 264. [↑](#footnote-ref-47)
48. K Ewing, Review of E Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act*, and M Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, (2009) 7(1) *International Journal of Constitutional Law*, 155-69 [↑](#footnote-ref-48)
49. E.g., D Bilchitz, ‘Socio-Economic Rights, Economic Crisis, and Legal Doctrine’ (2014) 12(3) *International Journal of Constitutional Law*, 710-39 [↑](#footnote-ref-49)
50. E.g., R Gargarella, ‘Theories of Democracy, the Judiciary and Social Rights’ in R Gargarella, P Domingo and T Roux (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Aldershot: Ashgate Publishing, 2006) [↑](#footnote-ref-50)
51. See, for example, the discussion in J King, *Judging Social Rights* (Cambridge: Cambridge University Press, 2012) [↑](#footnote-ref-51)
52. Ibid [↑](#footnote-ref-52)
53. A Pillay, ‘Towards Effective Social and Economic Rights Adjudication: The Role of Meaningful Engagement’ (2012) 10(3) *International Journal of Constitutional Law*, 732-55 [↑](#footnote-ref-53)
54. E.g., R Dixon, ‘Creating Dialogue about Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited’ (2007) 5(3) *International Journal of Constitutional Law*, 391-418 [↑](#footnote-ref-54)
55. E.g., D Davis, ‘Socioeconomic Rights: Do They Deliver the Goods?’ (2008) 6 *International Journal of Constitutional Law*, 687-711; J King, ‘Two Ironies about American Exceptionalism over Social Rights’ (2014) 12(3) *International Journal of Constitutional Law*, 572-602 [↑](#footnote-ref-55)
56. E.g., MM Kavanagh, ‘The Right to Health: Institutional Effects of Constitutional Provisions on Health Outcomes’ (2016) 51 *Studies in Comparative International Development* 328 [↑](#footnote-ref-56)
57. DM Brinks, V Gauri and K Shen, ‘Social Rights Constitutionalism: Negotiating the Tension Between the Universal and the Particular’ (2015) 11 *Annual Review of Law and Social Science* 289-308 [↑](#footnote-ref-57)
58. S Gloppen, ‘Courts and Social Transformation: An Analytical Framework’ in R Gargarella, P Domingo and T Roux (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Aldershot: Ashgate Publishing, 2006) [↑](#footnote-ref-58)
59. KG Young and J Lemaitre, ‘The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa’ (2013) 26 *Harvard Human Rights Journal*, 179-216 [↑](#footnote-ref-59)
60. See J King, *Judging Social Rights* (Cambridge: Cambridge University Press, 2012) at pp. 18-9 for a helpful discussion of the different forms of social rights. [↑](#footnote-ref-60)
61. In the context of an uncodified constitution, the legal basis of the challenges to welfare austerity in the UK would be considered to be part of its constitutional law. The fact that the UK does not have a codified constitution does not mean, of course, that it lacks constitutional law. Rather, it simply means that the sources of constitutional law are the common law, parliamentary legislation, the royal prerogative and constitutional convention. [↑](#footnote-ref-61)
62. See, e.g., C O’Cinneide, ‘Austerity and the Faded Dream of Social Europe’ in A Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (Cambridge: Cambridge University Press, 2014) [↑](#footnote-ref-62)
63. See, e.g., KD Ewing (2015) 26(1) ‘The Death of Social Europe’, *King's Law Journal*, 76-98 [↑](#footnote-ref-63)
64. T Prosser, ‘Constitutionalising Austerity in Europe’ (2016) (Jan) *Public Law* 111-29 [↑](#footnote-ref-64)
65. D Garland, ‘The Welfare State: A Fundamental Dimension of Modern Government’ (2014) 55(3) *European Journal of Sociology* 327-64 [↑](#footnote-ref-65)
66. ibid, at p. 360. [↑](#footnote-ref-66)
67. D Garland, ‘The Welfare State: A Fundamental Dimension of Modern Government’ (2014) 55(3) *European Journal of Sociology* 327-64 [↑](#footnote-ref-67)
68. D Garland, *The Welfare State: A Very Short Introduction* (Oxford: Oxford University Press, 2016) [↑](#footnote-ref-68)
69. See also D King and F Ross, ‘Critics and Beyond’, in FG Castles, S Leibfried, J Lewis, H Obinger, and C Pierson (eds), *The Oxford Handbook of the Welfare State* (Oxford: Oxford University Press, 2010). [↑](#footnote-ref-69)
70. JA Couso, ‘The Changing Role of Law and Courts in Latin America: From an Obstacle to Social Change to a Tool of Social Equity’ in R Gargarella, P Domingo and T Roux (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Aldershot: Ashgate Publishing, 2006), at p. 72. [↑](#footnote-ref-70)
71. See footnote X above. [↑](#footnote-ref-71)
72. See footnote Y above. [↑](#footnote-ref-72)
73. M Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2008) [↑](#footnote-ref-73)
74. See, e.g., M Khosla, ‘Making Social Rights Conditional: Lessons from India’ (2010) 8(4) *International Journal of Constitutional Law*, 739-65 [↑](#footnote-ref-74)
75. KG Young, ‘A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review’ (2010) 8(3) *International Journal of Constitutional Law*, 385-420 [↑](#footnote-ref-75)
76. For a more general argument about expecting too much from the courts, see Malcolm Feeley’s discussion of Gerald Rosenberg’s *The Hollow Hope*: ‘Hollow Hopes, Flypaper and Metaphors’ (1992) 17 *Law & Social Inquiry*, pp. 745-69 [↑](#footnote-ref-76)
77. R Pound, ‘Law in Books and Law in Action’ (1910) 44 *American Law Review*, 12-36 [↑](#footnote-ref-77)
78. M Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services* (New York: Russell Sage Foundation, 1980) [↑](#footnote-ref-78)
79. J Prottas, *People-Processing: The Street-Level Bureaucrat in Public Service Bureaucracies* (Lexington: Lexington Press, 1979) [↑](#footnote-ref-79)
80. S Maynard-Moody and M Musheno, *Cops, Teachers, Counselors: Stories from the Frontlines of Public Service* (Ann Arbor: University of Michigan Press, 2003) [↑](#footnote-ref-80)
81. See, e.g., S Maynard-Moody and S Portillo, ‘Street-Level Bureaucratic Theory’ in R Durant (ed) *The Oxford Handbook of American Bureaucracy* (New York: Oxford University Press, 2010) [↑](#footnote-ref-81)
82. For discussions of this work, see, e.g., S Halliday and C Scott, ‘Administrative Justice’ in Cane, P and Kritzer, H (eds.) *The Oxford Handbook of Empirical Legal Research* (Oxford: Oxford University Press, 2010); C Hunter, J Bretherton, S Halliday and S Johnsen, 'Legal Compliance in Street-Level Bureaucracy: A Study of UK Housing Officers' (2016) 38(1) *Law & Policy,* 81-95 [↑](#footnote-ref-82)
83. See, e.g., M Hertogh and S Halliday (eds) *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2004); [↑](#footnote-ref-83)
84. See, for example, K Hawkins (ed), *The Uses of Discretion* (Oxford: Oxford University Press, 1992) [↑](#footnote-ref-84)
85. E.g., S Halliday, *Judicial Review and Compliance with Administrative Law* (Oxford: Hart Publishing, 2004) [↑](#footnote-ref-85)
86. J Baldwin, N Wikely and R Young, *Judging Social Security: The Adjudication of Claims for Benefit in Britain* (Oxford: Oxford University Press, 1992) [↑](#footnote-ref-86)
87. C Jewell, *Agents of the Welfare State: How Caseworkers Respond to Need in the USA, Germany and Sweden*, (New York: Palgrave MacMillan, 2007) [↑](#footnote-ref-87)
88. R Sainsbury, ‘Administrative Justice: Discretion and Procedure in Social Security Decision-Making’ in K Hawkins (ed), *The Uses of Discretion* (Oxford: Oxford University Press, 1992) [↑](#footnote-ref-88)
89. See, e.g., C Jewell, *Agents of the Welfare State: How Caseworkers Respond to Need in the Unites States, Germany and Sweden*, (New York: Palgrave MacMillan, 2008) [↑](#footnote-ref-89)
90. S Maynard-Moody and M Musheno, *Cops, Teachers, Counselors: Stories from the Frontlines of Public Service* (Ann Arbor: University of Michigan Press, 2003) [↑](#footnote-ref-90)
91. K Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (Oxford: Oxford University Press, 2003) [↑](#footnote-ref-91)
92. See also D Cowan *Homelessness: The (In)appropriate Applicant* (Dartmouth: Ashgate, 1997); S Halliday, ‘Institutional Racism in Bureaucratic Decision-Making: A Case Study of Administration of Homelessness Law’ (2000) 27(3) *Journal of Law & Society*, pp. 449 - 71 [↑](#footnote-ref-92)
93. See, e.g., D. Cowan and S. Halliday, *The Appeal of Internal Review: The (Non-)Emergence of Disputes* (Oxford: Hart Publishing, 2003); E Brodkin and M Majmundar, ‘Administrative Exclusion: Organisations and the Hidden Costs of Welfare Claiming’ (2010) 20 *Journal of Public Administration Research and Theory*, 827-48; J Fossett and FJ Thompson, ‘Administrative Responsiveness to the Disadvantaged: The Case of Children’s Health Insurance’ (2016) 26 *Journal of Public Administration Research and Theory*, 369-92 [↑](#footnote-ref-93)
94. See, e.g., D Moynihan, P Herd and H, Harvey, ‘Administrative Burden: Learning, Psychological, and Compliance Costs in Citizen-State Interactions’ (2015) 25 *Journal of Public Administration Research and Theory*, 43-6 [↑](#footnote-ref-94)
95. Adler and Terum caution the reader that their sample size is small. Equally, their focus is on the development of policy rules and not on the reality and incidence of rule-application. Third, their time frame is short (2011-14). [↑](#footnote-ref-95)