

Democracy and the Right to Income¹

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Abstract: Two widely endorsed moral principles – sufficiency and reciprocity – lie at the core of existing systems of social protection. The tension between these two principles accounts for most political conflicts around the appropriate form of social protection and for the contemporary normative crisis of the welfare state. International human rights law is also ambiguous on this issue. As a result, the human right to a decent standard of living – maybe the most fundamental of all rights – is widely abused. This paper considers several ways of improving social protection in order to protect this fundamental right. It argues for the recognition of a right to a subsistence income, its unconditionality, its constitutionalization, and reviews several objections from a variety of perspectives.

Keywords: Social protection – sufficiency – reciprocity – income security – constitutionalization

Most people accept the idea that everyone should have enough resources to live a decent life. This is the principle of *sufficiency*. Yet most people also endorse the view that we should all contribute to social efforts and that no one should receive benefits without reciprocating. This is the principle of *reciprocity*³. These two moral principles lie at the core of all existing systems of social protection, and the tension between them accounts for most political conflicts about the appropriate form of social protection as well as the contemporary normative crisis of the welfare state.

After a brief analysis of the tension between these two principles and its reflection in some ambiguities of international law, this paper will suggest three separate ways in which social protection could be enhanced, with the aim to ban poverty and a specific kind of exploitation⁴. The first is the recognition of a right to a subsistence income, at least for those who do not earn enough through their jobs (section 2). The second is the affirmation of this right's unconditionality with regard to willingness to work (section 3). The third is its constitutionalization in international law (section 4). If those three moves were combined, this paper argues, democracy's capacity to generate social justice would be greatly enhanced and peo-

¹ This paper has been presented to audiences at the University of Barcelona and at the Hoover Chair of Economic and Social Ethics (University of Louvain). For useful comments and remarks, I would like to thank Jean-Michel Chaumont, Anne-France Colla, Charles Delmotte, Jurgen De Wispelaere, Filip Dorssemont, Daniel Dumont, Iñigo Gonzáles Ricoy, Maxime Lambrecht, Louis Larue, Andrew Lister, Olivier Malay, Miriam Ronzoni, François Vandamme, Yannick Vanderborght and Philippe Van Parijs.

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³ For empirical evidence of the wide acceptance of these two principles, see Forsé & Parodi, 2004.

⁴ I will use the term exploitation in its popular understanding as characterized by an insufficient wage for the task performed rather than a matter of surplus value extraction or ownership of the means of production. On this popular account of exploitation, it is the vulnerability entailed by the necessity to satisfy one's basic needs that forces people to accept exploitative wages. See Vandamme, 2014.

ple subjected to economic vulnerability would be made much better-off. The conclusion considers second best issues, i.e. situations where only one or two of the recommendations can be satisfied.

SUFFICIENCY AND RECIPROCITY IN SOCIAL PROTECTION

The principles of sufficiency and reciprocity clash whenever one begins wondering whether a person is responsible for her poverty. If that person is refusing to take available jobs and prefers living off welfare benefits, it seems that reciprocity is violated and that the sufficiency claim loses strength. Yet people disagree importantly about the appropriate balance between the two conflicting goals of fighting poverty and exploitation, on the one hand, and fostering reciprocity on the other hand. Historically, capitalist societies have thus always adopted an ambiguous attitude towards unemployment: a strange mix of pity and blame. In order to get rid of their pity without harming reciprocity, the rich once imagined giving work vouchers to the begging poor: a right to work for a (minimal) remuneration instead of traditional alms (Loriaux, 2015: 60). The activation of the unemployed in advanced welfare state is somehow reminiscent of this ancient practice: no charity without reciprocity.

The Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the European Social Charter (ESC) are also ambiguous regarding the articulation of these two principles. Although they recognize a right to an adequate standard of living (Article 25 of the UDHR and 11 of the ICESCR) and a right to social security for the workers (Article 22 of the UDHR and 9 of the ICESCR), they remain relatively silent about the rights enjoyed by the unemployed. Whereas social insurance is mandatory, social assistance does not seem so. What is more, nothing seems to preclude the suspension of rights for those who do not abide to the conditions always attached to welfare benefits, which go from the obligation to work (*workfare*) to the obligation to actively look for work (*punitive activation*⁵). The revised ESC is a clear example. Although Principle 13 recognizes a right to social (and medical) assistance to “anyone without adequate resources”, the Charter further specifies that states should provide assistance only to “any person who is without adequate resources *and who is unable to secure such resources either by his own efforts or from other sources*” (Article 13 (1), my emphasis), which clearly opens the door to “responsibilist” exclusions from welfare benefits and manifests a suspicious attitude toward the claimants. As a result, the principle of sufficiency can be violated without any evident violation of human rights⁶. Although states are required to take appropriate

⁵ Activation policies exist in many forms. Most of them use economic sanctions, yet some only aim at helping the unemployed find their way back to employment without the threat of sanctions. See Dumont, 2011. Thus, I will use the term “punitive activation” to target more accurately the kind of activation policies that I find morally objectionable.

⁶ One could judge that the right to an adequate standard of living is violated, but this is certainly not the mainstream interpretation, as international human rights law is ambiguous about this right’s (un)conditionality.

steps in order to achieve full employment (Article 6 (2) of the ICESCR; Article 1(1) of the ESC), they are not prevented from cutting some people off welfare benefits if some obligations (of reciprocity) are not respected by the claimants.

Now, what is the value of civil, political, economic and cultural rights for individuals whose basic needs are not met? How can human dignity be preserved when some people start their day wondering how they will have access to food or where they are going to sleep the following night? It seems that the satisfaction of basic needs should have priority over all other rights. This is what John Rawls was referring to when talking about the “equal value” of rights and the priority of a social minimum over the principle of equal liberties and his other distributive principles of justice (Rawls, 1993: 7).

The fundamental thesis of this paper is that sufficiency should also have priority over the principle of reciprocity (which does not amount to rejecting the very idea of reciprocity). Are you in a position to reciprocate when you are striving to survive? Certainly not the way people who have access to well-paid and rewarding jobs are. Depending on our skills and background, we are very unequal before a principle requiring contributing to social efforts *through work*. From this point of view, prioritizing the principle of sufficiency could be a way of empowering every citizen *for reciprocity*. Once you have enough, others can expect you to do something for the community. Yet the appropriate sanction if you do not is certainly not to deprive you from the very resources necessary for reciprocating. Social blame appears much less counterproductive.

Besides, the interpretation of the principle of reciprocity that makes it mandatory to contribute through *work* does not resist critical scrutiny. Opinion surveys in the US revealed that most people receiving welfare benefits were moved by a work ethic and recognized the principle of reciprocity. They simply did not want to accept *any* working conditions (Anderson, 2004, p. 249). Hence, if people sometimes refuse to work, it has much more to do with the job offer than with a failure of reciprocity⁷. And their right to refuse unsuitable work is undeniable: one cannot have a moral obligation to be exploited. Now, although international human rights law more or less protects this right to refuse unsuitable employment (Dermine, 2014), there is bound to be important disagreements about what are and are not suitable working conditions. Workers themselves are probably better placed than lawyers or civil servants to appreciate the subjective cost of work. And in France, for example, 33.7% of workers consider being exploited (Dubet, 2006, p. 116). In sum, the principle of reciprocity cannot be translated into a moral obligation to work (Vandamme, 2015). At most can it imply a moral obligation to *contribute*, each according to his/her abilities and opportunities, to social efforts. And from this viewpoint, a guarantee of sufficiency might do justice to all the people who bring their social contribution outside formal employment –through parenting, caring for the elderly or doing any kind of socially useful unpaid work–.

⁷ This becomes clearer yet when you consider the non-monetary benefits of work that cannot be compensated by a high unemployment income. See Dubet & Vêretout, 2001.

I will come back to the reciprocity objection later on in this article. One thing to consider for now is where its appeal comes from. There is certainly an evolutionary explanation for its prevalence in many cultures: being aware of free riders has most probably constituted an evolutionary advantage (Singer, 1981). Yet there might be other reasons for its contemporary resurgence manifest in popular support for activation policies. One prominent reason why it is gaining field in advanced welfare states compared to the principle of sufficiency is the combination of democracy and social disintegration. As analyzed by Claus Offe, social solidarity is crucial for the collective provision and defense of collective goods such as a strong welfare state protecting the vulnerable and the unlucky. Yet democracy, through the secret individual ballot, «provides a greater and less expensive opportunity and even temptation to “opt out” and to obstruct this production than any other form of government» (Offe, 1987: 520). You can vote against social solidarity without having to justify your decision to your fellow citizens. Hence, if social solidarity is weak, if people do not trust each other enough and are particularly afraid of free riders, the democratic logic can become antagonist to social protection. The temptation grows to pay fewer taxes and count on one's good fortune (or take private insurances). The feeling of collective responsibility for the fate of everyone disappears. And this is the case in advanced welfare states, where as a result of the evolution of work and the heterogeneization of the population through migrations, class solidarity has left the stage to a «process of fragmentation, pluralization, and ultimately individualization of socioeconomic conditions and interest dispositions» (Offe, 1987: 527).

Solidarity must rely either on mutual trust or mutual interest. Because of competition for scarce jobs and ethnocentrism, mutual trust between workers is diminishing. Fear of free riding generalizes and turns into the pathological form of reciprocity promoted (in various degrees) by workfare and punitive activation policies. Mutual interest is also less clear than it used to be. The interests of workers depend to a high degree on their form of employment (self-employment or wage relation) and on their skills (scarce or not). Hence, we cannot rely on spontaneous class solidarity anymore. This is why *justice* arguments matter, more than ever.

Under these conditions, this paper argues for a realistic target for the future of welfare state capitalism⁸: an unconditional right to income, at least for those temporarily or permanently unable to cover their basic needs through wages. The promotion of this right relies on two moral principles:

- Everyone should have enough to live a decent life, exempted of poverty and exploitation;
- This fundamental human interest cannot be sacrificed for the aggregate welfare.

⁸ Obviously, this does not imply the claim that welfare state capitalism is the best form of economic organization. This article endorses a non-ideal perspective with the aim of taming the injustice of contemporary capitalism.

Although international human rights law recognizes the first principle, it leaves it vulnerable to reciprocity considerations, especially because it does not accept the second principle. As a matter of fact, the second principle comes in tension with the ICESCR's fourth article, which opens the door, in a utilitarian fashion, to some limitations of those rights "for the purpose of promoting the general welfare". Workfare and punitive activation policies are thus both justified in reference to the moral principle of reciprocity and to the importance of reciprocity for economic efficiency and the general welfare. I will discuss these two aspects later on.

LEVELING UP THE RIGHT TO INCOME

The first thing I want to argue is that it would be important for increasing democracy's justice potential that we recognize a right to an income sufficient for decent subsistence and independent from contributions. By this I mean that *at least* those unable to earn enough through the job market should be entitled to an income covering their basic needs, *even* if they have not paid social contributions. There is a diversity of ways of meeting this right. You can have genuine full-employment with a sufficient minimum wage (or wage subsidies); you can have a guaranteed income for the unemployed only; you can instore a universal basic income or a negative income tax. I will thus leave aside here most of the discussion about the distinctive merits of unconditional unemployment benefits and universal basic income (or negative income tax)⁹. What is necessary for the democratic quest of social justice is the protection of social assistance and of a guaranteed individual¹⁰ income aimed at tackling poverty and exploitation in the absence of full and well-paid employment.

26 out of the 28 members of the EU –Greece and Italy being the exceptions– already have such income guarantee, means-tested and conditioned upon willingness to work. In the UK, there is income support for people in incapacity to work because sick, disabled, pregnant or alone with a young child. In the US, there is a "supplemental security income" for the aged, blind or disabled. My normative recommendation would be to generalize this kind of income, level it up beyond poverty line, and relax eligibility conditions to include all citizens and long-term residents lacking income. Where a right to income currently exists, its level of provision is always under poverty line. It is not in the interests of capital that it be otherwise, as unapologetically confessed by Patrick Colquhoun in the early 19th century, in a statement that has not completely lost contemporary relevance: «Without a

⁹ One point is worth making, though. In light of the social disintegration mentioned above, *universality* could rebuild wider allegiance to the welfare state and to social rights, alleviating their political fragility. Not because *everyone* will be net beneficiary, but because more people would probably benefit from it than from targeted welfare benefits. Yet the global budgetary cost of social protection would clearly be increased if the aim is to cover basic needs, which reduces the political immediate feasibility of a full basic income approach. Universality is thus a *possibility*, which has some efficiency advantages (Van Parijs, 1990; 1996), but not a *necessity*. Note also that a modest basic income can be combined with more targeted forms of social protection.

¹⁰ Individuality is crucial for avoiding dependence within households. See Alstott, 2000.

large proportion of poverty there could be no riches, since riches are the offspring of labour, while labour can result only from a state of poverty» (quoted in Marshall, 1949: 86).

The first reason for the defense of such right to income is that in capitalist economies, the state seldom provides nutrition and housing to the needy. Income is the *main* access to these two social rights. It is also the necessary condition of genuine social protection, as it helps decommodifying people's access to subsistence (Esping-Andersen, 1990). Furthermore, by increasing the bargaining power of the potential worker, a guaranteed income plays a decisive role in the fight against labor exploitation (Vandamme, 2014).

Such right should be considered as a central part of social rights, along with health care and education. Depending on its level of provision, it could cover partly or completely the rights to housing and nutrition. If decommodification is the aim, the guaranteed income should cover basic needs, or be aligned with a standard of "decent life". By the term "subsistence", I do not mean "mere subsistence". I target something closer to *sufficiency*, i.e. whatever is necessary to escape all the undesirable consequences of poverty. One very rough way of assessing the income's potential to relieve from poverty is to make use of proxies such as the 60% of the median national disposable income generally considered as the "poverty line"¹¹. In any case, the assessment of the income's relative and fluctuating calculation could be delegated to independent bodies, such as a Human Rights Commission¹² in charge of determining the appropriate level of (minimal) state provision for all social rights (Fabre, 2000: 169).

Let us now consider the main objections to this proposal. First, is this right realistic in the "age of austerity" (Schäfer & Streeck, 2013)? Admittedly, it is impossible to consider this right to income without any regard to states' economic capacities, i.e. the amount of expenditures they can afford within a reasonable debt level (level which is itself subject to political debate). States' commitments to social rights always include a "resources" proviso, stating that the obligations of the state depend on its available resources. The danger is that the austerity argument –'we cannot do otherwise than fail to fulfil our obligations because of recession'– becomes too tempting. It is therefore the role of the public to continuously question governments' assessments of their economic capacities and push them towards alternative ways of financing social protection. Because, although there is bound to be uncertainty about states' economic capacities, it is reasonable to assume that developed welfare states could face such obligation, and if necessary prioritize the financing of social protection over other expenditures. Some degree of austerity

¹¹ This proxy assumes homogeneous needs. It will be absolutely necessary to complement such income for disabled people at least. Equal resources do not guarantee equal opportunities, people differing in their capacity to derive well-being from economic resources (Sen, 1992; Cohen, 2011). Yet as a matter of regulation, a combination of equal (guaranteed) income and health and education provisions according to needs might be the best achievable approximation of justice.

¹² One existing example is the South African Human Rights Commission (<http://www.sahrc.org.za/>), which is governmental. A different one is the International Society for Human Rights, a non-governmental and non-profit organization which has consultative status with the Economic and Social Council of the UN and participative status with the European Council. See <http://www.ishr.org/>

might be currently unavoidable –which is in itself controversial–, but it is certainly not a fatality that the least well-off shoulder its burden.

In emerging welfare states, the resources argument might be taken differently into account. What matters then is a visible commitment to increasing social protection. The distinct duties that could be faced by states in different contexts regarding the right to income can be stated as follows:

- Countries with a developed welfare state could have a *positive duty to secure a guaranteed minimum income above poverty line* and a *negative duty not to reduce their level of social protection*¹³.
- Emerging welfare states could have a *positive duty to take appropriate steps*¹⁴ and *commit in a publicly visible way to progressively bring everyone above the poverty line*¹⁵ and the same *negative duty not to reduce their level of social protection*.

At the supranational level – the EU for example –, countries could face the same “internal” duties, possibly supplemented with a *positive duty for the federation – or federated states if the federation lacks the capacity for action – to help member states unable to raise or maintain their level of social protection*.

The main objection to such right to income, besides states’ resources, is the partial disconnection between income and work (even if you do not work you would be entitled to an income). Some might argue that social rights stem from labor participation. They might be willing to accept moral rights to housing, nutrition and social security, but they expect work to provide the access to subsistence and security. And they see social protection as protecting workers in their contribution to economic cooperation. Rather than granting a right to income, should we then not strive for full-employment –possibly with compensations for the disabled and the temporary unemployed?–. Work engenders social membership and is supposed to provide the income necessary for a decent life. This is the path taken by the UDHR and the ICESCR.

The insistence on a right to income even in the absence of work is precisely based on the failing of this argument. Full-employment, far from being the norm, would be historically exceptional (Esping-Andersen, 1990: 198), although governments from the right and left continuously maintain it as a goal. The capitalist mode of production is not preferred for its ability to provide work to everyone, but for its unrivaled potential to create wealth. By accepting the dominance of private property of the means of production, states have actually abandoned *effective* power to regulate the rate of employment. All they can do is provide costly incentives to

¹³ This is the principle of *standstill* already recognized by the Belgian constitutional jurisprudence (see Dumont, 2013) and recognized elsewhere as a principle of “non-regression”. It consists in a negative duty for the state not to deprive its citizens from a social advantage that they previously enjoyed, unless required by some over-arching public interest.

¹⁴ The language of “appropriate steps” is used by the ICESCR.

¹⁵ Article 27 of the South-African Constitution uses the language of sufficiency (“sufficient food and water”) and asks the state to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights” (health care, food, water and social security). See <http://www.constitutionalcourt.org.za/site/theconstitution/english-2013.pdf>

firms to expand and hire. Yet hiring is in the interests of firms only during their expansion stage. And at any moment, automatizing work will always prove more interesting for them than hiring. Moreover, if it is true that persistent unemployment increases productivity –the Marxist reserve army of labor thesis–, full-employment might even be inimical to the very logic of capitalism.

Furthermore, even if standard economic models of perfectly competitive market economies predict equilibrium in which all those who want a job have one, various factors make structural involuntary unemployment explainable even under idealized conditions of perfect competition (Van Parijs, 1987: 123-127). The cost of firing, hiring and training, for example, provides those who have a job with an advantage over those who do not even if the latter would be ready to take it for a lower wage. Besides, the incentive to productivity provided by a higher wage also accounts for the fact that actual wages are superior to market-clearing wages.

In this situation, it is highly problematic that means of subsistence and social recognition stem only –or mainly, depending on countries– from work. It is also a problem that because we only recognize a right to work, not to income, governments can get rid of their obligations by claiming to strive for full-employment. The appropriation of natural resources and means of production by a few private actors has the effect of excluding some people from the very possibility of earning their living through their own work. Hence, if you are endowed with low marketable skills and you do not own land, the capitalist system pushes you towards exploitation, unless the state provides you with an exit option. The right to an income independent from work is thus the only way to justify to those who stand to lose from it an economic order based on private property and market economy (Van Parijs, 1995; Brettschneider, 2006). In a socialist economy, with jobs provided exclusively by the state, the right to income might not be necessary. Where means of production and land have been monopolized by a few, things are different.

The UDHR and the ICESCR, which tie the right to social security to the right to work must be understood in a historical context of wide employment and sustained growth that made the connection between social protection and employment more obvious than it is now. It is precisely because social insurance has not appeared sufficient to protect all citizens from poverty that many European countries have adopted minimum income guarantees. The explicit recognition of a right to an income independent from contributions aims at eliminating the ambiguity of human rights law and thereby protecting the involuntary unemployed –and those who rightly refuse to work under exploitative conditions– against abuses.

Now, what some people fear, if the battle for full-employment is abandoned, is the creation of a dual society, with a class of job holders and another of unemployed people who might not live in poverty but are nonetheless deprived of the “goods of work other than money” such as excellence, social contribution, social recognition and community inclusion (Gheaus & Herzog, 2016). It is an open question (which is not the target of Gheaus and Herzog’s paper) which of these non-monetary goods would be accessible only through work in a society where work and income would have been partially decoupled. Yet, assuming that some goods are accessible only through work, the promoters of a right to income still

have means of action at their disposal. They need not completely surrender to massive unemployment. Admittedly, an increase of workers' bargaining power can cause further unemployment by raising the cost of work (assuming that this is not compensated by increased demand). There is thus a *prima facie* tension between the relief from poverty and exploitation, on the one hand, and a high level of employment on the other¹⁶. Yet these aims can be reconciled, and should be if the intergenerational sustainability of the welfare state is at stake. This would entail policies such as retraining, public job creation (Harvey, 2014), and/or work sharing. A better distribution of work could be either "forced" by the legal restriction of working time, or more spontaneously obtained as an effect of a basic income policy allowing people to flexibly reduce their working time (Meade, 1995). What makes the right to income approach different from the full-employment approach previously rejected is that income security is here prioritized over employment. The latter cannot be pursued at the expense of the former.

Another objection to the right to income concerns the monetary medium. Assuming we want to make subsistence independent from the job market, why not distribute in-kind resources covering basic needs, such as public housing and public canteens (Hazan & Kamo, 2013) or, more modestly, housing vouchers and food stamps (Van Parijs, 1995: 41-45; Brettschneider, 2006: 128)? Paternalist or care approaches could argue for in-kind as a way to make sure, as a matter of *concern* for disadvantaged people, that they make appropriate choices. Yet income is preferable to in-kind as a matter of respect for *autonomy* and freedom to follow one's conception of the good (Brettschneider, 2006: 129-130). Furthermore, we do not tell the more advantaged how to use their incomes. Not only is paternalism-for-the-poor-only discriminatory; it is also offensive to the disadvantaged's *self-respect*.

Another related argument insists on the need for a more radical decommodification and the responsibility of the state to encourage non-monetary relationships between people, through the provision of free services for example¹⁷. If we really want to free people's subsistence from market transactions, services appear superior to cash (Panitch, 2011). Yet, besides favoring freedom, markets also foster responsibility by forcing people to take into account the opportunity cost of their choices—which is particularly important regarding the consumption of natural resources—. An appropriate balance must thus be found between cash and services, markets and state. Because some goods like health and education should not be tradable, it is a good thing that most social rights are nowadays provided in-kind. The proposal of a right to income does not aim at substituting services with money. Cash and services should rather be combined in a way that satisfies together the demands of autonomy and concern, responsibility and community. The aim of this paper is not to envision a radical alternative to capitalism—where the state would provide free access to all the necessary services, for example—, but a democratically

¹⁶ Here again, one advantage of basic income compared to traditional unemployment benefits and social assistance is that it removes the unemployment trap: it always pays off to take a job—even part-time—when you are unemployed because the new wage adds to the basic income rather than replacing it. See Van Parijs, 1996.

¹⁷ I thank Olivier Malay for this suggestion.

achievable way of tempering its unjust effects –which, I will not always recall in the paper, is not sufficient for justice–.

The proposed right to income would ideally have two further characteristics: 1) its unconditionality and 2) its constitutionalization. The next sections explain their rationale and consider some objections. The first set of objections is familiar to people working within theories of justice. The second one is more familiar to democratic theorists. The reason why it is interesting to treat these two separate issues in the same article is that unconditionality *and* legal protection are two important tools for increasing social rights' protection¹⁸. Yet the two characteristics are independent of each other. You can accept only one part of the proposal and reject the other.

UNCONDITIONALITY

The unconditionality of the right to income here defended is to be understood as *not conditioned upon the claimant's willingness to work*¹⁹. There might still be two conditions for its provision. One is the state resources proviso already discussed, as unconditionality in this sense is logically unfeasible. The other is the claimant's resources, as the right to income can (but need not) be means-tested²⁰. The income would thus be unconditional in the restricted sense that «no further conditions have to be met beyond those establishing eligibility» (Barry, 2005: 151; Dumont, 2011: 452). Where guaranteed income systems exist, they are never unconditional in this sense. Although they can or could seem unconditional in some places, due to relaxed controls, they are always linked with a readiness to work for those who are able-bodied. And the tendency in contemporary welfare states is to strengthen controls in order to *activate* the unemployed and reduce social protection expenditures (Dermine & Dumont, 2014), with the result of cutting some people off welfare benefits and forcing the others into work. Conditionality is thus a factor of poverty and exploitation. How can it be defended?

The first argument against unconditionality was already touched upon: it is the worry that austerity would currently be unavoidable, so that it would be suicidal for states to spend a lot of money on an income that –it is argued– disincentivizes work. Now, if one effect of a guaranteed income is to somewhat reduce the amount of work, consumption and production, this should not worry us too much. To the contrary, given the impact of continuous growth on the environment, such

¹⁸ Cécile Fabre (2000), for example, considers only the second aspect. Yet she recognizes (private communication) that legal protection without unconditionality contributes to social rights' vulnerability. Besides, unconditionality makes the claim for constitutionalization easier as it facilitates the judges' task.

¹⁹ White (2003: 139-141) makes a distinction between the unconditionality of the right (to access income through reasonable effort) and the unconditionality of the provision of the income, arguing that the former does not imply the latter. I reject his very weak understanding of unconditionality, which would have the effect of weakening the right itself.

²⁰ Obviously, if a universal basic income is financed through taxes, not everyone will be a net beneficiary. Yet ex-post fiscal control of resources differs from ex-ante means-tested welfare programs in being less intrusive and humiliating.

reduction might be more than welcome (Barry, 2005: 229). Now, the real challenge is the sustainability of the welfare state: social protection should not have the effect of reducing state revenues in a way that would jeopardize its financing. Admittedly, the amount of the guaranteed income might vary with the state of the economy, but we should recognize a bottom line under which the income cannot fall. In bad economic times, a special effort will be asked to more advantaged people or less crucial expenditures will be reduced. We could, for example, stop subsidizing political philosophers, or spend less money for sports, the police or the army. As suggested by Malcolm Langford (2008: 31), in some countries «public expenditures for social security are dwarfed by funds allocated to protect personal security, such as police and defence», while the respect of social rights is very likely to have a positive effect on internal security. Fighting tax evasion is another obvious path. In any case, there is no reason why those already most disadvantaged should bear a relatively much higher cost –poverty– than their fellow citizens –increased tax burden–. The perversity of austerity arguments is that they usually hide matters of political priorities behind a sustainability argument.

A more serious threat to the proposal comes from the prioritarian version of this efficiency argument. According to prioritarianism²¹, what matter primarily are the prospects of the least (or less) well-off. From this viewpoint, the incentives to work provided by *conditional* welfare benefits might be preferable to unconditionality if they work as to improve these prospects (for example by providing the unemployed with a helpful motivation to improve their situation)²². My answer to this well taken point is that it might be true that in an “ideal” world, conditionality would lead to better expectations for the least well-off, as it would stimulate people’s contributive ethos for the benefit of *all*, yet this seems unlikely in real world conditions, as concern for the least well-off is too easily traded-off against maximization of aggregate wealth and conditionality generally works to the advantage of the better-off *only*. Even if conditionality was not condemnable in principle, we should worry about its vulnerability to abuses. In practice, it generally opens the door to punishment of the victims (the involuntary unemployed) and labor exploitation through the obligation to accept job offers.

One could therefore suggest entrenching a prioritarian proviso –or indeed the difference principle– into the constitution, proviso stating that the organization of social protection *must* work to the greatest advantage of the least well-off. Conditionality would then be legitimate only if it does so. However, leaving here aside practical worries concerning adjudication (Barry, 1995: 95-96), it seems to me that such proviso is unlikely to receive before long the democratic support necessary for its entrenchment. A subsistence income is more “sufficientarian”, and thus more in line with what sociologists consider as most people’s current sense of justice (see Forsé & Parodi, 2004). Although it is less ambitious, it could already empower the vulnerable and lead to more egalitarian legislations.

²¹ Here broadly understood as to cover positions ranging from Rawls’ difference principle to more aggregative forms of prioritarianism. On the distinction between leximin egalitarianism and aggregative prioritarianism, see Gosseries, 2011.

²² As far as these incentives do not infringe basic liberties or self-respect, in the Rawlsian version.

The other important objection is less concerned with the *economic effects* of a right to income than with its *morality*. Thus the frequent objection to the idea of an unconditional right to income, already touched upon in the first section, is that it becomes a right to exploit, or to free ride. Gijs van Donselaar (2009), following David Gauthier, defines exploitation as parasitism, i.e. benefiting from another's pain without reciprocating. The voluntary unemployed who lives off welfare benefits without looking for a job exploits in this sense people whose labor is taxed in order to fund his welfare benefits.

A first answer to this reciprocity/exploitation objection is that there is no unfairness in living off the labor of others provided that everyone is given the same possibility to do it (van der Veen & Van Parijs, 1986: 726). If some people prefer to work despite their right not to, one might think that they just prefer income to leisure. However, a certain amount of work is necessary to maintain the freedom not to work, or to work less. Some people might thus choose to work for (partly) altruistic reasons, moved by an egalitarian ethos or a duty of contribution. In this case, free riding is unfair; it is an infringement of the principle of fair play, which Michael Otsuka characterizes as follows: «if one enjoys a benefit available to all, and this benefit exists only because of the sacrifice of others, then one is obligated to share in the sacrifice necessary to provide this benefit to all» (Otsuka, 2010: 224).

Some have argued against this that the able bodied refusing to work are just receiving their fair share of the benefits derived by the others from the exploitation of resources which are morally common property of all (Van Parijs, 1995)²³. My reply is different. The fact that an unconditional right to income might engender some form of “parasitism”, or a lack of reciprocity is not enough to reject it. Overall, it might have more beneficial effects, such as tackling a much more serious kind of exploitation, that of the vulnerable employees by the rich employers (White, 2003). Consider an analogy: the right to freedom of expression might be considered as a right to lie or to insult. Yet negative side effects are not sufficient for rejecting a right otherwise considered as fundamental or desirable in light of its overall effects. Thus, although I recognized earlier the existence of something like a moral duty to contribute according to one's abilities, I maintain that this is not enough to reject unconditional welfare benefits²⁴. This moral duty should be stimulated through education, social pressure, or state provision of an «infrastructure of participation» (van der Veen, 1998: 159-160); not through legal norms and economic sanctions.

The core of this exploitation objection is also present in a widely shared intuition of fairness whose philosophical formulation has been developed by luck-egalitarians (Dworkin, 2000; Arneson, 1989; Cohen, 2011). What fairness requires, they argue, is to compensate people for their bad circumstances, for what is outside their control and unduly affects their opportunities. But we do not want our

²³ Those resources are both natural resources and jobs, considered by Van Parijs (1995) as scarce external assets. Van Donselaar (2009, ch. 5) rejects this argument.

²⁴ Unless governments make sure that *non-exploitative* jobs are available for *everyone* (Gutmann & Thompson, 1996: 294), which is a very unlikely assumption in a market economy.

policies to be responsibility insensitive, as we tend to conceive ourselves as capable of genuine choices and policies refuting any individual responsibility might be very intrusive. Thus if some people voluntarily choose not to work, it seems, the argument goes, that they have to pay the opportunity cost of their choice²⁵.

If we accept the luck-egalitarian premise, why should we find any appeal to this idea of an unconditional right to income? First, it is not true that the proposal is responsibility *insensitive*, because the (total) income of a person will generally depend on her choices between work and leisure²⁶. Fairness might require certain proportionality between effort and reward, but this does not necessarily entail that the absence of effort should be sanctioned by absence of income (Arneson, 1992; Olsaretti, 2009) –especially when lack of effort proves to be difficult to distinguish from bad luck, as is the case with job seeking–. Second, other (egalitarian) values such as respect might trump fairness if enforcing fairness comes at too great a cost in this respect (Wolff, 1998). This is the case for most institutional devices aiming at distinguishing between the “deserving” and “undeserving” poor. Or, alternatively, conditionality itself could be rejected for reasons of fairness if it entails too big a loss of welfare by hurting people’s self-respect and the distribution of welfare is considered as a matter of fairness (Wolff, 1998). Third, one might find more appeal to a sufficiency-constrained version of luck egalitarianism (Casal, 2007). We have no certainty about people’s genuine free will. Therefore, responsibility assignment will necessarily be a matter of societal convention (Ripstein, 1994). In this perspective, I see four main reasons for such sufficiency constraint. 1) We should avoid the possibility that bad choices turn into a chain of disadvantages making a person vulnerable to poverty and exploitation (Barry, 2005; Olsaretti, 2009)²⁷. 2) Potential children should not suffer from their parents’ bad choices (Shapiro, 1999: 107; White, 2003: 144; Barry, 2005). 3) The state should make sure to cover the needs of people voluntarily making their contributions outside the job market (Anderson, 2004). 4) As people generally want to live well, it is unlikely that one can make a genuinely voluntary choice not to have enough. A sufficiency constraint might thus be a proxy for responsibility: once you have enough, it becomes *more* plausible to hold you responsible for your choices. The luck-egalitarian objection to unconditionality can thus also be addressed.

INCREASED LEGAL PROTECTION

The solidity of the right to income and social rights in general will depend both from the public support they enjoy and from their degree of legal protection. Leg-

²⁵ Dworkin (2000: 2) goes as far as to claim that “there is nothing to be said for a world in which those who choose leisure, though they could work, are rewarded with the produce of the industrious”.

²⁶ One exception is for the bad-paid workers under minimal income support systems, as an unemployed might earn as much as them. Far for being an argument against unconditionality, this might rather be an argument for basic income vs mere unemployment benefits targeting the poor. See above, note 16.

²⁷ Note that this is also an argument for providing some crucial social rights such as health care and education in-kind. I thank Anne-France Colla for pointing this out.

islative rights are more fragile than constitutional rights, as they can be turned down by a simple majority. Constitutionalization²⁸ appears therefore as a way of securing the right on the long run; it is «the best expression of how serious we are about our commitment» (Mantouvalou, 2011: 88). My view is thus that like Ulysses with the sirens (Elster, 1984) our governments should bind themselves against the temptation to sacrifice the right to income when the sirens of austerity start their corrupting song.

Some countries have already included social rights provisions into their constitutions (see Ben-Bassat & Dahan, 2008 for a comparative study). Besides, supranational institutions such as the Economic and Social Council of the UN or the European Committee of Social Rights are in charge of evaluating states' respect of those rights. Yet social rights have not been as fully constitutionalized as civil and political rights have²⁹. Many countries keep considering them as *secondary* (idea which has lost almost entirely the intellectual support it could enjoy in the past). A good illustration of this discrepancy is the split between the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Such divide has important practical consequences (Mantouvalou, 2011: 94). Whereas civil and political rights should be respected immediately, social and economic rights are aspirational: states have to take progressive steps, within the limits of their resources. Moreover, until 2008 and the adoption of the "optional Protocol", there was no complaint mechanism for the second Covenant. This new Protocol «brings the ICESCR and the ICCPR a step closer together» (Mantouvalou, 2011: 95), but many countries remain reluctant to allow the judicial enforcement of social rights. The same reluctance is at stake with the European Committee of Social Rights, which is considered as the equivalent of the European Court of Human Rights for what regards social rights. Differences between the ECHR and the ECSR include the facts that judges are replaced by experts and judgments take the form of conclusions –when government reports are assessed– and decisions –when collective complaints are ruled on– that are not effectively binding because they are not justiciable. Many countries do not recognize the authority of the ECSR, or at least do not follow up on its recommendations.

The mistrust regarding those kinds of supranational institutions is notably based on national sovereignty claims –whose political force is increasingly weakening–. But what is probably the main source of mistrust concerning social rights is their cost. Too often, this cost is envisioned statically; one only looks at the budgetary implications of effectively realizing these rights. Yet one should also look at the dynamic economic effects of social rights, which might prove positive. Social investments, redistributions and better protection might result in an increasing

²⁸ In the wide sense that applies at the supranational level even where there is no real constitution, but an international charter or covenant.

²⁹ Countries such as Portugal and Poland in Europe, or Brazil, Mexico and Nicaragua stand out in social rights indexes, whereas countries such as Germany, Canada, the US or Israel have the lowest score – social rights are absent of their constitutions (Ben-Bassat & Dahan, 2008). Pedro Magalhães (2013: 461) observes that "in French civil law countries, in historically recent constitution-making processes, and in non-protestant countries [...] social rights have tended to receive a stronger recognition in constitutional texts". Note however that there is some distance between legal recognition and effective realization.

demand for goods and services and reduce the costs of security and health care, for example. What is more, all rights are costly (Holmes & Sunstein, 1999) in the sense that they all require state action (administration, police and tribunals) to be effectively protected. But contrary to civil and political rights, social rights frighten investors because they are suspected to disincentivize work, to create inflation and to imply higher redistributions. They thus come in tension with states' «structural dependence on capital» (Przeworski & Wallerstein, 1988) –the centrality of private investments for capitalist economies, whatever the party in government–. This is why supranational enforcement seems more plausible than national initiative; it might solve a collective action problem in a context of international economic competition.

This last section thus argues in favor of an increased legal protection of social rights. Justiciability – the possibility to bring complaints to courts –would increase social rights' protection–. I do not claim that it is the only path for protecting social rights³⁰. Rather, I see constitutionalization as a part of a broader process of *constituting* and *legalizing* social rights³¹. But I will focus here on constitutionalization and justiciability because these are the most controversial aspects. Although the article focuses on the specific right to income, it is unlikely to be constitutionalized alone, especially in light of the general reluctance to constitutionalize social rights in general.

One reason for this reluctance is the idea that a focus on rights might have a *depoliticizing effect*. The constitutionalization of fundamental rights would erode popular energies (Walzer, 1981). In a less philosophical perspective, some people fear a colonization of politics by law's empire, whereas «the primary way of embedding human rights generally (and social rights particularly) in any given culture is via the political process» (Gearty, 2011: 22). This legitimate fear, however, does not affect the argument developed in this paper, which is not arguing for a constitutionalization of social rights through the backdoor by a «judicial *Deus ex machine*» (Gearty, 2011: 27). The argument should be read as a *political* one. Its aim is to build a sufficiently wide consensus around the fundamental right to income and to find ways to protect it *durably* (a temporarily wide consensus might crumble later). I agree with Conor Gearty that human rights should be politicized rather than remain the tool used by lawyers to do politics. But the legislative and the judicial arenas should be seen as complementary. Bills of rights are the product of political battles and should be shaped by political evolutions. What is more, their meaning goes beyond the issue of justiciability. The recognition of fundamental rights in those bills also gives the tone for legislative action. Constitutional social rights can make the «legislators realise that they are under a constitutional duty to treat the meeting of every-

³⁰ Various non-judicial paths are explored in Campbell, Ewing & Tomkins, 2011 for social rights in general, and in De Wispelaere & Morales, 2015 for the right to basic income in particular.

³¹ Catherine Young (2012) suggests *constituting* social rights rather than merely *constitutionalizing* them, and by that she means “to socially institute” them “so that the commitments are committed to social understanding, and are realized effectively in law”. In the same spirit, Virginia Mantouvalou (2011) talks about the *legalization* of social rights, which also goes behind their *judicial protection* by recognizing to legislatures the “primary obligation to promote social rights” (Mantouvalou, 2011: 89).

one's basic needs as an issue that has priority over other matters» (Mantouvalou, 2011: 132). As already mentioned, the participation of the public will always be necessary to force governments to respect the rights they are committed to. As they can try to escape their responsibilities through the austerity argument, such "control" participation is likely to be necessary. Constitutionalized rights could thus become tools for political protest.

Another famous objection against social rights' justiciability claims that it is *illegitimate* for courts to tell governments how to allocate resources. As this distributive issue is a matter of deep disagreements within society, it should be the prerogative of legislative decisions (Waldron, 1999). However, this should not count as an objection to social rights in particular, because civil and political rights sometimes have budgetary implications too. The legitimacy argument concerns judicial review in general, and many opponents of the judicial enforcement of social rights are in fact opposed to the very practice of judicial review (Mantouvalou, 2011: 116). Yet it is not necessary to have strong judicial review to protect social rights in general and the right to income in particular. The argument developed here is furthermore independent from any general defense of constitutionalism³². It is rather conceived as a way of tempering the negative effects of existing constitutions and changing the imbalance of power between different social groups or classes. Some rights are already protected and enforced by courts, and unbalanced constitutions –characterized by the classic discrepancy between rights of different "generations"– are not neutral from a distributive viewpoint. They protect the wealthy against expropriation, but they hardly protect the vulnerable against exploitation or social exclusion. The pressing question is therefore not 'should we have judicial review at all?' but 'how can we tame this unjustifiable imbalance of power?'

Besides, as it is practiced in several countries, we might insist that courts play only a modest role. They might just state that social rights have been (or will be) breached by a law and ask the government to come up with an alternative proposal more respectful of those rights, without telling the government what exactly it should do, what kind of law would better respect these rights (see Shapiro, 1996: 609-612; Fabre, 2000: 148-150). It is possible –and desirable– to combine the input legitimacy of the legislative power with the output legitimacy of the judiciary. One addresses citizens as *authors*, the other as *subjects* of laws (see Beitz, 1989; Brettscheider, 2006). Both contribute to governments' accountability: because courts are not accountable to the majority, they can make governments accountable to minorities (Mantouvalou, 2011: 125).

Beside the question of democratic legitimacy, many people are worried by judges' alleged lack of *economic expertise*. According to this argument, often taken to be central in constitutional theory (see Fabre, 2000; Brettschneider, 2006; Tushnet, 2008), judges would not have the competence necessary to adjudicate social rights. This view is so popular that judges themselves seem to have adopted judicial restraint regarding social and economic rights (De Wispelaere & Morales, 2015:

³² Constitutionalism can even be seen as a tool for elites to reinforce their power, by protecting the economy from popular will and in this way reassure possible investors (Hirshl, 2000).

16) –which can also partly be explained by the relative lack of jurisprudence–. This case against the justiciability of social rights is nonetheless controversial. It is not very clear why social rights would be much more difficult to adjudicate than civil and political rights once you consider some difficult implications on both sides (Fabre, 2000). What is more, even if one admits this supposed difficulty, it does not suffice to build a case against their constitutionalization. Thus you could simply limit the role of courts in line with «weak-form judicial review» (Tushnet, 2008) and/or make their task easier. For example, Fabre (2000: 173-179) argues that judicial *preview* requires less expertise and information than judicial *review*³³. A principle such as the principle of standstill or non-regression –prohibiting diminishment of the level of social protection without reasonable justification– does not appear too demanding for judges either. Furthermore, the right to a subsistence income advocated in this article can be seen as a simplification of social rights. Its unconditionality makes it even easier to adjudicate. The sole difficulty is to determine the level of subsistence, which would not necessarily be the task of the court.

Another possible argument against the proposal is that it would have no effect³⁴. An example of the alleged inefficiency of constitutional protection of social rights would be South-Africa, which has one of the most progressive constitutions in this respect and is often referred to as an example by social rights advocates. As mentioned earlier, social rights are always limited by the state's economic capacity. In addition to this, the judges often think as the majority of the elite (Hirschl, 2000). What is the upshot of this? In the South-African case, despite the constitution's commitment to protecting social rights³⁵, the court has not objected against the early (it lasted two years) replacement of the very redistributive Reconstruction and Development Programme set up by the Mandela government with a Growth, Employment and Redistribution program “which aimed for sustained growth rather than the redress of injustice, and which adopted the neoliberal economic blueprints of privatization, liberalization, and competition in order to reach its growth targets” (Young, 2012: 21).

One can tackle this pessimistic –rather than normative– objection by calling attention to successful practices of social rights adjudication around the world. It seems that «there is evidence of cases exhibiting both direct impact on poverty and discrimination as well as indirect impact in the areas of policy, law, mobilisation and consciousness raising» (Langford, 2008: 45). Yet the efficacy of social rights adjudication depends on multiple contextual factors such as «the nature of the or-

³³ Judicial preview (which is practiced in France and Ireland) is easier than assessing individual cases because the impact of a particular law on a particular situation might be hard to assess. For what regards judicial *review*, Fabre argues that it would be preferable to judge *collective* complaints (see the supervision mechanism of the ESC) because 1) it is difficult to assess a person's situation without comparisons with third parties about which the court will lack information; 2) a redress for one claimant will not automatically involve a redress for all the people in similar situation.

³⁴ This objection was presented to me by Ian Shapiro. Such skepticism also grounds De Wispelaere and Morales's recent (2015) assessment of the prospects of a constitutionalized basic income. It is not clear whether their arguments similarly apply to the more general right to income here defended. In any case, they invite skepticism more than rejection of the constitutional strategy.

³⁵ The South-African constitution recognizes “rights to food, water, health care and social assistance, which the state must progressively realise within the limits of its resources”.

der, the political and organisational power of the claimants and the institutional strength of the State» (Langford, 2008: 45). It also depends on the formulation of rights. In light of the ambiguity surrounding social protection in existing human rights law, it is not surprising that their recognition is not enough to effectively fight poverty and exploitation. Things might again be different with an explicit unconditional right to income.

It can also be answered that even where increased legal protection does not have immediate desirable effects from the point of view of justice, those rights could be a tool to be used in the future. Think about the “Equal protection” clause in the American Constitution. Who would have expected, at the time of its writing, that it would justify the end of racial segregation? Law and politics evolve in dynamic interactions. Without political activism and a wide support in civil society, social rights will not by themselves transform societies. They nonetheless constitute non-negligible safeguards against abuses and a useful tool –among others– in the democratic quest for social justice.

CONCLUSION

I have argued for the recognition and generalization of a legal right to an income sufficient to cover basic needs, an unconditional understanding of this right, and its increased legal protection, preferably at a supranational level. As already mentioned, these three arguments have independent validity. You can reject one without affecting the others. My conviction is that their combination increases the protection of people’s right to a decent standard of living, which is widely –and rightly– recognized as fundamental, although minimum incomes are settled “below the at-risk-of-poverty threshold” (Vanderborght, 2014: 213) even in the most developed European welfare states. It is nonetheless interesting to conclude this article with an examination of the situations where the three recommendations cannot all be satisfied together.

If the language of a right to income (or “income security”) is rejected, one might defend an unconditional right to social *assistance* (targeting those who are not protected by social *insurance*) and insist that it entails at least a system of guaranteed minimum income independent from contributions and willingness to work. This right should thus be distinguished from the right to social security currently protected by the ICESCR (Article 9), which can –but must not– limit itself to social *insurance*. A positive example of such right is the article 27 of the South-African Constitution –which recognizes a right to «social security, including, if they are unable to support themselves and their dependants, appropriate social assistance»–. Whatever the chosen terminology, it should also be argued that there is no genuine security, in a capitalist economy, without decommodification, which implies that the safety net cover basic needs³⁶.

³⁶ The basic needs of individuals *and* all the people they are in charge of (i.e. children if the right is strictly individual for adults, as it should be for gender equality reasons).

If unconditionality is rejected by the majority, for example because people are –or have been made– pathologically afraid of free riders, you can have constitutionalization without unconditionality. The hardest version is a strict obligation to work in order to have access to social security –the mere insurance model–. This is very damaging for the less able. A somewhat less crude version, which is almost standard in Europe, makes welfare benefits conditioned upon people’s *willingness to find work*. As long as they are perceived as actively looking for a job, they will enjoy the social minimum. But a milder version between this and full unconditionality is also possible: only a generous unemployment income –financed through contributions – is conditional, not the minimum safety net– financed through taxes.

Finally, you can have an unconditional right to income recognized as a goal by a constitution, but not as a justiciable right³⁷. This might work as a long-term incentive towards social progress, but it might as well be ineffective. Or you can have such right recognized and implemented but not constitutionally protected³⁸. My worry is that it would not last. Business corporations would pressurize the government to abandon such disincentive to work. And taxpayers would soon start looking at the unemployed with mistrust. Unless efficiency can be reconciled with justice through the introduction of a universal basic income (Van Parijs, 1990) and universality increases the allegiance to social protection (Esping-Andersen, 1990; Vanderborght, 2014). Yet these speculations bring us beyond the scope of this article.

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³⁷ In line with the directive principles of social policy set out in the Irish and Indian constitutions, for example. See Gearty, 2011: 56.

³⁸ Waldron, for example, considers that welfare rights matter, yet he would certainly not advocate their constitutional entrenchment. He argues that a commitment to moral rights does not entail a defense of bills of rights. See Waldron, 1999, ch. 10.

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