Social Rights and User Charges: Resistance or Subsumption?

Amir Paz-Fuchs

Introduction

Along with privatisation, contracting out and “new” management techniques, one of the important, but less discussed, manifestations of the way neo-liberal ideology and policies have changed social services is through the requirement that individuals pay for those services – services that were once provided free of charge. A parallel method, which should be distinguished, includes the offer of ‘premium’ services in a given sector at a prescribed cost.

In the UK, for example, over 600 individual services that impose user charges (Bailey, 1994a). It is interesting to note that “social democratic” countries, such as Norway, Finland and Denmark, which have proud public services, are also those with the wider and longer experience of user charges (Emmerson and Reed, 2003). As an indication of the importance of the trend, the IMF has recently offered a definition of user charges which is relatively straightforward: “payments made by consumers to providers of government services” (IMF, 2007: 132).

While the literature has addressed the imposition of user charges in public sectors in general, with some focus on utilities, this paper addresses user charges in the field of social services, with a particular emphasis on health and education. The fact that such charges have adverse effects on equal access to services (and thus on equality in general) seems straightforward: their imposition precludes those without the necessary means from accessing the services. But it will be argued that the charges have more profound effects as well. Through these relatively small charges, the relationship between the citizen and the state is transformed. The citizen, we are told, is now the ‘citizen-consumer’, who “expects improved standards from public services, in line with those supplied by the private sector” (Lister, 2003: 438). Replicating free market services, such charges are seen as part of an overall strategy to “roll back the frontiers of the state” (Bailey, 1994: 366).

*School of Law, University of Sussex.*
Closely related is the role and, perhaps, the nature, of the relevant rights. This chapter focuses on the relationship between user charges and the rights to health and to education. This may be referred to in two ways. First, the relevant rights should have a role to play when assessing the legitimacy and legality of user charges. Rights, after all, are “especially sturdy objects to stand upon, a most useful sort of moral furniture” (Feinberg, 1970: 252; also Holmes and Sunstein, 1999). They have the potential, at the very least, to alter the confines of the debate that would have taken place in their absence. A world without the right to freedom of speech, we assume, would be different from a world in which such a right is granted and respected. Focusing on social services in general, and on health and education in particular, we therefore need to explore what impact social rights may have on the phenomenon of user charges and/or its effects. Second, the direction of the cause and effect may also be reversed. If the nature of services changes, and the relationship between the citizen and state becomes increasingly mediated through market norms, then our understanding of rights – or at least of social rights – should be revisited.

But in doing so, we need to, first, understand the origins and breadth of the trend; to come to terms with the rationales and justifications that drive it; and to offer a tentative typology of user charges in the fields of health and education. The chapter then moves on to inquire whether the right to education and the right to health can, and should, provide the analytical and pragmatic basis for bucking this trend. The paper concludes with an assertion that social rights’ failure to serve as safeguards in the face of increased marketization of the services has consequences not only for the services and their clients, but also for the understanding of the rights themselves.

1. The Origins of the Trend, and its Rationales

To an extent, paying for services has become quite natural for most of us. Indeed, where services offered on the market are concerned, this has been the case (almost) since the dawn of time. And yet, in many areas, public services have been insulated from the reach of market practices. They are paid for, of course, but through general taxation.

This was not always the case. User charges for public services were common in the 19th century, and a harsh critique of their implementation may be found in the 1906 Webbs’ Minority Report of the Poor Law Commission. They stated that the practice was a “chaotic agglomeration of legal powers conferred on different authorities at different
dates for different purposes proceeding upon no common principles” (cited in Judge, 1980: 2). Indeed, nationalizing the payment for public, and in particular social, services, was viewed as not only a progressive move that was part and parcel of the development of welfare state institutions, but one guided by concerns of efficiency and effectiveness. And yet, in a lovely historical twist, exactly 100 years later, the British House of Commons Health Committee report on National Health Service (NHS) charges echoed (probably unknowingly) the Webbs’ indictment, opening with the clear statement: “The system of health charges in England is a mess” (House of Commons, 2006: 3). It goes on to note that there is no clear reason why some services are charged while others are not; why one constituency (say, the elderly) receive exemption from one service, while another (say, the disabled) are exempt from charges for a different type of service, and so on.

The case against user charges in social services has not been based solely on efficiency grounds. Perhaps more importantly, it is clearly in society’s interest (even regardless of its assessment of the individual’s rights or, indeed, her inclinations) that individuals access these services. In the economists’ terminology, such services have obvious positive externalities. The more educated a population, the more employable they are, and the more competitive a country’s economy becomes. The healthier the population, the less chance that epidemics will spread, and the lower the costs to the health services. And so on.

While these rationales have supported the foundation of public services that are free at the point of delivery, they have been met with strong opposition in recent years. The adherence to a neoliberal framework has led to alternative rationales, some of which are set out below, that favour the imposition of user charges.

1. **As a source of income and an alternative to taxation:** The macro-economic rationale suggests that in times of austerity the state should look ‘outside the box’ to other sources of income. As this chapter was in its final stages, the British government made public its intention to charge non-EU patients for GP services, thus saving £500 million a year. Bailey noted over 20 years ago that ‘in almost all countries, there is a clear and consistent trend for user-charge revenues to grow substantially faster than other income sources’ (1994b: 746), and since then the trend has not abated (Sjoquist and Stoycheva, 2012). Quite cynically, this rationale relies on the inelasticity in the demand for public services. Simply put, people will be willing to pay for health, education, welfare and urban services
when they need them (Creese, 1991: 311). Charging small sums of money will not deter them, and it may have a positive significant impact on public finances (cf Rose, 1990). It should be noted, however, that this rationale requires that the administration of the charges be considered. Significant revenue may be gained if charges are flat rate, simple and universal, but such charges are more prevalent where urban services, such as waste disposal or congestion charges, are involved. They are less justifiable for social services, where costs may restrict access to health, education and welfare. In such cases, administrative costs and wide exemptions will weigh down the budgetary gains significantly (Asato, 2006).

2. **To restrict demand and change behaviour**: In times of austerity, on the one hand, and increased desires, on the other, the state simply cannot provide free access to all social services that citizens demand access to. “Principles are priceless”, it is said, “but services are not costless” (Bailey, 1994b: 752). Despite the similarity, or even partial overlap, with the previous category, this rationale is based on a diametrically opposed logic. Here policy makers would like (some) people to be deterred from making use of public services that are readily available, thus reducing the need to supply them to the same extent, and consequently saving costs.

The Prime Minister at the time of the establishment of the NHS, Clement Attlee, highlighted (what is now referred to as) the ‘signalling’ attribute of charges: “a deterrence against extravagance, rather than as an economy” (Eversley, 2001: 53). The idea here is to prevent abuse, while also refraining from deterring those who are in need. Thus, if you do not charge for a doctor’s appointment, people who have nothing better to do will come by, simply to talk to the doctor whilst not deterring those who truly need to see a doctor.

3. **Equity**: while this justification would, intuitively, serve as grounds to oppose user charges, it has been employed as an argument in their favour. There are three complementary strands to this argument. First, a moral argument is made that those who wish to gain access to a particular service should pay for it, partially or even in full. Thus, if I, after serious consideration, chose not to have children because (inter alia) of the cost of childcare, why should I be asked to pay (through taxation) for other people’s childcare? Second, other individuals, who use and support public services, may be willing to pay for them, but do not trust the government to spend tax revenues on the ‘right’ public services. They would therefore prefer “hypothesed”, or “earmarked” taxes to general taxation
(Le Grand, 2003). And third, a utilitarian justification would suggest that user charges with means-tested exemptions would actually allow more people to access social services, while requiring those who are better off to pay their way.

It should be obvious that searching for one rationale across the whole range of services is an exercise in futility. Over 25 years ago, Richard Rose noted that: ‘The present pattern of hundreds of charges throughout every aspect of British government cannot be explained by a single hypothesis or a single theory’ (Rose, 1990: 303). Since then, the number of services imposing charges has more than doubled.

2. User Charges in Health and Education, and the Rights Involved

Health and education are two central areas of the welfare state that are subject to the recent trend of user charges, also known as user fees, or co-payments. They share some similar traits: both are massive public services that command vast budgets; both serve a very wide range of the population, which are considered worthy of heightened protection: the sick, elderly and disabled, and children; in both, women are the ‘field level’ workers (nurses and teachers) on relatively low graduate salaries. And yet, insofar as charges are concerned, we find an important difference, that may be attributed to the second pillar (in addition to the charges themselves) of this paper: social and economic rights. Even where the two are present in the same document, a curious (and highly relevant) difference is notable: the word ‘free’. Thus, here are the relevant provisions of the UN’s International Convenant on Economic, Social and Cultural Rights 1966:

**Article 12**

(1) The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

**Article 13**

(2) The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

1. Primary education shall be compulsory and available free to all;

2. Secondary education in its different forms ... shall be made generally available and accessible to all by ever appropriate means, and in particular by the progressive introduction of free education;
3. Higher education shall be made equally accessible to all ... in particular by the progressive introduction of free education;

And the European Social Charter uses similar language:

**Article 11**

...the Parties undertake...:

1. to remove as far as possible the causes of ill-health;

2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;...

**Article 17(2)**

... the Parties undertake...:

2. to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools.

Similar comparisons can be derived from the comparison of Articles 25 and 26 to the UN Declaration of Human Rights; Articles 14 and 35 of the European Charter of Fundamental Rights, and elsewhere. On a national level, section 16(1) of the Constitution of Finland states that “Everyone has the right to basic education free of charge...”; while section 19(3) states that "The public authorities shall guarantee for everyone ... adequate social, health and medical services and promote the health of the population". Similarly, section 27(4) of the Constitution of Spain prescribes similarly that “Elementary education is compulsory and free”; while section 43 only provides that “(1) The right to health protection is recognized; (2) It is incumbent upon the public authorities to organize and watch over public health by means of preventive measures and the necessary benefits and services...”.

We may prefer to be skeptical about the effect that human rights conventions and constitutional provisions have over policy; and yet, it may not be a coincidence that user charges are used widely in core health services; in contrast, Western capitalist democracies have, by and large, shielded the core of primary and secondary education from such hazards. The caveats in the last sentence may suggest, however, where the provision of free education has suffered some inroads of its own: in tertiary education, in the form of university fees; in the existence of ‘private’, fee-paying primary and secondary
schools, as an alternative to the state system; and in the peripheral services in the state system (e.g. school meals and school buses). We turn now to provide a brief outline of user charges in the fields of health and education, while mentioning some of the motivations behind the charges, and a glimpse into their effects.

Health

Health care user charges exist in all OECD countries, but not all charges are created alike. For present purposes, three examples highlight different rationales for user charges (see Commission, 2014):

1. **Consultation fees**: for sessions with a GP or a hospital visit. The UK is one of only 9 EU countries that does not charge for GP visits and one of 14 EU countries that does not charge for hospital treatment. Against this background, it is not surprising that consideration of the policy is constantly on the horizon. An early BMA research report found, for example, that a £10 GP consultation fee could raise £3.3bn annually (British Medical Association, 1997).

2. **Ancillary (non-medical), but necessary, services**: charging for hospital car parking may seem reasonable to some, but in Britain charges have been introduced only recently in some hospitals, and have been rising dramatically in others, forcing the government to introduce a Guidance to regulate the area (Department of Health, 2014). The Guidance lists the categories of individuals for which concessions should be available (e.g. people with disabilities; visitors with relatives who are gravely ill), but does not include a cap on charges, thus enabling some hospitals, such as the Heart of England NHS Foundation in England, to rake in £4 million in car park charges for the tax year 2013-14. More controversial are charges for hospital beds – again, not a ‘medical service’ per se, but one that is intimately associated to the medical care. And yet, in late 2014, the Chief Executive of the NHS Confederation stated that if the service’s financial crisis is not addressed, hospitals may have to ‘think the unthinkable’ and start charging hospital patients for the ‘hotel costs’, or ‘bed and board’, of their hospital stay (Unauthored, 2014).

3. **“Premium” or additional services**: the House of Commons Health Committee on NHS charges noted the ‘increasing number of charges for clinical services’ (House of Commons, 2006: 24). These may be services which are provided by the NHS for free
at a basic level, but for which a charge enables a higher level of service at additional cost; or services provided only at cost (i.e. no free service) by NHS personnel. The Jentle Midwifery Scheme at Queen Charlotte’s and Chelsea Hospital in London is an example of the first case, as it offers women one-on-one midwife care during the course of the pregnancy and after delivery, for £4,000. Delivery at a private hospital costs between £7000 and £10000. The dermatology clinic run by Harrogate and District NHS Foundation Trust offers a wide array of skin treatments (e.g. removal of moles and warts) that prior to 2003 were provided for free by the NHS, but are now provided by NHS staff at a cost that ranges from £85 to £250.

A comparison across OECD countries reveals the breadth of the trend. In 2008, France, a country that has prided itself on a socialist ethos that is far deeper than that of Britain, introduced higher charges for hospital care, as well as new charges for GP appointments and for ambulance services. Italy has introduced, and Ireland has increased, charges for unnecessary A&E attendance (Emmerson and Reed, 2003).

There are surprisingly few studies of the consequences of user charges in the health sector. However, those that exist seem to agree that charges deter at least some patients from accessing necessary treatment, thus worsening their own situation and potentially (in the case of infectious diseases, for example) harming others. If charges are universal, they will deter those who cannot pay; and if they are means-tested, the administrative costs and the reduced income may render the policy inefficient (House of Commons, 2006).

A prominent exception to the scarcity of empirical evidence is the controlled experiment study conducted by the RAND group. The study took place in the U.S. in the 1970s, where 2000 patients were subject to four different charging regimes. It lasted 15 years and is the largest health policy study ever conducted. The study revealed that increasing costs resulted in consistently reduced use of health care services, with particular effect on individuals from lower social and economic groups; and on those with chronic illnesses. Moreover, those who were poor and suffered from health conditions were more subject to hypertension, which resulted in a rise in the annual likelihood of death by 10 percent. More contemporary studies, which are survey based, conclude that ‘charges above zero had a serious adverse effect on those who were both poor and suffering from poor health, the poor being defined in this study as those in the bottom 20 per cent of the income
distribution’ (Commission, 2014: 25). Thus, a recent survey of 20,000 individuals in 11 countries found that patients in the UK had the lowest tendency (4 per cent) to forgo meeting a GP or filling in a prescription form when compared to countries, such as the United States (37 per cent), that have far higher user charges. Obviously, when patients defer consulting a GP or purchasing medicine to treat an illness at its early stages, their condition may deteriorate, worsening their personal situation and leading to more expenses for the health services (House of Commons, 2006). These are some of the reasons that lead the King’s Fund Commission to conclude that ‘health care should be freely available to those who need it, regardless of income’ (Commission, 2014: 29).

Education

As noted in the introduction to this section, despite the fact that health and education are often discussed in conjunction, user charges in the field of education have some different attributes, when compared to health. The explicit mention of a duty to provide free primary and secondary education in international conventions as well as in national constitutions and statutes imposes (or perhaps reflects) an understanding that paying for education at young ages will link a child’s socio-economic background to his or her life chances, thus widening, instead of limiting, inequality.

Against this background, most of the attention of policy makers and, correspondingly, academics, has been on tertiary education, or as it is commonly referred to – university fees. Interestingly, when compared to user charges in the field of health, here the equity rationale is said to be reversed. That is, the argument is made that while charging for health care is regressive, charging for tertiary education is progressive (Johnstone, 2004). The reason is that those subject to health care charges tend to be poor, disabled, and socially disenfranchised; while those taking advantage of tertiary education tend to be more privileged. Higher education fees are thus redistributive because of students’ backgrounds, and because graduates tend to earn higher salaries. Some suggest that higher education is expected to increase women’s pay by 25 to 27 percent; and men’s pay by 18 to 21 per cent. Universities UK refers to research suggesting that the difference is even more pronounced – up to 45 per cent in the UK, and an average of 40 per cent across OECD countries (Universities UK, 2013). Therefore, not charging for university education would mean that tax payers, including working class families, would be paying for middle
class and upper middle class children’s free access to a service that would plausibly widen social and economic gaps (Asato, 2006; King, 2012: 82).

Whether or not this is the case, or even the motivation, it is clear that university fees have gone up significantly over the past decade. The fact that fees in private (non-profit) universities in America have risen by 28 per cent in a decade may surprise few, but perhaps more significant is the fact that public universities increased their fees by 27 per cent over five years, leading the Economist (2014) to conclude that “Universities have passed most of their rising costs to their students”.

In England, fees were introduced for the first time in 1998, at a flat rate of £1,000 per year. They were raised to £3,000 in 2006-2007 and then, in 2012-13, following a significant change in structure, to a maximum of £9,000. The change in structure refers to the fact that, with the rise in fees, home students are no longer required to pay the fees up-front, as charges deferred until after graduation (subject to the individual earning above £21,000 p.a.), with loans available at a reduced (at lower earnings – zero) interest rate.

Charging for education, however, is not limited to tertiary education. Two additional realms of user charges in education are noted: “private” schools and peripheral educational services.

First, we note the existence of “private”, fully fee-paying, primary and secondary schools. To an extent, this would mean privatization of the public service. As such, these cases do not seem to fall within the main interest of this chapter, because (as indicated by the OECD definition) charges are not understood as an alternative to public service provision, but rather are integrated into the public provision of services. And yet, it is worth questioning whether we should not view ‘private’ education as an extreme case of user charges, rather than as an alternative to the public system. Most schools are on public land and, as charities, enjoy generous tax benefits funded by the public, to the tune of £700m a year, in the UK (Wintour, 2014); users of the service often enjoy similar tax benefits, thus suggesting that the state supports the provision of health and education even in the ‘private’ sector.

Second, peripheral but essential services, such as school meals and school buses, are subject to charges. Section 451(2) of the Education Act 1996 prohibits the imposition of charges for education, stating that “Where the education is provided for the pupil during
school hours no charge shall be made in respect of it”. And yet, the Department of Education reported receipts of £1.3bn for education (Heald, 1990; Department for Education, 2014). The explanation for this conundrum is that the Education Act opens the door to charging for musical instrument lessons (s.451(3)): for education outside of school hours; and where a governing body is liable to pay a fee in respect of the entry of a student for an examination, and the student fails without good reason to meet any examination requirement (s.453(2)). The Education Act 1996 also proscribes the requirement that a school and local authority may maintain a policy with respect to the provision, classes and description of cases in which they propose to charge (s.455).

3. Limiting User Charges through Social Rights?

Why is it acceptable to charge for some services, of a more commercialized nature, while serious objections are raised in other cases (use of public parks, or libraries); and what’s law got to do with it? The market pricing model assumes that all goods are commensurable. We may agree that insofar as these goods are private (albeit provided by the public service…) and not collective (Rose, 1990), they can be commensurable or, perhaps more relevantly, marketable. Moreover, even the paradigmatic light house could be sustained by charging ships arriving at the port or visitors at the sea front (Bailey, 1994a). But should they?

Barry Schwartz and Anne Alstott separately refer to Michael Walzer’s Spheres of Justice, suggesting that in deciding the relevant principles for the provision of goods and services, the dominant principles should be identified, and distinguished from those prevalent in other spheres (Schwartz, 2012; Alstott, 2012). Economists sometimes describe goods that can but should not be marketable as merit goods (Musgrave, 1987). However, this has been viewed as ‘an apolitical way to refer to political values’ (Bailey, 1994a: 367), or plainly tautological (Rose, 1990: 303). So if that is the case, how can we buck the trend? According to Anne Alstott, “If market ideology has a tendency to take over, to spill over into nonmarket spheres where it doesn’t belong, then we should consider constructing legal firewalls to protect spheres of nonmarket exchange” (2012: 191; my emphasis). In other words, per Alstott, if we cannot rely on market, social or cultural norms, it is for the law to carry the load. But how can the law assist in identifying the boundaries that should be protected?
Increasingly, in our individualized world, when we say ‘law’, we refer to ‘rights’. If that is indeed the case, can rights provide a ‘legal firewall’, or at least a stop-gap measure, to curb the breadth and depth of the tendency to impose user charges? Where civil and political rights are concerned, courts have had no qualms about restricting the government from levying charges on protesters. In a case concerning free speech, the Israeli Supreme Court suggested (and not for the first time) that “setting a price for the implementation of a right means violating the rights of those who cannot afford it”.

In contrast, courts are far less willing to accept the argument that substantial user charges violate the right to health, for example. The ECtHR dismissed such claims as manifestly ill-founded (see references in Brems, 2007: 141). In Israel, a woman who required surgery so as not to lose her hearing was asked to pay 70% of the cost. In rhetoric that is strikingly different from the one employed in free speech cases, the Israeli Supreme Court stated that when priorities are to be set, the judiciary should defer its judgment to professional committees, such as the one that deliberated the question in this case (Gross, 2007).

In light of the above, how are we to identify the role that the rights to health and to education are to play? We may identify two relevant distinctions en route to this inquiry.

First, we find the distinction between core and peripheral services. Take the case of an individual who is not given access to a primary education or life-altering health service solely because she cannot afford them. Arguably, this is the strongest case for social and economic rights intervention, and even here courts have failed to give the relevant rights true meaning. The Israeli Supreme Court ruling noted above is a case in point. In addition, although Roe v Wade (1973) is familiar to many as the case that established a woman’s right to have an abortion in the United States, far less familiar is the case of Harris v McRae (1980), which denied a woman’s right to have an abortion funded, if she cannot afford it. The link between the two was not missed by Justice Marshall, of the minority, who noted (p. 383) that the policy “den[jies] to the poor the constitutional right recognized in Roe v. Wade”.

Can we envisage a similar scenario in the field of education: a local government begins to charge fees for primary schools, rejecting children whose parents cannot pay for access to education? The fact that it seems inconceivable (at this stage) is, perhaps, indicative of the fact that, within the realm of social welfare rights, the right to (free) education is
perceived by policy makers and the public at large as stronger than the right to health, and less subject to government policy of imposing user charges.

These cases are distinguished from peripheral services. It should be noted that here we refer to peripheral services themselves, and not to their qualities, availability, or peripheral characteristics (to which we turn immediately). Thus, this case refers to the distinction between, for example, cancer treatment, on the one hand, and cosmetic surgery for aesthetic reasons, on the other; and not to matters such as waiting times, the expertise of the physician or the size of the hospital room in which the patient recovers. In education, it may refer to the distinction between primary and tertiary education (and, for that matter, private music or arts lessons), and not to the size of classes. Parker (1980) hypothesizes that charges are more likely to be imposed when a ‘part of a service can be regarded as marginal’.

Of course, a difficulty may, and will, exist as to where to draw the line. Thus, the Canadian Supreme Court denied a claim that behavioural therapy for autistic children must be funded by the government, stating that it is not a core service, and thus not covered by the Charter.iii But drawing the line would be important only if core services should be protected more vigorously than peripheral services. I believe that they should (similarly King, 2012: 132). If we are to preserve the importance, integrity and function of the right to education and the right to health, their core and peripheral meanings should be argued for and identified, with the implication that the further we are from the core, the less weight would be carried by the right used to challenge a government that refuses to fund the service. But the opposite is also true: the closer we are to the core, the more courts should be able to review policy decisions that condition the service on ability to pay.

We need not limit ourselves to two categories (core and periphery). Stephen Bailey (1994a) identified four: ‘need’, ‘protective’, ‘amenity’ or ‘facility’ services. According to Bailey’s prescription, ‘need’ services would be wholly financed from taxation and so free at the point of use whilst the ‘facility’ services would be wholly financed by charges. In between these extremes, the ‘protective’ and ‘amenity’ services would be financed by a combination of taxes and charges, income from subsidies exceeding charges for the former and the reverse for the latter. The closer we are to the need category, the more vigilant we should be in allowing the right to health and the right to education, if taken
seriously, to provide the ‘legal firewalls’ that Alstott referred to. In the intermediate categories, courts would be advised to undertake a proportionality test to assess whether the charges are overbearing, and if the same (legitimate) aim may be achieved through means that are less onerous, or charges that are lower.

The second distinction arises between basic and non-basic elements of a given service. The ‘basic’ elements will be provided free of charge, while non-basic elements will be chargeable at a subsidized rate, or up to full cost. Though a distinct matter, it raises boundary issues that are similar to those in the previous case. But, more importantly, while the focus of the previous category was on access to health or education, this category is mainly concerned with the idea of equality in the provision of the service. So this category will assume that a certain service is governed by the relevant right (cf the case of behavioural therapy above), but those who are willing to pay receive a more professional service, shorter queues, or simply general amenities (nice room, wi-fi connection). Supporters of this two-tiered service argue that allowing some to pay for better services harms no one and, moreover, that money funneled through this channel will be used to support the free, universal provision, thus being Pareto-superior to the situation which does not allow for such distinctions. In response, opponents argue that when well-resourced users opt out of universal services, the “voice” necessary for their improvement is substantially weakened. The creation of “poor service for poor people” is thereby facilitated. What is the role of social rights in such cases? To be honest, probably quite minimal. As long as access to the core element of the right is provided, courts are likely to be of the view that the right is not violated. The long-term deterioration of the service as a result of the two-tiered structure is likely to be seen as a speculative argument that the court will not entertain.

However, an alternative, and perhaps stronger, avenue is available by arguing that a two-tiered service is a straightforward violation of the right to equality, a well-established constitutional principle which has managed to secure more success for social welfare interests than arguments based on the rights themselves (Gross, 2007; Brems, 2007). Indeed, the right to equality would seem vacuous if white people would enjoy the right to education, health or housing that is denied to black individuals. Moreover, at times it seems that the right to equality is doing the ‘heavy lifting’, far more than the right to health or the right to education. It is now almost 50 years since Frank Michelman
(1969) argued that equality will be the most promising vehicle to secure social welfare rights, and advance the cause of social justice in general. A similar, wide-ranging ambition was presented more recently by Kerry Rittich (2007):

... social rights remain fundamentally about distributive justice. They are concerned not simply with the provision of basic needs or a safety net for the most destitute ... they operate as a metric of our commitment to relative social equality.

This link between distributive justice and social rights leads us to the most ambitious challenge: that which relates to the possibility that rights will safeguard certain spheres from marketization. In particular, the idea that courts will play a role in constituting, through the language of rights, some spheres as ‘taboo’, (Schwartz, 2012; Harrington, 2009) not to be tainted with, or mediated by, money. If that avenue were to succeed, challenges based on the right to education and health could be advanced against the support that private schools and private hospitals receive from the public purse. This idea is politically appealing (if private schools and hospitals facilitate inequalities in the provision of health and education, why should the public support them?) but it is not clear what the legal rationale would be. If the existence of such private institutions have deleterious effects on distributive justice, and thus on the provision of the particular right, could a challenge be mounted against their existence in general? Here, we find the aim of social rights is most removed from its core, minimal meaning and assumes a remit that even some of its supporters are not comfortable with (King, 2012).

In summary, policy makers and courts can and should consider social rights when assessing the implementation of user charges. They should ascertain the expected effects of such imposition on equal access to social services. If a detrimental effect is expected, they should assess whether it relates to the basic services and thus, to the core of the rights involved; or whether, alternatively, the detrimental effect affects only peripheral services or ancillary, non-basic elements of the services. It is perhaps worth noting that while courts are justified in awarding more discretion to policy makers in the latter cases, policy makers themselves would do well to consider the social effects of differential education, health care or other social services.

4. User Charges and the Transformation of Social Rights
Lawyers tend to focus on the relationship between rights and the world around them in a manner that is uni-directional: rights have, or should have, an impact on decision-making, on policy, on end-states (Dworkin, 1977). But one need not be a committed Marxist to appreciate the fact that rights themselves are also the products of a social and economic structure. User charges can be seen as part of a process in which the rights that a citizen enjoys no longer independently define the range of activities available to her (Rawls, 1999); instead, this liberal concept of citizenship is transformed into one associated with consumerism, or ‘consumer citizenship’ (Carney and Ramia, 2002:16). Foucault, for example, identified the trend with alarming prescience almost 40 years ago: “neoliberalism models the overall exercise of political power on the principles of the market ... and the economic grid tests action and gauges validity” (2010: 131, 247, emphasis added). With the benefit of awareness to contemporary developments, Wendy Brown has recently developed this approach, showing how, “As liberty is relocated from political to economic life, it becomes subject to the inherent inequality of the latter and is part of what secures that inequality” (Brown, 2015: 41).

This is a crucial insight, with important implications for the role of rights in political discourse and public policy. Rather than providing boundaries and limits to the economic rationale, rights (and social rights in particular) are reconstructed as subordinate to the demands of the economy. The consequence of this is that they lose their core function, and are made redundant. If this trend continues, the right to health, for example, will cease to guarantee access to care based on the criterion of need, and will instead become a right to treatment conditional upon payment (Gross, 2007: 311-313; cf Atria, 2015: 603). The internal logic of (social) rights will change. Traditionally, rights are designed to shield individual interests, and in the case of social rights, to provide a strong political and legal argument in favor of guaranteeing access to social goods irrespective of the ability to pay. This is true, it should be made clear, even where need for user charges is justified by resorting to budgetary constraints. The phrase ‘rights cost money’ should be as applicable in the case of social rights as it is in the realm of civil and political rights. If this is not the case, collective interests - such as budgetary constraints, the need to reduce queues for services or the general effort to change individual behaviour - will be advanced uninhibited, and social rights will provide no barrier. Rights will be no match for the neoliberal rationality which justifies the transformation of political relations (rights governing relations between citizen and state) into economic relations (purchasing
services). Moreover, through the mechanism of (social) rights, law itself becomes complicit in disseminating this rationality into constitutive elements of our social and democratic life (Brown, 2015: 151).

How does this come to pass? Policies implementing user charges put in place a contractual mechanism that, as Vincent-Jones rightly notes, “. . . both draws upon and reinforces these notions of agency and choice ... contracts render individuals responsible for their predicament ... in ways that differ significantly from the governance of relations by hierarchal authority” (2006: 233, emphasis added). The theme of responsibility is one that is central to the neo-liberal paradigm, and is eerily relevant to the issue at hand. The burdening of individuals with financial responsibility in these spheres is neatly captured by Shamir as “the economization of the political” (2008: 1). Brown suggests that it involves “the moral burdening of the entity (individual) at the end of the pipeline ... [It] tasks the worker, student, consumer or indigent person with discerning and undertaking the correct strategies of self-investment and entrepreneurship for thriving and surviving; it is in this regard a manifestation of human capitalization” (2015: 133).

The point here is not only legal, but moral as well. Since social and economic rights are constantly under contention, there is an ongoing struggle to define their content, and their boundaries (Barak-Erez and Gross, 2007). This struggle takes place not only in legal arenas, but also in the moral and political sphere. Now, with the shift in emphasis to a marketised provision of social services, an individual who does not have the means to pay for treatment, or for her child’s school trip, is not only legally denied the service itself, but also denied the moral right of protest against an unjust system. This is because the system has redefined not only legal, but, through the law, moral entitlements to social goods as well. The construction thus ‘cloaks the status quo with an air of legitimacy’ (Barry, 2005: 40). As a result, the right to education - which would include, say, joining a school trip - has been redefined: you have the right to join only if you pay for the trip. If you do not, or cannot afford to, pay, you don’t have the right. In a way, you are not even denied your right to education because that right was not engaged at all, that is, according to this new construction of rights.

One may assert, at this stage, that paying for services is simply an extension of the theme of reciprocity, which is identified in the founding documents of the design of the welfare state. It is true that the Beveridge Report held a central role for the idea of reciprocity, as
did John Rawls, in his construction of ‘Justice as Fairness’. Closely related, Rawls’s theory is ‘contractual’ in nature, thus interpreting moral and political concepts through the paradigm of the social contract. And contracts, as we know, are reciprocal. They require ‘something for something’. Herein lies the rub: proponents of user charges may reject the presumption that citizens are entitled to health care or to education free of charge on the basis of a philosophical, or moral, approach that there is no ‘something for nothing’. Rather, individuals who are in need of a service, should be expected to give ‘something’ in return, to wit – to pay, for the service. This logic has, as noted, undermined the moral, political and legal role for rights. Here, it is suggested that it also constitutes a manipulation of the idea of reciprocity that Beveridge and Rawls referred to, as well as the concept of the social contract (Paz-Fuchs, 2007; Handler and Hasenfeld, 2007; Jones and Novak, 1999; cf Wax, 2003).

It is readily admitted that contractarian language lends itself to such manipulation. For some, like David Gauthier (1986) and James Buchanan (1975), the reciprocal nature of the social contract is exemplified in economic exchange. Rawls explicitly rejects this approach, stating that: “It is sometimes contended that contract doctrine entails that private society is the ideal, at least when the division of advantages satisfies a suitable standard of reciprocity. But this is not so…” (1999: 458). In particular, the central role that equality holds in Rawls’s theory suggests that primary goods, such as health and education, should be distributed equally in society and thus that the relevant rights dictate the limits of the market (Scanlon, 1998).

To close the circle, this very idea – equal distribution of rights, irrespective of ability to pay – is accepted insofar as civil and political rights are concerned, as discussed above with regards to freedom of speech. So, yet again, here we find that social rights are different. But why is that the case? To an extent, charging for social services highlights the tensions inherent in social welfare rights as a concept, and brings them to the fore. These tensions derive from the fact that whereas social rights are based in social realms, such as health, education, housing and welfare, “rights talk” is traditionally individualistic. But while social rights seek to bridge this tension, enriching the social, collective dimension of rights, charging for access to rights pushes back, militating towards heightened individualization, the “personalization of risk rather than its collective assumption by the state” (Carney and Ramia, 2002: 165).
The risk, therefore, is that not only are rights to health and education losing the battle against charging in their respective realms. It is, additionally, that with the marketization of those realms, social welfare rights are subsumed, and marketised, as well.

**Conclusion**

This chapter has highlighted the serious risks posed by the expanding policy of charging for publicly-funded services in the health and education sectors. It suggests that a carefully constructed legal firewall, in the form of strong rights to health and to education should, at the very least, protect the core elements of those social goods from the intrusion of market norms. In addition, these rights should be used to temper the use of charging as a precondition for access through familiar public law instruments, such as assessing whether charging serves a legitimate aim, and is advanced through proportionate means.

The fact that some courts have not been willing to adopt this position and halt the advance of user charges through a strong interpretation of social rights has resulted in unequal access to the provision of these crucial social services, and may have worrying negative externalities. But the difficulties do not end there. The intrusion of market norms into social realms includes their intrusion into the conceptualization of the relevant rights themselves. And viewing rights as a vehicle to protect budgets or to engineer social behaviour is a very troubling prospect indeed. Doing so by way of charging, thus realistically affecting only the poorest members of society, who rely most on social rights, effectively means the hollowing out of those rights, and denying these members a crucial instrument to protect their basic interests.
References


Gauthier, D.P., 1986. Morals by Agreement. OUP, UK.


Machin, S. and Vignoles, A.: What’s the Good of Education? The Economics of Education in the UK.


Wintour, P., 2014. Tristram Hunt warns private schools to help state pupils or lose £700m in tax breaks. The Guardian.

---

1 HCJ 2557/05 The Majority Headquarters v The Israeli Police [2006], at [16]; See similarly Fordyce County, Georgia v The Nationalist Movement 505 US 123 (1992).

2 HCJ 2974/06 Israeli v Committee for the Expansion of the Health Basket [2006]