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# Against market constitutionalism: a needs-based approach to rights and the case for a socialist constitutionalism

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## ABSTRACT

In this paper I explore the hypothesis that a conception of right(s) that draws from the notion of needs is crucial for a critique of market constitutionalism. To this end, I review different theories of need, revisit the ‘needs versus rights’ debate and set it in the context of the Marxist critique of rights. Market rationality pits ‘needs’ against ‘rights’ (in the legal field) and favours a narrow conception of ‘need’ (in the field of normative theory). In contrast to this, I propose a rich conception of ‘need’ based on Marx’s critique of capitalism and explore its potential for a materialist conception of right(s). I conclude with a tentative exploration of the constitutional implications of adopting a needs-based approach to rights, in terms of both judicial and political decision-making forms. To develop the above argument, I focus on labour rights – especially the ways in which market rationality has affected the conception and application of labour rights in the European Union and the United Kingdom.

## KEYWORDS

Rights; critique of rights; needs; market constitutionalism; economic democracy; socialist constitutionalism

## 1. Introduction

The meaning and social function of rights is contested. Historically, the language of rights has been at the forefront of revolutionary upheavals. In capitalist societies, rights, as a form of granting concessions and sustaining a -quite often illusory- sense of justice, have also played a significant role in the reproduction of social relations of exploitation. The contradiction inherent in the form and discourse of rights becomes even more apparent in situations of crisis, which are usually perceived as giving rise to antinomies between rights. The crises associated with the Covid pandemic, and the economic – or ‘cost of living’ – crisis that followed are examples of this.

Concerning the former, different countries’ legal responses to the Covid-19 pandemic were often framed in terms of a conflict between rights. The public interest and the right to health were pitted against several rights and freedoms.<sup>1</sup> Yet, this framing did not allow

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<sup>1</sup>Indicatively see Audrey Lebreton, ‘COVID-19 pandemic and derogation to human rights’, 7(1) *Journal of Law and the Bio-sciences*, (2020); David McGrogan, “It is unarguable that what happened under these regulations amounted to a deprivation of liberty”: *Dolan v Secretary of State for Health and Social Care*, *Public Law*, Issue 4, (2021), 671–8; Dimitrios

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for a very critical discussion of the measures to deal with the pandemic. For instance, the juridical examination of measures could not assess the suitability of the measures chosen. Calls for measures that posed a direct threat to property rights were not considered by governments, despite compelling legal arguments supporting them. Such measures would include the requisition of private clinics, the commandeering of productive units to redirect their production to health material and equipment, as well as the contravention of the patent protection afforded by the Agreement on Trade-Related Aspects Intellectual Property Rights (TRIPS) through the use of compulsory licences and the parallel imports of medicines.<sup>2</sup>

Following the pandemic, a cost-of-living crisis, triggered by a combination of factors (such as the flow of cash to tackle the economic effects of the pandemic and the war in Ukraine), led to a social crisis and the biggest wave of trade disputes and strike actions in over four decades. This situation shifted the focus once again to socio-economic rights, as governments introduced measures to prevent a spiral of inflation by hampering the trade union movement and restricting workers' capacity to struggle for higher wages. In the UK context, the enactment of the Strikes (Minimum Service Levels) Act aimed at restricting the lawful exercise of the right to strike, based on a justification determined by market rationality. The right to strike was presented as an 'individual' right, exercised by a social minority, and pitted against a multiplicity of rights of the majority (the 'right to life and limb') summed up in the notion of 'public interest'.<sup>3</sup> This approach, of course, ignores the effect of inflation on the needs of the majority of the population, as well as the role of social -especially labour- rights in securing the means to satisfy these needs.

The urgency with which these issues emerged on the surface of juridico-political debate necessitates an exploration of the jurisprudential implications of a stronger emphasis on the concept of needs. I start from the premise that the restriction of the critical scope and emancipatory potential of rights, as well as the distorted results of judicial applications of balancing exercises, are due to the subsumption of constitutional thinking and practices by market rationality.<sup>4</sup> My hypothesis is that a conception of right based on needs can contribute to the critique of this market rationality and point towards an alternative model of socialist constitutionalism, as well as a more comprehensive critique of extant social conditions. Essentially, I propose the development of a needs-based conception of right, in order to move beyond the balancing dead-end, as well as the depoliticisation and individualisation, of the rights discourse.

To this end, I revisit the debate of 'needs versus rights', while simultaneously reviewing Marxist critiques of rights, in an attempt to wed the two together for a needs-based conception of right. I argue that the narrowness, individualism, and depoliticising effect of rights discourse in modern societies is due to the dominance of market rationality. In this article, needs are not viewed in opposition to rights. Instead, social needs taken together with rights can enrich the notion and discourse of rights. In this sense, the

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Kivotidis, 'Public Interest or Social Need? Reflections on the Pandemic, Technology and the Law' in Carl F. Stychein (ed.), *Law, Humanities and the Covid Crisis* (University of London Press 2023).

<sup>2</sup>See Akritas Kaidatzis, Alexandros Kessopoulos, & Charalampos Kouroundis, *Measures for the health crisis: Property intact? (in Greek)*, (3 April 3 2020), available at: <https://www.constitutionalism.gr/metra-gia-tin-igionomiki-krisi-sto-apirovlito-idioktisis/>.

<sup>3</sup>House of Commons Debate 16 January 2023, vol 726, col 57.

<sup>4</sup>Emilios Christodoulidis, *The Redress of Law: Globalisation, Constitutionalism and Market Capture* (Cambridge University Press 2022).

paper picks up a thread from Mark Tushnet's original contribution to the 'needs versus rights' debate for a radical critique of rights that 'may help us build societies that transcend the failures of capitalism'.<sup>5</sup> Last but not least, the argument is intended as a contribution to the growing body of literature engaging with the notion of socialist constitutionalism,<sup>6</sup> which denotes a field of study interested in the exploration of institutional forms and principles that challenge and aim at the transformation of the extant social order, from a jurisprudential and constitutionalist perspective.<sup>7</sup>

The article begins with a review of critical approaches to rights and turns to the 'needs versus rights' debate, to claim that viewing needs and rights as opposites and approaching rights in an individualistic and depoliticised manner reflects the dictates of the market. The second section focuses on the normative value of needs. It reviews the relevant literature to argue that the dominant, narrow understanding of the normative value of needs is also produced by the pre-eminence of market rationality. It then presents a rich notion of needs based on Marxist critiques of capitalism, focusing on the notion of 'radical needs'. Based on this rich notion of needs, the final section tentatively explores the constitutional implications of a needs-based conception of rights.

## 2. 'Needs versus Rights'?

The idea of 'right', similar to the German concept of *Recht*, may refer to any of the following: 'a system of law, a legal or moral right, and a standard of rightness or justice'.<sup>8</sup> Right can, first, be conceived as objective right, i.e., as a system of law which regulates social behaviour. Second, right can be conceived as subjective right, in other words as a claim. Third, right can be conceived as a normative standard (*ius* in Latin or *δικαιον* in Greek) used to evaluate a system of positive law (*lex* in Latin, *Gesetz* in German or *νόμος* in Greek).

The language and form of rights has historically accommodated significant advances and victories of popular movements. These crystallised in the form of political, social and economic rights enshrined in bourgeois constitutions since the late eighteenth century, as well as rights secured in socialist constitutions throughout the course of the twentieth century. In this sense, rights have been central to the struggle of the masses for the improvement of their living and working conditions. At the same time, rights have played a crucial role for the development and formation of bourgeois society and its juridico-political form.<sup>9</sup> Last but not least, rights have been central to the reproduction of capitalist relations of production and the maintenance of the process of valorisation, which is capital's *sine qua non*.<sup>10</sup>

Furthermore, right can be approached as a form of social consciousness.<sup>11</sup> Social consciousness refers to 'collectively-organised', 'harmonised' modes of conceiving reality,

<sup>5</sup>Mark Tushnet, 'An Essay on Rights', 62(8) *Texas Law Review*, (1984), 1363–403, 1363.

<sup>6</sup>There have been several recent calls for re-focusing attention on 'socialist constitutionalism'. One of the most influential is that put forward by the Law and Political Economy group. Indicatively see William E. Forbath, *Socialism Past and Future: Part I*, (22 June 22 2020), available at <https://lpeproject.org/blog/socialism-past-and-future-part-i-of-ii/>. Governed by the same logic, a social democratic conception of constitutionalism, geared towards tweaking existing institutions while disregarding their historical role and class function, is put forward by Keith Ewing. See Keith Ewing, 'Socialism and the Constitution', 73(1) *Current Legal Problems*, (2020), 27–58.

<sup>7</sup>Paul O'Connell, 'The Poetry of the Future: Law, Marxism, and Social Change' in Paul O'Connell and Umut Özsü (eds), *Research Handbook on Law and Marxism* (Edward Elgar 2021), 458–76, 473–75.

<sup>8</sup>Igor Shoikhedbrod, *Revisiting Marx's Critique of Liberalism: Rethinking Justice, Legality and Rights* (Palgrave Macmillan 2019), 2.

<sup>9</sup>Michael E. Tigar and Madeleine Levy, *Law and the Rise of Capitalism* (Aakar Books 2006).

<sup>10</sup>Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press 2019).

which are shared by individuals in a society, and which reflect and act upon social processes, practices, relations and institutions.<sup>12</sup> Systems of law and rights are considered objective and ineradicable forms of the external world. They also play a major part in how we understand and experience the totality of social relations. Yet, in reality, they are only ‘fetishised’ or ‘reified’ forms of collectively organised experience.<sup>13</sup> These forms have crystallised in social consciousness and are reinforced by force of habit and tradition, but they are certainly not ineradicable or uncontested.<sup>14</sup>

It follows that right is a contested notion with different social functions depending on the concrete historical context and the interests of the social forces making use of the rights-form or discourse. This fact has given rise to several critical approaches to rights. On the one hand, a variety of scathing critiques of ‘rights talk’ and practice, with particular emphasis on the US constitutional tradition, have been launched.<sup>15</sup> Human rights practices and discourses have been criticised for: (i) insulating and valorising subordination in the private sphere; (ii) legitimating, perpetuating and concealing greater injustice than they address; and (iii) tending to be atomistic and alienating people from one another.<sup>16</sup> In other words, mobilising the language of human rights tends to distract us from broader, structural causes of injustice, and to undermine other discourses that might better allow us to get to the root causes of injustice.<sup>17</sup>

On the other hand, there have been various attempts at reconsidering the role of rights and opening them up to a serious evaluation ‘by the Left in order to develop a positive program for a politics of rights.’<sup>18</sup> According to this approach, rights can and should be deployed in emancipatory political projects, because the recognition of rights, such as welfare or socio-economic rights, can form part of a general strategy of subverting the logic of capital.<sup>19</sup> There have been several refreshing approaches to this debate recently.<sup>20</sup>

<sup>11</sup>See Karl Marx, ‘A Contribution to the Critique of Political Economy’, in Karl Marx and Friedrich Engels, *Marx and Engels Collected Works: Volume 29* (Lawrence and Wishart 2010), 263: ‘In the social production of their existence, men inevitably enter into definite relations, which are independent of their will, namely relations of production appropriate to a given stage in the development of their material forces of production. The totality of these relations of production constitutes the economic structure of society, the real foundation, on which arises a legal and political superstructure and to which correspond definite forms of social consciousness’.

<sup>12</sup>As Soviet philosopher, Evald Ilyenkov, put it, social consciousness ‘from the very beginning precedes individual consciousness as something already given, and existing before, outside, and independent of individual consciousness’. According to Ilyenkov, social consciousness is ‘not primary, but secondary, derived from social being, i.e. the system of material and economic relations between people’. Yet, in its ‘individualised form, in the form of the consciousness of one’s closest teachers, and after that, of the entire circle of people who appear in the field of vision of a person’, social consciousness forms individual consciousness to a much greater degree than the ‘material world’. Evald Ilyenkov, *Leninist Dialectics and the Metaphysics of Positivism* (New Park Publications 1982).

<sup>13</sup>ibid.

<sup>14</sup>ibid.

<sup>15</sup>Duncan Kennedy, ‘The Critique of Rights in Critical Legal Studies’ in Brown and Halley (eds), *Left Legalism/Left Critique* (Duke University Press 2002), 178.

<sup>16</sup>See Robin West, ‘Tragic Rights: The Rights Critique in the Age of Obama’, 53 *William and Mary Law Review*, (2011), 713, 716; and Anthony Chase, ‘The Left on Rights: An Introduction’, 62 *Texas Law Review*, (1984), 1541.

<sup>17</sup>In this way, the argument chimes with a concern among critical commentators that ‘reliance on rights in political struggles and by political movements invites a kind of legal imperialism, in which courts and lawyers take on an unhealthy prominence’. Austin Sarat and Thomas Kearns, ‘Editorial Introduction’ in Sarat and Kearns (eds), *Identities, Politics and Rights* (University of Michigan Press 1997) 1, 4–5.

<sup>18</sup>Amy Bartholomew and Alan Hunt, *What’s Wrong with Rights?* 9(1) *Law & Inequality*, (1991).

<sup>19</sup>See Prabhat Patnaik, *A Left Approach to Development*, 45 (30) *Economic & Political Weekly*, (2010), 33.

<sup>20</sup>See for instance Radha D’Souza, *What’s wrong with Rights* (Pluto Press, 2018); Paul O’Connell, *Human rights: contesting the displacement thesis*, 69 (1) *Northern Ireland Legal Quarterly*, (2018), 19–35; Paul O’Connell, *On the Human Rights Question*, 40(4), *Human Rights Quarterly*, (2018), 962–88; Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press, 2018); Jessica Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism*, (Verso 2019).

According to one of these, rights may refer to a broader set of claims and can be pursued as collective demands through collective struggle. The mobilisation of rights language can make important contributions to movements for radical social change, without displacing or precluding the mobilisation of other emancipatory languages, and the challenging of deeper, structural causes of injustice. Movements such as the Focus E15 campaign in London and the Right2Water in Ireland ‘engaged the language of human rights alongside other frames of reference and connected the specific rights struggle its protagonists were engaged in with broader causes of injustice’.<sup>21</sup>

In this paper I aim to further this approach by proposing a needs-based conception of right(s) which moves beyond the individualist and depoliticised notion determined by market rationality. It is not the first time that a needs-based critique of rights has been suggested. However, in the discipline of law and legal studies, rights and needs have mostly been approached as opposites. I wish to propose an alternative approach.

The debate between Mark Tushnet and Jeremy Waldron illustrates this point. In 1984, Tushnet argued that the language of needs should replace the language of rights. Tushnet saw this as a crucial aspect of a ‘radical critique of rights’.<sup>22</sup> Responding to Richard Posner’s view that ‘the concept of liberty in the Fourteenth Amendment does not include a right to basic services’, such as education, housing and welfare assistance,<sup>23</sup> Tushnet identified the fundamental flaw of the rhetoric of rights as being that rights are indeterminate and contestable. Consequently, they can ‘provide only momentary advantages in ongoing political struggles’, as what is today protected as a right may not be the same as what is protected in the future.<sup>24</sup> Having noted the reifying function of rights,<sup>25</sup> Tushnet called for abandoning the rhetoric of rights altogether. This call was necessitated by ‘substantial pragmatic reasons’ which compelled him to reject the alternative path of reformulating ‘the rhetoric of rights’. As Tushnet argued ‘people need food and shelter right now, and demanding that those needs be satisfied [...] strikes me as more likely to succeed than claiming that existing rights to food and shelter must be enforced’.<sup>26</sup>

Jeremy Waldron’s response to Tushnet’s critique began by noting that needs are contestable too.<sup>27</sup> For Waldron, the argument essentially revolves around the dilemma of choosing between a legal and a political avenue for the vindication of popular claims. Are popular claims more likely to be vindicated through an argumentative battle in a court of law or through political struggle in parliament and the streets? Yet, Waldron continued by arguing that the answer to the dilemma between ‘litigation’ and ‘revolution’ should not necessarily determine whether we endorse the language of rights or not. He points out that in early modernity rights were more often associated with revolution than litigation.<sup>28</sup> According to Waldron, few would believe that ‘rights-talk is limited to constitutional litigation’.<sup>29</sup>

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<sup>21</sup>O’Connell, *Human rights: contesting the displacement thesis*, 27–32.

<sup>22</sup>Tushnet, ‘An Essay on Rights’, 1363.

<sup>23</sup>*ibid.*, 1203–4.

<sup>24</sup>Tushnet, ‘An Essay on Rights’, 1371.

<sup>25</sup>*ibid.*, 1382.

<sup>26</sup>*ibid.*, 1394.

<sup>27</sup>Jeremy Waldron, ‘The Role of Rights in Practical Reasoning: ‘Rights’ versus ‘Needs’’, (2000) *The Journal of Ethics*, 115–35, 120.

<sup>28</sup>*ibid.*, 117.

<sup>29</sup>*ibid.*, 118.

This raises the question: If rights are not limited to litigation but, as a discourse, have such normative force as to serve revolutionary purposes, then why critique them and why abandon them for the language of needs? I claim that Tushnet's argument was not adequately developed to give a convincing answer to this question. Indeed, the terms of the debate itself are too restrictive because both thinkers approach needs and rights as opposites. They both accept that needs and rights are contestable, yet they fail to inquire into the factors that determine these different and contested conceptions. Why does the rights discourse serve both revolutionary purposes and the reproduction of relations of exploitation? Additionally, what is the normative value of needs? Is it reduced to the avoidance of harm and to measures addressing extreme poverty? If 'needs' are contestable too, can they give rise to a different, more revolutionary interpretation? What determines this interpretation?

To move this argument forward, the position developed here is that the root of the problem with analyses of the relationship between rights and needs so far has been the lack of appreciation of the effect that market rationality has had on both discourses. In his recent work, Emiliios Christodoulidis uses the notion of market constitutionalism to refer to a process of 'undoing of the constitutional form under the pressure of total market thinking'.<sup>30</sup> As a result of this process, constitutional function shrinks to 'what Hayek calls 'catalaxy' – the protection of property title and the stability of expectations'.<sup>31</sup> This market capture signifies a 'paradigmatic shift of constitutional thought from political to a market register'.<sup>32</sup> The individualist notion of rights and the consequent depoliticisation of social relations regulated by this form are key characteristics of market constitutional rationality.

This is most evident in the constitutional role of labour legislation. Labour law theorists accept that the employment relation is essentially a relationship of conflict, intrinsic to capitalist societies, between the owners of capital, who invest in productive activities, and the workers, who supply the necessary labour.<sup>33</sup> From a socialist perspective, labour rights, such as the right to unionise or the right to take industrial action, promote the unilateral protection of employees and aim to create, at a constitutional level, a rival authority against that of the employer, which emanates from the right of ownership of the means of production.<sup>34</sup> The legal recognition of such rights reflects the social struggle of workers to limit the monopoly power of their social competitor to unilaterally determine the employment status.<sup>35</sup>

However, in most capitalist countries, especially after the process of neoliberal restructuring,<sup>36</sup> the law on employment relations is primarily determined by market rationality. In the UK, for instance, the individual contract of employment is the primary legal form of regulating industrial relations. The focus on the individual contract of employment reflects the view that the hiring of workers to perform work is and should be treated like any other market transaction.<sup>37</sup> This approach perceives and presents the contract

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<sup>30</sup>Christodoulidis, *The Redress of Law*, 8.

<sup>31</sup>*ibid.*, 9.

<sup>32</sup>*ibid.*, 2.

<sup>33</sup>Hugh Collins, Keith Ewing, and Aileen McColgan, *Labour Law (2nd ed.)*, (Cambridge University Press 2019), 108–10.

<sup>34</sup>Dimitrios Travlos-Tzanetatos, *Industrial Action in the Enterprise and the Constitution (in Greek)*, (Sakkoulas 1984), 16.

<sup>35</sup>*ibid.*, 17.

<sup>36</sup>David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2007).

<sup>37</sup>Collins, Ewing, McColgan, *Labour Law (2nd ed.)*, 218.

of employment as a bargain between equals in the marketplace. This individualistic approach abstracts from the reality of material, power relations and thus depoliticises the relation of employment. The presentation of this relation as a contract freely entered into after a bargain between equals belies the fact that the two parties are not equal, and the contract is hardly ever the result of a bargain.<sup>38</sup>

This point does not negate the existence of collective practices and the legal sanctioning of those in the UK legal system. It rather illustrates how market constitutional rationality determines the dominant, individualistic and depoliticising approach to rights. If we take the right to strike for instance, we see that the default position in UK common law is that industrial action constitutes a breach of contract on the part of the strikers and gives rise to ‘economic torts ... [for] the organisers and their union’.<sup>39</sup> It was only through the statutory regulation of industrial action throughout the twentieth century, owing to the different levels of development of class conflict, that immunities against existing torts in the context of trade disputes were created, providing workers who until then ‘stood naked and unprotected at the altar of the common law’ with some statutory protection.<sup>40</sup> Class struggle inspired by a different, socialist rationality had transformed the law on employment relations as manifested in statutes like the Trades Disputes and Trade Unions Act 1947, which had lifted the ban on secondary action, and the Trade Union and Labour Relations Act 1974 which afforded substantially broader protection to industrial action than is the case at present.

Yet, market rationality was never eradicated and the individualistic and depoliticised approach to rights was further strengthened by waves of legislation after the 1980s that repealed the aforementioned statutes. Since then and once it was perceived as a barrier to profit and, thus, normatively abhorrent, labour regulation intended to protect employees has been replaced by economic regulation intended to attract investment.<sup>41</sup> In the context of the EU, Christodoulidis sees the cases of *Laval*<sup>42</sup> and *Viking*<sup>43</sup> -according to which industrial action in the context of the EU is presumptively disproportionate and therefore unlawful- as constituting a degenerative ‘constitutional moment’ which hardened and radicalised market constitutionalism.<sup>44</sup> In the UK, a recent wave of legislation that imposed further restrictions on the lawful exercise of industrial action was characterised as ‘highly authoritarian’ and ‘anti-liberal’.<sup>45</sup>

In parallel, from a market perspective, the concept of needs appears irrelevant for the normative evaluation of employment law. As we shall shortly see, the normative force of this notion is predominantly associated with the avoidance of harm and the provision of bare necessities. It is, thus, hardly relevant for a critique of the market approach to labour law, which views the employment contract as a relationship between equal parties where goods of equal value are exchanged. This relationship is not characterised by any notion of extreme need or a threat to an individual’s survival.

<sup>38</sup>Hugh Collins, Keith Ewing, and Aileen McColgan, *Labour Law (1st ed.)*, (Cambridge University Press 2012), 98–100.

<sup>39</sup>*Metrobus Ltd v Unite the Union* [2009] EWCA Civ 829, [2010] ICR 173 [118].

<sup>40</sup>Collins, Ewing, McColgan, *Labour Law (1st ed.)*, 665.

<sup>41</sup>Ruth Dukes, ‘Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labour Law’, 35(3) *Journal of Law and Society*, (2008), 341–63.

<sup>42</sup>*Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet & ors* (C-341/05).

<sup>43</sup>*International Transport Workers’ Federation & anor v Viking Line ABP & anor* (C-438/05).

<sup>44</sup>Christodoulidis, *The Redress of Law*, 367, 376, 397.

<sup>45</sup>Alan Bogg, ‘Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State’, 45(3) *Industrial Law Journal*, (2016), 299–336, 307.

It follows that different conceptions of rights and needs reflect different worldviews. Market constitutional rationality determines the individualist and depoliticising notion of rights. It also determines the narrow notion of needs which restricts their normative value to avoidance of harm and mere survival. This point, however, also leaves open the possibility for an alternative conception of rights and needs, indeed a needs-based conception of right which would enhance the democratic and revolutionary characteristics of these notions.

### 3. Normative value of needs

#### 3.1. Narrow notion of needs

Let us begin the examination of a needs-based conception of right(s) with the hardly controversial statement that assigning normative value to certain needs may give rise to rights claims, as means for their satisfaction. Two questions arise regarding the validity and application of this statement. First, do needs have any normative value? And, if so, which are the needs that have normative value? Both questions invite contestation. This section will review the relevant philosophical literature on the notion of needs to identify the normative value of needs according to political theory and moral philosophy. Furthering my critique of market rationality, I argue that, for the most part, theorists accept a rather narrow notion of needs as normatively significant. I shall then propose a richer notion of needs, based on Marxist critiques of capitalism, and explore its normative value focusing on the idea of ‘radical needs’. The following section will then explore the constitutional implications of such a notion.

A review of the literature on the normativity of needs shows that it is a rather contestable notion. This is evident already from the definitions provided by different theorists. For instance, according to G.E.M. Anscombe, to say that an animate creature needs such and such environment is to say that ‘*it won’t flourish unless it has it*’.<sup>46</sup> Moreover, according to Aristotle, something is said to be necessary ‘if it is that without which ... *living is impossible*’, or ‘if it is anything without which it is *not possible for the good to be or come to be or for the bad to be got rid of or taken away*’.<sup>47</sup> We see already that three different categories emerge as defining the normative value of needs: ‘flourishing’, ‘survival’ or ‘bare life’, and ‘avoidance of harm’ or good life’. These are all contestable categories, open to wide or narrow interpretations.

Indeed, contemporary theoretical analyses of needs reveal the possibility of wide interpretations of needs and their normative significance. However, as we shall see, the vast majority of thinkers tend to reduce the normative value of needs to a core set of needs associated with avoidance of harm and situations of dependency. The term ‘fundamental needs’ has been used to define the absolutely necessary conditions in order for a person ‘not to undergo serious harm’.<sup>48</sup> Additionally, the term ‘constitutive needs’ has been used to describe ‘needs that a person cannot satisfy without the help of others’.<sup>49</sup>

<sup>46</sup>G.E.M. Anscombe, ‘Modern Moral Philosophy’, 33(124) *Philosophy*, (1958), 1–19, 7, (emphasis added).

<sup>47</sup>Aristotle, *Metaphysics*, (1015 a20). I used Aristotle, *Metaphysics*, (Hackett 2016), 74, (emphasis added).

<sup>48</sup>Garrett Thomson, ‘Fundamental Needs’ in Soran Reader (ed.), *The Philosophy of Need* (Cambridge University Press 2005), 175–86, 175.

<sup>49</sup>Sarah Clark Miller, ‘Need, Care and Obligation’ in Soran Reader (ed.), *The Philosophy of Need* (Cambridge University Press 2005), 137–60, 142.

According to another thinker, ‘basic needs’ are ‘those things the satisfaction of which is necessary for human agency’,<sup>50</sup> whereas others view the normative value of needs as reduced to ‘a class of needs whose satisfaction is necessary not just for the satisfaction of particular goals, but as a precondition for pursuing any goals at all’ – the most obvious examples being the need for food and shelter.<sup>51</sup>

It is interesting to note that all the above thinkers and definitions provide expansive interpretations of the normative value of needs. For instance, the notion of harm can be defined as lack of ‘engaging in non-instrumentally valuable experiences and activities’.<sup>52</sup> Similarly, dependence can be defined narrowly (to refer to social groups like infants, elderly people, injured or disabled persons) or widely, recognising that in capitalist society the extended division of labour renders everyone dependent upon each other. Furthermore, if one understands the needs essential for human agency as requiring a certain amount of autonomy<sup>53</sup> then one may arrive at a ‘more expansive list, which includes needs for a relatively stable upbringing, education, and access to information about the opportunities available in one’s society’.<sup>54</sup>

Nevertheless, despite the possibility of alternative wider interpretations, a review of the relevant literature reveals a general reluctance to expand the normative scope of needs and a tendency to reduce their normative value to a minimal set of ‘subsistence’, ‘fundamental’, ‘basic’ or ‘constitutive’ needs, associated with the prevention of harm and situations of extreme necessity or dependency. The association of the normative validity of needs with extreme situations of necessity was originally – at least as far as modern societies are concerned – established in G.W.H. Hegel’s analysis of the *Notrecht* (i.e., the right of need).<sup>55</sup> For Hegel, an illegal action, such as theft, which infringes upon the right to property, may be justified on the basis of ‘*Notrecht*’. The *Notrecht* is the right of extreme need, which can be invoked by individuals who find themselves in a dire situation of propertylessness, such that their very existence is put in danger. Despite his dialectical mode of analysis, Hegel could not in his time develop a more comprehensive critique of a society which systematically produces situations of suffering and degradation for the vast majority of human population, based on the concept of needs – as opposed to his successor in the field of dialectical thought, Karl Marx.

Before we turn to the Marxist analysis of the normative value of need, it is important to dwell a bit more on the normative implications of associating needs with situations of dependency and destitution. The normative scope of needs is severely restricted by arguments which associate need with situations of charity and dependence. According to these arguments, to make a needs-claim is to acknowledge one’s dependence on others.<sup>56</sup> This dependence is a source of humiliation and, consequently, in certain

<sup>50</sup>Gillian Brock, ‘Needs and Global Justice’ in Soran Reader (ed.), *The Philosophy of Need* (Cambridge University Press 2005), 51–72, 63.

<sup>51</sup>Bill Wringer, ‘Needs, Rights, and Collective Obligations’ in Soran Reader (ed.), *The Philosophy of Need* (Cambridge University Press 2005), 187–207, 191.

<sup>52</sup>Thomson, ‘Fundamental Needs’, 178.

<sup>53</sup>Brock, ‘Needs and Global Justice’, 63.

<sup>54</sup>Wringer, ‘Needs, Rights, and Collective Obligations’, 191.

<sup>55</sup>G.W.F. Hegel, *Outlines of the Philosophy of Right* (Oxford University Press 2008), 235.

<sup>56</sup>John O’Neill, ‘Need, Humiliation and Independence’ in Soran Reader (ed.), *The Philosophy of Need* (Cambridge University Press 2005), 73–97, 90.

conditions ‘distribution according to need, for example through means-tested benefits, becomes a source of social stigma and humiliation’.<sup>57</sup> From this standpoint, relying on the state to satisfy the needs of certain social groups fosters paternalist and authoritarian practices and hinders the autonomy and self-sufficiency, as well as the social standing of individuals. It is easy to see that this view reflects the market viewpoint. It was Adam Smith, the great patriarch of market rationality, who proclaimed commerce as the great preventative of dependency, which ‘tends to corrupt and enervate and debase the mind’ more than anything else.<sup>58</sup> I argue that, for reasons that will shortly become even more evident, market rationality ultimately leads to the reduction of the normative value of needs to a bare minimum.

### 3.2. Rich conception of needs

Let us now turn to the rich conception of needs which draws from Karl Marx’s critique of the capitalist mode of production.<sup>59</sup> Marx’s notion of ‘human needs’ includes not just the basic needs of sustenance, warmth and shelter, basic hygiene, but also the more refined needs of recreation, culture, education and intellectual exercise, artistic expression, emotional fulfilment and aesthetic pleasure.<sup>60</sup> All the above needs have *significant normative value* for the critique of the social conditions produced by capitalism. Yet, there are two more needs that strengthen the normative force of Marx’s critique of capitalism: the need for fulfilling work and the need for meaningful community. The former relates to the process of superseding the alienated character of work in capitalism, where the worker is alienated from the product of their labour, as well as from the joy and fulfilment of the labour process itself, and ends up becoming a mere appendage to a machine, a cog in the profit-making engine of capitalist production.<sup>61</sup> Relatedly, the need for meaningful community involves an understanding of needs as a principle of justice as well as community, where production and distribution according to needs involves a direct concern for the well-being of others, results in the creation of a communal bond between members of society and confirms our social nature.<sup>62</sup>

In Marx’s work the concept of needs assumes a prominent role in the critique of the social conditions of existence. This concept appears in the opening paragraphs of the first volume of ‘Capital’, where Marx analyses the elementary form of wealth in capitalist societies, i.e., the commodity.<sup>63</sup> According to Marx, ‘the commodity is, first of all, an external object, a thing which through its qualities satisfies human needs of whatever kind’.<sup>64</sup> One of the main scientific contributions of Marx’s theory of value to the

<sup>57</sup> *ibid.*, 77.

<sup>58</sup> Adam Smith, *Lectures on Jurisprudence* (Liberty Press 1982), vi. 6.

<sup>59</sup> It has been argued that Marx’s theory is not the only one possessing a rich notion of needs. Marx’s conception of needs has certain affinities with the capabilities approach, originally developed by Amartya Sen. See David Braybrooke, ‘Where does the Moral Force of the Concept of Needs Reside and When?’ in Soran Reader (ed.), *The Philosophy of Need* (Cambridge University Press 2005), 209–28, 215, as well as David Leopold, ‘Karl Marx and the Capabilities Approach’, in Enrica Chiappero-Martinetti, Siddiqur Osmani and Mozaffar Qizilbash (eds.), *The Cambridge Handbook of the Capability Approach* (Cambridge University Press 2020), 40–58. For a critical discussion of this relationship, see Hartley Dean, ‘Critiquing Capabilities: the Distractions of a Beguiling Concept’, 29(2) *Critical Social Policy*, (2009), 261–273.

<sup>60</sup> Karl Marx, ‘Economic and Philosophic Manuscripts of 1844’, in Karl Marx and Frederick Engels, *Collected Works: Vol. 3*, (Lawrence & Wishart 1975), 229–346, 275, 301, 308, 309.

<sup>61</sup> István Mészáros, *Marx’s Theory of Alienation* (Aakar Books 2006).

<sup>62</sup> O’Neill, ‘Need, Humiliation and Independence’, 73–74.

<sup>63</sup> Karl Marx, *Capital: Volume 1* (Penguin 1990), 125.

discipline of political economy is explaining the dual nature of the commodity. Commodities appear as use values and exchange values.

The use value of a commodity is the aspect that has to do with satisfaction of needs. However, commodity production is not governed by needs satisfaction. Rather, the process of production in capitalism is put in motion by the capitalist's incessant drive to add more value to the initial value of the money-capital they advance in the market. This process is known as valorisation. According to Marx, valorisation takes place in constantly renewed movement.<sup>65</sup> The bearer of this movement is the capitalist and its purpose is not the profit of a single transaction, but the unceasing movement of profit-making.<sup>66</sup> The totality of the capitalist process of production, i.e., production, circulation, distribution and consumption, is determined by this compulsion for profit. The self-valorisation of capital, which is another name for profit-making, lies at the root of capitalist rationality and determines the form and content of needs (e.g., need for food, shelter, health, education, etc), as well as the forms of needs satisfaction.

Marx goes on to show that the valorisation of capital relies on the consumption of 'a commodity whose use-value possesses the peculiar property of being a source of value': the capacity for labour or labour-power.<sup>67</sup> This is an important point as it shows how the aforementioned need for fulfilling work is distorted in the context of capitalist society. The need for fulfilling work is reduced, from the standpoint of the worker, to the need to sell one's labour power as commodity to obtain the means of subsistence. What is more, as far as the exchange value of labour-power is concerned, just like any other commodity, the value of labour-power is equal to the value of the labour-time necessary for its production and reproduction. Consequently, the value of labour-power is equal to the labour-time necessary for the production of the means of subsistence necessary for the worker's maintenance.<sup>68</sup> *It is, therefore, in the capitalist's interest to minimise and restrict individual needs, so as to drive down the exchange value of labour power and maximise their profit.*

This point is essential for understanding *why the normative value of needs tends to be reduced to the bare minimum* by theorists of need -who examine need in the context of the capitalist mode of production. Additionally, the process of valorisation enables us to understand how the market perspective determines the dominant conception of rights in capitalist society. On the topic of labour rights, for instance, market rationality and the need for valorisation determine the outcome of balancing the right to strike against the public interest. 'Public interest', from a market perspective, is understood as the abolition of barriers to profit-making. This perspective is reflected in judicial decisions, as well as in legislation. As we shall see in more detail in the next section, collective labour rights, to the extent that they impede companies' access to markets (and therefore impact on the quest for higher rates of profit)<sup>69</sup> are necessarily conceived in a narrow sense. For instance, according to the jurisprudence of the Court of Justice of the EU (CJEU), the right to strike has by

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<sup>64</sup>ibid.

<sup>65</sup>Marx, *Capital: Volume 1*, 253.

<sup>66</sup>ibid., 254.

<sup>67</sup>ibid., 270.

<sup>68</sup>Marx, *Capital: Volume 1*, 274–75.

<sup>69</sup>Guglielmo Carchedi, *For Another Europe: A Class Analysis of European Economic Integration* (Verso 2010), 60.

default a disproportionate effect on the freedom of establishment and the onus is on a trade union to justify its use.<sup>70</sup>

Before we move on to discuss ways in which a needs-based approach to rights can reverse this process of market capture, we must briefly elaborate on the notion of ‘radical needs’. This notion features centrally in Agnes Heller’s ‘The Theory of Need in Marx’. Heller’s analysis is important for clearly and unambiguously articulating the view that capitalist production, and capitalist society in general, reverses the social relationship between means and ends. Under ‘human’ conditions, the main end of humans are other humans.<sup>71</sup> In other words, the end of social production ought to be the satisfaction of social needs and the free and full development of the individual.<sup>72</sup> However, in capitalist alienated production, the end turns into a means and humans become for other human beings a mere means towards the satisfaction of their own private ends.<sup>73</sup>

Heller’s notion of radical needs clearly sets out the distorted and alienated character of market rationality. It also points towards the transcending of this alienation *in a post-capitalist society where production is geared towards the satisfaction of social needs*. Radical needs are ‘inherent aspects of the capitalist structure of need’.<sup>74</sup> They are born in capitalist society, yet their satisfaction can only be achieved in a higher mode of production. They compel individuals, in the interest of satisfying them, ‘to bring about a social formation which is radically, ‘from the root’, different from the previous one, a society in which the radically new system of needs will be different from all earlier ones’.<sup>75</sup> As a result, radical needs, according to Heller, embody a normative urgency to transcend capitalism, but, since they originate in capitalist production, they and the normative content they embody are immanent and not transcendental or transhistorical.

Additionally, Heller’s concept of radical needs expands the normative scope of needs. Not just a core set, but a multiplicity of needs become normatively relevant through the notion of radical needs. Social needs (such as the needs for food and shelter, which in capitalism are inadequately or improperly satisfied for the vast majority of the global population; the needs for health and education, which are never addressed holistically but predominantly in accordance with capital’s dictates and needs; especially needs such as the need for leisure time and creative labour) are immanent to the capitalist mode of production, essential aspects of the capitalist social formation, but their satisfaction in a manner that promotes the free and full development of the individual can only be realised in a society where the ‘means and ends’ relationship is not reversed and distorted.

It follows from the above that a rich notion of needs, based on Marx’s critique of capitalism, allows us to conceive of a normative standard which is born in capitalist society but points towards a post-capitalist social formation. Such a social formation would be governed by an entirely different principle: not ‘profit’ but the ‘free and full development of the individual’ would be the ultimate aim of a society that transcends capitalist contradictions and alienation. Furthermore, as mentioned above, this is both a principle of

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<sup>70</sup>See supra notes 39 and 40.

<sup>71</sup>Agnes Heller, *The Theory of Need in Marx* (Verso 2018), 48.

<sup>72</sup>*ibid.*, 49.

<sup>73</sup>*ibid.*, 48.

<sup>74</sup>*ibid.*, 97.

<sup>75</sup>*ibid.*, 97–98.

justice and a principle of community.<sup>76</sup> Under a socialist mode of production, individuals have the immediate satisfaction and knowledge that in their labour they gratify a human need.<sup>77</sup> In other words, they act as mediators between all other individuals and the human species as a whole.<sup>78</sup>

It follows from the above that Marxist analyses of need present a different rationality based on social solidarity and direct concern for the well-being of others. This rich notion, which approaches needs as a totality governed by a fundamental principle that determines both social production and systems of justice and rights, can form the basis for a critique of the dominant model of market constitutionalism as well as of the extant social order. A system of needs governed by the principle of ‘free and full development of the individual’ would necessitate a different model of constitutionalism. We could call this socialist constitutionalism.

## 4. Towards a socialist constitutionalism

### 4.1. ‘Full development of the individual’ and fundamental rights

This section explores the implications of the above analysis for a different model of constitutionalism governed by a qualitatively different rationality. In particular, it explores how a need-based conception of rights is central to a model of socialist constitutionalism. This notion has been used to describe the theoretical investigation of ‘institutional forms that empower the working class in ways that challenge the logic of the extant system’.<sup>79</sup> A socialist constitutionalism contests the foundational aspects of market constitutionalism, such as the reduction of law to an instrument that ensures economic efficiency<sup>80</sup> and the prioritisation of property rights over socio-economic rights,<sup>81</sup> but it also challenges the material relations that these constitutional forms seek to protect and reproduce. As such, a socialist constitutionalist approach might have both reformist and revolutionary implications, as we shall shortly see. I shall begin with the potential effect of such an approach on the judicial approach to fundamental rights and continue with a tentative exploration of the potential effect on institutional forms of decision-making.

The principle of ‘free and full development of the individual’, as the governing principle of a socialist rationality, is very important in this respect. It may seem surprising that there is a scarcity of systematic elaborations of this principle, which has a high normative value in Marx’s analysis.<sup>82</sup> Indeed, it is only in Tony Smith’s work on the

<sup>76</sup>O’ Neill, ‘Need, Humiliation and Independence’, 73.

<sup>77</sup>Karl Marx, ‘Excerpts from James Mill’s Elements of Political Economy’ in Karl Marx, *Early Writings* (Penguin 1975), 27.

<sup>78</sup>*ibid.*

<sup>79</sup>Paul O’Connell, ‘Marxism and Public Law’ in Paul Daly and Joe Tomlinson (eds.), *Researching Public Law in Common Law Systems* (Edward Elgar 2023), 231–50.

<sup>80</sup>Michael Rodi, *Economic Analysis of Public Law* (Springer 2022), 10–52.

<sup>81</sup>Friedrich Hayek, *Law, Legislation and Liberty, Vol. 2: The Mirage of Social Justice* (Chicago University Press 1976).

<sup>82</sup>The debate on the normative aspect of Marx’s analysis is too wide to document here, however, a brief comment is necessary. The debate, which was for the most part carried out within Analytical Marxism, revolved around the questions of whether Marx has a theory of justice, as well as whether he condemned capitalism from a principle of justice or from another normative position. The dominant anti-moralist position was represented, among others, by Robert Tucker and Allen Wood, who viewed Marx’s social critique as grounded in science and historical positivism, rather than on the principle of justice. Indicatively see Robert Tucker, *Philosophy and Myth in Karl Marx* (Cambridge University Press 1961); Robert Tucker, *The Marxian Revolutionary Idea*, (W.W. Norton and Company 1969); Allen Wood, ‘The Marxian Critique of Justice’, 11(3) *Philosophy & Public Affairs*, (1982), 244–82; Allen Wood, ‘Marx on Right and Justice: A Reply to Husami’, 8(3) *Philosophy & Public Affairs*, (1979), 267–95. The argument against condemning

principles of a socialist constitution that we find a detailed discussion of this concept.<sup>83</sup> Smith discusses the principle of ‘free and full development of every individual’ as the foundational principle for a socialist constitution. This principle appears both in the ‘Communist Manifesto’ where Marx and Engels call for a society where ‘the free development of each is the condition for the free development of all’,<sup>84</sup> and in ‘Capital’, where Marx refers to a highest form of society where ‘the full and free development of every individual forms the ruling principle’.<sup>85</sup>

According to Smith, this is a fundamental principle which lies at the root of a social formation, permeating all sorts of institutional frameworks and systems of social practice, including decision-making and dispute-resolving processes. In his work, Smith proceeds with a concrete analysis of the central tenets of this principle. Let us begin with the aspect of ‘full development’, its impact on a system of needs, and its relation to fundamental rights. Smith begins by noting the impossibility of fully developing ‘every potential latent in the human species in a single lifetime’.<sup>86</sup> Nevertheless, he moves on to break down the principle of ‘full development of the individual’ into two sets of needs: universal and particular needs. Universal needs are needs that ‘all members of the community have qua members of a geographical or virtual community’, while particular needs refer to the ‘particular goods individuals require for their particular life plans’, and which are provided ‘to the greatest feasible extent compatible with the principle of solidarity’.<sup>87</sup>

As far as universal needs are concerned, these include: a collective universal need for the resources required to establish and maintain the essential institutions and organisations of self-governance; a collective universal need for a built social environment conducive to the full development of social individuals; a collective universal need for an effective innovation system furthering human flourishing; as well as a collective universal need for a natural environment within which human beings can flourish.<sup>88</sup> Particular needs refer to essential capabilities, which are met according to the principle of solidarity. These include: the need to live healthy lives of normal length; the need to exercise agency in creative ways; the need to develop the capacity for sensation, imagination, theoretical and practical thought; the need to have appropriate emotional connections with other beings; the need to experience ourselves as part of the natural world in relationship with other parts; the need to engage in play; the need to cooperate with others in households, workplaces and other organisations and associations; and the need to participate as an equal in the institutions and social practices of self-governance without domination.<sup>89</sup>

We see that the fundamental principle of a ‘free and full development of the individual’ translates into a multiplicity of needs which are instrumental to the satisfaction of

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capitalism in terms of an abstract and transhistorical principle of justice is arguably based on Marx’s epistemological principles. Nevertheless, convincing arguments have been made that Marx’s theory had a strong normative force and our analysis seeks to contribute to this literature. Indicatively see George E. McCarthy, *Marx and Social Justice: Ethics and Natural Law in the Critique of Political Economy* (Haymarket Books 2017) and Philip J. Kain, *Marx and Ethics* (Oxford University Press 1988).

<sup>83</sup>Tony Smith, *The Full and Free Development of the Individual: A Socialism for the Twenty-first Century* (forthcoming), 2025.

<sup>84</sup>Karl Marx and Friedrich Engels, ‘Manifesto of the Communist Party’ in Karl Marx and Friedrich Engels, *Marx and Engels Collected Works: Volume 6* (Lawrence and Wishart 2010), 506.

<sup>85</sup>Marx, *Capital: Volume 1*, 738.

<sup>86</sup>Smith, *The Full and Free Development of the Individual*.

<sup>87</sup>ibid.

<sup>88</sup>ibid.

<sup>89</sup>ibid.

this fundamental human need, and, as a result, have categorical value in themselves. Additionally, this principle places strong emphasis on the material conditions necessary for the satisfaction of these needs and, therefore, influences the content and role of fundamental rights in a socialist constitution. It can be argued that such a foundational principle would necessitate inclusion in a socialist constitution of rights which most often do not find their way in bourgeois constitutional documents -and when they do they tend to be subjected to a rather restricted interpretation and application by relevant institutions. An indicative list would include: the right to housing; the right to free and public health-care; the right to free and all-round education; the right to a reasonable standard of living; the right and duty to work; the right to rest and leisure; the right to join trade unions; the right to collective bargaining; the right to strike; and the right to environmental protection.

Even more importantly, a needs-based approach to rights could potentially influence how state institutions, including the judiciary, approach such rights, which have sporadically appeared in bourgeois constitutions but have always been treated in a rather restrictive manner in the context of capitalism. We saw above how market rationality has subsumed constitutional thinking in the last few decades, especially in the context of labour rights. Market constitutionalism views rights in an individualist manner and thus depoliticises the social relations regulated by these rights. We mentioned above the example of relevant CJEU cases, yet the same is illustrated even in the jurisprudence of the European Court of Human Rights (ECtHR).

The individualist and depoliticised market conception of rights is reflected in the ECtHR's approach to trade union activity. This might seem like a controversial claim, considering that in *Ognevenko v Russia*, the European Court of Human Rights (ECtHR) had confirmed that Article 11 protects the right to strike,<sup>90</sup> while in *Demir and Baykara v Turkey*, the Court had gone further, stating that a State would have only a limited margin of appreciation in such matters.<sup>91</sup> Nevertheless, when members of the Union of Rail, Maritime and Transport Workers (RMT) brought a case against the UK government to contest the compatibility of the absolute ban of secondary industrial action in UK law with the European Convention on Human Rights, the ECtHR rejected the RMT's application by emphasising that the margin of appreciation was indeed wide in the context of industrial and economic policies of the state, especially regarding secondary action which could not be conceptualised as 'core' to Article 11.<sup>92</sup>

This decision has been described as 'doctrinally odd' and possibly 'explicable as a 'political' rather than a 'legal' decision, given the stated preference of some UK Government Ministers to withdraw from the ECHR'.<sup>93</sup> It certainly manifests a quite individualistic conception of trade union activity. In the RMT case, the Strasbourg court conceives of the right to form a trade union and take industrial action as rooted in an individual's right to free association. Under this interpretation of Article 11, there is nothing distinctive or special about trade unions; there is no sense of the special role that trade unions

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<sup>90</sup>*Ognevenko v Russia* [2012] ECHR 1266.

<sup>91</sup>*Demir and Baykara v Turkey* [2008] ECHR 1345, paragraph 119.

<sup>92</sup>*National Union of Rail, Maritime and Transport Workers v United Kingdom* [2014] ECHR 366.

<sup>93</sup>Bogg, 'Beyond Neo-Liberalism', 328. See also Keith Ewing and John Hendy, 'The Trade Union Act 2016 and the Failure of Human Rights', 45(3) *Industrial Law Journal*, (2016), 391-422.

are called to play in a capitalist society.<sup>94</sup> This approach abstracts from the political nature of the employment relation and presents it as a clash of individual rights. This explains the difference in the outcomes of the aforementioned cases. The ECtHR conceives of the right to take industrial action as possible only in furtherance of a dispute *between employer and employees*. This means that employees are viewed as isolated individuals, not as members of a social class. The political and democratic value of the right to take industrial action is not assessed by the Court as being within the ‘core’ of Article 11.

Furthermore, this individualistic approach enables a distorted view of the conflict central to this dispute and a reversal of the democratic credentials of trade union activity and labour legislation. We saw above that labour rights aim to protect the employees by recognising the structural imbalance of the employment relationship and seeking to create a democratic counter-power to the employers’ minoritarian power monopoly. By re-framing industrial action as a ‘clash of rights’, as it did in the case of *RMT v UK*, the ECtHR manages to depoliticise the employment relation and turn the democratic aspect of the industrial relation into its opposite. From the ECtHR’s standpoint, the right to take secondary industrial action is in conflict not only with the rights of employers who are not party to the original dispute, but also with the rights of the wider public to receive essential services.<sup>95</sup> In other words, conceived as an individual right, industrial action is exercised by a minority of the population and adversely affects the rights of a vast majority since it ‘disrupts the economy’ and impacts on the delivery of public services. In this depoliticised context, industrial action can only be a bad thing, i.e., a disruption and *prima facie* violation of rights, rather than an exercise of democratic rights.<sup>96</sup>

The same distortion, which predetermines the result of any balancing exercise and application of the proportionality test, is evident in the UK government’s explanatory notes to the Strikes (Minimum Service Levels) Act 2023. This Act was characterised as ‘another legislative episode in the never-ending ‘death by a thousand cuts’ of trade unions’ ability to mount an effective lawful industrial action’.<sup>97</sup> It imposed an additional condition for a strike to be lawfully conducted and participating employees to be protected, namely that the union must take reasonable steps to ensure compliance by its members with a work notice in relation to minimum service levels. The Government’s justification reproduced the individualist view of industrial action as a clash of rights and reversed the majority-minority relation.<sup>98</sup> The political conflict between workers and employers was presented first as a legal dispute between the rights of employers

<sup>94</sup>Robert Knox, ‘A Marxist Reading of *RMT v UK*’ in Damian Gonzalez-Salzburg and Loveday Hodson (eds.), *Research Methods for International Human Rights Law* (Routledge 2019), 13–41, 28.

<sup>95</sup>*ibid.*, 30.

<sup>96</sup>*ibid.*, 31.

<sup>97</sup>Ioannis Katsaroumpas, ‘The Strikes (Minimum Service Levels) Bill: A Blatant Violation of International Labour Standards’, *UK Labour Law Blog*, (18 January 2023), available at <https://uklabourlawblog.com/2023/01/18/the-strikes-minimum-service-bill-a-blatant-violation-of-international-labour-standards-by-ioannis-katsaroumpas/>.

<sup>98</sup>Both the Secretary of State for Business, Energy and Industrial Strategy and the Parliamentary Under-Secretary of State for Business, Energy and Industrial Strategy, in their speeches delivered in support of the Strikes (Minimum Service Levels) Bill, in its second reading in the House of Commons, emphasised the importance of regulating industrial action as the most cost-effective solution to the ongoing trade disputes in the context of a ‘cost of living’ crisis. See HC Deb 16 January 2023, vol 726, col 55 and HC Deb 30 January 2023, vol 727, col 80. Imposing additional conditions for a strike to be lawful, thereby restricting the exercise of industrial action and minimising its disruptive effect on the economy, was the ‘market rational’ solution since any wage increase matching the rate of inflation would lead to a spiral of inflation.

and the rights of the employees, and further as a clash between the rights of a social minority of employees and the rights of the vast majority of the population, or, in other words, the public interest.<sup>99</sup> In the words of the Minister, the Act's purpose was to ensure that the public is protected from disproportionate disruption to their daily lives.<sup>100</sup>

In contrast, a socialist constitutionalist approach would proceed from a politicised understanding of social and economic rights. From a socialist constitutionalist perspective, the aim of employment legislation is the empowerment of employees through limiting the employers' discretionary power. The full development of human personality rests on limiting the 'realm of necessity' and expanding the 'realm of freedom'.<sup>101</sup> Limiting the 'realm of necessity' necessitates the imposition of limits to the employer's authority to dictate the terms and conditions of employment. In other words, the reduction of the working day and the legal protection of decent working conditions, as well as the legal protection of the means through which employees can struggle for the recognition of these rights as well as for their enforcement, can be understood as instrumental for achieving 'human flourishing'. Under this prism, *the right to strike – and generally labour law provisions protective of workers' rights – assume categorical value for being instrumental to the workers' struggle* for better working and living conditions.

Such a socialist constitutionalist approach could be an integral part of a reformist strategy that would allow for labour legislation and labour rights to acquire their proper meaning, even within the confines of a capitalist society, based on an accurate and politicised understanding of their social function in a class divided society. Additionally, it could potentially affect the judicial interpretation of rights and the application of tests like proportionality. Understanding the social and radical value of labour rights could lead to: (i) a political evaluation of the importance of such rights and a corresponding reflection of their value in the constitutional text, in the form of absolute or unconditional rights; and/or (ii) a judicial approach to these rights that seeks to expand rather than restrict their application, through the use of teleological methods of interpretation which would consider potential limitations of these rights as lying beyond the scope of the relevant constitutional provisions and, therefore, unconstitutional.

#### **4.2. 'Free development of the individual' and institutional forms of decision-making**

It follows that understanding 'human flourishing' as a radical need, which points towards the supersession of the extant social order, gives rise to normative claims here and now and simultaneously raises the issue of radical and structural change. We saw that the 'free and full development of the individual' gives rise to several other principles, needs, and

<sup>99</sup>The notion of the public interest has been commonly used to justify the curtailment of rights, especially social rights, in the context of crisis. See Dimitrios Kivotidis, 'The Form and Content of the Greek Crisis Legislation', 29 *Law and Critique* (1), 59–81, as well as Kivotidis, 'Public Interest or Social Need? Reflections on the Pandemic, Technology and the Law'. A critical discussion of the role and place of this notion in the context of socialist constitutionalism is necessary in this respect but must be the subject of a different article.

<sup>100</sup>HC Deb 16 January 2023, vol 726, col 57.

<sup>101</sup>Karl Marx, *Capital: Volume 3* (Penguin 1991), 958–9.

rights, such as the need for creative labour and leisure time, as well as the *need for collective decision-making forms* and processes. We shall now examine the latter focusing on reformist and radical proposals for institutional change.

There have been various theoretical elaborations and proposals for alternatives to market constitutionalism recently.<sup>102</sup> These focus on the original notion of the economic constitution, which stood for the democratic control of the economy.<sup>103</sup> Despite the notable differentiations, these views approach the constitution as an instrument that enables, rather than restricts, economic transformation.<sup>104</sup> The common characteristic is the search for a formal, permanent and dynamic institutional framework of economic democracy. They range from reformist proposals that draw inspiration from the Weimar Republic and seek to ‘put an end to the subordination of labour to capital’,<sup>105</sup> to more ambitious proposals for an Economic Council as a first step towards socialisation of the process of economic governance,<sup>106</sup> all the way up to revolutionary explorations of institutional arrangements of future societies that have transcended the capitalist market relations. In this section we focus on Keith Ewing’s proposal as an example of the reformist approach, and on Tony Smith’s proposal as an example of a more revolutionary approach to socialist constitutionalism.<sup>107</sup>

In the UK context, it has been argued that an alternative economic constitution could involve the extension of democratic standards in the economy. Keith Ewing, inspired by early twentieth century debates, discusses two examples of institutional arrangements that would promote representation of workers in the management of the economy. These arrangements would provide workers with the right to be engaged with all questions of interest, and to initiate and make legislation within the economic sphere.<sup>108</sup> The first concerns the establishment of an Economic Council, as a step towards the democratisation and socialisation of the process of economic governance. This council would initially be a tripartite executive body responsible for developing and proposing policies that would lead to the progressive socialisation of the economy.<sup>109</sup> With the gradual socialisation of the economy underway, the powers of this Economic Council would grow to the point of transitioning from an executive to a legislative body. In that case, were the economy to become socialised, a functional devolution of power could take place, alongside the territorial devolution of political power, through the creation of an Economic Parliament.<sup>110</sup> The second proposal concerns a greater regulatory role for trade unions, through collective bargaining and collective labour agreements. Modelled after social-democratic constitutions of southern Europe (Italy, Spain and Greece), which provided for collective labour agreements with mandatory effect, Ewing advocates for a nation-wide regulatory system of industrial councils as an ‘alternative legislative process made without reference to Parliament, creating norms

<sup>102</sup>See for instance the Symposium on ‘Socialist Constitutionalism’ organised by the *Law and Political Economy Project* in June 2020, available at <https://lpeproject.org/symposia/socialist-constitutionalism/>.

<sup>103</sup>Michael A. Wilkinson, ‘Authoritarian Liberalism as Authoritarian Constitutionalism’ in Helena Alviar García and Günter Frankenberg, *Authoritarian Constitutionalism* (Edward Elgar 2019), 317–37.

<sup>104</sup>Keith Ewing, ‘Socialism and the Constitution’, 33.

<sup>105</sup>*ibid.*, 341.

<sup>106</sup>Ewing, ‘Socialism and the Constitution’, 39–47.

<sup>107</sup>Smith, *The Full and Free Development of the Individual*.

<sup>108</sup>Ewing, ‘Socialism and the Constitution’, 42.

<sup>109</sup>*ibid.*, 42–43.

<sup>110</sup>*ibid.*, 43.

that would take priority over any less favourable parliamentary legislation to the contrary'.<sup>111</sup>

Tony Smith's proposal, articulated as an example of socialist constitutionalism, is more radical as it describes the institutional arrangement of a socialist society, i.e., a society already engaged in building the institutional forms of economic democracy and production according to needs. Smith's work is part of a growing literature which explores socialist alternatives to the market.<sup>112</sup> This literature examines the possibility of substituting socialist production based on social needs satisfaction for capitalist production based on profit. Theorists are revisiting the original 'calculation debate', which concerned the feasibility and viability of a socialist mode of production based on central planning,<sup>113</sup> in light of recent technological developments, namely the growth of a digital infrastructure which can arguably replace the market in collecting and distributing information essential to economic transactions and coordination.<sup>114</sup>

The work of Tony Smith is interesting in this respect, as he proposes a model of democratic indirect planning where needs discovery and organisation of social production takes place in an intricate web of democratic institutions. Smith notes that the notion of 'free development of the individual' does not merely refer to the 'formal freedom to act without external interference so strongly emphasised in the republican constitutions of modern capitalism'.<sup>115</sup> It rather conveys that 'socialism does not aim at a state of well-being paternalistically bestowed on passive recipients'.<sup>116</sup> Instead 'every individual must have a freedom to develop on the basis of their own actions'.<sup>117</sup> This freedom presupposes the existence of institutional forms for collective evaluation, planning and decision-making, which are 'created, continually renewed, and periodically modified through the collective actions of the members of the socialist society'.<sup>118</sup> According to Smith, the notion of 'free development' necessarily concerns the democratic management of the sphere of production, since the production and allocation of social wealth in general, and the social surplus in particular, is the issue of collective decision-making par excellence.

On this basis, Smith proposes an intricate institutional arrangement which ensures that the 'ultimate sovereign power of a socialist society lies in the collective ensemble of social individuals in their social interactions, mobilised within public forums and referendums'.<sup>119</sup> This institutional arrangement consists of: (i) Representative Democratic Assemblies charged with overseeing the process of the democratic determination

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<sup>111</sup>ibid., 46.

<sup>112</sup>See Robin Hahnel, 'Democratic Socialist Planning: Back to the Future', 57 *Socialist Register*, 291–309; W. P. Cockshott, A. Cottrell, and J. P. Dapprich, *Economic Planning in an Age of Climate Crisis* (Self-published 2022); Max Grunberg, 'The Planning Daemon: Future Desire and Communal Production', 31(4) *Historical Materialism*, 115–59.

<sup>113</sup>Indicatively see Ludwig von Mises, *Socialism: An Economic and Sociological Analysis* (Yale University Press 1951); Ernest Mandel, 'In Defence of Socialist Planning', (1986), 159 *New Left Review*, 5–37; Oskar Lange, 'On the Economic Theory of Socialism: Part One', 4(1) *The Review of Economic Studies*, 53–71; Maurice Dobb, *Socialist Planning: Some Problems*, (Lawrence and Wishart 1970); Michael Ellman, *Socialist Planning* (Cambridge University Press 2014).

<sup>114</sup>Katharina Pistor, 'Rule By Data: The End of Markets?', 83 *Law and Contemporary Problems*, 101–24; Przemyslaw Palka, 'Algorithmic Central Planning: Between Efficiency and Freedom', 83 *Law and Contemporary Problems*, 125–49; Leigh Phillips and Michael Rozworski, *People's Republic of Walmart* (Verso 2019).

<sup>115</sup>Smith, *The Full and Free Development of the Individual*.

<sup>116</sup>ibid.

<sup>117</sup>ibid.

<sup>118</sup>ibid.

<sup>119</sup>ibid.

of needs as a whole, along with other matters of common community concern, in the local, regional, national and international level; (ii) Representative Community Associations whose members are selected by lot to be broadly representative of the whole society, and to ensure that the voices of the final users of produced outputs are strong and effective; (iii) Community Activist Groups, which are self-selecting representative bodies with a special interest in a specific matter of social concern; and (iv) Worker Collectives dedicated to the production and distribution of goods and services addressing social wants and needs in their local, regional, and national area.<sup>120</sup>

Smith's proposal is presented here as an example that illustrates the essentially political character of needs-determination. The organisation of material production for needs-satisfaction, therefore, presupposes the existence of collective forms of decision-making tasked with discovering and prioritising social needs. In his attempt to present a feasible and normatively attractive alternative to capitalist society and bourgeois democracy, Smith describes a different model of constitutionalism inspired by a socialist rationality. It is not the only model and certainly cannot (nor does it claim to) answer all the problems of a future socialist society. Additionally, a much more thorough engagement with the constitutional implications of the relationship between economic planning and economic democracy is required for a more comprehensive exposition of the fundamental principles of a socialist constitutionalism. Nonetheless, the above exposition shows how a needs-based conception of rights and a different model of constitutionalism can influence both the operation of existing institutions and proposals for their reform.

## 5. Conclusion

Under the Damoclean sword of environmental catastrophe, over the last two decades the world has witnessed consecutive economic crises, a global pandemic and the reignition of imperialist wars. A constant in the juridico-political response to all these crises has been the slow process of 'death by a thousand cuts' of socio-economic and political rights, even in the context of 'liberal democratic' states. The issues of labour rights and economic democracy especially tend to be overlooked in policy and mainstream academia from a constitutionalist perspective.

In this article, I argued that this is because of the dominance of market constitutionalism. Market constitutionalism restricts the scope and emancipatory potential of rights by approaching them in an individualist manner and depoliticising the social relations regulated by relevant rights. It predetermines the outcome of balancing exercises and leads to distorted applications which tend to favour those economically powerful at the expense of the weakest parts of the population. Additionally, it denies the normative relevance of the notion of needs and views needs narrowly and in opposition to rights.

Yet, the dominance of market constitutionalism is historically contingent. It should not be forgotten that the fathers of neoliberalism and market rationality, Ludwig von Mises and Friedrich Hayek, 'won' the calculation debate at a time when even the Tory party accepted the value of socialist planning. In an age of permacrisis and polycrisis, alternative visions are urgently needed to inspire the movement necessary to challenge

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<sup>120</sup>ibid.

both the hegemony of market rationality and capitalist social relations. I argue that a needs-based conception of rights can be a crucial aspect of this process.

This needs-based approach to rights transcends the narrowness and individualism of the rights discourse and enables the deployment of rights in emancipatory political projects in a manner that aims for immediate redress but simultaneously raises the need for alternative models of constitutionalism that overcome the contradictions of market constitutionalism. For instance, the fundamental need for human flourishing -which includes needs like creative labour, leisure time, and an all-round education- points towards a social formation which gears production towards satisfying the totality of needs that comprise it. At the same time, understanding the categorical value of institutional forms like labour rights and economic democracy can influence calls for reform 'here and now'.

The rich notion of needs advanced in this article increases the normative force of the rights discourse by emphasising the demand for comprehensive reform, which is intrinsically linked to demands for substantive protection of a multiplicity of rights. As a result, this needs-based approach to rights tend to give full meaning to the maxim 'salus populi suprema lex'.

### **Disclosure statement**

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