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JOHN VEIT-WILSON'S PAPERS  
ON CONCEPTS, DEFINITIONS AND MEASURES OF POVERTY,  
ON INCOME ADEQUACY AND ON MINIMUM INCOME STANDARDS.**

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## **SOME SOCIAL POLICY IMPLICATIONS OF A RIGHT TO SOCIAL SECURITY**

### **Abstract.**

International jurists have declared as false the distinction between the civil and political rights, which are juridified and individually justiciable, and the social and economic rights which have been treated as merely declamatory and therefore not as justiciable. Among social rights are the asserted human rights to the broad meaning of social security as protection against the risks of income absence or loss by income replacement to conventional adequacy levels. The paper argues that to restrict the meanings of the term 'social security' to anything more limited than this is to distort the ordinary understanding of the word 'security' as implied by the social rights conferred by international agreements, which are themselves as valid in principle as civil and political rights. The implications include not only the need for governments to juridify the right both to adequate incomes in and out of work for all who need them, and to justiciable remedies for those who need them, but a change in the toleration by power holders of the social stratification of human rights embodied in the traditional distinction.

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### **Introduction.**

“‘Liberty’ is theory, laws are facts. Or at least, in theory they are facts. Liberty is an abstract concept: laws are intended to be enforced.” Christopher Hill (1996), *Liberty Against the Law*, Penguin, Harmondsworth, p 326.

“The States Parties to the present Covenant recognise the right of everyone to social security, including social insurance.” *The International Covenant on Economic, Social and Cultural Rights*, United Nations (1966, referred to as ICESCR), Article 9.

The right to social security is an abstraction, like liberty. The right is meaningful only if laws exist to enforce the offer and the claim. The laws which the historian Christopher Hill wrote about were enforced by seventeenth century power holders to threaten people's liberties. Similarly, the laws which establish the formal institutions of social security in modern industrial societies do not thereby ensure the freedom from need which social security implies. As Craig Scott and Patrick Macklem's

legal review of social rights concludes, “Many traditional civil liberties are illusory to those living in poverty”<sup>1</sup>, while Lucy Williams illustrates how rules delimiting the membership of social security schemes exclude equally needy workers who are then forced into poverty.<sup>2</sup> The right to social security which is asserted by many international and European charters is neither juridified in statute nor justiciable by those who would claim their ostensible rights, even though interpretations of the principles and guidelines suggest that the rights are indivisible and must be implemented. How can there be a right if there are no remedies, and what use are paper remedies if governments do not recognise, enforce or pay for the right or the remedy?

Civil and political rights have sometimes been called negative rights, in that the essence of the right is for a person not to be hampered in the exercise and enjoyment of central values in democratic societies; the government role here is to remove those barriers. By contrast, the social and political rights have been described as positive, in the sense that they point to what a person needs in order to experience and enjoy participation in society, and here the government must ensure the rights are accessible. Irrespective of abstract arguments about the philosophies of rights and the laws of social security, in reality millions of Europeans continue to endure financial insecurity and suffer damage to their lives through the consequential poverty and social exclusion. What are the implications of the idea of a right to social security for the social policies needed to address these problems?

A right to social security on paper is fatuous if it means no more than a procedural right. If it is to have substantive significance, the security it purports to offer must satisfy a person’s needs for social protection, which must cover poverty if it is to be more than a mere phrase. There are of course many understandings of the term, and some treat it narrowly as synonymous with contributory income maintenance schemes, distinguishing it from social assistance. But Sandra Liebenberg comments that although ICESCR article 9 does not define social security, “given the express inclusion of ‘social insurance’, it can be inferred that the provision refers to both contributory and non-contributory social security benefits”.<sup>3</sup> This wide interpretation is supported by the International Labour Office’s report on social security in 1984, which referred to it “failing to give the adequate security throughout life which its title seems to promise”, and failing “to solve the whole problem of poverty” which its proponents expected.<sup>4</sup> Indeed, the ILO sees the term as practically synonymous with social protection

Social security has wider aims than the prevention or relief of poverty.<sup>5</sup> .... The fundamental aim of social security is to give individuals and families the confidence that their level of living and quality of life will not, in so far as is possible, be greatly eroded by *any* social or economic eventuality.<sup>6</sup>

It is clear that the abstract concept of social security has long been publicly understood in this broad sense, and that is how it is used in this paper. What this means, and for what and for whom, must be considered first. The paper focuses on Europe, since the ideals of social protection are expressed there in and by the supranational institutions of the Union. It refers to some of the many international and European assertions about human rights to various aspects of welfare, together with comments on the prospects for implementing such rights. The international charters which assert rights are themselves problematic, since it is questionable how far some laws derived from them are designed for enforcement; they do not seem to be enforced in some countries where the absence of laws guaranteeing adequate minimum incomes would make them valuable to poor people. Current legal commentaries argue that they should be enforced like all other human rights, but the means of achieving this have not yet been explained.

If the rights are to have substance, then they must be juridified – that is, embodied in laws that can be enforced nationally. A right to social security must include purposive policies for the juridification of rights to welfare, the setting of agreed standards of what that welfare is to be, and the implementation of adequate incomes for all. Access to rights must also be made justiciable – subject

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<sup>1</sup> Scott and Macklem 1992 p 85.

<sup>2</sup> Williams 2005 p 93.

<sup>3</sup> Liebenberg 2002.

<sup>4</sup> ILO 1984 p 5.

<sup>5</sup> ILO 1984 p 19.

<sup>6</sup> ILO 1984 p 103; emphasis in original.

to test and remedy in the judicial system of courts and tribunals. A right to social security involves the establishment of legal institutions for the active and accessible justiciability of breaches of the juridified right to the agreed standards of welfare, together with an enforceable obligation on governments to mobilise the resources needed to cover the costs of ensuring the implementation of the rights. Identifying who should have power to influence those standards and the means of accessing them collectively and individually is also an implication of establishing real rights.

### **Social security for what and for whom?**

In a volume dedicated to celebrating Jef Van Langendonck's contribution to the study of social security, it is right to start with his comment on a central issue in income maintenance systems.

Any social benefit scheme – as indeed any insurance or assistance scheme, both public and private – needs an objective standard in order to distinguish the designated victims, who are entitled to benefits, from the other members of the target community, who are expected to pay contributions to support the scheme.<sup>7</sup>

As written, this implies that such schemes are akin to charitable handouts, in which 'payers' give benefits to 'victims'. In reality, of course, in all kinds of contributory and tax-financed social security schemes (including social assistance) the claimants, Van Langendonck's victims of the income-loss risk contingency occurring, are simultaneously also payers, both by their prior and subsequent contributions and by their continuing payment of direct and indirect taxes. It is imperative to realise that this concerns whole populations in dynamic conditions in which contributors and claimants cannot be distinguished except at a moment in time. The point remains the indispensability of a clear and agreed criterion of eligibility for benefit receipt. Whose right is it?

The rules of eligibility in all income maintenance schemes start from the occurrence of the defined risk of income loss, but insurance then tests scheme membership while assistance tests financial need. In social insurance the defined risk is of a temporary or permanent interruption of earnings, while in social assistance the risk is alternatively or additionally that income falls below a defined threshold. The issue of need for replacement income arises only when a person's residual non-earned resources are inadequate. This aspect needs emphasis in this connection. Most social security discussion revolves around a set of relationships between earnings and contributions, contributions related to funding and benefits, and benefits and earnings (the replacement ratio). None of this has anything to do with the issue, distinct in both concept and practice, of how much income a person needs to maintain a socially-recognised minimally acceptable level of living. In the sense in which the idea of 'need for resources for welfare' is generally used and applied to the majority of the population, it is literally true, even if provocative to say so, that rich people do not *need* income maintenance if they become unemployed. Indeed, it must be openly acknowledged that enough wealth to be able to choose a comfortable permanent unemployment is a highly valued social and economic status, and many retirement pension arrangements are based on precisely this understanding. Eligibility for and rights to social security benefits in terms of scheme membership by prior contributory and earnings history is thus of interest only to those whose focus is on legal and administrative design, system or national cash flows, capital fund investment, or similar issues concerned with the elegance or operation of formal administrative and financial systems. By contrast, eligibility for social assistance benefits raises entirely different value-laden questions of what kind of society do we want and for whom do we want it, and all the system questions of structure and finance follow from this prior concern.<sup>8</sup>

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<sup>7</sup> Van Langendonck 2001 p 194.

<sup>8</sup> The history of the development by governments of social security and assistance schemes in Europe has obscured this simple analytical distinction. Both were instituted to deal with the income maintenance problems of large working class populations, and both therefore assumed that the contingencies of unemployment, ill health or incapacity through old age were themselves *causes* of poverty. Policies for employment and to delay retirement are still promoted to combat poverty, but just as low paid work does not relieve it, so the growth of affluence and parallel systems of private income replacement shows that unemployment and old age are perfectly compatible with wealth, and this conclusion emphasises that poverty is *caused* literally and simply by lack of resources. Why some people lack adequate disposable resources is a separate question which demands attention in its own right, on the same footing as why both employers and governments fail to supply them or prevent the need for them arising.

By contrast to the right to benefit under social security as such, which is a matter of administrative law and legal contract and can be discussed in those terms, the crucial issue for human rights to social protection is the adequacy of the income benefits offered where a person's residual resources are inadequate. Adequacy is a concept which can be understood only in terms of purpose and perspective. Like similar concepts such as need and sufficiency, it cannot be understood in the abstract but only concretely in terms of what it is for and for how long, for whom it is adequate and who says that it is.<sup>9</sup> In this social policy discourse, the objective is generally taken to be human welfare in the broadest sense; that is, adequacy of benefits can be judged only in terms of sufficiency to meet recognised human needs for dignity, inclusion, participation and respect in the society and country in which the claimant lives.

For nearly a century European countries have been signatories to many international declarations of human rights, including social and welfare rights, affecting individuals as adults or as children. In recent years in the EU, official declarations have been made about everyone's right to the resources needed to combat social exclusion, for the experience of human dignity and for the promotion of social inclusion. These declarations of universal rights embody abstract moral values which cannot be dismissed as idealistic fantasies, such as the fundamental equal worth of all humans to be endowed with such rights. To concretise such abstractions would demand review of the social, political and administrative practice of social security in terms of those values. Such discussions rarely confront the deep-seated political resistance to implementing the rights which creates the problematic. Some lawyers have argued that the differential treatment of civil and social rights deliberately reflects the reluctance of power holders to extend positive rights which would cost money.<sup>10</sup> Not many people vote for higher taxes to enable the redistribution of resources from the better off which adequate incomes for all would demand. Perhaps these asserted social rights set out in international declarations are no more than rhetorical 'manifesto rights', as Feinberg puts it.<sup>11</sup> If there are to be *enforceable and justiciable* laws to oblige EU member states to ensure that the individuals and households in their countries always have, among their essential resources, incomes not below the level at which the ostensible EU goals of human dignity and full social participation and inclusion are demonstrably achieved, then a central question remains Van Langendonck's, what objective standard is to be used to distinguish adequate from inadequate incomes.

Failure to achieve the goal of adequate income is one among the many meanings of the word poverty, but whatever the variety of meanings, "poverty cannot be defined in any way one likes. Its technical definition in research should not stray too far from the everyday meaning of the word".<sup>12</sup> Everyday usages can be summarised by what I call the 'Lord, Lord' or '2R' perception that poverty consists of Lack Of Resources Deprivations and Lack Of Respect Deprivations, where the 2Rs are the lack of money Resources and social Respect to the levels demonstrably needed to achieve the minimum standards of human dignity and full social participation or inclusion, or the avoidance of exclusion. These ideas are, however, not commonly used in the social security literature, which prefers to measure the effectiveness of income transfers in terms of their consequences for the income distribution. But to call the income levels of those households at or below some arbitrary percentage of the median household income 'poverty' is misleading because these statistical measures have no basis in empirical evidence of the levels of income at which the rights to human dignity and social inclusion are achieved, whatever their other merits. At the other extreme, to describe as 'poverty' a wide variety of indicators of social exclusions in general, some of which may not be poverties as they are generally understood by European populations, is to obscure the social security aim of household resources needed for members to experience their rights to respect, human dignity and social inclusion. Van den Bosch summarised his empirical findings about a variety of kinds of poverty, measured in various ways, to emphasise that everyday meaning –

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<sup>9</sup> Dubnoff 1985 and see Veit-Wilson 1999a.

<sup>10</sup> See for example the discussion in Scott and Macklem 1992.

<sup>11</sup> Feinberg, cited by Campbell and then quoted by Hartley Dean 2002 p 11.

<sup>12</sup> Van den Bosch 2001 p 295.

In my view the defining characteristic of the poor is that they have a material standard of living that is socially regarded as unacceptable; they do not share any other characteristic or combination of characteristics that distinguishes them from the non-poor. The poor are not necessarily excluded in the sense of having low status or being restricted in their social contacts. They cannot be identified on the basis of behaviour, or any other observable characteristic only.<sup>13</sup>

This conclusion is also suggested by the many studies of the dynamics of poverty which found that over time many more people move into and out of poverty than are poor at one time.<sup>14</sup> Except in strongly stratified societies with little social mobility, the people who are poor at a point in time share many social characteristics with those who at that time are not. But they lack resources, and the cure for this kind of ordinary poverty is adequate resources. In marketised economies, which Europe indisputably is, adequate resources means chiefly sufficient money to buy a decent, dignified and acceptable level of living. The lack of respect for human dignity, as with many social exclusions, may be caused by other factors such as prejudices based on class, ethnicity, religion or gender which need other remedies, but where it is associated with the unacceptable lifestyle caused by lack of money as such, it is an aspect of poverty.

A right to social security must therefore mean a right to receive an income which is adequate for the purpose of living decently in society. It is social in the sense that the purpose is collectively recognised – the enjoyment of human dignity and participation in society – and the standard of adequacy therefore derives from society, even if the question of how to construct socially and politically credible measures of income adequacy in time and place is a separate and complex subject in its own right.<sup>15</sup> Similarly, it is social in the sense that the income source or guarantor is a nation's society through its democratic government. Income adequacy is implicit in the concept of social security, and while it is more often explicit in the idea of social assistance, most social assistance schemes do not pay empirically adequate benefits.<sup>16</sup> In the discourse of social security rights, Van Langendonck's objective measure cannot thus be only the administrative rules of contributions but whether the claimant has an adequate income. The victim of income inadequacy therefore has an asserted right to demonstrably adequate social security.

### ***The scope of declarations of rights to social security.***

International declarations on human social rights have a long history, but the history of their implementation is very patchy and incomplete. In her study of *Discovering Child Poverty*, Lucinda Platt refers to the League of Nations Declaration of Geneva which later became the UN *Convention on the Rights of the Child* (1989), and points out that this includes a specific requirement that children must be given the resources for their material and social development.<sup>17</sup> To give resources to children inevitably involves their carers' households, normally taken to be the family unit, so there is no need to make distinctions between children and adults in this context.<sup>18</sup> Ever since the United Nations *Universal Declaration on Human Rights* in 1948 there has been a string of declarations and reports which refer to the right to security and adequate levels of living. Some are referred to below, but the terminology most of them use is exemplified by the statement in the EC *Joint Report on Social Inclusion* of 2002 that governments should aim to guarantee (with emphases added) "an adequate income and resources to live in *human dignity*: the challenge is to ensure that all men, women and children have a *sufficient* income to lead life with *dignity* and to *participate in society as full members*".<sup>19</sup> The EU also requires Member States to ensure that everyone has access to 'a wage *sufficient* to enable them to have a *decent* standard of living'<sup>20</sup> and also to 'adequate social protection'<sup>21</sup>, and adequacy here means the level of income and not its source. Income adequacy is an

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<sup>13</sup> Van den Bosch 2001 p 412

<sup>14</sup> See for example Leisering and Leibfried 1999.

<sup>15</sup> See for instance Veit-Wilson 1998, 1999a.

<sup>16</sup> See for example Eardley 1996.

<sup>17</sup> Platt 2005 p 74.

<sup>18</sup> For a legal commentary on the international covenants on children's rights to social security showing the indivisibility of policy impacts, see Liebenberg 2002.

<sup>19</sup> EC 2002 p 27.

<sup>20</sup> EC 1989, para 5.

<sup>21</sup> EC 1989, para 10.

empirical question, and as long as demonstrable poverty persists and there is no empirical evidence of incomes adequate to overcome it we may assume that the problem of unfulfilled rights to social security continues.

It is not clear if this problem is fully understood at governmental levels; at any rate, the EU statements about future prospects are not encouraging. Both national and EU political commentators run two parallel arguments as if there were no connection between them. One is framed in economic discourse about the assumed demands and imperatives of economic globalisation which threaten the maintenance of the European Social Model. The other adopts a social integration discourse and concerns the meaning of social protection rights, whose rights they are and who is responsible for meeting them. The economic argument assumes the role of the state (at EU or national level) is to implement the rights by maintaining low pay and low taxes so that the exigencies of global trade can steadily make profits for shareholders, often rationalised by a trickle-down model of economic development benefiting all. In the integrationist discourse it is to maintain incomes in and out of work for all and protect the population from global trade exigencies. Yet they are deeply connected and demand, at the very least, to be demystified and debated openly. But the economic discourse is so deeply entrenched in the political thought of the EU's ruling elites of all political persuasions that it is doubtful if the debate can take place before there is greater clarity about EU goals and the priorities EU governments or people give to social or economic objectives. So while many EU governments assert that poverty can and will best be overcome in the waged labour market, it is salutary to find such an apparent exponent of the dominant economic approach as Didier Fouarge writing about the potential for *Minimum protection from an economic perspective* after having studied it very intensively,

Comparison of pre-and post-government poverty rates makes it clear that the market does a much poorer job than the welfare state in preventing poverty in the short, medium and long term. ... For all the countries – including the liberal Great Britain – it is not the market that prevents long-term poverty. It is through government intervention that poverty is successfully tackled.<sup>22</sup>

The implication for reliance on the labour market is that government must ensure that there is always a buoyant demand for labour of all kinds, irrespective of competitive skills, where the minimum wage rates must be not less than adequate, and that for those who cannot find work, or for whom employment cannot be created, the government's income maintenance system must also pay adequate benefits.<sup>23</sup> The same of course applies to those who are rightly outside the labour market temporarily or permanently.

The UN *Universal Declaration of Human Rights* (1948), article 22, is often quoted because of its reference to everyone's 'right to social security', but the substance is added by article 25's reference to "the right to a standard of living adequate for the health and wellbeing" of everyone. But "the Declaration contains neither enforceable rights for citizens nor binding obligations on Member States" as Gabriel Amitsis pointed out<sup>24</sup> in his search for justiciable remedies, suggesting instead the greater scope of the *International Covenant on Economic, Social and Cultural Rights* (1966). Article 9, shown in full in the epigraph to this paper, is an unequivocal declamatory statement of the right to social security, but it contains no explanation of the content of the concept, beyond the statement which shows its breadth. Article 11 states that the signatories "recognise the right of everyone to an adequate standard of living" and that the signatories "will take appropriate steps to ensure the realisation of this right". To lawyers, everything depends on the ambiguities of interpretation of whether the ICESCR creates "enforceable rights that individuals can invoke before national or international courts".<sup>25</sup>

There may, however, be other approaches to be considered by which the principles of the ICESCR could be embedded in national constitutional, legal and political structures and enforced in such ways as to make individual justiciability only the last resort. How this has been and might be

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<sup>22</sup> Fouarge 2004 p 156.

<sup>23</sup> For the implications for minimum income tiers and differentials, see Veit-Wilson 1998 pp 34-38.

<sup>24</sup> Amitsis 2006 p 215.

<sup>25</sup> Amitsis 2006 p 217.

done were the subjects of an Irish Human Rights Commission international conference in December 2005, examining the nature of the rights and the variety of means of their implementation.<sup>26</sup> What emerges from this work by lawyers and other experts is that many of the objections to treating social rights as full human rights can no longer be treated as serious objections in the international arena, following the explicit statements in the *Limburg Principles on the Implementation of the ICESCR* (1986) and the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1997) that –

4. It is now undisputed that all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity. Therefore, *states are as responsible for violations of economic, social and cultural rights as they are for violations of civil and political rights.*<sup>27</sup>

The international jurists who wrote the guidelines considered them to be a reflection of the state of international law at the time, designed to be used by all monitors and judges of violations of economic, social and cultural rights, at national, regional and international levels. There should therefore be no need to pursue this old argument any longer. However, as the Irish Human Rights Commission points out,

States are selective as to which rights they protect, and more particularly which rights they enforce through the creation of legal enforcement mechanisms. An expression of this ‘a-la-carte’ approach to economic, social and cultural rights can be found in the Revised European Social Charter, where States are allowed to select which treaty obligations they undertake to be bound by. This approach contrasts with the wide acceptance of the universality and inalienable nature of civil and political rights.<sup>28</sup>

The question remains, what is the scope for more direct testing of the contents of the right to an adequate income? Where governments, such as Germany and Sweden, have not only juridified the right in their social protection legislation but also set standards against which it can be tested (discussed below), remedies for the aggrieved are available in the appropriate administrative courts. Where governments such as that in South Africa or Israel have included the right in their constitutions but have not set minimum adequacy standards, the matter becomes one for legal argument in the constitutional and other courts – what do the constitutions mean in practice?<sup>29</sup> But for most countries the situation at present remains a matter of testing the applicability of the international covenants in the national courts.

In *A note of caution on using the UN Convention on the Rights of the Child*, Ian Hassall and Emma Davies point out that while the Convention is accepted as a point of reference in case law in New Zealand, where Hassall was the first Children’s Commissioner 1984-89, it may be more generally resisted than accepted as a potentially justiciable statement of rights, whether of children or their families. They suggest six reasons: two refer to negativity about the UN and about the lack of will of most governments to do more than pay lip-service to the Convention, and two refer to misunderstandings about what children’s rights mean in practice. However, the remaining two are relevant here. One suggests the conflict inherent in the Convention between the individualist and collectivist implications for states makes juridification a matter of political conflict; the other, “because it is invariably relevant”, deserves quotation –

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<sup>26</sup> See IHRC website. The IHRC Discussion Document (IHRC 2005) reviews the background issues at length.

<sup>27</sup> Maastricht Guidelines 1997, article 4; emphasis added.

<sup>28</sup> IHRC 2005 p 5.

<sup>29</sup> For examples of legal commentary on these issues in South Africa but drawing on material from other countries, see Liebenberg 2002 and Scott and Macklem 1992.

The Convention is a formulation of rights. It says how states should behave toward children to enable them to fulfil their destinies. It is not a model public policy for children. It does not say what structures and processes are to be put in place and what money is to be spent to the benefit of children or otherwise. The likely effectiveness of a children's policy and how it rates against competing policies are matters outside the frame of reference of the Convention.<sup>30</sup>

They did not see implementation as among the concerns of the Convention, and if its claims were to be made justiciable, then that was a matter for individual states to decide in the context of their political concerns. Unfortunately, the rights given are so vaguely expressed that this is unlikely.

Although the Committee on the ICESCR suggested reporting guidelines, these offer indicators that cannot function as income adequacy measures. But a start can be made with the advice offered by the Maastricht Guidelines on the implementation of the Limburg Principles. States must "take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights" (paragraph 6); the fact that it takes time to achieve full realisation of rights does not exempt states from doing so progressively (para 8) and budget problems cannot be used as an objection (para 10). Violations would include failing to provide 'an adequate replacement' for eliminated social security schemes (para 13) or the "reduction or diversion of specific public expenditure, when such reduction or diversion results in the non-enjoyment of such rights and is not accompanied by adequate measures to ensure minimum subsistence rights for everyone" (para 14.g). Remedies are also provided for by the ICESCR – "victims ... should have access to effective judicial or other appropriate remedies at both national and international levels" (para 22) and to restitution (para 23). In short, the ICESCR extends unambiguous rights to social security as generally understood. Beside the question of adequacy, what remains unclear is how to compel EU governments to observe the rights. Action is needed to test assertions such as Angelos Stergiou's –

More specifically, social rights constitute a defined state objective that compels the legislator to adopt all the more advanced (and appropriate) social measures that are in compliance with these rights. ... Legislators are not free to abrogate social rights to which they themselves have given specific substance. In this sense, the defensive aspect of social rights is legally enforceable.<sup>31</sup>

### **Justiciability.**

Who can sue governments for failing to introduce enabling legislation? Nigel Johnson, writing on the application of the UK's Human Rights Act 1998, comes to a gloomy conclusion: "The Convention rights that were incorporated into British law by the HRA are over 50 years old and were never designed to provide social and economic rights for the citizen".<sup>32</sup> In considering the detail of rights which would include an adequate income, Johnson writes that "While the UK has signed up to these human rights documents, so far the government has chosen only to incorporate into law the more limited civil and political rights and not to give parity of treatment to social, economic and cultural rights".<sup>33</sup> It could be argued that there is no principled difference between interpreting the meaning of the detailed contents of article II-91(2) of the EU *Charter of Fundamental Rights*<sup>34</sup> which states that "every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave", and interpreting article II-94(3) which states that –

In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices. (emphasis added)

Such interpretation would naturally have to take account of article II-61 which states *tout court* that "Human dignity is inviolable. It must be respected and protected". The only apparent difference

<sup>30</sup> Hassall and Davies 2003.

<sup>31</sup> Stergiou 2003 p 196.

<sup>32</sup> Johnson 2004 p 113.

<sup>33</sup> Johnson 2004 pp 115-116.

<sup>34</sup> As set out in the draft Constitution.

between the rights offered by these articles is that the citizen's right to decent employment conditions is held against the employer, under sanction by the government, but the right to decent minimum incomes respecting human dignity is held against the government, against whom there are no sanctions. Why these similar rights receive contradictory political treatment deserves investigation.

The question of whose rights they are was raised in the context of poverty relief in the UK in the nineteenth century. T H Marshall did not directly define rights in his seminal work "The Right to Welfare" (1965), tacitly treating them as the counterpart of duties and obligations which could be tested, legally or by approbation depending on whether they were statutory or social and moral. The issue was on whom the duty to meet the right fell.

Did the duty to care for the poor ... imply a right of the poor to be cared for? In England the answer was an equally unqualified 'No'. The pauper was a person deprived of rights, not invested with them. The duty to relieve him was admitted, but in source did not lie in any rights possessed by the person relieved. He was the *object* of the action taken, just as he had previously been the *object* of charity. ... The duty to relieve the poor, says Sir Ivor Jennings (writing about the Poor Law of 1930), was 'a duty owed to the public and not to the poor person himself'. Consequently no action could be brought by the poor person to whom relief was denied, and any negligence of an official in his treatment of the poor was an offence, not against the pauper, but against the public who employed him to look after paupers.<sup>35</sup>

If the persistence of poverty leads to consequences in the forms of social evils (social disorders, crime, education and health costs, loss of working power and so on) which cost the rest of society, it can be argued that citizens have a right to expect the government to abolish the poverty experienced by some which demonstrably gives rise to the social costs borne by all citizens (whether or not directly or equally). This could be justified either by a collectivist view of the role of the state, or by a broader interpretation of individual contractarian views than sometimes argued.

These quasi-philosophical arguments about whose rights and whose obligations remain topical in the political arena. In Europe the political rhetoric and economic discourse of global competitiveness implies, or is even used openly to suggest, that the holders of any rights against the state are the 'stakeholders', the employers and other entrepreneurs who try to retain their competitive business advantage in global markets by maintaining low wage poverty as a European labour market incentive. The fact that employees are stakeholders too is often suppressed in such rhetorical debates. This usage runs alongside the European Social Model's social integrationist discourse, where the holders of rights against the state are the general population wanting adequate protection against poverty risks, and adequate income maintenance (social security benefits) to prevent it if the risk contingencies arise. In these two simplified accounts, the role of the state (at EU or national level) in the first is to implement the rights by maintaining low pay and low taxes so that global trade can make profits for some, often rationalised by a trickle-down model of economic development benefiting all; in the second it is to maintain incomes in and out of work for all and protect the population from global trade exigencies. The parallel with Marshall's and Jennings's example is clear – the economic model is akin to the Poor Law, while the Social Model is the only one which endows *the population itself* with the right to social security.

The idea that the wronged party may not be the individual but some collectivity is also embodied in the provision for the Council of Europe's Committee of Social Rights to investigate complaints of breaches of the *European Social Charter* (1961, revised 1996). The Council of Europe's *European Convention on Human Rights and Fundamental Freedoms* (1950) is adjudicated through the Court of Human Rights. It does not contain welfare rights, which appear instead in the Charter. Under the heading of 'Legal and social protection', the ESC includes 'the right to be protected against poverty and social exclusion'. But while the human rights aspects are justiciable in Strasbourg, the welfare rights are not. (European Court Judge) Koen Lenaerts and Eddy de Smijter commented on the omission and justiciability gap in a paper on "A 'Bill of Rights' for the European Union".<sup>36</sup> The European Court of Human Rights has, following its normal practices, referred to other

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<sup>35</sup> Marshall 1965 pp 262-263; original emphasis.

<sup>36</sup> Lenaerts and de Smijter 2001.

international conventions on human rights, such as the Social Charter, to determine the precise scope of fundamental rights, but these potential rights were not articulated in a comprehensive catalogue in spite of the EU states signing various charters. They continue: "there was no sign of any willingness to go beyond that and adopt a legally binding catalogue. Even at present, the political will still appears to be lacking to amend the EC Treaty along the lines indicated by the Court of Justice in order to allow the European Community to adhere to the European Court of Human Rights". So even if the Charter had referred to any welfare rights drawn from other conventions, individual justiciability was unachievable at present; complaints of breaches of Charter rights can be lodged only by organisations recognised by the Council of Europe. Amitsis reported an investigation into a complaint that Greece had acknowledged the Charter's right to social and medical assistance for those in need but had failed to implement it by establishing a social assistance scheme; the Committee recommended that "a state is obliged to ensure that persons in need are granted *adequate* assistance, which must be granted as of right, which can be invoked before an independent body of appeal, such as a court".<sup>37</sup> It criticised Greece because, as Amitsis put it,

... interested persons cannot invoke international provisions before any domestic court in order to claim specific social welfare benefits, due to the lack of direct applicability; (and) violation of this right does not produce legal effects, due to the absence of international legally binding sanctions ...<sup>38</sup>

In short and referencing previous scholars, he continued, "The formal, rights-oriented approach to citizenship is violated by the lack of mechanisms to enforce the right to a social safety-net", and this discrepancy discourages the agency of people suffering wrongs and calls democratic legitimacy into question.<sup>39</sup> A prerequisite for action is, then, to establish who is the holder of the rights and on whom the duty falls of meeting them. If the population in general has a right to expect that government will protect it from the risks of modern life – social protection is a central demand of European politics and often treated as synonymous with social security – then government should protect against the social risks which persistent widespread poverty creates as externalities for the non-poor just as much as directly for the poor.

These Council of Europe declarations are the foundations of the EU's *Charter of Fundamental Rights*, embodied in the draft Constitution. Whatever the eventual fate of the EU constitution, the Charter's statements of values and principles to which it refers and which it attempted to incorporate will remain. Its Preamble asserts that "it is necessary to strengthen the protection of fundamental rights ... by making those rights more visible in a Charter", and " ... reaffirms ... the rights as they result ... from the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case law of the Court of Justice of the European Union and the European Court of Human Rights. In this context the Charter will be interpreted by the courts of the Union and the Member States ..." Further, "enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations". But there is no sign that justiciable rights are conferred. Courts might reject adjudicating the household income levels at which dignity is respected (article II-61, cited above), but should be challenged to uphold the rights conferred by article II-94 on 'Social security and social assistance' which refers in clauses (1) and (2) to the right of entitlement to benefits as legislated and throughout the EU, and in clause (3, cited above) recognises "the right to social ... assistance so as to ensure a decent existence for all those who lack sufficient resources". The fact that the 'national laws and practices' do not ensure decency or adequacy should not override the right.

Some of the EU states which used governmental minimum income standards have also legislated for the right to *adequate* social assistance benefits and made this right to adequacy justiciable.<sup>40</sup> This is not the same thing as the juridified right to social assistance as such, whose

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<sup>37</sup> Council of Europe – Social Charter Recommendation R ChS (93)1, adopted by the Committee of Ministers 7.9.93, quoted by Amitsis 2003 p 190. NB: emphasis added.

<sup>38</sup> Amitsis 2003 p 190.

<sup>39</sup> Amitsis 2003 p 193.

<sup>40</sup> Veit-Wilson 1998.

benefits may or may not be adequate and generally are not.<sup>41</sup> Eligibility to receive social assistance benefits as such is generally juridified and justiciable; were it not so, they would be no better than state charity at the discretion of officials. But in Germany, the 1961 Federal Social Assistance Act additionally required benefits to be set at levels which conform to the requirements of human dignity (*Menschenwürde*), and what that means could be and was tested in the administrative courts. One has to note that the German idea of human dignity is not egalitarian, but it needs more than minimum subsistence. The right was tempered by what was in effect a less-eligibility provision, and it is unclear if negotiated wage rates in Germany threatened this right. Similarly in Sweden, the 1981 Social Services Act required the social assistance system to 'assure the individual of a reasonable (*skälig*) level of living', and what the meaning of reasonableness is has often been tested in the courts, which usually referred to the National Consumer Board's current budget studies based on conventional Swedish levels of living. It is also relevant to note that the Swedish Taxation Board used these budgets as the basis of guidelines to the minimum income below which no deductions could be made by the courts because they would damage a person's welfare. Similar provisions applied in Germany and Norway.

Adjudication here is thus not just the legal entitlement to benefit as such but the practical meanings of these descriptions to be embodied in the benefit. Adequacy is juridified in the national social assistance statutes and is justiciable in the administrative courts, where the questions of the meanings of the terms in current and changing practice, and whether the minimum social assistance benefits met these forms of verbal criteria of adequacy, could be tested by argument with adduced evidence. But in the UK, according to the authorities over many years, 'a decent existence' is usually taken to be, by circular definition, what national laws and practices relating to the social assistance benefits offer. The expression is not normally treated as requiring an *independent* criterion of adequacy subject to argument, evidence and adjudication. But this circularity may not make governments immune to contest.

The EU *Charter of Fundamental Rights* Title VI 'Justice', article II-107 'Right to an effective remedy and to a fair trial' lays down that "everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy ...". The article II-112 'Scope and interpretation of rights and principles' article (1) does state that "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms", and article (3) makes it clear that the meaning and scope of the *Convention for the Protection of Human Rights and Fundamental Freedoms* must be incorporated and can be extended but not restricted. However, this would seem to be futile in the absence of a right to welfare; indeed, the section on 'Social Policy', article III-209 makes it clear that references to fundamental social rights in the *European Social Charter* of 1961 and in the *Community Charter of the Fundamental Social Rights of Workers* of 1989 mean the promotion of economic aims and inclusion in labour market terms. Whether or not this would allow adjudication of the adequacy of minimum wage rates and 'proper social protection' (in article III-210 on achieving these objectives) in the field of '(j) the combating of social exclusion' remains arguable.

The *OMC (Open Method of Coordination)* is often presented as if it were 'soft law': the use of EU instruments to offer guidance and examples, recognising the importance of subsidiarity in implementation. In a densely argued paper with numerous citations about the OMC and fundamental social rights, Stijn Smismans addresses the justiciability issue directly –

In particular, fundamental social rights – together with economic and cultural rights – are often said to be 'soft' in that they are not readily justiciable and may even be merely manifestations of a political or social programme, in contrast to civil and political rights which can be invoked in court against State action which fails to respect them.<sup>42</sup>

Smismans argues that the negative/positive law dichotomy is exaggerated since either may require the State to use powers to intervene or not. He does not refer to the Limburg and Maastricht statements on the ICESCR, but they may be implied in his comment that "Yet, while arguments to place social

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<sup>41</sup> Eardley et al 1996.

<sup>42</sup> Smismans 2005 p 6.

rights on the same ground as other fundamental rights are increasingly to be found, international documents most often still deal with them separately and provide for different enforcement mechanisms".<sup>43</sup> But there is no means of enforcing OMC guidance, perhaps because social rights were conceptualised in the EU as essentially subservient to economic considerations; indeed, he quotes Miguel Poiaras Maduro's acerbic and salutary comment that –

EU social rights are not conceived as rights corresponding to social entitlements that EU citizens can claim with regard to the European polity. They are conceived, instead, either as an instrument of undistorted competition or as a guarantee that such competition will not affect the level of social protection afforded by the Member States.<sup>44</sup>

If these views are correct, it is naïve to expect the EU's grandiose declarations about human dignity and incomes adequate for inclusion to be intended for serious implementation, and consequently there is no point in looking for enforceable remedies. If there were any intention of implementing the recommendation of the *Joint Inclusion Report* of 2002 on this topic, guidance could have been given on the German and Swedish models for consideration as suitable for OMC. However, it seems that the OMC is limited to the social agendas on social inclusion omitting income adequacy, pension coverage but not adequacy, health and long-term care, and 'making work pay'.<sup>45</sup> Smismans confirms that social rights (defined more broadly than welfare rights focused on adequate income) "have rarely found their way into case law" and "there is no case in which the Court (of Human Rights) has required the Member States or the EU to take 'positive action' in order to respect an (unwritten) fundamental social right".<sup>46</sup> The question remains why income adequacy is not perceived and treated as being as central to the EU *Social Agenda* for citizens' protection and inclusion<sup>47</sup> as are the juridified and justiciable rules on protecting employees' health and safety.

At both the international and European level, opinion suggests that there is little scope for making rights justiciable. Istvan Kantsin emphasises there is no international court of last instance for adjudicating welfare rights, in *No Rights without Remedy: in search of an ICHR*.<sup>48</sup> Reviewing the development of human rights declarations, he answers his question why states agreed to them by stating that "in an important sense they did not", since there is no effective enforcement mechanism. "The political negotiations that led to this state of affairs are well documented: even the monitoring mechanisms were constructed in an emasculated form. Given that state interests cannot be relied upon to ensure enforcement, this issue is more acute in human rights than elsewhere in international law." In other words, where juridification is unlikely, the struggles for some form of justiciability become more important. However, Lucy Williams comments, such views reflect an idea of society as a static given, in which the distribution of resources and opportunities – and poverties – are pre-legal, where the legal entrenchment of existing property rights outweighs human efforts to mobilise resources to relieve suffering.<sup>49</sup> Further, Scott and Macklem point to the near-absolute nature of the obligations which states party to the ICESCR have subscribed to: "Courts are capable of determining the adequacy of fulfilment ... with the aid of evidence and the testimony of experts".<sup>50</sup> They quote a case in Canada in 1989 where a Federal court forbade overpayments by administrative error to be deducted from benefits which were only minimally adequate. More recently, the Israeli High Court adjudicated an appeal against welfare cuts which claimed they were inconsistent with Israel's Basic Law on Human Dignity and Freedom. While the Court rejected the appeal, the Chief Justice stated that "our ruling does not bring to an end appeals on citizen's rights to a dignified existence" and recognised "the constitutional right to live in dignity".<sup>51</sup> Interestingly, Polly Vizard points out that in South Africa

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<sup>43</sup> Smismans 2005 p 6.

<sup>44</sup> Poiaras Maduro 2003 p 285.

<sup>45</sup> Atkinson et al 2005 pp 31-34.

<sup>46</sup> Smismans 2005 p 7.

<sup>47</sup> EC 2005.

<sup>48</sup> Kantsin 2002.

<sup>49</sup> Williams 2005 p 91.

<sup>50</sup> Scott and Macklem 1992 p 77.

<sup>51</sup> Report in Haaretz.com, 12 December 2005.

Articles 26-29 of the Bill of Rights attached to the South African Constitution (1996) entrenches a cluster of socio-economic rights essential for an adequate standard of living – including the human rights to housing, access to health care, sufficient food and water, social security and education. The justiciability and legally enforceability of these human rights has been put beyond question by jurisprudence of the South African Constitutional Court, which has upheld claims for the violation of socio-economic rights in a series of landmark judgements.<sup>52</sup>

Nevertheless, the judgements made it clear that implementation could take place through the adoption of policies to achieve the human rights and rather than through immediate fulfilment, but this did not relieve the government of the obligation to take positive steps to fulfil the rights in question.

As matters stand in Europe, Smismans considers the only hope for the justiciability of broad social rights lies in finding openings in the European Employment Strategy which support its economic policy objectives. He sees potential in social rights being realised over time as relevant national social policies are fed into the EU's cognitive framework.<sup>53</sup> This shifts the debate onto a long-term basis, where the scope for gradual entry of ideas of enforceable welfare rights can be considered by one means or another.

### **Implications for action – but by whom?**

International and European conventions on social rights are rather like inter-war disarmament conferences: frequent, earnest and well-meaning, but ultimately lacking enthusiasm or sanctions for enforcement. Hartley Dean reminds us that "To be of value rights must be enforceable. Within liberal democracies, this means they must be legally enforceable".<sup>54</sup> This requires an ideological receptiveness to the principle that there should be no stratification of rights to welfare.<sup>55</sup> In Norway, Sweden and Germany, governments accept that the state has a responsibility to ensure that everyone's income is minimally adequate for some accepted idea of a decent level of living (as reflected in a governmental minimum income standard), and consequently the application of the principle is justiciable. By contrast, no UK government of any party has ever accepted the principle, not at any rate to the extent of being able to specify what minimal level of living the social assistance system was supposed to support.<sup>56</sup> As in Europe, the UK debate is exemplified by the narrow legal perspective of the Rowntree report on *Human rights obligations and policy supporting children and families*, where the authors acknowledge that more needs to be done, such as "... the establishment of a minimum income standard and clearly enunciated service entitlements. These have not been established".<sup>57</sup>

The remedy for unmet rights, some argue, is the political ballot box and not the courts. Ruth Lister reviewed the large literature on the connections between poverty and human rights.<sup>58</sup> She concludes that whatever the arguable symbolic and mobilising functions of the discourse of human rights, "... the ultimate test of its effectiveness as a *political* tool will be the closing of that gap between promise and reality"<sup>59</sup>, where reality means political implementation of demands for the ostensible rights. But the call for political action may not achieve the desired results, since in democracies with stratified poverty, the majority vote might not offer rights to the minority – the persistence of ethnic poverty in many countries is an example. This is a particular problem where the rights in question are not universal. As Tony Lynes put it in explaining welfare rights when they first became an issue in the UK, there is a distinction between "rights that people have *although* they are poor – rights to equal treatment with the better-off members of the community – and rights which

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<sup>52</sup> Vizard 2005 p 24.

<sup>53</sup> Smismans 2005 p 19.

<sup>54</sup> Dean 2002 p 186.

<sup>55</sup> Reflected in Sargent Shriver's reference to "We the people and They the poor".

<sup>56</sup> See the research reported in Veit-Wilson 1999b. In the UK, according to the authorities over many years, 'a decent existence' is usually taken to be, by circular definition, what national laws and practices relating to the social assistance benefits offer. UK governments do not treat the expression as requiring an *independent* criterion of adequacy subject to argument, evidence and adjudication.

<sup>57</sup> Henricson and Bainham 2005 p 105.

<sup>58</sup> Lister 2004 chapter 7.

<sup>59</sup> Lister 2004 p 163; original emphasis.

people have *because* they are poor".<sup>60</sup> It is the latter rights which in practice appear to be those which never become juridified or justiciable; they remain declamatory, perhaps because the governments' underlying aims are to maintain the status quo of property rights and other electoral interests, not to abolish poverty. As Scott and Macklem put it, "A failure to entrench social rights is an act of institutional normatization (sic) that amounts to a powerful viewing of society by society itself".<sup>61</sup>

Should change follow long-term top-down activity to change the cognitive frameworks and discourses according to which the potential for implementing rights is blocked or becomes feasible? Some argue instead for bottom-up campaigning activity to press for enforceable rights, perhaps by shaming the establishments (moral pressures), by political pressures where the campaigning groups have any leverage, or by legal action where there is any scope for it. Top-down approaches from the perspective of the power-holding elites usually assume the acceptability of the institutional frameworks they have themselves established or maintained; bottom-up approaches from the perspectives of those experiencing poverty are more likely to be radical in questioning those institutional arrangements, at any rate if those affected have not been incorporated and domesticated into accepting the dominant maldistribution of power and resources. Writing about exclusion and rights, Paul Spicker refers to Drèze and Sen (1989) who –

see the principal form of redress for people without rights as lying, not in economic processes, but in political ones. The effect of giving people political rights is also to give them the ability to address their problems; and they argue, strikingly, that there has never been a famine in a democracy.<sup>62</sup>

Nevertheless, striking degrees of deprivation and poverty, of social exclusion and the denial of human dignity, remain in many modern industrialised societies described as mature democracies, and Sen has acknowledged the role of effective personal purchasing power in combating deprivations of food and other needs and capabilities.<sup>63</sup> Political rights are not enough; Antonella Mameli quotes a US Supreme Court judgement –

Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. ... And under the conditions of modern government, litigation may be the sole practicable avenue open to a minority to petition for redress of grievances.<sup>64</sup>

But as Tony Lynes pointed out at the time, this may work only if the rights are already acknowledged and enforceable by some, but not if they are merely declamatory –

The American civil rights movement ... sought the full implementation of rights which already existed, which most white Americans already enjoyed, and which were enshrined in the American constitution. ... The fact that the reforms have turned out to be neither radical enough nor rapid enough does not detract from their importance as an example of what can be done by insisting on rights being made real. "Give us what you admit we are entitled to" is a demand that is not easily resisted.<sup>65</sup>

To be consulted, to be listened to, even to make demands is not enough; they must be backed by power to enforce them. Lister refers to "the ultimate disrespect is seen as 'being involved in phoney participation, by people who don't listen, when things don't change'".<sup>66</sup> But when the ostensible rights are only for the disrespected, not for the mass of the non-poor population, then where can the political power be found to oblige the government to juridify them? As Lynes pointed out, what the US welfare rights movement "could not do was to mobilise a current of public opinion ... because the rights on which the movement was based were not generally recognised as such ...".<sup>67</sup>

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<sup>60</sup> Lynes 1969 p 3; emphasis in original.

<sup>61</sup> Scott and Macklem 1992 p 35.

<sup>62</sup> Spicker 2003 p 131.

<sup>63</sup> e.g. Sen 1999 p 87 quoted by Lister 2004 p 18.

<sup>64</sup> NAACP v Button 1963, quoted by Mameli 2003 p 155.

<sup>65</sup> Lynes 1969 p 3.

<sup>66</sup> Lister 2005 p 7.

<sup>67</sup> Lynes 1969 p 4.

### Conclusion.

The international jurists responsible for monitoring the implementation of the ICESCR insist that all human rights, including social rights, are indivisible and states have as much responsibility to implement the covenanted rights to social security as they do for civil and political rights.<sup>68</sup> Ireland has been monitored by this Committee on Economic, Social and Cultural Rights and was criticised for not adopting "a human rights approach to tackling the issues related to poverty" in its National Anti-Poverty Strategy.<sup>69</sup> In view of this, it is therefore puzzling that European states continue to treat the implementation of social rights as discretionary. There is something badly wrong here, and it behoves everyone concerned with the question of the human suffering caused by inadequate incomes in the EU to take appropriate action to call both the EC and governments to account for this failure to ensure the implementation of the human right to adequate social security for all the populations for whom they are responsible.

Before making rights justiciable comes their juridification, but before either of them comes prevention of the need to invoke the law. If governments were to act in the interests of their whole populations to prevent both poverty and the externalities and oncosts it causes everyone, by ensuring that whether people were in or out of work they had adequate incomes, then this human right might be implemented without, as at present, implicitly or explicitly 'blaming' those whom Van Langendonck called the victims. That demands a reassessment of political ideology and practice which has yet to take place throughout Europe, except perhaps in the Nordic countries. It would require the broadest interpretation of social security, so that the contingency secured against was the fact of inadequate income and not the risks of income loss, and eligibility was based solely on need for income and not on contributions or behaviour. The parallels with civil and political rights need constant re-emphasis.

In the absence of political will and power, neither the EC nor governments are likely to do anything of substance until forced, either by political pressure or by a long campaign through the international and national courts, if courts can be found to take such cases. But politicians want to maintain the high profile appearance of purposive activity, and this continues in the massive EU investment in reporting on and monitoring social exclusions. Amitsis sees this as futile if nothing comes of it in terms of enforceable welfare rights –

The neglected use of legal instruments to impose obligations on states for the development of welfare rights policies has negative consequences for needy persons and intermediaries who are interested in applying international social rights instruments in the struggle against poverty and social exclusion. Likewise, the lack of any judicial control over respect for international obligations concerning welfare rights is a vital shortcoming of the monitoring system adopted by international organisations. This shortcoming cannot be adequately addressed through internal monitoring mechanisms (like the periodic evaluation of national reports or the submission of individual recommendations to member states that do not fulfil their obligations).<sup>70</sup>

The EU can hardly intend that the contradictions inherent in unenforceable rights should expose the hollowness of the continuous rhetoric. Is it misguided to rely on international declarations of rights, EU reports on social inclusion and coordinating programmes? Perhaps, as Herbert Gans noted, power holders find poverty has 'positive functions' for them and do not intend to abolish it.<sup>71</sup> The constant repetition of rights to welfare seems an almost deliberate rhetorical distraction from the refusal to enforce their implementation, a refusal symbolised by the contrast with the enforcement of detailed employment regulations throughout the EU, and it is insulting to people whose human dignity is damaged by disrespect and poverty. The declamations about social rights seem to be what Murray Edelman identified in the title of his book *Political language: words that succeed and policies that fail*.<sup>72</sup>

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<sup>68</sup> See note 28 above.

<sup>69</sup> IHRC 2005 p 41.

<sup>70</sup> Amitsis 2003 p 189.

<sup>71</sup> Gans 1972.

<sup>72</sup> Edelman 1977.

The social scientific community which understands the epistemological and methodological complexities of the issues surrounding the establishment of robust measures of household income adequacy for participation could – if it cares enough about the suffering poverty causes people in Europe – press for every government to act on the EC’s ‘Minimum Income Recommendation’ of 1992 which recommends EU states to implement the right to an adequate income by setting and maintaining governmental minimum income standards (MIS), though the EC did not use that phrase as it had not then been coined.<sup>73</sup> Some countries already have such MIS.<sup>74</sup> In the UK the House of Commons Social Security Committee held hearings in 2000-2001 on proposed legislation for integrated child credit and, following evidence given by social scientists<sup>75</sup>, recommended government sponsorship of research as a basis for a MIS for the UK.<sup>76</sup> Although the UK government continues to derogate from some of its social obligations, this parliamentary approach might be effective in countries which recognise social rights but as yet have no criterion of income adequacy.

In the mean time, the poor victims of this condescension by the comfortable part of the population must take what action they can, through the legal and political systems available to them. On the quasi-legal side, a so-far unexplored possibility is the use of the Council of Europe’s complaints machinery. EAPN, the European Anti-Poverty Network, is recognised by the Council as the representative body of the national NGOs representing people in poverty, and it can lodge complaints that the signatory governments of the Social Charter have failed to ensure that their populations enjoy “the right to be protected against poverty and social exclusion”. Similarly, the recognised trades unions’ organisation, ETUC, could lodge complaints about countries where the minimum wage rates fail to meet the ‘68% rule’<sup>77</sup> which was used by the Committee of Independent Experts on the European Social Charter as the criterion of the adequacy of the human right to pay sufficient for a decent standard of living (68% may not be what empirical studies would find to be adequacy, but that is a separate issue). Scott and Macklem reported that the Committee found that the UK was in violation of this rule<sup>78</sup> and it “has called upon governments to account for the inadequacy of the level of benefits provided on a number of occasions”<sup>79</sup>, though it could only issue non-binding recommendations. Since 1998, collective complaints are investigated by the European Committee of Social Rights, and while the outcomes cannot be predicted, the action would help to expose and demystify the rhetoric.

Politically, the issue is, as the jurists Scott and Macklem summarise it,

“Social rights are not meant simply to entrench bureaucratic structures of the modern welfare state so that beneficiaries continue to be treated as passive recipients of state largesse. Instead, social rights ought to include rights to participate in the design, implementation, critique, and revision of measures that seek to improve material and social circumstances. As such, social rights are aimed at the material and political empowerment of the worst off in society.”<sup>80</sup>

This is consistent with the calls of the foremost thinkers in poverty policy for recognising the importance of the agency of those affected.<sup>81</sup> One administrative form this takes in the EU is the EC requirement that people experiencing poverty and exclusion be involved in the ‘mobilisation of all actors’, such as in the process of forming the National Action Plans for Social Inclusion. If then the manifesto right to social security is to be given substance, it is not only the administrators of social policy who have to act now – it is those who have or can gain power to change it for the future.

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<sup>73</sup> EC 1992 para 1.C.

<sup>74</sup> See Veit-Wilson 1998.

<sup>75</sup> For instance Veit-Wilson 2001.

<sup>76</sup> HCSSC 2001 paras 24-25; see also Veit-Wilson 1994.

<sup>77</sup> Or whatever percentage is currently in use.

<sup>78</sup> Scott and Macklem 1992 p 104.

<sup>79</sup> Scott and Macklem 1992 p 34.

<sup>80</sup> Scott and Macklem 1992 pp 85-86.

<sup>81</sup> For example, Lister 2004.

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