

Inequality, Not Insufficiency: Making Social Rights Real in a World of Plenty

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Introduction

Supporters of social and economic rights to health, education, food, housing, social security, etc. (hereinafter simply “social rights”) often complain that these rights are neglected in comparison to civil and political rights (e.g. freedom of speech and religion, the right to vote, the right not to be tortured). This often quoted passage of the Committee on Economic, Social and Cultural Rights provides a good example of this rather typical stance:

“[T]he international community as a whole continue to tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action. In effect, despite the rhetoric, violations of civil and political rights continue to be treated as though they were far more serious, and more patently intolerable, than massive and direct denials of economic, social and cultural rights.”²

Several academics and activists have echoed these claims. David Bilchitz, for instance, has stated that social and economic rights are “more honoured in the breach than in the observance”,³ whereas Margot Salomon, in a similar vein, urges that “[e]qual attention and urgent consideration (...) be given to the civil, political, economic, social and cultural rights”.⁴

Many think that this alleged neglect is in great part due to a misconceived belief that social rights are different in nature to civil and political ones, especially in relation to their dependence on scarce resources.⁵ A lot of effort is therefore employed by supporters to prove this distinction wrong in the hope that, by establishing parity between the two types of rights, social rights will finally receive the attention they deserve and be more effectively enforced through the legal system. The following extract from a UN document illustrates well this widespread approach.

“[E]conomic, social and cultural rights have been seen as requiring high levels of investment, while civil and political rights are said simply to require the State to refrain from interfering with individual freedoms. It is true that many economic, social and cultural rights sometimes require high levels of investment—both financial and human—to ensure their full enjoyment. (...) Similarly, civil and political rights, although comprising individual freedoms, also require investment for their full realisation. For example, civil and political rights require infrastructures such as a functioning court system, prisons respecting minimum living conditions for prisoners, legal aid, free and fair elections, and so on.”⁶

I believe that this strategy (let us call it the “parity thesis”) is not only based on an im-

plausible argument but is also largely unhelpful for the project of strengthening the implementation of social rights. Even if it were true that these civil and political rights are identical in relation to their dependence on scarce resources (something I reject but will not deal with in this article), the main obstacle to strengthening the implementation of social rights, i.e. the difficulties that this resource dependence creates for the definition of their precise content, would still be there. All the parity thesis would have achieved would have been to highlight that resource dependence also affects civil and political rights.

In my view, thus, rather than keep complaining that social rights are neglected in comparison to civil and political rights and waste time and effort with the parity thesis, the main task for social rights supporters, but one that has been largely neglected, should be the development of a more concrete conception of these rights, i.e. one that faces the resources issue head on and clarifies the content and nature of these rights. Until such a conception is developed and attains the level of consensus achieved in some civil and political rights, complaints about social rights' neglect will remain purely rhetorical.⁷

This article attempts to contribute to that endeavour by proposing a conception of social rights which I believe fulfils the criteria set out above. I start by trying to clarify the meaning of *resource scarcity* (and the related idea of "available resources"). Understanding resource scarcity properly, and, in particular, dispelling some common misunderstandings surrounding it, is a necessary and crucial step in the effort to make the content of social rights more determinate and their implementation possible and effective.⁸ My main goal is to show that resource scarcity is not solely or chiefly a practical obstacle

to the implementation of social rights stemming from insufficiency (i.e. lack of resources), as many in the debate seem to wrongly assume, including social rights supporters. The world as a whole, and most of the countries within it, including so-called developing countries, are rich enough to satisfy the basic needs of their entire populations. The main problem, thus, is not insufficiency of resources, but rather inequality of distribution, and the main obstacle for the consolidation of social rights is the complexity of the questions that the definition of their content and nature necessarily raise in this context of what I call "relative abundance" of resources. Is redistribution of privately held resources from the better off to the worse off normatively required for compliance with social rights? If so, to what extent? Should it happen only within the borders of national states or also across them? How politically and practically feasible would the appropriate redistributive measures, whatever they are, be? All these intractable issues of distributive justice need to be dealt with and achieving consensus on them, although extremely difficult, perhaps even utopian, is a crucial step in making the content and nature of social rights more concrete and their implementation more effective. The second part of this article discusses these issues and puts forward a conception of social rights based on the idea of equality of opportunity which in my view could be a step forward in the pursuit of that consensus.

I. Understanding Resource Scarcity

I.1 Resource Scarcity in the Literature

It is not disputed in the literature that the provision of the goods and services related to social rights is dependent on so-called *scarce resources*. There is an acceptance, moreover, even among social rights supporters, that these rights cannot be immediately

implemented, but are rather to be “progressively realised”, because some, and perhaps many states, may not be in a position to afford to guarantee these rights immediately to their populations within their “available resources”. This position was well summarised in the following passage of the oft-cited General Comment No. 3 of the Committee on Economic, Social and Cultural Rights:

“The concept of progressive realisation constitutes a recognition of the fact that full realisation of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. (...) It is (...) a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights (...).

[But] it (...) imposes an obligation to move as expeditiously and effectively as possible towards that goal.

(...) [A]ny assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2(1) obligates each State party to take the necessary steps ‘to the maximum of its available resources.’”⁹

This approach is reflected in several legal instruments recognising social rights in the domestic and international sphere. The International Covenant on Economic, Social and Cultural Rights (Article 2(1)), for instance, formulates the obligation of states in the following manner:

“Each State Party to the present Covenant undertakes to take steps, (...) to the **maximum of its available resources**, with a view to **achieving progressively** the

full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” [my emphasis]

I happen to believe that the idea of a “progressive right” (i.e. one to be achieved progressively, in future rather than immediately) is conceptually flawed because it is incompatible with the concept of right in the well-established strong sense of the term, i.e. as a norm of high priority to be respected immediately unless there are some special and exceptional grounds not to do so.¹⁰ However, I do not have space to discuss this issue here.¹¹ My aim here is to try to clarify the concept of resource scarcity that needs to be taken into account when determining the content of social rights. The assumption, explicit in the passages quoted above and implicit in a large part of the literature, is that resources are simply insufficient in most, if not all countries in the world, to make the immediate implementation of social rights possible.¹²

James Nickel explains that assumption well in his entry to the Stanford Encyclopaedia of Philosophy on human rights when referring to some criticisms levelled against them:

“It is very expensive to guarantee to everyone basic education and minimal material conditions of life. Perhaps social rights are too expensive or burdensome to be justified even in rich countries.”¹³

Surprisingly, social rights supporters have not by and large taken issue with this assumption, but rather accepted it, as already noted, and then tried to counter it with the claim that civil and political rights are also costly (the parity thesis I referred to in the Introduction above). David Bilchitz, for instance, a leading South African academic and

supporter of social rights, states in his book that “[t]he world (...) does not contain an abundance of all the resources that we need to fulfil our [social] rights”.¹⁴ The Office of the UN Commissioner for Human Rights echoes the claim:

“[T]he reference to ‘resource availability’ reflects a recognition that the realisation of these rights can be hampered by a lack of resources and can be achieved only over a period of time.”¹⁵

But are social rights really “too burdensome”, or “too expensive” to be implemented immediately? It depends, of course, on how one defines the content of these rights, an issue on which, as already noted, there is no consensus at present, not even among social rights supporters. In Nickel’s statement, for instance, there is an assumption that social rights are entitlements to the satisfaction of a certain *minimum* level of needs in education, health-care, housing, etc. Other commentators, however, interpret these rights in a much more generous manner.¹⁶ This lack of consensus is reflected in legal instruments. In the Constitution of Finland, for instance, there is a “right to basic subsistence” and a duty on the state to guarantee “adequate social, health and medical services”.¹⁷ In other constitutions and in some international legal instruments, however, these rights are formulated in more generous terms. In the International Covenant on Economic, Social and Cultural rights, for instance, the right to health is recognised as a right to the “enjoyment of the highest attainable standard of physical and mental health”, and other social rights are formulated as rights to adequate rather than basic “food, clothing and housing”.

There is also no consensus on whether social rights are unconditional or targeted, i.e. belonging only to those who are in need

through no fault of their own. Whereas in the ICESCR there seems to be no condition for the enjoyment of these rights, in the Universal Declaration of Human Rights these rights are formulated as conditioned on “lack of livelihood in **circumstances beyond [the individual’s] control**” (Article 25) [my emphasis]. A similar provision is found in the Brazilian Constitution which expressly states that the system of social security and social assistance funded by the state through general taxation has the objective to protect the ill, the disabled, the very old, pregnant women and those involuntarily out of work, i.e. all those who are needy through no fault of their own.¹⁸

Now, given that there is no consensus as yet on the precise content and nature of social rights, it is rather surprising that the literature has converged so easily, supporters and detractors alike, on the assumption that resources are simply not sufficient in most countries for immediate implementation of these rights. That would have been appropriate only if most of the world were clearly too poor to afford these rights even at their least generous possible formulation (i.e. as rights to the satisfaction of minimum basic needs brought about by circumstances beyond the individual’s control) or if there was consensus around the most generous conception that advocates the highest standards of health, education, housing, etc. For those supporting the latter, most generous formulation, Maurice Cranston’s infamous remarks made several decades ago would still be appropriate:

“How can governments of those parts of Asia, Africa and South America, where industrialisation has hardly begun, be reasonably called upon to provide social security and holidays with pay for the millions of people who inhabit those places and multiply so swiftly? (...) [F]or a government to enforce

[social rights], it would need to have access to great wealth, wealth that most governments of the world have no means of acquiring.”¹⁹

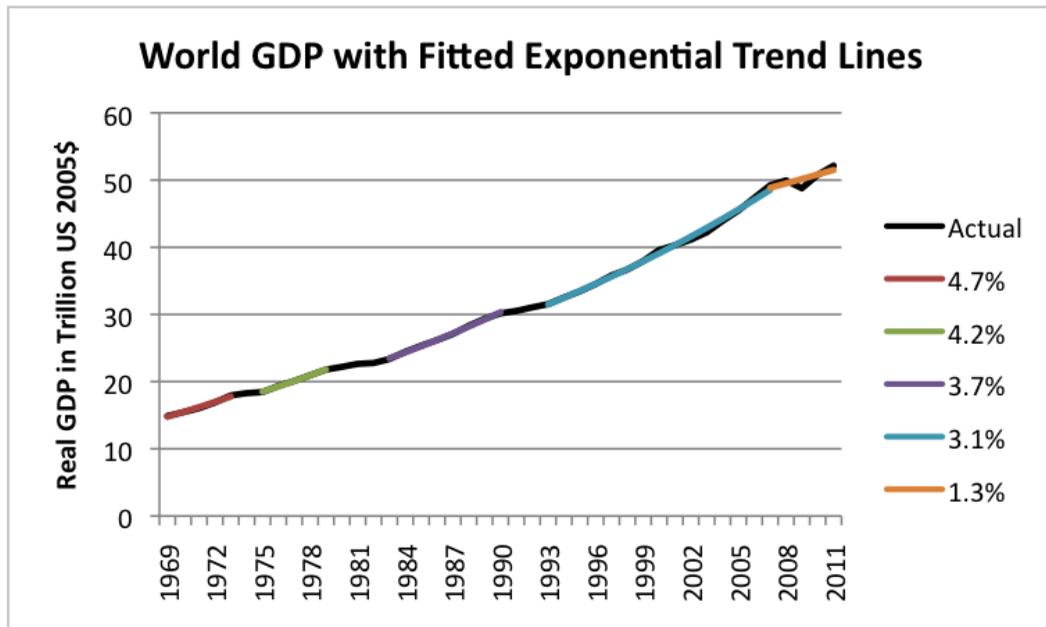
If this most generous and implausible formulation is rejected, however, then the most appropriate stance is to approach the resources issue in a less rhetorical and superficial manner than the literature has tended to do. Two main interrelated and crucial questions that need to be addressed are these: how poor, or rich as the case may be, our world and the individual countries in it actually are? What should the content and nature of social rights be in such a world? The next sub-section addresses the first question. The latter is the subject of section II.

I.2 The Poverty and Wealth of Nations: Is Most of the World Simply Too Poor to Afford Social Rights?

Let us start by noting that the level of wealth in our world has never been greater than

it is today. Gross world product (GWP), i.e. the combined gross national product of all the countries in the world, was, in 2011, approximately US\$78.95 trillion. That makes a *per capita* GWP of approximately US\$12,000. Despite all financial and economic crises, including the most recent one of 2008 (“The Great Recession”), GWP and GWP *per capita* have not stopped growing and have never been so high. It has actually almost doubled in the past twelve years alone.²⁰

We can immediately dismiss, therefore, any claims that the world *as a whole* is simply too poor to guarantee all its inhabitants the satisfaction of their basic needs, most certainly if these are set at a reasonably basic level. Indeed, if one divides GWP *per capita* by the days of the year, the result adds up to just over US\$32 a day, which would be plenty to enable everyone in the world to afford basic needs in food, clothing, shelter, education and health at a reasonably high level. To see this one can compare this figure



with a couple of other indicators intended to measure the resources necessity of individuals to achieve a basic standard of living. In the USA, for instance, the living wage calculator of the Massachusetts Institute of Technology estimates that a family of four in the county of New York needs US\$39,348 a year after tax to afford food, medical, housing, transportation and other basic expenses. That makes US\$26.95 a day per person.²¹ At the other end of the spectrum, the World Bank sets its absolute poverty thresholds at US\$1.25 and US\$2 a day, that is, 25 and 16 times below respectively what GWP *per capita* would allow everyone to have under a perfectly equal distribution. At the higher US\$2 a day threshold a redistribution of less than 0.5% of GWP, or less than 1% of high income countries Gross National Product's combined, would be sufficient to take out of poverty everyone in the world (i.e. the 40% of the world population who live below that threshold). For the lower US\$1 a day extreme poverty threshold, even less would obviously be required.²² Thus, as the World Bank affirmed more than fifteen years ago:

“The world has more than enough resources to accelerate progress in human development for all and to eradicate the worst forms of poverty from the planet. Advancing human development is not an exorbitant undertaking. For example, it has been estimated that the total additional yearly investment required to achieve universal access to basic social services would be roughly \$40 billion, 0.1% of world income, barely more than a rounding error. That covers the bill for basic education, health, nutrition, reproductive health, family planning and safe water and sanitation for all.”²³

It is clear from the data above that resources produced in the *world as a whole* would in no way be insufficient to enable everyone to

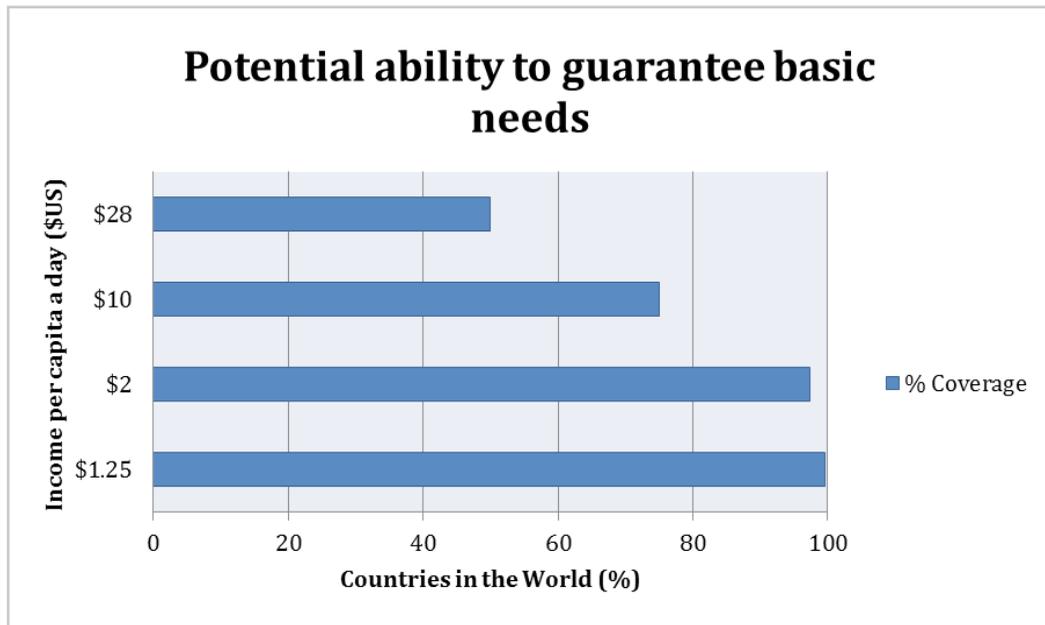
satisfy their basic needs, even when these are set at reasonably high levels.²⁴ We can confidently and quickly refute, therefore, the argument often accepted without contestation by many, including social rights supporters, that it would be simply too expensive and burdensome to guarantee to everyone basic education, health, food, housing, etc. The problem, so far as the world as a whole is concerned, is clearly not one of pure scarcity (i.e. insufficiency), but rather one of distribution.

Whether this unequal distribution is morally wrong, represents a violation of social rights or could be changed without significant negative implications for the production of resources are, of course, different and crucial questions. I will discuss them further in the second part of this article. The point for now is simply that social rights cannot be dismissed *tout court* or regarded as impossible to realise in the short term on grounds that the world as a whole is simply too poor to guarantee basic needs to everyone.

Let us now change the focus from the world as a whole to individual countries within it. Perhaps what those stating that the world is simply too poor to afford social rights really mean is that *most countries in the world, individually considered*, are too poor. They may well be assuming the more accepted position that social rights' corresponding duties are primarily domestic matters. Under this assumption, the generic claim that social rights cannot be immediately implemented and are therefore to be progressively realised would be plausible if most of the countries in the world were indeed too poor to afford them. In an insightful article on social rights James Nickel proposes this very test: “The test of feasibility for an international human right that I propose is that most countries in the world today are able to implement the right in question.”²⁵

But is this modified claim any more plausible than the previous one? We must look at the wealth of empirical data available on the economic situation of individual countries to test it. It is worth re-emphasising, first, that the plausibility of the claim depends on how the content and nature of social rights are defined. But let us again leave that complex matter aside for the moment (I will return to this issue later) and start by looking at the economic situation of individual countries in the world. Gross Domestic Product (GDP), the standard measure of a country's wealth, varies enormously among countries, and a large share of the world's GDP is indeed heavily concentrated in the most developed ones. This might give many the impression that for most countries in the world it would indeed be impossible or extremely difficult to afford the satisfaction of the basic needs of their entire populations. But this impression would again not be borne by the facts. All but the poorest country in

the world (The Democratic Republic of the Congo) have a GDP per capita above the lowest World Bank threshold of US\$1.25 a day, and all but six would have a GDP per capita above the higher US\$2 dollar a day threshold. More than half of the countries in the world have a GDP per capita above US\$28 a day, or US\$10,500 a year, which is the GDP *per capita* of Palau, ranked 114th among the 227 countries in the world with available data. You will remember that the living wage in New York, not one of the cheapest places in the world, was calculated by the MIT as being US\$26.95 a day per person. Almost 75% of the countries of the world have a GDP *per capita* above US\$10 a day, which is the current GDP *per capita* of India (US\$ 3,800 a year, 2012 data), often used as an example of social rights unfeasibility. China, another country often intuitively regarded as too poor to afford social rights to everyone, has a GDP per capita of US\$24.83 a day, almost the living wage in New York just mentioned.²⁶



The data just presented seems again to show that the intuitive belief that social rights are much too expensive for most countries, in particular developing ones, to afford, a belief shared both by supporters and detractors of these rights, cannot be substantiated by the facts. Again, just as the world as a whole would be able, in principle, to support its entire population's basic needs at a relatively high level with a GDP per capita of US\$32 a day, most countries in the world considered individually produce enough resources a year to support their whole populations above, and often well above the US\$2 a day level.²⁷

It is important to reemphasise, at this juncture, that the exercise so far has been a pure economic plausibility assessment. Nothing written so far has touched on the extremely complicated issues of normative justification and political feasibility, crucial to the definition of the content and nature of social rights. These will be discussed in the next section of this article. But the empirical data just presented enables us to approach these issues in a more informed and less abstract manner than the literature has so far tended to do.

The main issue for the vast majority of countries and for the world as a whole is not one of absolute insufficiency of resources, but rather inequality, i.e. that the relatively abundant world resources are distributed across and within nations in such a manner that some people are able to enjoy very high standards of living while others are incapable of satisfying even their most basic needs. Is redistribution of privately held resources from the better off to the worse off normatively required for compliance with social rights? If so, to what extent? Should it happen only within the borders of national states or also across them? How politically and practically feasible would the appropriate redis-

tributive measures, whatever they are, be? The discussion of these intractable issues, to which we now turn, is essential for progress in the understanding and implementation of social rights and must be carried out within the backdrop of the concrete empirical data just presented.

II. Social Rights in a Context of Relative Abundance

When terms such as “resource scarcity”, “resource availability” and “lack of resources” are used in connection with social rights, we must therefore be careful not to accept too readily and, as shown above, mistakenly, that the whole world, and most countries within it, are simply not rich enough to enable everyone to satisfy the needs related to these rights. A better and more helpful way of approaching the issue, I suggest, is through a distinction between two types of scarcity: *absolute scarcity (insufficiency)* and *relative scarcity (inequality)*. A situation of absolute scarcity is one in which available resources are clearly insufficient to guarantee everyone's satisfaction of basic needs. A situation of relative scarcity is one in which available resources are in principle sufficient to satisfy everyone's basic needs yet, due to the way these resources are distributed, some individuals are able to satisfy all their basic needs and more whereas others fall below basic needs satisfaction.²⁸

As the data presented above clearly shows, if our focus is the world as a whole, the appropriate standard to use is that of *relative scarcity*. The same goes for most of the countries in the world, but exactly how many would depend on at what level we set the threshold of basic needs satisfaction. In any event, as we saw, even if we set the threshold at a reasonably high level (say at double or triple the poverty threshold of the World Bank),

the standard of *absolute scarcity* would apply only to a handful of countries in the world.

Some important implications follow from this. First, social rights cannot be dismissed as infeasible on grounds of resource limitations alone as some critics do, even if one adopts a more generous interpretation of the content of these rights. These critics might be right in relation to some few countries, as feasibility should indeed be an important consideration when determining the content of a right and its corresponding duties, but are clearly wrong in relation to most countries in the world.²⁹ Secondly, and most importantly for the purposes of this article, social rights supporters themselves should understand this and change their strategy in their fight for these rights accordingly.

Once it is realised that inequality (i.e. relative scarcity) rather than insufficiency (absolute scarcity) is the actual obstacle to the satisfaction of basic needs of most poor people in the world, the intractable yet unavoidable question for social rights supporters is this: what precise redistributive duties, if any, are entailed by social rights in our world of relative abundance of resources? Ought available resources to be more evenly distributed? If so, to what extent? To the extent that everyone is able to satisfy a minimum level of basic needs, or further to enable everyone to achieve an adequate standard of living? Should that right apply equally to everyone irrespective of what they do with their lives or only to those who cannot support themselves for reasons beyond their control? Should redistribution operate only within countries or also across countries? Would such redistribution be economically and politically feasible?

These are the intractable questions that most social rights supporters have for too

long evaded under the cover of “progressive realisation” but that need to be answered in a plausible manner if these rights are ever to achieve equal status with more established civil and political rights. I can obviously not offer here a fully developed discussion of all these issues.³⁰ In the remainder of this article, however, I want to propose, even if in sketchy form, how I think the task should be taken forward. The discussion will be focused on the following three main interrelated issues: (i) should social rights’ corresponding duties apply only within national states or globally?; (ii) what level of basic needs satisfaction should social rights guarantee?; and (iii) should this guarantee benefit everyone unconditionally or only those in need through circumstances beyond their control?

II.1 Social and Economic Rights: Universal or Local?

Answering whether social rights should be universal or local involves the controversial issue of whether principles of distributive justice should apply globally or be confined to nation states. The problem was insightfully discussed by Thomas Nagel in his paper “The Problem of Global Justice”.³¹ He distinguishes between two main views, the cosmopolitan and the political one. Cosmopolitans, such as Peter Singer and Thomas Pogge, for instance, believe that justice applies among individuals and see institutions as a mere instrument for the achievement of justice. The current absence of global institutions capable of implementing economic justice among individuals is thus something to be regretted and fought against. Supporters of the political view, such as John Rawls and Ronald Dworkin, see the locus of application of principles of distributive justice not on individuals but rather on institutions that exert sovereign power over individuals. No obligation of distributive justice exists, therefore,

between individuals not living under the same sovereign power. Given that the world is currently organised into separate sovereign states and lacks a global institution that exerts sovereign power, socio-economic justice is restricted to nation states. Further, there seems to be no duty for individuals to create such global institutions.

Nagel himself seems to favour the political view, and tries to defend it by claiming that “it is this complex fact—that we are both putative joint authors of the coercively imposed system, and subject to its norms, i.e., expected to accept their authority even when the collective decision diverges from our personal preferences—that creates the special presumption against arbitrary inequalities in our treatment by the system”.³² As he explains, this does not mean that no obligations are owed to individuals of other nation states; but they are mostly negative obligations, to respect “the most basic human rights against violence, enslavement, and coercion”, and exceptionally positive obligations to perform “the most basic humanitarian duties of rescue from immediate danger”.³³ His conclusion is neatly summarised in the following passage: “Everyone may have the right to live in a just society, but we do not have an obligation to live in a just society with everyone.”³⁴

I find this line of argument persuasive. In the way our world is currently organised, the nation state and its political, economic and legal systems are still by and large a much stronger determinant of someone’s circumstances and available choices than foreign countries and international institutions (although there are, of course, exceptions and great variations – more on which later). My income, wealth and well-being still depend mostly on the economic and social policies of the nation state under whose rules I live,

especially its regulation of the economy, its taxation and social policies. My political right to influence them and my political duty to abide by its outcomes is what directs my distributive justice claims primarily towards my state and fellow citizens.

This current situation can, of course, change and is indeed changing, although to what extent and with what effects is a complex empirical matter open for debate. Some have claimed that the massive deprivation we witness in the world today is a direct consequence of an unjust global institutional order. Thomas Pogge is one of the leading supporters of this thesis. He claims:

“Given that the present global institutional order is foreseeably associated with such massive incidence of avoidable severe poverty, its (uncompensated) imposition manifests an ongoing human rights violation – arguably the largest such violation ever committed in human history. It is not the gravest human rights violation, in my view, because those who commit it do not intend the death and suffering they inflict either as an end or as a means. They merely act with wilful indifference to the enormous harm they cause in the course of advancing their own ends while going to great lengths to deceive the world (and sometimes themselves) about the impact of their conduct. But still, the largest.”³⁵

But Pogge’s opinion, although extremely well argued and backed by robust empirical data, is not uncontroversial. Many others claim that the global order is actually beneficial to the world’s poor and indeed directly responsible for the significant reduction in poverty experienced in countries such as China in the past decades.³⁶ I do not think that this intractable dispute will be settled anytime soon. As a short and medium-term strategy to

strengthen social rights, therefore, I suggest supporters should adopt the less controversial political view that distributive justice is a national matter and attempt to define the content of these rights and their corresponding duties within countries. Moreover, extending distributive justice beyond borders is a less pressing concern than usually thought. As I have demonstrated in the previous section, most countries in the world are today sufficiently rich (be it because of or despite globalisation) to enable every one of its citizens to satisfy their most basic needs with their own national resources.

II.2 The Content and Nature of Social Rights

The next two questions I proposed above can be dealt with together since they are closely interrelated. They are questions about the content and nature of social rights. To recapitulate: (i) what level of basic need satisfaction should social rights guarantee? and (ii) should this guarantee benefit everyone unconditionally or only those in need through circumstances beyond their control?

The literature has by and large evaded these crucial questions by assuming uncritically that resources are insufficient to provide even a basic minimum to everyone in most countries and relying thus on the vague idea of progressive realisation. But if my argument in the previous section is correct, these questions, however intractable, should not be avoided. The difficulty comes mostly from the fact that distributive justice is still a highly controversial issue, philosophically and politically, and this is in great part due to an impossibility, in most cases, of us knowing the actual *causes* of a person's predicament in terms of her ability or inability to satisfy basic needs, and also fierce disagreement about whether these causes are relevant or

not for distributive justice. This issue is often discussed in the distributive justice literature with use of a dichotomy, *choice and circumstance*, or *choice and chance*, to distinguish between the two main potential determinants of a person's predicament in life. Imagine a homeless person, like Mrs Grootboom in the famous South African case.³⁷ Should it matter, for distributive justice purposes, whether her homelessness was a result of her lack of effort and hard-work (*choice*) or lack of opportunity or some kind of disability beyond her control (*circumstance*)?

Political philosophers, politicians and people in general disagree fiercely about this, as the age old and never ending disputes about the social security system vividly attests. Many believe that only those who find themselves in need through no fault of their own have a right to be supported by society (i.e. people should bear *personal responsibility* for their free choices, but not for the circumstances that affect them), whereas others argue that a decent society has a duty to support needy individuals simply because they are needy, irrespective of causes. The dispute is well summarised in the following passage of an article by Tom Campbell, a leading proponent of the latter view:

"If poverty is a violation of human rights it is primarily because of the stringency of the moral demands arising from the existence of suffering, irrespective of the special characteristics or merits of those involved. On this view, poverty is the basis of a universal, unqualified claim based on the moral relationships between those who suffer and those who can do something about it."³⁸

Again, as with the dispute between holders of the cosmopolitan and the political view discussed in the previous section, I don't think we are anywhere near settling this dispute.

However, I do think that the view that personal responsibility matters in social justice is currently the less controversial and more accepted one. Peter Singer, another leading proponent of the moral irrelevance of personal responsibility, himself admits its radical nature, accepting that it would require a change in “the whole way we look at moral issues – our moral conceptual scheme – (...) the way of life that has come to be taken for granted in our society”.³⁹

It would again be strategically wise, therefore, for social rights supporters to push for a definition of the nature of these rights not as unconditional claims on society’s support, but rather as claims for support in cases of deprivation caused by circumstances beyond an individual’s control. The Universal Declaration of Human Rights itself adopts this less radical position in Article 25, as already noted above. Moreover, as I will claim below, such a strategy, if well implemented, would enable the eradication of poverty from most of the world without the need to disrupt the intuition held by many that personal responsibility is indeed an important element of distributive justice.

The problem is that at the same time that, for the reasons explained above, it would be unwise to leave the principle of personal responsibility aside, it is often impossible to implement it. As put by Richard Anerson in an insightful paper:

“The idea that we might adjust our distributive-justice system based on our estimation of persons’ overall deservingness or responsibility seems entirely chimerical. Individuals do not display responsibility scores on their foreheads, and the attempt by institutions or individuals to guess at the scores of the people they are dealing with would surely dissolve in practice into giving vent

to one’s prejudices and piques. The criminal justice system has a difficult time making reliable determinations of an individual’s guilt or innocence with respect to the charge that she committed a particular criminal act; the thought that we could construct a distributive-justice system that assesses people’s lifetime responsibility is surely a nonstarter.”⁴⁰

Other difficult obstacles to the implementation of a personal responsibility based system of distributive justice are related to the privacy of individuals (we would need to pry too much into peoples’ personal lives)⁴¹ and the fact that choice and circumstance are often inextricably linked.⁴² But there is a potential solution to these problems. It is the adoption of credible presumptions that someone’s inability to satisfy basic needs is the result of circumstance rather than choice. The challenge is to specify these presumptions credibly, that is, in such a way that enables one to assume, with a reasonable level of certainty, that an individual’s deprivations of basic needs satisfaction are likely to be mostly a result of circumstance rather than choice. If our presumptions are not credible, then we are back to square one, that is, open to challenges from those who deny social rights on grounds that basic needs deprivation is a matter of choice rather than circumstance (the so-called “undeserving poor”).⁴³ But one does not need complete certainty to make these presumptions acceptable and legitimate. We content ourselves with less than certainty in many fields of policy and law; how could we do otherwise? We make people pay compensation to others on a balance of probabilities, and we put people in jail even if we cannot be 100% sure that they are responsible for the crime they are accused of. So why should we not also confer social rights on individuals based on a reasonable presumption that they suffer deprivation out of no choice of their own? In the final subsec-

tion of this part of the article I discuss briefly how such a credible presumption could work using the idea of equality of opportunity.

II.3 Equality of Opportunity and Social Rights

How can we establish a credible presumption that someone's deprivation of basic needs is a consequence of circumstances beyond her control rather than choice, that is, one that would satisfy believers in personal responsibility that this person deserves to be guaranteed the provision of a certain level of basic needs as a matter of right? The well-accepted idea of equality of opportunity and the growing data available on it could, in my view, be helpful here. It reconciles the idea of equality, embedded in social rights, with that of personal responsibility, thus satisfying this important condition, as I defended above. Here is how John Roemer, a leading proponent of this idea, defines it in general terms:

“Citizens of western liberal democracies generally endorse equality of opportunity, I believe, because we think it is morally correct to hold persons responsible, at least to some degree, for their actions. This moral view about responsibility devolves in turn from the western liberal view of the value of individual freedom. If individuals are to be free to choose how to lead their lives, then they must be held accountable for those choices: otherwise such a freedom is vacuous. In economic phraseology, the cost of freedom is responsibility.”⁴⁴

I have already noted the difficulties in distinguishing what should be attributed to individuals' free choices and what should be regarded as caused by their circumstances. Roemer is obviously aware of this problem, as he himself notes that “[a]ny particular ac-

tion a person takes, and its associated consequences, are (...) caused by a highly complex combination of circumstances and autonomous choices.”⁴⁵ The complexity is not only of an empirical factual nature, i.e. of accessing information about an individual's life and disentangling choices from circumstances in all her actions, but also of normative character. People often disagree about what should be considered an individual's autonomous choice and what should be regarded as circumstances beyond an individual's control. Take the classic example of smoking, discussed by Roemer, which can cause lung cancer and several other illnesses. Do individuals freely choose these consequences? But there are also much less controversial cases. No one would reasonably dispute, for instance, that discrimination of any sort (e.g. racial, gender, age) is a matter of circumstances that should not put individuals in disadvantage regarding their opportunities in life. The level of education and income of one's parents is also clearly something that no one is able to choose. When inability to satisfy basic needs is caused by any of these factors, we have a clear case of inequality of opportunity and, as a consequence, a violation of social rights under the conception I am proposing.

Now, it is clearly impossible (and also undesirable for reasons already explained) to implement this conception in a perfectly accurate manner; individual by individual, with the information that is possible and legitimate to obtain on individuals' lives. But we can make credible presumptions of injustice (i.e. of basic needs deprivation due to inequality of opportunity) based on the growing availability of data on inequality of opportunity. In an early study, for instance, Bourguignon *et al.* found that “between 10 and 37 percent of observed earnings inequality among Brazilian males can be attributed to a set of only five exogenous circumstance variables: race; place

of birth; mother's and father's education; and father's occupation".⁴⁶ In a broader survey of six Latin American countries (Brazil, Colombia, Ecuador, Guatemala, Panama and Peru), Ferreira and Gignoux looked at how total household income *per capita*, which they use as a proxy for well-being, is influenced by a set of circumstances beyond individuals' control related to family background (parent's occupation and education), ethnicity, region of birth and gender. After a complex analysis of data available in national household surveys for these countries, they are able to construct what they call "opportunity-deprivation profiles", which identifies "combinations of pre-determined, morally irrelevant circumstances [that] lead to the greatest opportunity deprivation in a given society."⁴⁷

In all countries, despite some important variations, the data reveals that household income is strongly influenced by ethnicity, parent's occupation and education, and region of birth. In Brazil, for instance, black or mixed raced individuals, whose parents work in agriculture, whose mothers have no education and who were born in the North or North-East are significantly more likely to be poor than individuals with a different circumstance profile.⁴⁸ To put it in more precise economic terms, they found that "between one quarter and one half of observed consumption inequality is due to differences in opportunities" in the selected countries; and their estimate is rather conservative, as it focuses on a rather small set of circumstances.⁴⁹ In France, according to a study by LeFranc *et al.*, "[d]ifferences in social origin translate into significant gaps of living conditions", so "[e]quality of opportunity in income acquisition does not prevail", although the "average gap between the most advantaged social group, the children of higher-grade professionals, and the least advantaged one fell by one half" between 1979 and 2000.⁵⁰

Even in Sweden, which is regarded as a land of equal opportunity, residual inequalities remain, which cannot be properly attributed to individual effort. According to a recent study by Björklund *et al.* (2011) using a "set of circumstances that is about as complete as one can expect to compile, given existing data sets", they concluded that "only at most one third, and in general less, of inequality is due to circumstances in Sweden".⁵¹

In another study, the World Bank has produced an index, called the Human Opportunity Index (HOI) focusing on children up to the age of 16.⁵² The focus on children eliminates many problems of separating choice from circumstance as it is more likely that children's inability to satisfy basic needs will mostly derive from their circumstances and not their choices. As put in the report: "focusing on this age range obviates the need to make any distinction between access and utilisation related to effort, attitudes or preferences of the child or parents. The assumption is that as long as society agrees on universalising an opportunity, it must ensure utilisation by children, independently of the preferences of the child or her family".⁵³

The study analyses opportunity of access to a set of basic services and goods, divided into basic education and adequate housing, in light of seven circumstances of children's lives: parent's education; family income *per capita*, number of siblings, presence of both parents at home, child's gender, head of household's gender and location of residence (rural or urban). It then constructs an index ranging from zero to 100, where 100 is a situation of perfect equality of opportunity, that is, all children, irrespective of circumstances, have access to all basic services.

Even if the current data is not sufficient to disentangle with 100% accuracy choice and

circumstance in order to enable the principle of personal responsibility to be implemented individual by individual, it can give us the necessary confidence to establish presumptions, in many countries, that a great part of basic needs deprivation in our world of relative abundance is not due to a lack of effort by poor people (choice), but rather the significant inequalities of opportunities that they face in their lives (circumstance). This presumption becomes stronger the more basic the level of needs deprivation we take into account.

If the conception of social rights I defended above is correct, the corresponding duty of states is to adopt measures that correct or minimise the inequality of opportunities suffered by these groups and, failing that (or until the effects of these measures are felt), to compensate these groups by guaranteeing a minimum level of basic needs satisfaction which, most likely, they would have been able to achieve had opportunities in their society been equal.

Conclusion

I have argued in this article that social rights supporters should stop complaining that social rights are neglected in comparison to civil and political rights and investing so much effort in the argument that both types of rights are identical in terms of their dependence on scarce resources (the “parity thesis”). We should instead try and clarify the concept of

resource scarcity and how it affects the determination of the content of social rights. I have tried to contribute to this project by arguing, first, that resources in the world as a whole and in most of its countries are currently sufficient to guarantee everyone a reasonably high level of basic needs satisfaction. The problem, therefore, is not insufficiency, but rather inequality in the distribution of these resources. This raises several intractable questions on resource inequality and re-distribution that need to be answered for the determination of the content of social rights, all pertaining to the controversial political and philosophical field of distributive justice. I have then discussed these questions and claimed that the most plausible way of conceiving social rights under circumstances of such fierce disagreement on how the relatively abundant resources of the world and its individual countries should be distributed is to view them as rights to an equal opportunity to satisfy basic needs, that is, a right not to be unjustly deprived of the opportunity to satisfy these needs. I have also claimed that the implementation of this conception would require the adoption of credible presumptions of inequality of opportunity as the cause of basic needs satisfaction deprivation, and that the growing empirical data on inequality of opportunity can help in that effort.

There is of course much left to do in the task of making social rights real, but I hope this article has at least indicated a plausible, realistic and promising way forward.

1 The author is an Associate Professor of Law at the University of Warwick.

2 “Statement to the World Conference”, UN Doc. E/1993/22, Annex III, Para 5. A similar claim is made by Leckie, S., “Another Step towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights”, *Human Rights Quarterly*, Vol. 20.1, 1998, pp. 81-124.

- 3 Bilchitz, D., *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-economic Rights*, Oxford University Press, 2008, p. 1.
- 4 Salomon, M., *Global Responsibility for Human Rights, World Poverty and the Development of International Law*, Oxford University Press, 2007, p. 122.
- 5 See Nolan, A., *Children's Socio-economic Rights, Democracy and the Courts*, Hart Publishing, 2011, who claims that this view continues "to influence judicial perceptions", p. 25.
- 6 UN Office of the High Commissioner for Human Rights, *Fact Sheet No. 33, Frequently Asked Questions on Economic, Social, and Cultural Rights*, December 2008, No. 33, p. 9, available at: <http://www.ohchr.org/Documents/Publications/FactSheet33en.pdf> (last accessed 5 March 2014).
- 7 For a similar claim see Fredman, S., *Human Rights Transformed: Positive Rights and Positive Duties*, Oxford University Press, 2008, p. 3: "[I]t is not enough to acknowledge the need to transcend the traditional distinctions. There is still much to be done to develop a full understanding of the implications of positive duties triggered by human rights, both from a theoretical and practical legal perspective."
- 8 Robertson had already made a similar warning back in 1994 in his insightful article – see Robertson, R., "Measuring State Compliance with the Obligation to Devote the 'Maximum Available Resources' to Realizing Economic, Social, and Cultural Rights", *Human Rights Quarterly*, Vol. 16, No. 4, November 1994, pp. 693-714, p. 694.
- 9 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para 1 of the Covenant)*, UN Doc. E/1991/23, 14 December 1990, Para 9.
- 10 Dworkin, R., *Taking Rights Seriously*, Duckworth, 1977, p. 188.
- 11 I have dealt with this to some extent in Ferraz, O., "Poverty and Human Rights", *Oxford Journal of Legal Studies*, Vol. 28, No. 3, 2008, pp. 585–603.
- 12 See, for instance, Fabre, C., *Social Rights under the Constitution*, Oxford University Press, 2000. In this otherwise extremely interesting monograph on social rights, a single paragraph is devoted to this issue, pp. 166-7.
- 13 Nickel, J., "Human Rights", *Stanford Encyclopedia of Philosophy*, available at: <http://plato.stanford.edu/entries/rights-human/> (last accessed 26 February 2014).
- 14 See above, note 3, p. 84.
- 15 See above, note 6.
- 16 See, for instance, Bilchitz, above note 3.
- 17 I took this example from King, J., *Judging Social Rights*, Cambridge University Press, 2013, p. 101.
- 18 See *Brazilian Federal Constitution*, 1988, articles 201 to 203, available in English at: http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfSobreCorte_en_us/anexo/constituicao_ingles_3ed2010.pdf.
- 19 Cranston, M., "Are There Any Human Rights?", *Daedalus*, Vol. 112, No. 4, Fall 1983, pp. 1-17, at p. 13.
- 20 In 1999 it was US\$ 6800. See <http://www.indexmundi.com/g/g.aspx?c=xx&v=67>.
- 21 Available at <http://livingwage.mit.edu/> (last accessed 9 February 2014).
- 22 Pogge, T., "Growth and inequality: understanding recent trends and political choices", *Dissent Magazine*, Winter 2008, available at: <http://dissentmagazine.org/article/?article=990> (last accessed 5 March 2014). See also Pogge, T., "The First UN Millennium Development Goal: A Cause for Celebration?", in Pogge, T. and Follesdal, A. (eds.), *Real World Justice, Grounds, Principles, Human Rights, and Social Institutions*, Springer, 2005, p. 330.
- 23 World Bank, *State of Human Development Report*, 1998, p. 37. It is also perhaps relevant to note, to put this into perspective, that the world's billionaires (497 people, approximately 0.00008% of the world's population) were worth an estimated \$3.5 trillion (over 7% of world GDP) and the total wealth of the top 8.3 million people (0.13% of the world's population) was \$30.8 trillion in 2004, about 25% of the world's financial assets in 2004. See Pogge (2008), above note 22. A recent report by Oxfam reinforces this point: the world's 85 richest individuals are as wealthy as half of the world's poorest population together, i.e. 3.5 billion people. See Wearden, G., "Oxfam: 85 richest people as wealthy as poorest half of the world", *The Guardian*, 20 January 2014.
- 24 It is important to note that I am using annual national income as a proxy for available resources, which is a conservative estimate. A perhaps more adequate measure would be so-called national wealth, which also takes into account accumulated wealth and is therefore a more accurate measure of countries' capacity to support financial burdens. If national wealth is considered, then total world resources would add up currently to an as-

- tonishing US\$700 trillion, that is, almost ten times national income. I owe this insight to Ed Page. For the data on national wealth and a discussion of the issue within the debate on climate change, see Page, E., "Give It Up for Climate Change: a Defence of the Beneficiary Pays Principle", *International Theory*, Vol. 4 (No. 2), July 2012, pp. 300-330.
- 25 Nickel, J., "Poverty and Rights", *The Philosophical Quarterly*, Vol. 55, No. 220, 2005, p. 399.
 - 26 All data from the CIA Factbook, available at: <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2004rank.html> (last accessed 11 February 2014). For New York, see *ibid*.
 - 27 It is important to re-emphasise here that GDP represents the wealth produced only in one year. Accumulated wealth is often several times that. See above, note 24.
 - 28 In an interesting paper Nick Ferreira makes a related point using a distinction between two senses of the concept of feasibility. (See Ferreira, N., "Feasibility constraints and human rights: Does 'ought' imply 'can'?", *South African Journal of Human Rights*, Vol. 28, Issue 3, 2012, pp. 483-505.) He proposes a distinction between two senses of infeasibility of rights. As he explains it, a right can be infeasible because "it is not possible to implement the right" (he calls is "infeasibility-p"), or because "it is too costly to implement the right" ("infeasibility-c"), p. 491. My argument so far is simply that what Ferreira calls infeasibility-p is clearly not the problem for social rights. Whether they are also infeasible-c, i.e. "too costly", depends of course on how "too costly" is defined, and this relates to the discussion of section II.
 - 29 A similar point was made by Nickel, J., above note 25, p. 400: "But it seems likely that at least the top third of them are able to implement basic economic and social rights." My claim goes further as he seems to be using actual GDP rather than PPP (purchase power parity).
 - 30 I have dealt with some of the issues in previous work, in particular Ferraz, above note 11, and Ferraz, O., "Harming the poor through social rights litigation: lessons from Brazil", *South Texas Law Review* 89 (7), 2008, pp. 1643-1668.
 - 31 Nagel, T., "The Problem of Global Justice", *Philosophy & Public Affairs*, Vol. 33, No. 2, April 2005, pp. 113-147.
 - 32 *Ibid.*, pp. 128-129.
 - 33 *Ibid.*, p. 131.
 - 34 *Ibid.*, p. 132.
 - 35 *Freedom from Poverty as a Human Right: Who owes what to the very poor?*, Oxford University Press, 2007, p. 52.
 - 36 See, for instance, Wolff, M., *Why globalization works?*, Princeton University Press, 2004.
 - 37 *Government of the Republic of South Africa and Others v Irene Grootboom and Others*, CCT 11/00. This was a famous case decided by the Constitutional Court of South Africa in which Irene Grootboom and other homeless people successfully argued that their right to housing under the South African Constitution had been violated; yet no effective remedy was granted, at least from the perspective of the claimants, who remained homeless. Mrs Grootboom herself died homeless more than 10 years after her court "victory".
 - 38 In Pogge (2008), above note 22, p. 66.
 - 39 Singer, P., "Famine, Affluence, and Morality", *Philosophy and Public Affairs*, Vol. 1, No. 1, Spring 1972, pp. 229-243, at p. 230.
 - 40 Arneson, J., R., "Egalitarian Justice versus the Right to Privacy", *Social Philosophy and Policy* 17, No. 2, Summer 2000, p. 97.
 - 41 *Ibid.*, p. 107.
 - 42 Björklund, A. *et al.*, "Equality of Opportunity and the Distribution of Long-Run Income in Sweden", *Social Choice and Welfare*, Springer, Vol. 39(2), July 2012, pp. 675-696.
 - 43 "Undeserving poor" is an expression that dates back to Victorian times and is still often, but not exclusively, employed by conservative critics of the welfare state to refer to those beneficiaries who "don't deserve" to be helped by the state since their predicament is allegedly their own fault due to, for instance, their alleged laziness and lack of will to work. For an interesting philosophical discussion of the topic, see Arneson, R., "Egalitarianism and the Undeserving Poor", *The Journal of Political Philosophy*, Volume 5, Number 4, 1997, pp. 327-350.
 - 44 Roemer, J., "Equality and Responsibility", *Boston Review: Social Equality and Personal Responsibility*, available at <http://new.bostonreview.net/BR20.2/roemer.html> (last accessed 26 February 2014), originally published in the April/May 1995 issue of *Boston Review*.
 - 45 *Ibid.*

- 46 Bourguignon, F. *et al.*, "Inequality of Opportunity in Brazil", *Review of Income and Wealth*, Series 53, No. 4, December 2007, p. 655.
- 47 Ferreira, F. and Gignoux, J., "The Measurement of Inequality of Opportunity: Theory and Application to Latin America", *Review of Income and Wealth*, Series 57, Number 4, December 2011, p. 652.
- 48 *Ibid.*
- 49 *Ibid.*, p. 654.
- 50 LeFranc, A. *et al.*, "Equality of Opportunity and Luck: Definitions and Testable Conditions, with an Application to Income in France", *Journal of Public Economics*, No. 93, 2009, pp. 1189–1207, at p. 1205.
- 51 See above, note 42. It is important to note that the study measures pre-tax income. So, given Sweden's extensive redistributive policies, this residual inequality of opportunity driven inequality of income is dealt with by the state. In the USA, conversely, the more significant pre-tax inequality of opportunity driven inequality of income is less reduced, and it is left almost intact in Latin America. See *The OECD Latin American Economic Outlook 2009*, available at <http://www.oecd.org/dev/americas/latinamericaneconomicoutlook2009.htm> (last accessed 26 February 2014); Stiglitz, J., *The Price of Inequality: How Today's Divided Society Endangers Our Future*, W.W. Norton & Company, 2013.
- 52 The World Bank (R. Molinas Vega, J., Paes de Barros, R., Saavedra Chanduvi, J., Giugale, M., Cord, L., Pessino, C., Hasan, A.), "Do Our Children Have a Chance? The 2010 Human Opportunity Report for Latin America and the Caribbean", 2010, available at: http://siteresources.worldbank.org/INTLAC/Resources/Livro_2010-Imprensa.pdf.
- 53 *Ibid.*