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Market constitutionalism and social rights: a critical analysis of judicial deference

Dimitrios Kivotidis*

1. Introduction

This article examines the place of social rights in liberal constitutions from the perspective of critical political economy. The term ‘social rights’ is used to refer to the constitutionally protected entitlements that impose substantive, legally binding obligations on the state to provide for the basic material needs (such as housing, social security, adequate food, health, and education) of people.¹ The value of these rights is recognised in international treaties, central among which is the International Covenant on Economic, Social and Cultural Rights, but their substantive protection and effective promotion ultimately relies on the juridico-political apparatus of individual states. In the UK, the overall picture that emerges with regards to the protection of social rights is quite concerning, despite the ratification of relevant international treaties and the UK Government’s obligation to make socio-economic rights a reality.²

This article explores the judicial approach to social rights as a factor that contributes to the poor implementation of these rights in the UK. Over the last few decades, the judicial system has increasingly been used to hold public authorities to account for delays or failures to provide access to welfare services like health treatment, education and

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¹ George Katrougkalos and Paul O’Connell, ‘Fundamental Social Rights’ in Mark Tushnet, Thomas Fleiner and Cheryl Saunders (eds), *Routledge Handbook of Constitutional Law* (Routledge 2013).

² Equality and Human Rights Commission, *Update Report on Great Britain’s Implementation of the International Covenant on Economic, Social and Cultural Rights* (March 2018) 5 <www.equalityhumanrights.com/sites/default/files/2021/progress-on-socio-economic-rights-in-great-britain-march-2018.docx>; more recently see Economic, social and cultural rights in Great Britain: 2025 submission to United Nations (February 2025) <www.equalityhumanrights.com/economic-social-and-cultural-rights-great-britain-2025-submission-united-nations>.

housing.³ Despite this judicial engagement with social rights, the courts' approach to these rights has been predominantly characterised by the practice of judicial deference. Judicial deference with regards to social rights is generally associated with a deep-rooted scepticism about the potential for courts to make effective and constitutionally appropriate contributions to the resolution of socio-economic disputes.⁴ This phenomenon was greatly exacerbated in the context of the economic crisis, where courts, domestic and international, favoured an approach that did not challenge the economic justifications put forward by governments for restricting social rights.⁵ Notably, in the same context, a critique centred around the notion of market constitutionalism, understood as the domination of the constitutional form by market rationality,⁶ was developed, though not adequately linked to the judicial approach to social rights.

I aim to explore this connection and further this critique by arguing that the place of social rights in a country's constitution, and by extension the judicial approach to these rights, is ultimately determined by said country's economic constitution, i.e. the rules and principles that determine how a constitution relates to the economy.⁷ A key question that emerges from this perspective is whether a constitution should, as a matter of principle, ensure that resources are allocated to satisfaction of social needs, in other words, to the actualisation of social rights. The answer to this question largely depends on the viewpoint adopted. From a market perspective the answer would be negative, while it would be positive from a socialist perspective.

Deploying an economic analysis which draws from both mainstream⁸ and heterodox⁹ perspectives, I argue that market constitutionalism is not a distortion of liberal constitutionalism but rather liberal constitutionalism (and its approach to social rights) is determined by a market rationality. To do this, I will explore different aspects of liberal constitutionalism that necessitate treating social rights as 'breaches

3 Ellie Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act* (Hart 2007); Malcolm Langford, 'The Justiciability of Social Rights: From Practice to Theory' in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2012) 3.

4 See Cecile Fabre, 'Constitutionalising Social Rights' (1998) 6(3) *The Journal of Political Philosophy* 263, 280–3; and Cass Sunstein, *Legal Reasoning and Political Conflict* (OUP 1996) 179.

5 Aoife Nolan, 'Not Fit for Purpose? Human Rights in Times of Financial and Economic Crisis' (2015) 4 *European Human Rights Law Review* 358; Mary Dowell-Jones, 'The Sovereign Bond Markets and Socio-Economic Rights Understanding the Challenge of Austerity' in Eibe Riedel et al. (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (OUP 2014) 51, 81; Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (CUP 2014).

6 Emiliios Christodoulidis, *The Redress of Law: Globalisation, Constitutionalism and Market Capture* (CUP 2021).

7 Tony Prosser, *The Economic Constitution* (OUP 2014).

8 This refers to the 'Law and Economics' perspective, which assesses the value of constitutional provisions against mainstream economic criteria, such as 'economic efficiency', 'economic growth', 'reduction of transaction costs'. See Michael Rodi, *Economic Analysis of Public Law* (Springer 2022).

9 This refers to the CPE approach which focuses on the process of class struggle, where classes with competing interests clash in the context of a capitalist economic system, that is, a system based on the private ownership of the means of production, as well as on the process of capital accumulation. Bastiaan van Apeldorn and Laura Horn, 'Critical Political Economy', *KFG Working Paper Series*, No. 87 (May 2018), Kolleg-Forschergruppe (KFG), 'The Transformative Power of Europe', Freie Universität Berlin.

within the system'. Establishing that market rationality is deeply embedded in liberal constitutionalism is key to both analyse a major contradiction found in deferential approaches and evaluate different proposals for reform.

The contradiction that this paper seeks to analyse is the following: the same view that rejects judicial intervention in matters affecting resource allocation, supports that political, i.e. democratic, institutions should also be prevented from deciding on matters relating to the economy. In other words, the deferential argument against judicial intervention in socio-economic policy does not result in the acceptance of the political and democratic institutions' role in this field, because from this standpoint political institutions are not better placed than courts to allocate resources. It is, therefore, false to approach the phenomenon of judicial deference from a formalist perspective as simply a matter of separation of powers. Judicial deference is not simply an issue of institutional competence or constitutional interpretation. As a phenomenon, it relies on politico-economic structures that condition its appearance. This needs to be made explicit for any attempt at improving the role and place of social rights in modern constitutions to be meaningful.

On this basis, the article is structured as follows. The first section examines the phenomenon of judicial deference with emphasis on cases relating to social rights. The second section introduces an economic analysis of the judicial approach to social rights and analyses the political context of judicial deference, arguing that emphasis should be put on the politico-economic determinants of social rights. Section three takes this argument further by elaborating on the notion of market constitutionalism in order to explain that the problem of social rights in liberal constitutions cannot be reduced to an issue of judicial approach. The final section will evaluate proposals for reform and alternative judicial approaches to social rights which seek to replace judicial deference with judicial activism, arguing that these proposals cannot come to fruition unless they constitute aspects of a radical overhaul and more generalised contestation of the grounding roots of liberal constitutionalism.

2. Judicial deference

In order to examine the reasons for the courts' deferential approach to social rights, it is essential, first of all, to define deference.¹⁰ Deference, a familiar feature in legal and non-legal contexts, is a matter of 'assigning weight to the judgment of another, either where it is at variance with one's own assessment, or where one is uncertain of what the correct assessment should be'.¹¹ In the legal context, deference is mostly justified in

¹⁰ Indicatively on judicial deference see Paul Daly, *A Theory of Deference in Administrative Law* (CUP 2012); David Dyzenhaus, 'The Politics of Deference: Judicial Review and Democracy' in Michael Taggart (ed.), *The Province of Administrative Law* (Hart 1997); Trevor RS Allan, 'Judicial Deference: Doctrine and Theory' (2011) 127 *Law Quarterly Review* 96; Alisson L Young, 'Deference, Dialogue and the Search for Legitimacy' (2010) 30 *Oxford Journal of Legal Studies* 815; Jeffrey Jowell, 'Judicial Deference: Servility, Civility or Institutional Capacity?' [2003] *Public Law* 592.

¹¹ Aileen Kavanagh, 'Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication' in Grant Huscroft (ed.), *Expounding the Constitution: Essays in Constitutional Theory* (CUP 2008) 185.

terms of the institutional characteristics of government branches and the corresponding constitutional principles. At the same time, the use of the term has been contested, most famously by Lord Hoffmann, for failing to capture accurately the relationship between the judicial and other branches of government because of its ‘overtones of servility, or perhaps gracious concession’.¹² Nevertheless, over the last few decades there is an abundance of judgments where the courts deferred to the other governmental branches’ expertise and institutional capacity.

A famous example is the *Belmarsh* case where the House of Lords reviewed the compatibility with the rights protected in the European Convention on Human Rights (ECHR) of legislation intended to combat terrorism which provided for the indefinite detention of foreign nationals.¹³ In this context, the court engaged with the question of whether the factual situation of combating terrorism amounted to a public emergency that justified a derogation under article 15 of the Convention, which allows suspending of the protection of several Convention rights.¹⁴ Lord Bingham for the majority gave weight to the executive’s decision on the existence of a public emergency by relying on the principle of separation of powers in what has been described as the most authoritative guidance on the boundaries of the respective institutional roles of the governmental branches¹⁵:

The more purely political [...] a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. [...] Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions.¹⁶

It appears that the most notoriously deferential decisions are handed down in cases relating to situations of public emergency.¹⁷ Nevertheless, it has been noted that deferential judgments are by no means confined to these circumstances.¹⁸ Indeed, deference has characterised the judicial approach to social rights way before the ‘war on terror’. There is a bundle of arguments that have been used to deny the justiciability of social rights:¹⁹ i) social rights, unlike civil and political rights, are by their nature resource intensive, and consequently unrealisable in practice;²⁰ ii) ‘the judicial review of legislative or executive decisions concerning their implementation and enforcement

¹² *R. (on the application of Pro-Life Alliance)* [2004] 1 A.C. 185, per Lord Hoffman at para. 75.

¹³ *A and others v Secretary of State for the Home Department* [2004] UKHL 56.

¹⁴ Art. 15 of European Convention on Human Rights.

¹⁵ Trevor RS Allan, ‘Deference, Defiance, and Doctrine: Defining the Limits of Judicial Review’ (2010) 60(1) *University of Toronto Law Journal* 41, 43.

¹⁶ *A and others v Secretary of State for the Home Department* [2004] UKHL 56, para 29.

¹⁷ See for instance *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60 and *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598.

¹⁸ Kavanagh, ‘Deference or Defiance?’ (n 11) 184.

¹⁹ Indicatively see Langford, *The Justiciability of Social Rights* (n 3); Sandra Fredman, *Comparative Human Rights Law* (OUP 2018); Katrougkalos and O’Connell, *Fundamental Social Rights* (n 1).

²⁰ See Aryeh Neier, ‘Social and Economic Rights: A Critique’ (2006) 13(2) *Human Rights Brief* 1; and Erich Weede, ‘Human Rights, Limited Government and Capitalism’ (2008) 28 *Cato Journal* 35.

constitutes an illegitimate intrusion into the policy affairs of the elected branches of government and a breach of the traditional doctrine of the separation of powers';²¹ iii) the adversarial system of judicial dispute resolution is ill-suited to decide on 'complex polycentric socio-economic disputes raising sensitive issues of resource allocation'; iv) judges lack the necessary training and analytical skills of economic forecasting necessary to decide on these issues.²²

Additionally, a bundle of cases confirm this deferential stance of the judiciary towards social rights. For instance, in the *R(SG)* case²³ Lord Reed opined that certain matters are by their nature 'more suitable for determination by Government or Parliament than by the courts', and that courts take this into account when determining the compatibility of Convention rights with executive action or legislation, by giving 'weight to the determination of those matters by the primary decision maker'.²⁴ When a case concerns social and economic policy that has 'major implications for public expenditure', which is 'pre-eminently the function of democratic institutions', the courts should 'give due weight to the considered assessment made by those institutions'.²⁵

The *SG* case concerned a benefit cap intended to reduce a person's housing benefit if their total entitlement to welfare benefits exceeded a stated amount equivalent to the net median earnings of working households. According to the Supreme Court, the test to find a measure intended to address a legitimate aim of economic nature (in this case 'fiscal savings', 'incentivising work', and 'imposing a reasonable limit to the amount of benefits which a household can receive') illegal is the 'manifest absence of a reasonable foundation' for this measure.²⁶ This case set a precedent that was followed by other cases regarding similar austerity measures.²⁷ What is evident is that the courts, in cases concerning state benefits and allocation of resources, apply a less rigorous and highly deferential approach in determining whether a breach of a right is justifiable.²⁸

This conclusion is not restricted to domestic jurisprudence. The same deferential stance characterises the European Court of Human Rights when it comes to social rights. The Strasbourg organs are said to have embraced a principle of general application according to which 'in sensitive areas of social policy, particularly those involving complex resource allocation issues, supervision by international adjudicators should

21 Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act* (n 3) 26–7.

22 See generally Lon Fuller, 'The Forms and Limits of Adjudication' (1978) 92(2) *Harvard Law Rev* 353; Martin Loughlin, 'Rights, Democracy and Law' in Tom Campbell, Keith D Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (OUP 2001) 41.

23 *R(SG) v Secretary of State for Work and Pensions* [2015] UKSC 16.

24 *Ibid.*, paras 92–3.

25 *Ibid.*

26 *Ibid.*, para 93.

27 See for instance the 'revised benefit cap' case, *Regina (DA and others) v Secretary of State for Work and Pensions v Shelter Children's Legal Services and others Regina (DS and others) v Secretary of State for Work and Pensions v Shelter Children's Legal Services and others* [2019] UKSC 21 [2019] 1 W.L.R. 3289.

28 See for instance *National Union of Rail, Maritime and Transport Workers v United Kingdom* [2014] ECHR 366, *R (on the application of McDonald) (Appellant) v Royal Borough of Kensington and Chelsea (Respondent)* [2011] UKSC 33.

give way to state discretion in the enforcement of domestic laws'.²⁹ Especially in the context of the economic crisis, the doctrine of the margin of appreciation was used to give weight to national authorities on issues relating to resource allocation.³⁰ In *Koufaki* the Court noted that the margin of appreciation in implementing social and economic policies is a wide one, and that the Court would only step in where the legislature's judgment as to what is 'in the public interest' was 'manifestly without reasonable foundation'.³¹ This deferential approach was followed in later cases involving austerity.³² Even decisions where the court found that rights had been violated by austerity measures³³ were articulated in very deferential terms and have since been cited by the Court to support that 'the adoption of policies to protect the public purse' should be accorded a wide margin of appreciation.³⁴

Two things are worth noting from this brief overview of judicial deference with regards to social rights. The first is the emphasis on the political nature of socio-economic disputes and disputes relating to resource allocation. This would seem to suggest they should more appropriately be resolved by democratic institutions with democratic legitimacy to allow for the representation of different views and social interests. As the following sections will show, this is not the case and judicial deference does not result in institutional demand for democratic decision-making over matters relating to the economy. The second is the key presence of the principle of separation of powers in arguments justifying judicial deference. This notion assumes a clear-cut separation between legal and political issues, even if this relationship is conceived as a spectrum, as per Lord Bingham. The question emerges: is the limit between legal and political issues a constitutional or a political issue? Attempts to answer to this question have given rise to fruitful analyses of the politics of judicial deference. I argue that one should also look at the political economy of the problem.

3. The economics of judicial deference

The issue of judicial deference essentially concerns one of the most prevalent debates in constitutional theory, namely the allocation of power between the judiciary and the legislature.³⁵ It has been argued that the doctrine of deference is, indeed, a doctrine

²⁹ Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act* (n 3) 64–5.

³⁰ Paul O'Connell, 'The Death of Socio-Economic Rights' (2011) 74(4) *Modern Law Review* 532.

³¹ *Koufaki & Adedy v Greece* App no 57665/12, (ECHR, 7 May 2013), paras 36–41.

³² *Mateus & Januário v Portugal* App no 62235/12 (ECHR 8 October 2013); *Da Silva Carvalho Rico v Portugal* App no 13341/14 (ECHR 1 September 2015); *Mihăieș & Senteș v Romania* App no 44232/11 (ECHR 6 December 2011); *Sulcs v Latvia* App no 42923/10 (ECHR 6 December 2011); *Mockienė v Lithuania* App no 75916/13 (ECHR 4 July 2017).

³³ *N.K.M. v Hungary* App no 66529/11 (ECHR 14 May 2013); *R.Sz. v Hungary* App no 41838/11 (ECHR 2 July 2013); *Gáll v Hungary* App no 49570/11 (ECHR 25 June 2013).

³⁴ *Bélané Nagy v Hungary* App 53080/13 (ECHR[GC] 13 December 2016), para 114.

³⁵ Young, 'Deference, Dialogue and the Search for Legitimacy' (n 10) 815.

of constitutional interpretation.³⁶ In other words, deciding whether an issue is legal or political is a constitutional question and apt for judicial resolution, as per Lord Hoffmann in the *Pro-Life Alliance* case.³⁷

Yet, one should not be too quick to accept this self-referential position. Especially in the context of the UK constitution where the lack of codification means that the interpretation as to how power is allocated *de jure* is simultaneously a decision on *de facto* power allocation. To put it differently, the constitutional question on how power has been allocated relies on a prior political decision on how to allocate power and at times the latter is expressed in the former. Concerning the issue at hand, the question whether the courts could approach social rights differently, take a more active role in their enforcement and encroach upon policies that affect the budget, is ultimately a matter of political will – one of the ‘political determinants’ of social rights, as Conor Gearty calls them in another contribution to this Special Issue.

This conundrum has led some thinkers to discuss, albeit in a non-systematic way, the politics of judicial deference.³⁸ This approach focuses on political context to explain judicial views on power allocation. David Dyzenhaus, for instance, traces the politics of judicial deference back to the opposition between the democratic positivists and the antipositivists in the nineteenth century, and approaches Dicey’s rule of law and the history of ouster clauses as ideological and institutional obstacles to the growth of administrative agencies and redistributive programmes.³⁹ The question ‘quis judicabit’, i.e. whether judges or politicians decide on the criteria of valid law, is a political one and the answer to it is determined by political views. If we follow Dyzenhaus’s reasoning, the judiciary more often than not appears as a bulwark of the ruling class and the established regime, i.e. as a conservative factor, since progressive reform historically has been carried out by the legislatures. Differently put, behind the contradiction between the rule of law and the administrative state, we usually find a conservative standpoint versus a popular demand for redistributive policies.

This line of reasoning paints a picture of judicial activism as tendentially conservative and, contrariwise, judicial deference as a tendentially progressive stance. A comparative review of the US Supreme Court’s stance during the *Lochner* era confirms this point. It is accepted that ‘the nonjusticiability principle was borne not out of conservative economic orthodoxy but in the progressive reaction to the *Lochner* era in US constitutionalism’.⁴⁰ Judicial deference, based on the non-justiciability principle, played some role in allowing rapid welfare state expansion, during the New Deal era.⁴¹ This is an important point that reveals the superstructural nature of arguments on separation

36 Kavanagh, ‘Deference or Defiance?’ (n 11) 190.

37 *R. (on the application of Pro-Life Alliance)* [2004] 1 A.C. 185, per Lord Hoffman at para. 75.

38 See for instance Dyzenhaus, ‘The Politics of Deference’ (n 10), and Gregory A Elinson and Jonathan S Gould, ‘The Politics of Deference’ (2023) 75 *Vanderbilt Law Review* 475.

39 Dyzenhaus, ‘The Politics of Deference’ (n 10) 280–1.

40 Jeff King, ‘The Future of Social Rights: Social Rights as Capstone’ in Katharine G Young and Amartya Sen, *The Future of Economic and Social Rights* (CUP 2019) 310.

41 *Ibid.*

of powers. It is rather the politico-economic framework within which governmental institutions operate and interact that determines arguments relating to separation of powers or justiciability.

In the UK context, this point is evident in cases like the *Duport Steels case*,⁴² which concerned the interpretation of a statute relating to the lawful exercise of industrial action. Before the case is discussed, a few words on the status of industrial action in UK law are pertinent. 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’.⁴³ Only by the statutory regulation of industrial action throughout the twentieth century were immunities against torts in the context of trade disputes created, providing workers with some statutory protection.⁴⁴ The position was ameliorated initially by the Trade Disputes Act 1906, subsequently revised and improved by the Trade Union and Labour Relations Act 1974 (as amended in 1976) which afforded substantially broader protection to industrial action than is the case at present. These and other measures transformed the law on employment relations under the pressure of a growing working-class movement.

The *Duport Steels* case concerned the true interpretation of section 13 (1) of the Trade Union and Labour Relations Acts 1974 and 1976 (TULRA). It decided that the test ‘whether an act was done by a person in contemplation or furtherance of a trade dispute’ was subjective, i.e. provided that that person honestly believed at the time when he did the act that it might help one of the parties to a trade dispute to achieve its objectives, and did it for that reason, they were entitled to the immunity in tort granted by section. *Duport Steels* is a very interesting case because it is decided when the paradigm is about to change, right before statutory reform of employment law assumes a reactionary content and judicial deference develops into an equally reactionary stance.

These extra layers become manifest if one contrasts Lord Diplock’s judicial opinion on the true interpretation of TULRA 1974 with his personal assessment of the socio-political effects of this interpretation. Lord Diplock’s personal assessment of the interpretation that the court is compelled to follow is that it is ‘is intrinsically repugnant to anyone who has spent his life in the practice of the law or the administration of justice’ because it results in granting to trade unions a power, ‘which has no other limits than their own self-restraint, to inflict by means which are contrary to the general law untold harm to industrial enterprises unconcerned with the particular dispute, to the employees of such enterprises, to members of the public and to the nation itself’.⁴⁵

⁴² *Duport Steels Ltd. and Others v Sirs and Others* [1980] 1 W.L.R. 142.

⁴³ *Metrobus Ltd v Unite the Union* [2009] EWCA Civ 829, [2010] ICR 173 [118].

⁴⁴ Hugh Collins, Keith D Ewing and Aileen McColgan, *Labour Law: Text and Materials* (1st edn, Hart 2001) 665.

⁴⁵ *Duport Steels Ltd. and Others v Sirs and Others* [1980] 1 W.L.R. 142, 157 as per Lord Diplock.

Nevertheless, from a constitutional perspective the court must give weigh despite the repugnant nature and devastating socio-political effects of this 'unjust' law: 'If the national interest requires that some limits should be put upon the use of industrial muscle, the law as it now stands must be changed and this, effectively as well as constitutionally, can only be done by Parliament – not by the judges'.⁴⁶ Lord Diplock gives weigh by reference to separation of powers but gives an additional reason for this too, namely that the confidence in the political impartiality of the judiciary would be compromised 'if judges, under the guise of interpretation, provide their own preferred amendments to statutes [...]'.⁴⁷ There is, however, a deeper and more sinister reason why the court did not have to risk delegitimising their institutional status. The radical overhaul of employment relations undertaken by the Conservative government in the 1980s was already underway.⁴⁸

Judicial deference in *Duport Steels* is performed in the eve of this radical reform, which Conor Gearty calls 'capital's retaliation'. The courts' deferential stance from that point onwards became part of a new constitutionalism which came to be identified as 'authoritarian liberalism'. This term has been used to describe the authoritarian tendencies inherent in liberal forms and ideals, whereby the main task of ensuring the constitution of economic freedom is assigned to a strong state.⁴⁹ It has been substantively argued that the key doctrine of the New Right and the political project it had inspired was the doctrine of the 'free economy and the strong state', in other words the doctrine of authoritarian liberalism:⁵⁰ 'The state had to be strong firstly to unwind the coils of social democracy and welfarism that had fastened around the free economy; secondly to police the market order; thirdly to make the economy more productive; and fourthly to uphold social and political authority'.⁵¹ This context can help explain both political phenomena like the 1984–1985 miners' strike and the courts' deferential stance, as Parliament was already in process of repealing pro-labour legislation and the judicial politics of non-interference was an essential aspect of this kind of authoritarian liberalism.

⁴⁶ *Ibid*, 164 as per Lord Diplock.

⁴⁷ *Ibid*, 157 as per Lord Diplock.

⁴⁸ Andrew Gamble, *The Free Economy and the Strong State: The Politics of Thatcherism*, (Macmillan Press 1994) 34. See also Lord Wedderburn, 'The New Politics of Labour Law: Immunities or Positive Rights?' in Lord Wedderburn (ed.), *Employment Rights in Britain and Europe: Selected Papers in Labour Law* (Institute of Employment Rights 1991) ch 4.

⁴⁹ Werner Bonefeld, 'European Economic Constitution and the Transformation of Democracy: On Class and the State of Law' (2015) 21(4) *European Journal of International Relations* 867, 869. See also Agustín José Menéndez (ed.), 'Special Section: Herman Heller's Authoritarian Liberalism' (2015) 21(3) *European Law Journal* 285–429; Eva Nanopoulos and Fotis Vergis, *The Crisis behind the Euro-Crisis: The Eurocrisis as a Multidimensional Systemic Crisis of the EU* (Cambridge University Press 2019); Helena Alviar García and Günter Frankenberg, *Authoritarian Constitutionalism: Comparative Analysis and Critique* (Edward Elgar 2019).

⁵⁰ For the sinister genealogy of authoritarian liberalism and its relationship to ordoliberalism and neoliberalism see Michael A Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (OUP 2021); also Renato Cristi, *Carl Schmitt and Authoritarian Liberalism*, (University of Wales Press 1998) and William Scheuerman, *Carl Schmitt: The End of Law* (Rowman & Littlefield 1999).

⁵¹ Gamble, *The Free Economy and the Strong State* (n 49), 35, 40.

It follows that the doctrine of deference is embedded in a system of power allocation and resources allocation and must be approached as such. In this context, the notion of the economic constitution of a country is important as it focuses on the following questions: How does the constitution relate to the economy? Should resource allocation be a constitutional matter? Are decisions affecting the allocation of resources and the budget legal or political? Or are they technical, and, therefore, not suitable for either legal or political resolution? Different standpoints produce different answers to these questions and reveal hidden assumptions about the relationship between law and the economy. The following sections will look more closely into this.

For the moment, let us put more emphasis on a major contradiction that will carry this argument forward. To reiterate a point made above, the constitutional decision on deference is determined by the political decision on how sources are allocated, and which substantive principles are prioritised. From a deferential standpoint, it is illegitimate for unaccountable judicial institutions to decide on (political) issues that affect the budget and resource allocation. Yet, this deferential view is only legitimate on the assumption that policy issues are indeed resolved by political institutions through democratic deliberation and popular participation. The problem is that, as Conor Gearty succinctly puts it in his contribution to this Special Issue, deference relies on the assumption that democracies work and therefore there is no need for courts to worry about (or apply) social rights, as this is guaranteed by the legislature.

This is increasingly not the case in the context of market constitutionalism, as the mainstream view of economic constitutionalism supports the view that it is not for irresponsible political institutions, susceptible as they are to popular (and populist) pressures, to decide on matters relating to the economy.⁵² As I have argued elsewhere, hostility to economic democracy and citizens' input in economic management are key characteristics of the modern economic constitution, including the economic constitution of the UK.⁵³ According to the new economic constitutionalism, management of the economy, and therefore allocation of resources, should be undertaken by non-political institutions (such as central banks or independent monitoring agencies) which are free from political pressures and democratic mandates.⁵⁴ Such institutional arrangements promote the depoliticisation of the economy and de-democratisation of economic decision-making, as well as the insulation of the latter from popular demands and social forces advocating government discretion over markets and government spending.⁵⁵

From this standpoint, judicial deference regarding the satisfaction of basic social needs cannot be deference to democratic institutions but deference to the

52 Wolfgang Streeck, 'The Crises of Democratic Capitalism' (2011) 71 *New Left Review* 5.

53 Dimitrios Kivotidis, 'The UK Economic Constitution: Between Authoritarianism and Democracy' (2023) 4 *Public Law* 650.

54 Streeck, 'The Crises of Democratic Capitalism' (n 56).

55 Prosser, *The Economic Constitution* (n 7) 9; George Gerapetritis, *New Economic Constitutionalism in Europe* (Hart 2021).

market.⁵⁶ The deferential argument against judicial intervention in resource allocation does not result in the acceptance of political and democratic institutions' role in allocating resources. Political institutions are not better placed than courts to allocate resources. The reason is that social rights are foreign to market logic and never fully realisable within the context of capitalist market, as they contradict one of the main functions of the modern capitalist state which is to ensure profitability of capital – even though they serve the other main function which is to provide social legitimacy. The following section will examine the notion of market constitutionalism, in order to explain why the problem of social rights in liberal constitutions cannot be reduced to an issue of judicial approach.

4. Market constitutionalism and social rights

The notion of market constitutionalism has been used to describe the subsumption of constitutional thinking and practices by market rationality.⁵⁷ The term has not been used widely and, in the context it has, it seems to signify a distorted version of liberal constitutionalism, whose elements are subsumed by a market logic following establishment of an institutional framework that promotes the neoliberal restructuring of the economy and the hegemony of neoliberal ideology. For instance, judgments that entrenched market values in the EU, such as *Laval*⁵⁸ and *Viking*,⁵⁹ which perceived labour rights as barriers to profit and obstacles to capitalist investment and growth, have been characterised as degenerative 'constitutional moments' which hardened and radicalised market constitutionalism.⁶⁰

It has been argued that over the last couple of decades, in the context of the economic crisis, judicial interpretations were adopted which instrumentalised constitutional provisions to give effect to the 'will of the market'.⁶¹ The judicial approach to governments' justifications for the multiple restrictions on social rights in the context of the crisis seemed to follow some kind of 'market theology' which recognised a fundamental normative power in the will of the market, as well as in the interpretation of this will by technocratic non-political actors (such as rating agencies, central banks or independent fiscal institutions).⁶²

To overcome the metaphysical connotations of speaking about the 'will of the market', I would instead refer to the instrumentalisation of law (legislation and judicial interpretation) to promote market imperatives and profit maximisation, which is not

56 Kári Hólmur Ragnarsson, 'The Counter-Majoritarian Difficulty in a Neoliberal World: Socio-Economic Rights and Deference in Post-2008 Austerity Cases' (2019) 8(3) *Global Constitutionalism* 605.

57 Christodoulidis, *The Redress of Law* (n 6) 8.

58 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet & ors* (C-341/05).

59 *International Transport Workers' Federation & anon v Viking Line ABP & anor* (C-438/05).

60 Christodoulidis, *The Redress of Law* (n 6) 367, 376, 397.

61 Constantinos Yannakopoulos, *Neofeudal Constitutionalism (in Greek)* (Sakkoulas 2022).

62 *Ibid*, 110.

restricted to situations of crisis, and was certainly based on a specific economic interpretation of the law – a point we shall return to. Market constitutionalism, seen under this light, involves the consolidation and prioritisation of legal principles which facilitate the profitable investment of capital, such as property, economic initiative, free trade, safety of contracts, flexible labour market, fiscal discipline, as well as the establishment of appropriate institutional forms (consensual or authoritarian) to accommodate this process.

One might be quick to note that market constitutionalism, thus conceived, signifies a distortion of the main tenets of liberal constitutionalism. This would be a rushed and mistaken assumption which neglects the fact that the process of capitalist restructuring, which began in the 1980s, was accelerated globally with the Global Recession that followed the 2008 crash, and has come to be referred to as ‘neoliberalism’, brings hardly anything new to the main tenets of liberal constitutionalism. Instead, neoliberalism is market fundamentalism correcting the aberration of the Keynesian moment. In one of the most authoritative works on the topic, neoliberalism is defined as ‘a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterised by strong private property rights, free markets and free trade.’⁶³

Under this prism, neoliberalism can best be understood as market fundamentalism, i.e. a process that does away with legal (as well as political and economic) forms imposed by the working-class movement and responding to processes of capital accumulation and class struggle post-WWII.⁶⁴ The market fundamentalism of neoliberalism is not historically contingent but generally reflecting market rationality as envisaged in liberal ideas. The new (neo-) element of neoliberalism, from this perspective, is quantitative, not qualitative, and refers to the scale, i.e. the globalised nature of the processes of production and capital accumulation⁶⁵ and the stage of class struggle.⁶⁶

On this basis, I argue that market constitutionalism refers not to a distorted version of liberal constitutionalism but to those aspects of it that are essential for the reproduction of capitalist economy, like the right to property, free trade, freedom of economic initiative, safety of contracts, as well as the individualist formalism and the abstraction from and neglect of material relations. Social needs, exploitation and alienation do not register as issues in liberal constitutional discourse. The welfare state and socio-democratic policies introduced elements foreign to liberal constitutionalism, ‘breaches

⁶³ David Harvey, *A Brief History of Neoliberalism* (OUP 2005).

⁶⁴ Paul O’Connell, *Capitalism, Inequality, and Human Rights* (4 June 2018) <<https://lpeproject.org/blog/capitalism-inequality-and-human-rights/>>.

⁶⁵ See Guglielmo Carchedi and Michael Roberts (eds), *World in Crisis: A Global Analysis of Marx’s Law of Profitability* (Haymarket 2018).

⁶⁶ John Smith, *Imperialism in the Twenty-First Century: Globalization, Super-Exploitation, and Capitalism’s Final Crisis* (Monthly Review Press 2016).

within' the system that were discarded as soon as they presented insurmountable obstacles to the process of capital accumulation.⁶⁷ Market constitutionalism is a key aspect of the process of bringing the legal and political framework back to the 'factory settings' of market economy.

An objection is anticipated here. The claim that market rationality is deeply embedded in liberal constitutionalism may hold with regards to cases like *Laval* and *Viking*, but it loses its persuasive force when courts vindicate social and labour rights. I argue that this objection cannot be sustained because one of the main characteristics of liberal constitutionalism is that it abstracts from the socio-economic content (and context)⁶⁸ and therefore allows for law to be seen, and partially operate, as independent from economic interests. This is what the 'form analysis' of law,⁶⁹ based on Marxist theory, calls the 'relative autonomy of law'.⁷⁰ Law's relative autonomy is due to its systematic nature.⁷¹ Marxist theory has recognised this characteristic since the 1860s, when Friedrich Engels wrote that '[i]n a modern state not only must the law correspond to the general economic situation and be its expression, it must of itself constitute a coherent expression that does not, by reason of internal contradictions, give itself the lie. And to achieve this, the fidelity with which economic conditions are reflected is increasingly thrown to the winds'.⁷²

It is also essential to note that, from a Marxist perspective, market constitutionalism is built on the dual and contradictory tasks of the capitalist state. Marxist theory accepts that capitalist society is established and reproduced upon two contradictory tendencies: a tendency towards crises of profitability and another towards crises of social legitimacy. Therefore, the capitalist state has to balance between two contradictory roles: ensuring profitability of capitalist enterprises and achieving social legitimacy.⁷³ As a result of this process, the subordinate classes' struggles force the recognition of rights that amend the legal content yet contradict the abstraction of the legal form.

To further strengthen the point about the relationship between market constitutionalism and liberal constitutionalism let us look at the main traits of liberal constitutionalism as evaluated from a mainstream economics perspective. This will prove that liberal constitutionalism subscribes to the principles of the free market. The mainstream approach to the relationship between economy and the constitution, referred to as 'Law and Economics' (L&E), is characterised by an adamant faith in the

67 Dimitrios Kivotidis, *The Dialectics of Democracy: Towards a Socialist Constitutionalism* (Routledge 2024) 105–10.

68 Louis Althusser, *On the Reproduction of Capitalism* (Verso 2014) 59.

69 Evgeny Pashukanis, *The General Theory of Law and Marxism* (Transaction Publishers 2003).

70 See Dimitrios Kivotidis, 'Principles for a Dialectical-Materialist Analysis of Law and the State' in Paul O'Connell and Umut Özsü (eds), *Handbook on Law and Marxism*, (Edward Elgar 2021) 543, 549–53.

71 Althusser, *On the Reproduction of Capitalism* (n 72), 58.

72 Frederick Engels, 'Engels to Conrad Schmidt, in Berlin, 27 October 1890' in Karl Marx and Frederick Engels (eds), *Collected Works*, Vol. 49 (Lawrence & Wishart 2010), 57, 60–61.

73 Beverly J Silver, *Forces of Labor: Workers' Movements and Globalization since 1870* (Cambridge University Press 2003) 17–20.

market. The market is considered the superior form of producing and distributing goods in a society, especially when compared to planned economies.⁷⁴ The blind faith in the market's superiority assumes such force that L&E considers the lack of interest in acquiring information about the working properties of alternative constitutional rules as an essential feature of 'homo economicus'.⁷⁵ In this manner, this economic logic naturalises the extant social, and juridical, condition. It follows that law's purpose is not to subvert, change or even manipulate the economy to achieve social goals or ideals, but to ensure economic efficiency.⁷⁶

From this perspective, public law serves to reduce transaction costs and address market failures. The economic efficiency of a constitutional document is assessed by its ability to prevent additional transaction costs and redirect those resources into commercial or other presumptively efficient private activity.⁷⁷ In other words, a constitution promotes economic efficiency if it adopts a pro-market approach that safeguards economic rights and protects resources from social policies that threaten to dispossess the wealthy. The protection of economic growth which relies on private investment necessitates an institutional framework that generally prohibits redistributive measures unless the costs associated with these are considered worth incurring to preserve social peace.

The threat of redistribution posed by the positive action and potential state intervention in the economy demanded by effective promotion of social rights, such as the right to housing, health or education, explains the mainstream jurisprudential attitude towards social rights. For many liberal thinkers⁷⁸ 'the constructs of civil and political rights and socio-economic rights are products of different political philosophies with correspondingly different ideas of the relationship between individual and state, and the role of the individual as citizen in society'.⁷⁹ Indeed, it has been argued that these two sets of rights stem from mutually unsustainable notions of freedom:⁸⁰ contrary to freedom from coercion, which civil and political rights stand for, social rights stand for freedom from want which, however, leads to oppression and dictatorship over needs.⁸¹ Liberal constitutionalism considers social rights, based as they are on a principle of social needs satisfaction, as necessarily tampering with the market and leading to oppression, through suppression of choice. Liberal proponents of limited

74 Rodi, *Economic Analysis of Public Law* (n 10) 10–52. See also George Dellis, *An Economic Analysis of Public Law* (Edward Elgar 2021) 28.

75 Stefan Voigt, *Constitutional Economics: A Primer* (Cambridge University Press 2020), 12.

76 Ronald Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics* 1.

77 Dellis, *An Economic Analysis of Public Law* (n 78), 58.

78 See for instance Friedrich Hayek, *The Constitution of Liberty* (University of Chicago Press 1960); Robert Nozick, *Anarchy State and Utopia* (Basic Books 1974); and Charles Fried, *Right and Wrong* (Harvard University Press 1994).

79 Colm O'Cinneide, 'The Present Limits and Future Potential of European Social Constitutionalism' 15.

80 See David Kelly, *A Life of One's Own: Individual Rights and the Welfare State* (Cato Institute 1998). See also Loren Lomasky, 'Liberty and Welfare Goods: Reflections on Clashing Liberalisms' (2000) 4(1) *Journal of Ethics* 99.

81 Ferenc Feher, Agnes Heller and Gyorgy Markus, *Dictatorship over Needs: Analysis of Soviet Societies*, (Wiley-Blackwell 1984).

government view social rights as antithetical to a free and democratic society and argue that is illegitimate for a constitution to attempt to secure their realisation.⁸²

The contrast is even starker when comparing social rights to property rights in particular. From a free market perspective property rights and social rights stand in competition as any promise of the state to promote social rights must be paid for by someone.⁸³ The right to property is viewed as necessary 'for enjoying an asset without the cost of endless bargaining and conflict with others'.⁸⁴ From this standpoint, secure property rights are leading to higher income levels while social rights have the exact opposite effect.⁸⁵ These economic arguments can help explain the judicial treatment of social and economic rights by liberal constitutions as separate from and inferior to civil and political rights.

Nevertheless, as mentioned above, the goal of maintaining social peace and ensuring social legitimacy also factors in the liberal constitutionalist approach to social rights. L&E acknowledges that much redistributive legislation may be defensible on efficiency grounds with reference to problems of social peace.⁸⁶ As a result, socio-economic rights as means of redistribution are not discarded altogether. L&E recognises their economic value as maybe 'the cheapest method of preserving social peace'.⁸⁷ Examples of such measures include: 'pro-union legislation designed to head off labour violence, generous welfare allotments designed to head off riots in the slums, and make-work public employment designed to reduce the incidence of crime'.⁸⁸

Therefore, social rights are accepted as a necessary evil, as 'breaches within' free market societies. Restricted versions of these rights, articulated through a combination of constitutional or legislative qualifications and judicial interpretation that essentially redefines them,⁸⁹ are tolerated as long as they contribute to the reduction of 'transaction costs' like social unrest and insurrection. Last but not least, and in confirmation of the latter point, these social rights have never automatically appeared in modern constitutional texts, but only as a result of class struggle carried out by subordinate classes.⁹⁰ There are many historical examples (from Weimar Republic to the UK

⁸² O'Connell, 'The Death of Socio-Economic Rights' (n 30); Craig Scott and Patrick Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution' (1992) 141(1) *University of Pennsylvania Law Review* 45–6.

⁸³ Friedrich Hayek, *Law, Legislation and Liberty, Vol. 2: The Mirage of Social Justice* (Chicago University Press 1976).

⁸⁴ Dellis, *An Economic Analysis of Public Law* (n 78) 145.

⁸⁵ *Ibid.*

⁸⁶ Richard A Posner, 'The Constitution as an Economic Document' (1987) 56(4) *George Washington Law Review* 10.

⁸⁷ *Ibid.*, 23.

⁸⁸ *Ibid.*

⁸⁹ See for instance Christoforos Sevastidis, *The Right to Strike and the Judicial Review of its Exercise* (in Greek), (Sakkoulas 2015), on how Greek courts interpret the constitutionally protected right to strike to accept series of legislative restrictions that essentially render this protection meaningless.

⁹⁰ Dimitrios Kivotidis, 'Theses on the Relationship between Rights and Social Struggle' (2019) 70(4) *North-ern Ireland Legal Quarterly* 407.

welfare state, to the social democratic regimes of Southern European countries) where these social rights were discarded as soon as they started obstructing the process of capital accumulation and the conditions for profitable investment of capital.⁹¹

5. Reform or refoundation?

It follows that the problem of the role and place of social rights in liberal constitutionalism is not reducible to an argument about judicial approaches. It is not a problem of deference versus activism but one determined by prior political economic views and whose solution requires a radical overhaul of the socio-economic system.

On this basis we now turn to evaluate various proposals for alternative judicial approaches to socio-economic rights, which advocate a more active role of the judiciary in protecting and promoting social rights in the context of liberal constitutionalism. These include the idea of treating the 'social state' principle as a fundamental interpretative meta-rule, which would constitute 'both a means of consistent interpretation of other constitutional rules and of control of the generation of infra-constitutional ones'.⁹² Another proposal is to approach socio-economic rights as 'principles', i.e. norms which must be realised to the greatest extent possible given the legal and factual possibilities.⁹³ Even if a right is not capable of immediate fulfilment, it is not reduced to mere aspiration because of the normative force of the duty to realise it.⁹⁴

Other proposals relate more directly to ways through which the obstacle of judicial deference can be bypassed. These approach the courts as one actor in a wider democratic structure which may play a catalytic role for democratic initiatives.⁹⁵ Courts, seen from this perspective, contribute to the iterative process of specifying the content of a social right by 'demanding a deliberative justification for a state's actions or inactions in progressively realizing a right, thereby strengthening democratic accountability'.⁹⁶ The optimum remedy for such an alternative model of adjudicative framework is the structural interdict, whereby the court declares that there has been a breach and requires the government to produce a programme on how it is going to remedy this breach, while retaining a degree of judicial supervision over or ongoing involvement with this process.⁹⁷

Last but not least, there are proposals that seem to recognise an extra-institutional role for the courts, as they envisage a more active judicial role as democracy-enhancing

91 Kivotidis, *The Dialectics of Democracy* (n 71), 105–10.

92 Katrougkalos and O'Connell, 'Fundamental Social Rights' (n 1).

93 Sandra Fredman, *Comparative Human Rights Law* (OUP 2018) 72–3.

94 *Ibid.*

95 Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 118–19.

96 Fredman, *Comparative Human Rights Law* (n 97) 77.

97 Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2014) 195–6.

counterweight for social justice.⁹⁸ From this perspective, the courts' role is viewed as that of 'an enforcer of socio-economic rights as 'destabilisation rights' that allow citizens to disrupt structures that are unresponsive to democratic challenge'.⁹⁹ The value of the courts' involvement with social rights cases is found not in the resolution of substantive disputes but in putting in motion 'processes of contestation' and replacing the current equilibrium of power with disequilibrium, to be worked out after the court delivers its judgment.¹⁰⁰

Regardless of their innovative character, these proposals for alternative judicial approaches to social rights all seem to assume the general normative framework which determines these approaches in the last instance. Instead, our analysis showed that the place of social rights in modern constitutions and their effective protection are issues that necessitate contesting the grounding roots of liberal market constitutionalism and engagement with the idea of the economic constitution and questions like: Does the constitution have something to say about resource allocation? Is the distribution of resources and social wealth a matter of constitutional significance? Should a constitution ensure as a matter of principle that resources are allocated to the satisfaction of social needs?

The answer to this last question is negative from a market constitutionalist perspective, but positive from a socialist constitutionalist perspective. Socialist constitutionalism¹⁰¹ 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.¹⁰² The socialist constitutionalist approach to social rights (i) links rights to relations of distribution and production, and (ii) favours an expansive notion of social rights based on needs. Let us elaborate on these two points.

(i) The first point relates to the abstract formalism of liberal constitutionalism. As mentioned above, modern constitutions are formally safeguarding rights while abstracting from social content and context. For instance, the right to freedom of association is protected for any legal subject without taking account of fundamental social inequalities.

⁹⁸ Ragnarsson, The counter-majoritarian difficulty in a neoliberal world: Socio-economic rights and deference in post-2008 austerity cases

⁹⁹ Robert M Unger, *False Necessity* (Verso 2001) 530–5; Charles F Sabel and William H Simon, 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117 *Harvard Law Review* 1016; Katherine G Young, *Constituting Economic and Social Rights* (OUP 2012) 268–71; and Cesar Rodríguez-Garavito and Diana Rodríguez-Franco, *Radical Deprivation on Trial* (CUP 2015) 186–9.

¹⁰⁰ Young, *Constituting Economic and Social Rights* (n 104) 269.

¹⁰¹ 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) <<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' (2020) 73(1) *Current Legal Problems* 27–58.

¹⁰² Paul O'Connell, 'The Poetry of the Future: Law, Marxism, and Social Change' in Paul O'Connell and Umut Özsu (eds), *Research Handbook on Law and Marxism* (Edward Elgar 2021) 458–76, 473–5.

But it is the latter which determine the actual possibility of exercising this right, so that only individuals with available means can exercise these rights in an effective manner. On the contrary, from a socialist constitutionalist perspective, the abstract universality of bourgeois right must give its place to a substantive universality of socialist right based on new relations of production and distribution, which constitute the material conditions for the actual exercise of these rights.

A systematic analysis of relevant provisions of socialist constitutions would substantiate this claim, but unfortunately an endeavour of such magnitude falls outside the scope of this article. However, a closer look at the provisions of one of the first constitutional applications of revolutionary socialist thought serves to illustrate this point for our purposes. The 1918 Constitution of the Russian Socialist Federated Soviet Republic, in safeguarding the rights to freedom of thought, freedom of expression and freedom of association, did not rest on the formal protection of these rights. The text makes explicit reference to the material conditions for the exercise of these rights, manifesting a materialist conception of these rights. *For the purpose* of securing freedom of expression to the toiling masses, paragraph 14 of article 2 ‘abolishes all dependence of the press upon capital, and turns over to the working people and the poorest peasantry all technical and material means for the publication of newspapers, pamphlets, books, etc., and guarantees their free circulation throughout the country’. Additionally, paragraph 15 of the same article ‘offers to the working class and to the poorest peasantry furnished halls, and takes care of their heating and lighting appliances’, *for the purpose* of enabling the workers to hold free meetings.

The above is evidence of a constitution which links rights protection to the material conditions for their satisfaction, moving beyond the abstract formalism and reservations of feasibility of liberal constitutionalism, to address explicitly class barriers, relations of production and distribution. This is why, the Soviet Constitution of 1918 safeguarded as the basic condition for the exercise of these rights, the popular ownership of means of production, and set as primary goal the resolution of the ‘fundamental problem’, i.e. ‘the abolition of the exploitation of men by men, the entire abolition of the division of the people into classes’ (Article 1 paragraph 3). From a socialist constitutionalist perspective, social rights and welfare policies and measures ‘*acquire their full meaning and significance only in connection with the ‘expropriation of the expropriators’ being either accomplished or prepared.*’¹⁰³ In other words, effective social rights protection necessitates the creation of different relations of production and distribution according to the solidarity principle ‘to each according to their needs’.¹⁰⁴

(ii) Regarding the second contribution of a socialist constitutionalist approach to social rights, it must be noted that a needs-based conception of rights,¹⁰⁵ which

¹⁰³ VI Lenin, *The State and Revolution* (Penguin 2009) 40.

¹⁰⁴ Karl Marx, ‘Critique of the Gotha Programme’ in Karl Marx and Friedrich Engels (eds), *Collected Works: Volume 24* (Lawrence and Wishart 2010) 77, 87.

¹⁰⁵ See Dimitrios Kivotidis, ‘Against Market Constitutionalism: A Needs-Based Approach to Rights and the Case for a Socialist Constitutionalism’ *Jurisprudence* (online) <www.tandfonline.com/doi/full/10.1080/20403313.2025.2461872>.

moves beyond the individualist and depoliticised notion determined by market rationality, is neither outlandish nor utopian. In the aforementioned case of SG,¹⁰⁶ the courts' deferential approach to the legality of the benefit cap exhibited several characteristics of market constitutionalism. The government's view that the benefit cap was necessary to promote the legitimate aims of 'fiscal savings, incentivising work and imposing a reasonable limit on the amount of benefits which a household could receive', was accepted by the court as not manifestly without reasonable foundation.¹⁰⁷

What is even more telling of the market constitutionalist viewpoint characterising the majority opinion in this judgment is the endorsement of the view that social rights, as entitlements, contribute to dependency and are, therefore, a source of humiliation and social stigma.¹⁰⁸ Under this prism, the benefit cap is promoting the family's interests by freeing them from welfare dependency whose paternalistic nature gives rise to social humiliation. Viewing social assistance policies as a source of stigma reflects market rationality and a narrow perception of needs. It was after all 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.¹⁰⁹

On the contrary, a view akin to a needs-based approach to rights is found in Baroness Hale's dissenting opinion, which, by looking at the appellants' personal circumstances, is instead focusing on their needs and not on the mainstream market approach to these needs and the means of satisfying them. According to Lady Hale, it is important that Ms SG and her family lived, and had very good reasons for wanting to continue to live, in Stamford Hill, North London, because they are members of a particular orthodox Jewish sect.¹¹⁰ Additionally, it is important to consider that the two-bedroomed flat rented from a private landlord in which they resided was already 'too small for them and would be quite unsuitable were [their] 12-year-old boy to come and live with the family again'.¹¹¹ Last but not least, it was essential for the court to consider that, since accommodation in Stamford Hill was in short supply because of demand from the local community, if Ms SG stayed there her weekly income would fall well below that which the state deems necessary for her and her three young children to live on.¹¹² As a result of her focus on the family's needs, Lady Hale dissented and found that the benefit cap was incompatible with Convention rights under article 14 and article 1 of Protocol 1 of the ECHR.

¹⁰⁶ *Regina (SG and others) v Secretary of State for Work and Pensions (Child Poverty Action Group and another intervening)* [2015] UKSC 16 [2015] 1 W.L.R. 1449.

¹⁰⁷ *Ibid*, para 96, per Lord Reed.

¹⁰⁸ *Ibid*, para 66, per Lord Reed.

¹⁰⁹ Adam Smith, *Lectures on Jurisprudence* (Liberty Press 1982) vi. 6.

¹¹⁰ *Regina (SG and others) v Secretary of State for Work and Pensions (Child Poverty Action Group and another intervening)* [2015] UKSC 16 [2015] 1 W.L.R. paras 170 and 172, as per Lady Hale.

¹¹¹ *Ibid*, para 171, as per Lady Hale.

¹¹² *Ibid*, para 172, as per Lady Hale.

This is not the only case where Baroness Hale exhibits a needs-based approach to rights.¹¹³ It certainly shows that the generalisation of a needs-based approach to social rights might result in influencing judicial approach and achieving positive change in the ‘here’ and ‘now’. That said, a needs-based conception of rights also points to a certain overcoming of the limitations of liberal constitutionalism. Such a revolutionary critique would be inspired by the early stages of socialist thought. One hundred and fifty years ago, Karl Marx in his ‘Critique of the Gotha Programme’ argued that bourgeois right is limited right because it views any individual in a one-sided manner, i.e. only as a worker, and distributes ‘to each according to their labour’.¹¹⁴

For Marx, the crossing of the ‘narrow horizon’ of bourgeois liberal right consists precisely in approaching the individual as a full personality with a multiplicity of needs. Distributive justice in capitalism is based on the principle of ‘*sum cuique*’ or ‘to each according to their labour’ and measures unequal individuals with equal measure (i.e. their labour) by focusing on one limited aspect of the human personality and neglecting all others (e.g. ‘one man is superior to another physically, or mentally, and supplies more labour in the same time’, ‘one worker is married, another is not; one has more children than another, and so on and so forth’).¹¹⁵ This limitation is only overcome in a socialist society where the measure of distribution is not anymore the limited bourgeois right but social need. Distributive justice in a socialist society follows the solidarity principle ‘to each according to their needs’. This is what constitutes, according to Marx, the ‘crossing of the narrow horizon of bourgeois right’.¹¹⁶

Notably, 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.¹¹⁷ All the above needs have *significant normative value* which influences the content and role of social rights in a socialist constitution. It can be argued that such a needs-based approach to distributive justice in socialism 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 healthcare; the right to free and all-round education; the right to a reasonable standard of living; the right and duty

¹¹³ See *R (on the application of McDonald) (Appellant) v Royal Borough of Kensington and Chelsea (Respondent)* [2011] UKSC 33, noting that Lady Hale’s opinion in both cases was dissenting.

¹¹⁴ Marx, ‘Critique of the Gotha Programme’ (n 108) 86.

¹¹⁵ *Ibid.*, 86–7.

¹¹⁶ *Ibid.*, 87.

¹¹⁷ Karl Marx, ‘Economic and Philosophic Manuscripts of 1844’ in Karl Marx and Frederick Engels (eds), *Collected Works: Vol. 3* (Lawrence & Wishart 1975) 229–346, 275, 301, 308, 309.

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; in other words, a totality of social rights. Some of these rights are procedural while others substantive but all would be afforded different protection in a constitutional framework that promotes social needs satisfaction.

This needs-based approach to social rights transcends the narrowness and individualism of liberal constitutionalism 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. In such a fundamentally restructured constitutional and politico-economic environment, the courts might play a qualitatively different role as arbiters of production, applying the solidarity principle 'to each according to needs' and intervening to check whether social needs satisfaction is met.

6. Conclusion

This article examined the courts' deferential stance in cases relating to social rights. This general reluctance of the judicial branch to intervene in matters affecting budgetary decisions an allocation of resources has consistently been justified on the basis of separation of powers. Courts are considered ill-suited institutions to resolve such sensitive and polycentric issues. Applying a critical political economy approach, I argued, instead that judicial deference with regards to social rights cannot be approached solely as a juridical phenomenon, but is instead determined by the wider politico-economic normative framework of liberal constitutionalism which is permeated by free market rationality.

It is precisely this market constitutionalist viewpoint that rejects the courts' involvement with issues affecting the economy, on in favour of political institutions, which are themselves found, from this standpoint, inadequate to deal with such issues as they are susceptible to popular pressure, but rather in favour of non-political, technocratic and unaccountable institutions subscribing to some kind of 'market theology'. Against this market constitutionalism, this article tentatively suggested a socialist constitutionalist approach to social rights, relying on the concept of social needs and linking them to socio-economic relations of production and distribution.

Four decades after the triumph of free market rationality in politico-economic and juridical discourses and institutional practices, events and processes like the prolonged recession, the global pandemic, imperialist wars and genocide, and a general immiseration of the living conditions of the popular strata across the globe, have given rise to xenophobic, populist and authoritarian reaction, accommodated within the liberal institutional framework. It is perhaps high time to contest the grounding roots of liberal constitutionalism not from a reactionary and authoritarian but from a progressive socialist standpoint. It is time for any reservations of feasibility related to social

needs satisfaction and social rights promotion to be treated with the kind of socialist realism captured in the famous phrase by Che Guevara: 'be realistic and demand the impossible'.

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