ENFORCING HUMAN RIGHTS INCREMENTALLY: REVIEW OF JEFF KING, *JUDGING SOCIAL RIGHTS* (CAMBRIDGE UNIVERSITY PRESS, 2012)

MURRAY WESSON*

In Australia, discussion of Bills of Rights has tended to focus on the human rights statutes adopted in Victoria and the Australian Capital Territory, and the broader question of whether Australia should adopt a national Bill of Rights. However, it is well-known that Australia is unusual amongst liberal democracies in lacking a Bill of Rights. In other democracies, the principle of judicial protection of constitutional rights is now widely accepted. And in many of these jurisdictions, debate has moved onto a further question, which is whether constitutional rights protection should be extended beyond civil and political rights to social rights, or rights to housing, healthcare, food, water, social security and education. A related question is the role of the courts in giving effect to these obligations. In South Africa, for example, the post-apartheid Constitution protects social rights and the Constitutional Court has produced an influential body of social rights jurisprudence.[1] Social rights are likewise constitutionally protected in many jurisdictions in Central and Eastern Europe and Latin America. The United Kingdom has for several years been debating whether to replace the Human Rights Act 1998 – which incorporates the European Convention on Human Rights – with a British Bill of Rights and there too a key question for the Joint Committee on Human Rights, the previous Labour government and the Commission on a Bill of Rights established by the current coalition government has been a possible role for social rights.[2] These developments have been accompanied by

* LLB (KwaZulu-Natal) BCL DPhil (Oxford), Lecturer, School of Law, University of Western Sydney.

[1] The important provisions of the Constitution are sections 26-29 dealing with housing, healthcare, food, water, social security, education and children's rights. For a general overview of the South African social rights case law see Sandra Liebenberg, 'South Africa: Adjudicating Social Rights under a Transformative Constitution' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2008) 75.

[2] Briefly, the Joint Committee on Human Rights favours the inclusion of social rights in a future British Bill of Rights, albeit subject to certain qualifications. See Joint Committee on Human Rights, *Twenty-Ninth Report 2007/08: A Bill of Rights for the UK?* (2008). The

an extraordinary proliferation of academic commentary on the subject, which has been characterised by increasing depth and sophistication. It is therefore no exaggeration to say, as Philip Alston does, that 'the debate about the justiciability of social rights has come of age.'[3]

From one perspective, the idea of social rights as human rights might seem uncontroversial. After all, as Jeff King notes in his important new book *Judging Social Rights*, different theories of human rights – dignity, freedom, utilitarianism and social citizenship – all converge in supporting the idea of social rights.[4] As well as this, the welfare state is now a settled feature of most liberal democracies. Even so, and even for readers unfamiliar with the literature on social rights, it should also be apparent that there are reasons to doubt whether social rights truly belong in Bills of Rights and specifically whether they should be subject to judicial enforcement. Some of these objections are more easily disposed of than others. For example, it might seem that social rights impose positive obligations on the state – in the sense that the state is required to provide goods such as healthcare – whereas the obligations imposed by civil and political rights such as freedom of expression are essentially negative in nature. It might also seem that social rights are resource intensive whereas civil and political rights are relatively cost-free, meaning that the latter are more readily subject to judicial enforcement. However, these dichotomies should not be overstated. Many quintessential civil and political rights – such as the right to a fair trial and the right to vote – require state action and expenditure.[5] Furthermore, to the extent that social rights are more expensive than civil and political rights, this is recognised in the fact that social rights are typically framed so that they are made subject to progressive realisation and the available resources of the state.[6]

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previous Labour government was willing to consider a role for non-justiciable principles reflecting existing welfare provisions in a future Bill of Rights. See UK Ministry of Justice, *Rights and Responsibilities: Developing our Constitutional Framework* (2009). However, only a minority of the Commission on a Bill of Rights favours the inclusion of social rights in a Bill of Rights. See Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (2012) 8.24-8.28.

[3] Philip Alston, 'Foreword' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2008) ix.

[4] Jeff King, *Judging Social Rights* (Cambridge University Press, 2012) 20-28.

[5] See Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008) 66-70.

[6] In the South African Bill of Rights, for example, the social rights set out in ss 26-27 are framed in the following form: (1) Everyone has the right to have access to [the relevant good]; (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. These provisions mirror Article 2(1) of the International Covenant on Economic, Social and Cultural Rights

There are, however, far more formidable objections to constitutional social rights, which are outlined by King in the first chapter of *Judging Social Rights*. Firstly, judicially enforced social rights might seem to lack democratic legitimacy. As King notes, nearly all of us pay into and take out of the public system. There could therefore hardly be a better scenario in which the voice of each should count equally which would suggest that the appropriate forum for resolving disputes involving resource allocation is the legislature, not the courtroom. To this we might add that even if the welfare state is a settled feature of most liberal democracies, it remains the case that reasonable disagreement about the nature and extent of the state's welfare obligations constitutes a key political fault line. Constitutional social rights might therefore threaten to remove important and contested issues from the political process to the hands of unelected judges. Secondly, the legal philosopher Lon Fuller coined the term 'polycentricity' to describe issues that he regarded as unsuitable for adjudication on the basis that they involve a vast number of interconnected variables.[7] Fuller famously employed the metaphor of a spider's web to describe problems where a decision on one issue – or a pull on one strand of the web – will have far-reaching and unforeseeable consequences. Fuller's point was not that such problems are incapable of resolution but rather that courts – with their reliance on an adversarial procedure typically involving two parties – are inappropriate forums for the resolution of polycentric issues, given that the full range of affected parties will not normally be represented. The allocation of scarce resources amongst competing needs would seem to be a paradigmatic example of a polycentric problem, given that a decision to allocate resources to a particular party will frequently have complex repercussions for other parties. Thirdly, many decisions relating to social rights – for example, whether a particular drug is safe – would seem to involve considerable expertise not typically possessed by judges. Fourthly, there is a clear need for flexibility in the provision of social rights because of the possibility of unforeseen information or changing circumstances. Courts, with their capacity to issue binding orders subject to a system of precedent, might threaten to introduce an unwelcome element of rigidity into the welfare state. All of this leads King to characterise the constitutionalisation of social rights as a 'risky enterprise.'[8]

which states that: 'Each State Party to the present Covenant undertakes to take steps … to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant…'

[7] Lon Fuller, 'The Forms and Limits of Adjudication' (1979) 92 *Harvard Law Review* 353.

[8] King, above n 4, 7-8.

Nevertheless, the aim of his book is to provide a convincing answer to these 'daunting arguments.'[9]

To this end, King's basic response is to emphasise caution and restraint. This is firstly evident in his discussion of the content of social rights. For King, social rights should be understood as rights to a 'social minimum', or a bundle of resources that would secure a 'minimally decent life.'[10] The social minimum should satisfy three thresholds: a healthy subsistence threshold, a social participation threshold, and an agency threshold.[11] King's emphasis on constitutional social rights as securing a social minimum – derived from the work of Frank Michelman[12] – is ingenious because it defuses much of the concern that constitutional social rights might function as a Trojan horse for a complete theory of distributive justice. To put this point differently, even if we reasonably disagree about the ultimate extent of the state's welfare responsibilities, we can presumably at least agree that the state should provide a social minimum. This much is now widely accepted. The role of the courts then becomes to play a subsidiary but nevertheless important role in securing the social minimum in cooperation with the other branches of government.[13]

In my view, King is clearly correct to regard constitutional social rights as securing the conditions for a minimally decent life. However, it is important to recognise that King's approach may not endear him to many other commentators working in this field. For a start, a more ambitious approach is evident in the text of key legal instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ICESCR recognises not merely a right to healthcare but instead 'the right of everyone to the highest attainable standard of physical and mental health.'[14] States Parties commit themselves to ensuring the 'continuous improvement of living conditions'[15] and providing an education directed to the 'full development of the human personality.'[16] Many academic commentators also make no secret of their desire to utilise constitutional social rights as a means of protecting social democracy, or an ample welfare state, in the face of

[9] Ibid 8.
[10] Ibid 17.
[11] Ibid 29-30.
[12] Frank Michelman, 'Foreword: On Protecting the Poor through the Fourteenth Amendment' (1968) 83 *Harvard Law Review* 7.
[13] King, above n 4, 18.
[14] Article 12(1).
[15] Ibid art 11(1).
[16] Ibid art 13(1).

political losses.[17] These tendencies are perhaps understandable but the effect is to cast social rights as essentially political claims that are unlikely to secure the broad cross-spectrum of support necessary for inclusion in constitutions. For this reason, King's discussion of the social minimum is an important addition to the existing literature.

However, this does not yet address the issue of the value that constitutional social rights might add to existing mechanisms for protecting the social minimum. In this regard, a strength of King's book is that unlike much of the literature in this area it engages with empirical studies on the impact of judicial review. Some of these studies are highly sceptical about the capacity of courts to deliver progressive social change,[18] or contend that even well-intentioned judicial interventions actually worsen the functioning of bureaucracies.[19] In essence, King argues that it is a mistake to look to courts to deliver significant social change. However, the balance of empirical evidence indicates that there are benefits to the type of enhanced legal accountability associated with constitutional social rights.

As for the concern that even well-intentioned judicial interventions may prove counter-productive to the realisation of social rights, this brings us to the heart of *Judging Social Rights*. King argues that the objections to social rights that have been outlined above – democratic legitimacy, polycentricity, expertise and flexibility – should not be taken to exclude the justiciability of social rights altogether. Instead, these objections should be recast as principles of deference. These principles should then be accorded weight in social rights adjudication – and human rights adjudication more generally[20] – so as to restrain judicial interventions in inappropriate cases. King characterises this as an 'institutional' approach to judicial restraint that recognises the advantages and disadvantages of the judicial process as a problem solving mechanism, and hence emphasises the problems of uncertainty and judicial fallibility.[21]

[17] Thus Sandra Fredman cites the 'icy winds of Thatcherism' as evidence for the necessity of constitutionally protected social rights. See Fredman, above n 5, vii.
[18] The classic study in this regard is Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (University of Chicago Press, 1991).
[19] See Jerry Mashaw, *Bureaucratic Justice* (Yale University Press, 1985).
[20] Jeff King, 'Institutional Approaches to Judicial Restraint' (2008) 28(3) *Oxford Journal of Legal Studies* 409.
[21] King, above n 4, 121.

Much of King's book consists of an elaboration of each of the four principles of judicial deference. Within the scope of this review, it is not possible to do justice to King's rich and detailed discussion. However, briefly, regarding democratic legitimacy, King argues that legislation adopted by a democratically elected legislature should generally be accorded great weight in political decision-making about rights. But this presumption does not apply where there has been an absence of legislative focus on a rights issue, or where the legislation addresses the right of someone belonging to a politically marginalised group.[22] On the issue of polycentricity, King has argued elsewhere that polycentricity is a pervasive feature of adjudication – after all, the very idea of *stare decisis* implies repercussions for unrepresented parties – so the adjudication of polycentric issues cannot be categorically excluded.[23] King therefore seeks to identify the circumstances in which polycentricity is relevant to adjudication and to list and elaborate factors that might mitigate the weight it ought to be given.[24] In relation to expertise, King identifies different forms of expertise and discusses how judicial deference should vary in accordance with the type of decision-maker under review. King similarly identifies different forms of inflexibility and considers how administrative and legislative flexibility can be accommodated in social rights adjudication. These discussions are elaborate and insightful and will be of interest not only to social rights scholars but public lawyers generally.

This lengthy discussion leads King to his central recommendation, which is that courts should adopt an 'incrementalist' approach to social rights adjudication. By incrementalism – a term borrowed from organisation theory[25] – King means that courts should avoid judgments that generate significant, nationwide allocative impact. Courts should instead give decisions on narrow, particularised grounds or, where far-reaching implications are unavoidable, decide cases in a manner that preserves flexibility. It follows that judicial decision-making should 'ordinarily proceed in small steps, informed by past steps, and small steps might affect large numbers of people, but in ways that preserve latitude for adaptation.'[26] Incrementalism should not be viewed as inert but rather as a dynamic and searching process that takes place in a controlled fashion.[27] This, King believes, is an appropriate response to

[22] King, above n 4, Ch 6.
[23] Jeff King, 'The Pervasiveness of Polycentricity' [2008] *Public Law* 101.
[24] King, above n 4, Ch 7.
[25] See, in particular, Charles Lindblom, 'The Science of Muddling Through' (1959) 19 *Public Administration Review* 79.
[26] King, above n 4, 293.
[27] Ibid.

the uncertainty that characterises social rights adjudication and the concern that courts may accidentally or intentionally inhibit the realisation of social rights by other branches of government.

In general, I am sympathetic to the argument that courts should proceed incrementally in social rights adjudication, even if this leads King to some overly cautious conclusions.[28] However, my main difficulty with King's argument is that the concept of incrementalism might specify an *approach* towards judicial decision-making but tells us very little about the *substance* of social rights. By this, I do not mean that courts should specify the exact content of the social minimum. Here I agree with King that this is not first and foremost a task for the judiciary.[29] Instead, my concern is that King provides very little analysis of the principles that should be applied by a court in a social rights case, other than to outline a highly sophisticated theory of deference coupled to an injunction that courts should proceed incrementally. The question that is left open is the nature of the legal principles that the courts should apply and develop. In parts, King gives the impression that courts should incrementally develop whatever legal principles are available in a given legal system, bearing in mind the principles of deference that he has outlined.[30] But if human rights are to mean anything, they must be associated with a set of core principles that are intrinsic the rights themselves.[31] Of course, King might argue that this criticism misses the point. Courts should take small steps, learning as they go, and it is not for him to specify the shape of the jurisprudence that emerges. But this ignores that there is already a considerable body of social rights jurisprudence, grappling with issues such as whether courts should apply a reasonableness or

[28] For example, King criticises the South African case of *Khosa v Minister of Social Development* (2004) 6 BCLR 569 (CC), in which the Constitutional Court ordered that social security benefits be made available to permanent residents, on the basis that the fiscal impact was excessive. See King, above n 4, 319. However, this ignores that citizenship had previously been recognised by the Constitutional Court as a ground of discrimination. The equality dimension to the case means that it would have been difficult for the Court to reach a contrary conclusion. Indeed, the case could be viewed as an incremental application of existing non-discrimination principles.

[29] See Murray Wesson, 'Disagreement and the Constitutionalisation of Social Rights' (2012) 12(2) *Human Rights Law Review* 33.

[30] Thus King writes that 'judges should act incrementally, taking small steps to expand the coverage of existing rules and principles…' See King, above n 4, 2.

[31] Elsewhere I have attempted to draw a distinction between principles of deference that apply in the adjudication of *all* rights and principles that are specific to *particular* rights. See Wesson, above n 29, 26. My concern is, in essence, that King does not sufficiently discuss the latter set of principles.

proportionality standard.[32] One cannot escape the conclusion that King's analysis would have benefited from further consideration of issues such as these.

An additional point of concern is that King has surprisingly little to say about cases of retrogression, or where a state takes backwards steps in the realisation of a social right. Subsequent to the global financial crisis, many European countries, the United Kingdom included, have adopted austerity policies in an attempt contain burgeoning debt and budget deficits. Austerity impacts directly upon social rights given that cuts are frequently made to spending on health, education, social security and so on. It is fascinating to consider what role constitutional social rights might play in this process. Applying King's analysis, there is no doubt that austerity is a highly polycentric issue that implicates considerable expertise. King would therefore presumably take the view that these principles of deference should be accorded great weight. It is possible that courts might specify certain procedural obligations but King would probably take the view that these should be particularised in the sense that they are not generally stipulated but applied as and when issues arise.[33] However, King's theory must also entail that courts should be vigilant to ensure that the social minimum is not threatened. It is the reader's loss that King does not have more to say about these issues.

From the above, it should be clear that to the extent that I have criticisms of *Judging Social Rights* they are mainly requests for further elaboration. There is no doubt that King has written a deeply impressive book that will be of great interest to social rights scholars and indeed anyone interested in public law. It is highly recommended.

[32] For an overview of the emerging social rights jurisprudence, see Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2008).

[33] See, for example, King, above n 4, 277 where the author discusses the 'meaningful engagement' procedure formulated by the South African Constitutional Court in *Occupiers of 51 Olivia Road v City of Johannesburg* (2008) 3 SA 208 (CC) for instances where the state is carrying out evictions.