

# SOCIAL RIGHTS, SOCIAL CONTRACT, SOCIALISM

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Are there structural differences between so-called “social rights” (or positive freedom rights) and individual rights (or negative freedom rights)? The relevance of this question is explained by the fact that traditional forms of judicial protection of fundamental or constitutional rights used to be restricted to individual, but not social, rights. According to what is the dominant position, at least in Latin America, this restriction was always arbitrary, a consequence of a political devaluation of social rights. The solution, at least for leftist legal thought, is to extend the judicial protection of rights to social rights. But is it correct to say that the non-justiciability of social rights can only be understood as a devaluation of such rights? Or to put it in other words: Is the difference in the available institutional means of protection of rights to be explained by the different structure of social rights vis-à-vis individual rights, or is it a mark of the political devaluation of the former when compared to the latter?

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In other words, Why is it the case that individual rights are to be protected judicially, but social rights are to be interpreted as mere “programmatic” declarations, which are to be realized (or defeated) in the political arena? The reason, progressive constitutional scholars tell us, is not a structural difference between these two kinds of rights; it is rather a political decision which we can nowadays call “neoliberal”<sup>1</sup>, in which the ideas of equality and liberty are interpreted only in formal terms. Since social rights are concerned not with the formal status of individuals but with the substantive content of citizenship, a neoliberal theory must conclude that declarations of social rights are to be understood as expressions of good will, not as “hard” rights. From this perspective, the left must fight for social rights, and the first battle is to guarantee that social rights receive the same institutional importance as individual rights do meaning in particular the same judicial actionability. And in this leftist constitutional scholars have been tremendously successful, because the justiciability of social rights is now, at least in Latin America, taken for granted. And in the (few) cases in which it is still the case that they are not, this is widely seen by the left as a notorious ideological (neoliberal) disbalance.

I think this is a serious mistake. Judicial institutions can protect individual rights more effectively than social rights because the latter imply an understanding of citizenship that is incompatible with bourgeois law, while the former are its most perspicuous manifestation. Thus traditional forms of bourgeois law cannot contain social rights.

One could say that this “theoretical” idea has been refuted in practice. For today social rights are in fact protected by the very actions which were purportedly incompatible with this kind of rights. If the claim is that something is impossible, what can provide a more complete refutation than the fact that it has happened? The issue, however, is not that simple. The thesis I want to develop in this article is that bourgeois law can protect social rights through its traditional forms of legal protection, but in doing

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<sup>1</sup> It is an interesting fact that the label “neoliberalism” is almost entirely absent in political philosophy, which subsumes it under “liberalism”. This assumes the continuity between what could be called “classical” liberalism and what is now presented as its neo-version. I believe this is a mistake. In most relevant areas, and in particular the issue of social rights, “neoliberalism” is illiberal. But this is not the place to discuss this. See Atria, *Veinte Años Después*, pp. 77-95.

so it will inevitably transform them in bourgeois (individual) rights. That is to say, the cost of subsuming social rights under bourgeois law is to de-socialize them.

## SOCIAL AND INDIVIDUAL RIGHTS: THE DIFFERENCES

### Ottfried Höffe's list of differences between rights

This is why it is important to distinguish a socialist critique of the current understanding of social rights from other liberal critiques of social rights. To this end, we will begin by considering one of the latter, as formulated by Ottfried Höffe.

Höffe believes that social (he calls them “positive freedom rights”) and individual rights (“negative freedom rights”) are different, not only in their content. Indeed, such a difference is fundamental, and implies a kind of ranking order between individual and social rights<sup>2</sup>. This difference is that

Negative freedom rights are, as such, indifferent to cooperation; positive freedom rights, by contrast, are dependent on cooperation<sup>3</sup>.

From this fundamental difference stem, according to Höffe, many others.

In the first place, as indicated by Höffe's labels, individual and social rights are distinguished insofar as the former are negative whereas the latter are positive. The content of social rights is not a set of negative provisions (“thou-shalt-no” rights), but positive provisions to food, clothing, shelter, healthcare and education, to mention a few<sup>4</sup>.

Secondly, social rights depend on available resources, and thus their content can be affected by scarcity. This implies that the demands they ground could be defeated by lack of resources, while negative freedom rights are invulnerable to economic vagaries: ‘With the exception of self-defence, it is always the case that those who kill violate a human right’<sup>5</sup>.

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<sup>2</sup> Höffe, Democracy in an Age of Globalization, p. 47.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid. It is odd, given the current intellectual climate, that Höffe ignores the issue of euthanasia.

This second difference implies a third one: the content of social rights is dependent upon economic development and culture in a way that negative freedom rights are not: ‘Social rights are dependent on culture as well as resources’<sup>6</sup>.

The currently predominant thesis, which understands itself as “progressive” and is, at least in Latin America, virtually unanimous, rejects Höffe's differences, arguing that they pertain to the superficial grammar of rights. In my view, this is correct. Today’s “progressives” are right in thinking that Höffe's differences do not justify the conclusion that we are dealing with a structurally different kind of rights. Thus these differences are either nonexistent, and appear plausible only when adopting an unnecessarily and unjustifiably narrow perspective, or are not structural differences but differences of content. And what matters is not whether social and individual rights are different regarding their content, because they obviously are. The point is whether there are deeper, structural differences that imply institutional consequences.

But though “progressives” are right in rejecting Höffe’s grounds for distinguishing kinds of rights, I believe Höffe is right in holding that they are indeed different. Precisely because here is an important difference we must endeavor to locate it correctly. We must thus begin by explaining why the traditional differences, accurately explained by Höffe, are to be discarded. The point of this is not to show that there are no differences between social and negative freedom rights that they must be abandoned; indeed, the opposite is true. We must show that Höffe's differences are superficial, that they do not account for what social rights represent, because the real, political difference is to be rescued and defended. Höffe believes that he can explain social rights within a contractualist theory of justice. In reality, social rights expose the limits of contractualism as such; or, to put it in a more provocative way, they show why a contractualist (or, what is the same, liberal) theory of justice must be abandoned.

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<sup>6</sup> Ibid.

### They belong to the surface grammar of rights

The differences that Höffe finds between social rights and negative freedom rights are evident; that is, they are entirely apparent. A reply to Höffe must be capable to account for them.

To begin with, the distinction between negative rights and entitlement to benefits, although evident, depends to a certain extent on the language used to describe the actions that comply with or infringe them. Every action can be described as an omission. But additionally, it is simply false to claim that negative freedom rights require only an omission. It is important here to distinguish good and bad arguments to substantiate this claim. A traditional argument to show that the action/omission distinction does not correlate with the social/individual rights distinction is that certain individual rights also require the state to act in a certain way; for instance, the right to due process implies that the state must do whatever needs to be done to guarantee due process<sup>7</sup>. In my view, this argument is spurious. The right to due process is a negative freedom right, that is, a right to non-interference. It enumerates the conditions with which the actions of the state must comply so that it can interfere with an individual's action without such interference counting as an infringement of the individual's negative freedom.

Generalizing, I am skeptical of the idea that one can show Höffe's mistake by way of searching for negative freedom rights that require that the state to act in a certain way. I believe the objection is more radical, and can be easily articulated in the language of criminal law. For in criminal law it is fairly clear that one can commit a criminal offense legally described in active terms by refraining from certain actions. Criminal law distinguishes between "improper omission" crimes, or crimes of 'commission by omission',<sup>8</sup> and "crimes of mere omission" (breach of a duty to act). The latter are crimes that are legally defined as omissions, thus imposing a duty to act (in corporate law, for example: the duty to provide regulatory bodies with some corporate information). The interesting category here is the former, which are crimes legally defined as actions (like "killing"), so that the normal way to commit them will be "positive" (=an action). Since

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<sup>7</sup> See, for example, Kelley, A Life of One's Own, pp. 23-29.

<sup>8</sup> Fletcher, Rethinking Criminal Law, §6.4.1.

what is punished is an action, the duty imposed is negative: the duty to ‘renounce something’ (thou shalt not kill). What is interesting about this is that the existence of crimes defined by actions immediately implies the possibility of crimes of “improper omission”, i.e. the possibility of commission by omission. Notice what has happened: a duty consisting in refraining from an action can translate into a duty to act. If negative freedom rights can be infringed via commission by omission, it is simply not true that they merely impose the duty to renounce something.

Now, this does not mean that action and omission do not differ. Not every omission that causally contributes to the relevant result (e.g. the death of a person) is an act that ought to be understood as commission by omission. For the result to be ascribed to whoever refrained from acting, an additional element is needed. This additional element serves the function of bridging the gap between omission and result, and several circumstances are usually discussed here. One of them will be of particular interest to us: if whoever refrained from acting could avoid the result and, additionally, had a previous duty of care towards the interest that is protected by the rule of conduct, then her omission can be qualified as a criminally relevant “cause” of the result. Thus the lifeguard who does not save the drowning swimmer is responsible for murder by omission if the swimmer dies, but the bystander who refrains from saving the victim is not. A normal bystander does not have, under normal circumstances, a duty to aid drowning swimmers, but a lifeguard does, if a swimmer is drowning in a pool that is under his care.

Thus, for a negative duty to become a positive one it is necessary to establish a special duty of care. This idea will turn out to be important because it will allow us to explain why negative freedom rights are usually understood as negative rights. For the time being, however, what matters is to notice that individual rights are negative rights only because the possibility of commission by omission is excluded. If Höffe is right, and negative freedom rights are indeed rights that impose a duty to refrain from acting, this is not because of the structure of negative freedom rights; rather, it is because, in these cases, it is not possible to establish a duty capable of transforming cases of (‘mere’) omissions into cases of commission by omission. In other words, it is not by examining

the active side of negative freedom rights (that is, the side of the right-holder) that we will learn why Höffe's superficial observation is correct. We will find the explanation in its passive side, i.e. in the position of the right's jural opposite (the subjects of which are free from these previous duties of care).

Regarding social rights' susceptibility to be defeated by scarcity, Höffe fails to distinguish the meaning of the statement that describes the right and its application. Certainly, a society's cultural and material conditions affect the content of social rights. Here one should distinguish between the fact that certain circumstances may render a right unenforceable, and the fact that a certain action may not belong to the set of actions required by a right. The former is not new, and is not particular to social rights; for every normative statement there will be circumstances under which the duty imposed by it will (or at least: may) be defeated. Höffe believes this distinguishes social rights from negative freedom rights, because only the former are defeated by scarcity: scarcity does not excuse murder (at least not normally: but what about Fuller's Case of the Speluncean Explorers?<sup>9</sup>). The relevant category, however, is not scarcity but 'circumstances under which fulfilling a right imposes an unreasonable burden on the debtor'. Since social rights normally adopt the form of claims for the provision of certain services, these 'circumstances' usually appear as material scarcity: if fulfilling the right to housing leads, in the circumstances, to an unreasonable sacrifice of other interests, this might justify failure to provide adequate housing. But scarcity is only a particular instance of a generic possibility; that is to say, it is only one of the cases in which fulfilling a right imposes an unusually heavy burden to the debtor. Negative freedom rights are likewise limited. Hence it is a mistake to rule out, as Höffe does, self-defense cases. To these we can also add necessity.

Höffe's third difference is that the content of social rights is susceptible to cultural conditions, whereas that of negative freedom rights is not. Again, this is intuitively correct, but only until one recalls that rights may be infringed not only with intent but also without, that is, by negligence. And the standard of care is clearly sensitive to

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<sup>9</sup> Fuller, "The Case of the Speluncean Explorers".

cultural considerations. Assuming that workplace safety regulations, for instance, are a manifestation of the individual right to life or to physical integrity, it is clear that material and cultural developments affect the content of those rights.

### The deep (political) grammar of rights

Does it follow, then, that there is no difference whatsoever between social rights and negative freedom rights? Many self-proclaimed promoters of social rights reach exactly this conclusion. Yet here lies a conspicuous irony, which can best be revealed by going back to Höffe's (correct) starting point. The emergence of the very idea of social rights can only be understood as a critique of the liberal idea of individual (natural) rights, precisely because they are indifferent to cooperation (they are "the rights of selfish man," as Marx called them<sup>10</sup>). Social rights arise, therefore, as a way of affirming – in terms of justice – the importance of understanding human self-realization as reciprocal rather than individual. But if this is the case, then it is central to the very idea of social rights to preserve the distinction between them and individual rights, because the point of social rights is to subvert the idea of individual rights, to turn it against itself. This is why social rights can only be understood as anomalous grafts in bourgeois law; the foundation for the latter is the idea of individual rights.

But of course, for them to be grafts they had to be formulated in terms that can resonate and be recognized by the rationality of the host. That is the reason why they have to be understood as "rights". This is a risky move, and the risk is usually associated with the leftist critique of social democracy. For though the idea that grounds social rights is the opposite to the idea that grounds bourgeois law, the language to express it is not the language of opposition (which could not be understood by the rationality of the host), but that of continuity: social rights as the full realization of what is important in those rights that are central for bourgeois law (civil and political). This is the importance of Marshall's claim that rights come in historical progression: civil rights (18<sup>th</sup> century), followed by political rights (19<sup>th</sup> century) and then social rights (20<sup>th</sup> century). The important point, of course, is not how accurate in historical terms is this progression.

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<sup>10</sup> Marx, "On the Jewish question".



What is important is the idea of movement, in which each step shows in a more developed way the content of the previous. Marshall expressed this as the idea of citizenship. We are not dealing here with three independent ideas. The same could be said by reference to the revolutionary trilogy: liberty, equality, fraternity. Each idea more fully realize and specify the content of the previous one: equality is the realization of liberty (for, in Billy Bragg's line, "freedom is merely privilege extended, unless enjoyed by one and all"), and fraternity is the realization of equality (for the idea of fraternity shows human realization as reciprocal rather than individual). In the same spirit, political rights show civil rights in a different light, and social rights transform (one could say: transfigure) the idea of political rights.

The "social democratic" risk is that, by using the language of the host, the attempt to reinterpret the rationality of the host in the light of the graft immediately creates the possibility of neutralization: this happens when the transformational content of the graft is negated and it is reinterpreted according to the rationality of the host. We must look into this in some detail.

Grafting creates an unstable situation, that is, a situation which has an immanent tendency towards its resolution. This resolution can, in principle, adopt one of two forms: the transformation of the host or the normalization of the graft. In the first case, bourgeois law ceases to be bourgeois law, or at least ceases to be a legal system built upon the notion of individual right, indifferent to cooperation, and becomes a system built on the idea of reciprocal duty, which is constitutive of social rights. In the latter case, social rights cease to be understood as grounded on the notion of reciprocity and are now understood as yet another kind of individual right, that is, indifferent to cooperation, only distinguishable from other individual rights because of their content (say, housing instead of property). The irony is that today, progressive promoters of social rights loudly proclaim that there is no difference between social and individual rights, but bourgeois law is still bourgeois law. The right to healthcare, for example, has ceased to be a right to a system which provides healthcare according to necessity and not ability to pay, and has become a right to have one's medical necessities attended even when the cost of treatment is unreasonably high, even if as a consequence the need of other people will

have to be neglected. Regarding these other needs, whoever sues for his need to be cared for may reply as parties in the market: am I my brother's keeper?

If we are to avoid this ironic conclusion, we must say that social rights are indeed different from individual rights. But the usual ways in which this distinction is portrayed (as the distinction between positive/negative rights, or between defeasibility/undefeasibility by scarcity or culture) conceals the political meaning of the aforesaid distinction. Höffe's starting point, according to which negative freedom rights are indifferent to cooperation while social rights are founded on cooperation, is promising, but it seems to take the conclusion as the premise. Indeed, if we want to get a clearer understanding of the political sense of the distinction, we will have to give a closer look to those features of these rights that are connected to the fact that some rights are indifferent to, and others presuppose, cooperation.

One of the peculiarities of negative freedom rights is that the specification of their active aspect (the right-side) is immediately a specification of their passive aspect (the duty-side, its jural opposite). A complete specification of a right's content entails identifying three elements: an active subject, a passive subject, and a given action someone is not under a duty to perform (in the case of W. N. Hohfeld 'privileges' or liberties) or is under a duty to perform (in the case of Hohfeld's 'rights')<sup>11</sup>. For negative freedom rights, the dominant side is the active side. In other words, it is enough to specify that to which the holder is entitled in order to provide a full specification of the content of said right<sup>12</sup>. Thus, albeit risking an over-simplification, we may say: the right to life is the right not to be murdered. Here the passive aspect is the reflection of the active aspect, directed generically against a universal subject. The active aspect of the right to life immediately reveals its passive aspect, thus fully specifying who has what duty. The passive subject

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<sup>11</sup> Hohfeld, "Fundamental legal conceptions".

<sup>12</sup> There is a different, unrelated way of identifying the 'dominant' position in a pair of jural opposites: by looking at the action concerned. Thus, in the opposition right/duty the dominant position is the passive (duty), for the action concerned is always an action of the debtor. In the liberty/no right opposite, the dominant position in this sense is that of the liberty holder, because the action involved in his or her action. I mention this only to prevent confusion between this sense in which a position is or is not dominant and the sense in which I am using the expression in the main text.

must be universal because these rights are “natural” rights. Their being “natural” rights is not a claim about what happened in a by-gone time when there was no government, but a political claim: they are rights that do not presuppose any artificial (=non-natural, political) relations between individuals.

When it comes to social rights, a specification of the interest which the right serves – that is, its active aspect – is not enough to specify its passive content. In other words, it is not enough to identify an interest worth protecting to ground a duty to protect it. This is what Höffe observes when he objects that

Some treat the demands aimed at this multifaceted social nature rather generously. Without any prior conceptual demarcation, they formulate extensive lists of social rights from obligations of solidarity and philanthropy or even a subsequent assessment of their legitimacy basis. This lack of a proper basis cannot be solved by the frequent, even inflationary appeal to social justice in politics<sup>13</sup>.

The excess of enthusiasm of these promoters of social rights consists in believing that it is enough to find an important aspect of someone’s well-being (i.e. an interest worth protecting) to conclude that, therefore, every human being has a right to whatever is necessary to satisfy it (i.e. it is protected). But this is mistaken, because it ignores that the point is to ground duties, duties that would warrant the conclusion that X is compelled to do something towards Y. And to ground X’s duty it is not enough to show that it would be good for Y to get something. The question, then, is how to bridge the gap between the interest of the right-holder and the duty of the debtor?

## THE SOCIAL CONTRACT AND ITS LIMITS

Does a contractualist theory of justice have a determinate content qua contractualist? In general, contractualist authors do not dwell on the substantive content of the metaphor they use, and present it claiming for it a merely expositive function; it is thus justified simply by showing that it is “a useful way to study ethical theories and their underlying assumptions”<sup>14</sup>. But the idea of social rights shows that the metaphor is not innocent and

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<sup>13</sup> Höffe, Democracy in an Age of Globalization, p. 46.

<sup>14</sup> Rawls, A Theory of Justice, §3.

carries with it a determinate political content, regardless of the way in which it is developed in this or that version.

### The need to bridge the gap between interest and duty

We begin where we left at the end of the previous section: the specification of the active content of a social right does not fully and immediately specify the content of the correlative duty. The right-side represents the interest protected by the right, but an appeal to that protected interest is not enough fully to specify the content of the duty-side. When dealing with individual rights, the aforementioned interest is specified by referring to others' interference. For instance, the interest protected by the right to life cannot be characterized as the interest to remain alive, but as the interest not to have one's life terminated by a third party. By this reference to third parties' interference, the characterization of the interest which the right protects fully determines the passive aspect of that right (the duty imposed on others). But when dealing with social rights (to education, or to healthcare, etc.) the protected interest is not characterized by reference to third parties' actions; it is only characterized by the holder's well-being. How can we translate a statement about the holder's well-being into one about others' duty?

Two different conceptions of social rights stem from the way in which the gap between the holder's interest and others' correlative duty is bridged. A contractualist theory of social rights is the first possibility. As any form of contractualism, its starting point is the fact that individuals have opposing interests, interests that can only be coordinated by contract. What moves the parties to contract is the desire to safeguard their interests, and the fact that it is rational for them in the circumstances to give up something (like: their natural freedom, or the right to adjudicate the natural law) in order to achieve some level of protection. Since the contract is the foundation for all political bonds, there can be no duty which simultaneously presupposes and precedes the contract; this is why the notion of commission by omission does not apply to natural rights (it is impossible to argue for the special position of care prior to the contract, since there are no

special relations before the contract)<sup>15</sup>. Within the limits set by the basic feature of a contractualist explanation, therefore, it is possible to ground social rights only on the rational interest of each to ensure that all parties will benefit from the contract in order to demand, in return, that they renounce their natural freedom (*i.e.* that they abide by law). This certainly provides a way to link interest and duty: law's authority can only be justified by reference to the fact that being subject to law improves the condition of the individual, in such a way that it would be irrational for him or her to reject it. Only if this condition is met we can label his rejection a case of free-riding, and ignore it. Hence all have reason to agree to provide the less fortunate with whatever is necessary to make sure that they benefit from the move from the natural to the civil condition<sup>16</sup>. This minimum level of welfare is what might constitute "positive" rights. The political consequence of this way of linking interest and duty is evident. Social rights here do not manifest an ideal of equality, but at best a protection against poverty; they ground not universal public services but strictly targeted (means-tested) programs. And the basis for these policies is not the well-being of the poor but that of the rich, who thus ensures that the poor are bounded by the contract.

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<sup>15</sup> Höffe criticizes Nozick and Locke for in their characterization of the state of nature they "prematurely break off the process of abstraction required by the state of nature" (Höffe, *Political Justice*, p. 189), by claiming that in the state of nature there could be such a thing as natural rights. According to Höffe, "The state of nature must be imagined as not only free of the state but also of all subjective rights" (*ibid*). For reasons explained in the main text, I believe this to be a mistake. What the state of nature requires is the exclusion of all political bonds between individuals because the contract, which is to be the way out of the state of nature, is the ground of political bonds. In some versions (such as precisely Locke's and Nozick's), natural law is defined precisely as law that exists before the political, law the validity of which does not rest on political authority. There is here neither contradiction nor a process of abstraction that is prematurely broke off. This is not to endorse Nozick' or Locke's view about natural law or natural rights, but to understand the political sense of the idea of the state of nature. Authors like Nozick and Locke do not incur in any "petitio principii" (*ibid*) when they make reference to natural law or natural rights. But of course, that a claim does not involve a petitio principii does not make it correct. Or to put it in other words, if it is the case that "primary state of nature is void of law and state" (Höffe, *Democracy in an Age of Globalization*, p. 29) this is a consequence of a thesis about law (=its validity rests on political authority), not about the state of nature.

<sup>16</sup> Again, risking oversimplification, we can say: it goes in the interest of the rich that the poor are bounded by law, and hence it goes in the benefit of the rich that the move from the natural to the civil condition is shown to be in the benefit of the poor.

The second way to understand social rights is T.H. Marshall's, as presented in his famous Citizenship and Social Class<sup>17</sup>. In this sense, social rights constitute the substance of citizenship, its content. They contain the idea that certain aspects of the well-being of each are everyone's responsibility. Since they rest on the idea of self-realization as reciprocal, they cannot be understood as indifferent to cooperation. But thus understood, social rights cannot be identified in the state of nature, because they presuppose the bond of citizenship which the contract purported to found. A contractualist account of justice, therefore, cannot but ignore them.

As we have seen, the idea that individual and social rights are structurally identical, and differ only in content, has become a commonplace among promoters of social rights and social rights activists. But now that we have found a difference, what are we to make of this claim? Here we have to return to the graft/host unstable situation identified above. By ignoring the need to offer an argument that would connect interest and duty, Marshall's idea of social rights is lost. This explains, in my opinion, the current popularity of two ideas that reciprocally reinforce each other, the hegemony of which is the extent to which the political meaning of social rights properly so-called has been defeated.

The first of these ideas is a contractualist justification of political association, which presents itself as politically neutral, that is, as if it stood outside and above the left/right political divide. One could thus, allegedly, find 'left-wing' and 'right-wing' versions of it (Rawls and Nozick immediately spring to mind). But in terms of social rights, contractualism is a way to bridge the gap between interest and duty, and hence it cannot be politically neutral; it implies that what is politically relevant is not equality but poverty (more or less extreme). This is because the idea of citizenship cannot play but a secondary role, since what is politically fundamental is the protection of interests that can be identified in the state of nature.

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<sup>17</sup> Marshall, Citizenship and Social Class.

### The neutralization of social rights

The second, and related idea, is the neutralization of social rights. Because it is Marshall's notion of social rights which expresses their true content, as social rights (that is, rights which belong to the citizen, and thus cannot be identified when one dispenses with the bond of citizenship, as is the case in the state of nature). By excluding or demoting Marshall's idea of citizenship as the link between interest and duty, this conception of social rights is neutralized, and it is incorporated into bourgeois law in the only way that really existing bourgeois law can incorporate it. Bourgeois law being the law of individual rights, social rights can be incorporated only by de-socializing them, by transforming them into individual rights to a minimum provision of well-being.

This neutralizes social rights because, as we have seen, social rights are not individual rights, but a subversion of the language of individual rights. Their recognition by bourgeois law was meant to create an unstable situation. This instability implied an inner tendency towards resolution, which was meant to come about via the transformation of bourgeois law, which would cease to being founded on the liberal idea of self-interest but would instead revolve around the socialist notion of reciprocal duty. But today this resolution has been reached not because of the transformation of bourgeois law into something else but by the transformation of social rights into individual rights to a minimum standard of living: social rights are now based in the same idea of self-interest which grounds bourgeois law.

These ideas reinforce each other, because the latter lends credibility to the former: since social rights, once neutralized, can be grounded by a contractualist doctrine, today contractualism can claim to be the common grammar in which old political positions express themselves, when in reality this is the extent to which one of them has been defeated.

### THE IDEA OF SLOW PEDAGOGY

Contractualism, then, is the replacement of equality for poverty as a politically relevant matter. The main legitimacy goal is not equality but improving the lot of what Rawls calls "the least advantaged". But this raises the following question: why contractualism?

This is the often unasked question, since contractualism is seen as politically neutral. We have already seen that Rawls justifies this perspective by appealing only to its expository clarity, since it allows one to easily identify ethical theories and their assumptions. But given the political consequences that flow from this idea, it is manifest that clarity is not a sufficient justification to adopt it. When dealing with politically important matters, clarity might be important, but it would be absurd to hold that it ought to be held as a substantive political criterion. Thus: why contractualism?

Every contractualist doctrine assumes the priority of individual over community. The meaning of this priority is not crudely ‘normative’, as if it were the claim that community is for individuals rather than individuals for community. The priority consists in the idea that the sense or point of the political lies outside the political, so that it can be identified from a pre-political perspective (be it state of nature or original position). It is from this perspective that the terms of political association are to be determined. For this reason, justice has no history; the state's conditions of legitimacy are determined by referring to what individuals with no bonds would agree to, which is why the principles of political justice do not develop in time. From whatever moment we are in, in principle we could always ask the question of which are the terms we would agree to in the original position, and since the question and the relevant circumstances are the same the answer would have to be the same. The content of this pact are principles valid “once and for all”<sup>18</sup>. Contractualism radically excludes the possibility of what Charles Taylor called slow pedagogy, that is, the notion that what we owe each other is something we learn by living political lives:

Here’s a hypothesis from within a Christian perspective: humans are born out of the animal kingdom, to be guided by God; and the males (at least the males) with a powerful sex-drive, and lots of aggression. As far as this endowment is concerned, the usual evolutionary explanation could be the correct one. But being guided by God means some kind of transformation of these drives; not just their repression, or suppression, keeping the lid on them; but some real turning of them from within, conversion, so that all the energy now goes along with God; the love powers agape, the aggression turns into energy, straining to bring things back to God, the energy to combat evil...

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<sup>18</sup> Rawls, A Theory of Justice, pp. 12, 75, 161.



This is the fallen condition. There are two dimensions. God is slowly educating mankind, slowly turning it, transforming it from within... . But at the same time, the pedagogy is being stolen, has been misappropriated, and misapplied; the education is occurring in this field of resistance...

Now God's pedagogy operates in this field of opposition. In this field, it can be a positive step, bringing us back closer to God, if the numinosity around some untransformed practice is bent back, brought into some kind of relation of service to God; even though one might suppose that the ultimate goal would be to leave this practice behind altogether. One can't leap altogether to the end. That's the truth of the slow pedagogy.

But on the other hand, there can and must also be leaps<sup>19</sup>.

Of course, in our context we have to give a political reading to references to God, and to do so we may take advantage of the fact that one can always invert theological concepts and understand them in political terms. A political paraphrase of the idea contained the fourth paragraph of Taylor's passage (which can be said to provide a clue to the interpretation of the whole passage) is that the education with which we are concerned is that of the people: the people educates itself slowly, through political coexistence, and progressively learns what it means to live in recognition<sup>20</sup>. Thus the people transforms itself, although, simultaneously, this pedagogy is stolen and misapplied: political education takes place in this field of resistance. This means that if we adopt the perspective of the state of nature to explain the political, we will find individuals who do not recognize each another, or (what is effectively the same) who do so in purely instrumental terms: each tries to use the others to his or her own ends (Taylor: As far as the natural condition is concerned, the usual evolutionary explanation could be the correct one). But by living together we learn how to understand and recognize one another.

Contractualism is a doctrine of denial. Denial of the possibility of slow pedagogy. Since the priority is on the pre-political individual, the content of the political bond is settled before there is any possibility of slow pedagogy. And this carries another consequence. We have seen that for contractualism justice has no history. But there is a

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<sup>19</sup> Taylor, *A Secular Age*, pp. 667-8.

<sup>20</sup> What is interesting about this inversion of theological language is that it also throws light on theological concepts, because of the "systematic analogy" (Schmitt, *Political Theology*, p. 37) between political and theological language. On this, see Atria, "Living under dead ideas". For notorious examples of this inversion (my words) regarding the theology of revelation, see Segundo, *El Dogma que Libera* and Torres Queiruga, *Repensar la Revelación*.

history of what we could call the technology of justice: we can learn from experience what institutional arrangements work better in the protection of (pre-political) rights. This is why the natural subject of a contractualist (liberal) theory of justice is institutions rather than individuals and their conduct (this is explicit in the very first paragraph of Rawls' A Theory of Justice).

And what is the justification for all of this? Here it is useful to turn to Höffe, who offers an answer:

The two basic approaches of institutional and personal interpretations of the state can be understood as opposing poles, so that moral demands imposed on the polity can be directed either exclusively at institutions or at persons. Those who only rely on individual morality, hope for a better, possibly new human being, free of any self-interest. Political liberalism sees here an unrealistic and excessive demand, and for this reason alone it identifies contract theory as an alternative to virtue ethics. In addition, it understands civic virtues as particularist elements that are not compatible with universal principles<sup>21</sup>.

Let it be noted: the only argument for contractualism is the unrealistic naivety of virtue ethics. Of course it is unrealistic and naive, if seen from the state of nature (or the original position)!

The question of justice must be asked in this context. If it is posed, as in contractualism, sub specie aeternitatis, in order to answer it "once and for all": What aspect of others' well-being is my duty?, the answer will be: the minimum ('negative') rights: non-aggression. In that case, only the situation of those who live below that minimum offends justice. Social rights are individual rights to a minimum. As previously mentioned, this is a way to neutralize social rights; they no longer subvert bourgeois law, because they no longer contain the idea of slow pedagogy. Their content is now given by what can be warranted as an actionable claim. It is important to understand the structure of the argument here: According to Höffe, the reason that justifies contractualism, and why the perspective to judge the principles of justice is that of radically independent individuals, indifferent to one another, is not a positive argument about this perspective, or about the 'true' form of human motivation, but a default reason as it were, grounded in

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<sup>21</sup> Höffe, Democracy in an Age of Globalization, p. 132 (emphasis added).

the fact that a different perspective would demand too much, would be “unrealistic and excessive”.

## RESCUING THE SOCIALIST IDEA OF SOCIAL RIGHTS

### The neighbor and the stranger

It might be useful to consider here an idea which, hidden in a text that is little more than a work of propaganda, has not received, to my knowledge, the attention it deserves. In F. Hayek's The Mirage of Social Justice, volume 2 of his trilogy Law, Legislation and Liberty<sup>22</sup>, Hayek claims that

the moral feelings which express themselves in the demand for 'social justice' derive from an attitude which in more primitive conditions the individual developed towards the fellow members of the small group to which he belonged. Towards the personally known member of one's own group it may well have been a recognized duty to assist him and to adjust one's actions to his needs. This is made possible by the knowledge of his person and his circumstances<sup>23</sup>.

This primitive condition changes, according to Hayek, in the “Great Society,” which required the extension of the process of material exchange beyond the aforesaid small groups. This in turn was made possible by an equal recognition given to neighbours and foreigners alike. Hayek continues:

This application of the same rules of just conduct to the relations to all other men is rightly regarded as one of the great achievements of a liberal society. What is usually not understood is that this extension of the same rules to the relations to all other men (beyond the most intimate group such as the family and personal friends) requires an attenuation at least of some of the rules which are enforced in the relations to other members of the smaller group. If the legal duties towards strangers or foreigners are to be the same as those towards the neighbours or inhabitants of the same village or town, the latter duties will have to be reduced to such as can also be applied to the stranger<sup>24</sup>.

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<sup>22</sup> While the second volume is little more than a work of propaganda, the first volume of the trilogy (Hayek, Rules and Order) contains an idea that is relevant for the concept of slow pedagogy: see Atria, "Socialismo hayekiano".

<sup>23</sup> Hayek, The Mirage of Social Justice, p. 88.

<sup>24</sup> Ibid.

This is an important claim: to deny the neighbor any special status is a condition for the universalization of rights, which strictly speaking requires that the bond of citizenship, given its particularistic nature, must be emptied of special obligations. When Hayek claims that this step, the universalization of rights, is “one of the greatest achievements of liberal society,” it is hard not to agree with him. But the point is that to take this step one must define duties with neighbors by reference to duties with strangers. Hence the attractiveness of the notion of social contract: my duty to others must be such that its content can in principle be established before the political, because otherwise it could not be understood as universal. This implies, however, that the content of that duty be minimal. Consequently, there exist only negative freedom rights, and ‘social rights’ (that, for this very reason, lose their truly ‘social’ aspect) can be justified, but not by reference to the normative notion of reciprocal duty, but as a condition to secure that the transit from the state of nature to the civil state benefits all. Politically speaking, we have seen that this means that ‘social’ rights deal not with inequality but with poverty. Legally speaking, this has implied an enormous increase in the relevance of international law of social rights. The implication of all this is precisely the phenomenon we are discussing: social rights cannot be understood as Marshall does, that is, as the content of citizenship.

Hayek’s argument holds only if one ignores Taylor’s notion of slow pedagogy. Indeed, if the question is for the rights and duties of each one that can be established once and for all, the answer will have to be based on the most primitive aspects of human behavior (which is why there is an intrinsic connection between liberalism and neodarwinism). This reduces humanity to a biological fact (=membership to a biological species). A political comprehension of the idea of ‘humanity’, however, sees it as a goal of history, a goal the value of which depends not on whether it will be achieved, but on granting us the capability to identify what counts as progress and what counts as regress, which is of course the very condition of any form of pedagogy<sup>25</sup>.

This is why it is important to retain a notion of social rights according to which they remain anomalous grafts, that is, rights which cannot be treated institutionally as

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<sup>25</sup> See McCabe, Law, Love and Language, pp. 35-67.

individual rights. By transforming them into individual rights (rendering them capable of being claimed before a court of law) the anomaly is lost, and they become the rights of 'isolated man' to minimum protection of one's health or education. Here social rights cease to provide a vantage point which is always out of reach, and become a demand which can be satisfied once and for all. Certainly, progressive promoters of this neutralization of social rights will claim that, in this way, they will be fulfilled and will cease to be 'empty promises' or 'merely programmatic declarations', but they ignore Hayek's point about universalization: if social rights are understood as rights that can today be fully realized, their content will have to be defined by reference to the rights a stranger can claim. This is the significance of Taylor's idea that the truth of the slow pedagogy is that one can't leap altogether to the end.

To ignore this and argue for the opposite effect, that is, to redefine the content of my duty to the stranger based on my duty to my neighbor leads, as Höffe remarked, to extensive lists of social rights stemming from obligations of solidarity and philanthropy, which rest on nothing but an inflammatory appeal to social justice in politics. We must accept his criticism but reject the closure of his solution. This means abandoning the liberal idea that our duties to each other can only be understood universally if they are established from a pre-political vantage point; the opposite move is to assume that the political (including the notion of political justice) is subject to development in history, because recognition is something that we learn by living together. Without recognition, however imperfect, there is nothing but Hobbes's state of nature; with perfect recognition, we have arrived to the Kingdom of God. The political is what lies in between. A contractualist perspective invites us to determine the content of mutual recognition, implausibly, from the vantage of point of a state in which such recognition is nonexistent.

### Is the idea of slow pedagogy utopian?

If the idea of slow pedagogy is ignored, then the choice is between liberalism or ethnocentrism. This is a position nowadays supported by an unlikely alliance. Not only does it face a predictable (neo-)liberal criticism, which holds that we have nothing to learn. Indeed, the very idea of a pedagogy addressed to the citizen looks totalitarian to

the (neo-liberal, who believe that any pedagogy must assume (i) that the individual is a child, and (ii) a clear distinction between student and teacher (Taylor's slow pedagogy serves precisely to show that both of these assumptions are flatly untrue); it also faces criticism from the postmodern left, according to which history should abandon the notions of progress and 'grand narratives'. Indeed the idea of slow pedagogy seems to imply a kind of "forward march" to a better world.

But it is precisely because of this that we must emphasize that this is a slow pedagogy, always exposed to being stolen, misappropriated, and misapplied. The most evident way to do this is by understanding pedagogy as an instrumental step to move from one point to the other, thus denying that it is constitutively, and not contingently, slow. This misappropriation is constitutive of the idea of 'leftism' or 'left-wing communism' as 'an infantile disorder'. Leftism views pedagogy as training, that is, only as a means. But the best training is that which allows one to acquire the desired skills as inexpensively and quickly as possible. Yet the sense in which political pedagogy is relevant is not instrumental, because it is what MacIntyre calls an 'internal good' of political practices (the practice of living political lives). The point is not to learn a certain propositional content for which, in principle, it is enough to be shown a convincing argument; the point is to learn to live in a different way.

The idea of goods internal to practices is opposed, of course, to that of external goods. External goods can, in principle, be obtained in various ways, such that once they have been acquired, the way in which they were acquired is irrelevant. When it comes to external goods, there is a fundamental distinction between means and ends, and the goal is to deploy the most adequate strategies to obtain the ends at the least possible cost. When it comes to internal goods, however, this distinction between means and ends collapses<sup>26</sup>.

Of what nature are the goods to which we aspire in politics? The (neo-)liberal reply is that they are external goods: 'to secure these rights, Governments are instituted among

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<sup>26</sup> See generally MacIntyre, After Virtue, pp. 188-203.

Men, deriving their just powers from the consent of the governed', as the American declaration of independence has it. Politics is here a means to secure pre-political rights.

The idea of slow pedagogy implies a different understand of the political: political institutions (or, in MacIntyre's terms, the practices supported by political institutions) are not a means to acquire something which in principle could be an be defined independently of them (an external good), but they are, in a sense, the end goal. To put it in theological terms, institutions have a sacramental dimension. Just as sacraments in Christian theology are ways in which the Kingdom of God is already among us, but not yet, political institutions are ways in which full reciprocal recognition is already among us, but not yet.

Yet, do we have, beyond sheer optimism, any reason to believe in the idea of slow pedagogy? In my opinion, slow pedagogy is distinctly a part of our political experience. Consider, for example, the difference between the American and the British discussion on healthcare. While in the US a rather moderate healthcare reform has just been achieved, after serious threats of being struck down as incompatible with the most fundamental rights of the American people, in Britain the discussion begins with the existence of a universal system which, though of course subject to acute political controversies, is a stable institution. How can we account for this difference? At least one of the things that clearly distinguishes, in this sense, the United States from the United Kingdom is that the UK has had a national healthcare system for over six decades. It is not the case that Bevan or Beveridge thought of a "killer" argument that has escaped Obama and his advisers to convince their opponents about the idea of universal healthcare. It is, rather, that an institution like the NHS creates its own support, which means: living under conditions in which individuals can see their interests as common, individuals learn about themselves. Thus Ed Milliban was right when he said that "If [the NHS] was proposed today, we would be told it could not be done"<sup>27</sup>. Since the point is not to find an argument which proves, beyond all doubt, that our interests are 'really' common, but to live under conditions in which interest appear to the individual as common, the teaching

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<sup>27</sup> 'The Future of the NHS', speech to the RSA, 4 April 2011, available at <http://www.labour.org.uk/the-future-of-the-nhs---ed-miliband>.

process – the pedagogy – is to be slow. AS Marx and Engels said, when discussing French materialism, “If man is shaped by environment, his environment must be made human”<sup>28</sup>.

## REFERENCES

- Atria, F.: "Socialismo hayekiano", in 120 Estudios Públicos (2011), pp.49-105.
- Atria, F.: "Living under dead ideas: law as the will of the People", in Del Mar, M. and C. Michelon (eds): The Anxiety of the Jurist. Legality, exchange and judgement (Surrey: Ashgate, 2013), pp. 101-140.
- Atria, F.: Veinte Años Después, Neoliberalismo con Rostro humano (Santiago: Catalonia, 2013).
- Fletcher, G.: Rethinking Criminal Law (New York, NY: Oxford University Press, 2000).
- Fuller, L.: "The Case of the Speluncean Explorers", in 62 Harvard Law Review (1949), pp.616-645.
- Hayek, F.: The Mirage of Social Justice (Chicago, IL: University of Chicago Press, 1978).
- Hayek, F.: Rules and Order (Chicago, IL: University of Chicago Press, 1978).
- Höffe, O.: Political Justice: foundations for a critical philosophy of law and state (Cambridge, UK [etc.]: Polity Press, 1995).
- Höffe, O.: Democracy in an Age of Globalization (Dordrecht: Springer, 2007).
- Hohfeld, W. N.: "Some fundamental legal conceptions as applied in judicial reasoning", in 23 The Yale Law Journal (1913), pp.16-59.
- Kelley, D.: A Life of One's Own (Washington DC: Cato Institute, 1998).
- MacIntyre, A.: After Virtue. A Study in Moral Theory (London: Duckworth, 1985).
- Marshall, T.: Citizenship and Social Class (London: Pluto, 1992; ed.orig. 1950).
- Marx, K.: "On the Jewish question" (1844), in O'Malley, J. (ed): Marx: Early political writings (Cambridge: Cambridge University Press, 1994), pp. 28-56.
- Marx, K. and F. Engels: The Holy Family or Critique of Critical Criticism. Against Bruno Bauer and company (Moscow: Progress Publishers, 1975; ed.orig. 1844).
- McCabe, H.: Law, Love and Language (London: Sheed and Ward, 1968).
- Rawls, J.: A Theory of Justice (Cambridge, MA: Harvard University Press, 1971).
- Schmitt, C.: Political Theology: Four chapters on the concept of sovereignty (Cambridge, MA: MIT Press, 1985).
- Segundo, J. L.: El Dogma que Libera (Santander: Sal Terrae, 1989).
- Taylor, C.: A Secular Age (Cambridge, MA: Harvard University Press, 2007).
- Torres Queiruga, A.: Repensar la Revelación (Madrid: Trotta, 2008).

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<sup>28</sup> Marx and Engels, The Holy Family, Ch. 6.3.d.