On Social Rights: Some Premises for A New Approach

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Abstract

From the point of view of human rights, what we are seeking in this paper is to expose some of the premises for a new approach to social rights. If we think about the absolute supremacy of human life, a life that, to be understood as such, must be a life lived with dignity, we have to think about life from a material point of view and, therefore, in a priority status to the so-called "social" rights, since social rights (economic, social and cultural) address issues as basic to life and human dignity as food, health, shelter, work, education and water. Social rights are fundamental human rights, which are for all men, can be exercised by everyone and are essential to life and human dignity. What we are seeking in this paper, then, is to shed light on the understanding that social rights are fundamental human rights.

Keywords: Democracy – Fundamental Rights – Human Rights – Premises – Social Rights.

Introduction

If we think about the absolute supremacy of human life, a life that, to be understood as such, must be a life lived with dignity, we have to think about life from a material point of view and, therefore, in a priority status to the so-called "social" rights, since social (economic, social and cultural) rights address issues as basic to life and human dignity as food, health, shelter, work, education and water. With this understanding, it becomes very clear that the materiality of human dignity rests on the so-called "existential minimum", the hard kernel of social rights, in such a way that social rights are genuine (true) fundamental human rights.

Recognition of social rights cannot be, therefore, a mere listing of good intentions on the part of the states in international law. Social rights are fundamental rights, which are for all men, can be exercised by everyone and are essential to life and human dignity. Nevertheless, that leaves much to be done so that these rights can be put on a par with civil and political rights insofar as legal status is concerned.

In this context, it is necessary to indicate the adoption of a new viewpoint on economic, social and cultural rights, or simply, "social rights", since the exercise of any human rights, even the traditional individual civil and politic rights, are intimately bound up with the notion of dignity and related to the freedom and autonomy of the individual, is not possible without a guarantee of the economically, socially and culturally dependent existential minimum.

This implies the need to address the process of trivialisation (which, in practice, strips human rights of their authority) and theoretical fragmentation of rights since the implementation of the social rights cannot be considered separately from the consolidation of democracy itself. The fulfilment of civic responsibilities, essential for democracy, requires economic and social reforms and the reshaping of mental attitudes for the effective removal of the obstacles that impede it.

To speak of human rights, then, is to speak of making social rights accessible to groups of people who do not usually have effective access to them. That is, this is a matter of opening up a new path, alternative and real in the true sense, leading to a non-exclusive citizenship that is democratic in the sense of its recognition by everyone and its all-inclusiveness and directed toward an authentically transformative praxis of society. To get this moving undoubtedly requires great energy and tenacity and the capacity to conceptualise content and techniques that allow reconsidering social rights and their guarantees.

2. Initial considerations: on human rights

One of the great advances of modern social constitutionalism and international law is that it has bestowed upon the international legal status of human rights a binding power, a fact that makes the legal content itself of human rights compulsory supra-legal law, a fundamental axis generally with constitutional standing, to be applied by state officials and effectively honoured by private individuals. This being the case, beyond the complex legal debate over the relationship between international law and internal law – monism and dualism – it is true that, with more or less emphasis, modern constitutions contain clauses conferring special force on international treaties on human rights[1] for a very simple reason: the investment by a social and democratic state must necessarily begin with the idea of a constitutional democracy as a system deeply anchored in human rights. Human rights are – or, better yet, the effective respect for human rights are – those rights that thus make up, currently, the primary principle of reference for evaluating the legitimacy of a legal-political system of law[2].

Nevertheless, this special approach to human rights treaties is also justified because such treaties contain ethical and legal details. In fact, while treaties of the traditional type generally establish reciprocal obligations between states and are entered into for the benefit of the parties, treaties on human rights have the peculiarity that states adopt them even though such states may be neither the beneficiaries nor the intended subjects of these treaties, for the simple reason that such legal status is directed towards the protection of personal dignity: human rights treaties follow the establishment of public order common to the parties and are directed at states as the chosen beneficiaries, but rather, at individual persons; they are not treaties of the traditional type, entered into by virtue of a reciprocal exchange of rights for the mutual benefit of the contracting states, and their purpose is to protect the fundamental rights of all human beings, without consideration to their national origin, in terms of the individual's own state as well as the other states that are parties to the treaty.

In addition, upon approving these treaties on human rights, the states submit to a legal order within which they assume, for the common good, obligations not in relation to other states, but rather towards the individuals under their jurisdiction, whether nationals or foreigners. This point has been brought up repeatedly by the doctrine of law decided by the courts[3] and has, at least, one transcendental legal consequence: the principle of reciprocity is not applied to human rights treaties in such a way that one state may not allege another's non-compliance with the human rights treaty for the purpose of excusing its own violations of these standards. This is so for the simple reason that such treaties have the particular feature that their rules make up guarantees benefiting individuals: obligations are imposed on the states, not for their mutual benefit, but rather to protect human dignity. Therefore, states may not invoke their internal sovereignty to justify human rights violations because they have made a commitment to respect them[4].

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[1] This tendency seems to have begun with the Portuguese Constitution, in its well-known Art. 16, which establishes that "Fundamental rights guaranteed by the Constitution do not exclude any other rights established in the applicable laws and rules of international law" and that "Constitutional and legal precepts pertaining to fundamental rights must be interpreted and integrated harmoniously with the Universal Declaration of Human Rights". In Latin America, the Peruvian Constitution of 1979 seems to present an innovation on the special treatment given to treaties on human rights, followed by the Constitutions of Guatemala in 1985 and Nicaragua in 1987. Modern constitutions of other countries, such as Brazil, Spain and Venezuela, show, to a greater or lesser degree, this tendency of modern social constitutionalism and, in particular, Ibero-American social constitutionalism, by recognising the status and special hierarchy given to treaties on human rights.

[2] Thus, within the scope of modern social constitutionalism, the special and privileged treatment of human rights is justified based on a deep axiological and legalistic affinity between modern international law, which, beginning with the Charter of the United Nations and the Universal Declaration of Human Rights, places human rights at the pinnacle, and internal rights, which situate constitutional and fundamental rights in an equivalent manner: it is natural that modern constitutions underscore this affinity, by conferring a special status on the international instruments of human rights.

[3] See, among other things, the Advisory Opinion of May 28, 1951 to the International Court of Justice on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide and Judgment of July 7, 1989 by the European Court of Human Rights, in the case of Soering vs. United Kingdom, N. 14038/1988.

[4] Art. 27 of the Convention of Vienna on the Law of Treaties establishes that no state signing any treaty can fail to perform it by invoking its internal law. According to Dulitzky *apud* Martin, Rodríguez and Guevara (2004, p. 91), insofar as it concerns treaties on human rights, "the particular nature of agreements of this type justifies the special treatment which various constitutions [...] dispense to rights internationally protected by treaties. It is clear that the internal and international effect produced by ratification of a general international treaty is not the same as that produced by a treaty protecting human rights. This is one of the justifications by which the constituents are concerned with giving a special treatment to international conventions on human rights".

The foregoing reasons for the special treatment of human rights treaties is further strengthened if we take into account, in addition, that respect for human rights in the international order established after World War II is considered an issue directly affecting and concerning the international community and that, therefore, it progressively establishes mechanisms for the protection of these rights. This special and privileged constitutional treatment to human rights treaties has, in turn, two very important regulatory consequences that also complement the justification of this constitutional approach.

On one hand, this approach allows us, in legal terms, to remove, at least in part, human rights treaties from the complex debate about the relationship between international law and internal law, to the extent that the constitution itself usually attributes a special power to international law on human rights (which become constitutional rights and fundamental rights when they are institutionalised[5]),without detriment to the level of priority that other treaties may have in the internal system of law. This means that a constitutional system of law can grant constitutional rank into international human rights laws, without that necessarily meaning that all treaties have such priority[6].

On the other hand and directly related to the foregoing, this favourable internal treatment of human rights treaties allows for ongoing and dynamic feedback between constitutional and international law in the evolution of human. Hence, constitutions are, to a certain degree, linked almost automatically to international developments in human rights through the references to international human rights law made by the constitutional texts[7].

In turn, and by taking into account that general principles of law recognised by civilised nations are one of the acknowledged sources of international law (as indicated in Art. 38.1 of the Statute of the International Court of Justice[8]), it thus becomes reasonable that international law take into account advances in constitutional law in terms of human rights for the development of international law itself, since the generalised constitutional adoption of certain human rights laws can be considered an expression of the establishment of a general principle of law.
So then, at least on the subject of human rights, a real "international constitutional law" or "law of human rights"[9] has emerged from the dynamic convergence between constitutional law and international law, which mutually aid each other in the protection of human dignity. The development of human rights law is, therefore, energised by both international and constitutional law, the interpreter of which is forced to choose, by virtue of the principle of human advantages (*pro homine*), the standard most favourable to the dignity of persons[10].

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[5] It is not an accident that the expression "human rights" is generally used in its common sense meaning of "fundamental rights" and vice versa: it is evident that the degree of uncertainty with which expressions such as "human rights" and "fundamental rights" are used, including in the Universal Declaration of the Rights of Man. See Ferrajoli (2005, p. 76 and ff.), Marshall and Bottomore (1998), and Martínez (1995) for more considerations on the distinctions between "human" rights and "fundamental" rights.

[6] Thus, the Argentine Constitution, after the constitutional reforms of 1994, establishes that, as a general rule, treaties do not have constitutional rank, although they have supra-legal rank; however, those same reforms confer constitutional rank on a specific label of human rights treaties and make it possible for other human rights treaties to gain access to that rank if Congress so decides by a qualified majority. Similarly, in the Brazilian case, after the constitutional reform of 2004, the possibility was established that international treaties and conventions on human rights could gain access to constitutional rank if they were so approved, in each chamber of Congress, after two rounds of voting by three-fifths of the votes of the respective members. In Colombia, the Constitutional Court has demanded that some treaties, as those on human rights, have a privileged constitutional treatment and comprise the block called the "block of constitutionality".

[7] Cf. Silva (2002, p. 374 and ff.).

[8] "The Court, whose function is to rule on the disputes submitted to it pursuant to international law, shall apply: a) international conventions, whether general or specific, which rules expressly establish rules recognised by the litigating states; b) international custom as proof of generally accepted practice with the force of law; c) general principles of law recognised by civilised nations; d) court decisions and doctrines published by the most prestigious scholars in the various nations as a supplementary means of determining the rules of law without prejudice to the provisions set forth in Article 59."

[9] As Dulitzky *apud* Martin, Rodríguez and Guevara (2004, p. 34) indicates, the expression *law of human rights* is drawn from Ayala Corao, while the expression *international constitutional law* has been simultaneously put forward by Flavia Piovesan.

[10] On the material level, we should not speak (or it is irrelevant to do so) about ranking the rules governing human rights, since the rule that most defines the status of a right, of a freedom or of a guarantee will always be applicable (in the specific case). Speaking in material terms, therefore, it is not the status or ranked position of the rule that counts, but rather its content (because that which is most assured by law will always prevail).

The method of special and privileged constitutional treatment of human rights treaties enables national judges to apply, directly and with priority, those international standards (the international law) without having to necessarily engage in a debate as to whether the constitution favours the theory of monism, dualism or integration of the relationship between international and internal law[11]. If the constitution is the applicable standard in which such treaties are integrated, it becomes clear that the legal thinker must apply international human rights regulations internally[12].

"Human rights", an expression that belongs to the spheres of political philosophy and international law, encompass those guarantees, powers, freedoms, institutions or demands relative to primary or basic needs, which include all human beings by virtue of the simple fact of their human condition, for the guarantee of a life lived with dignity[13]; they are, then, independent of particular factors, such as personal status, sex, gender, ethnicity or nationality. From a more relational point of view, human rights have been defined as the conditions that allow an integrated relationship to be created between the individual and society allowing individuals to be persons, identifying with themselves and with others[14]. To speak of human rights, then, is to speak of making rights accessible to groups of human beings who usually do not have access to them. In other words, an attempt is made to open up a new path, alternative and real in a true sense, leading to non-exclusive citizenship, democratic in the sense that it is participatory and oriented towards an authentically transformative praxis of society. Implementing this new path, of course, requires tremendous energy and tenacity and also the capacity to conceptualise content and techniques that permit re-education about social rights and their guarantees[15].

It is well known that legal institutions can be instruments of social oppression if divorced from democracy, but also that, when coupled with participatory democracy and the strength of citizenship, the law can become a collective institution of freedom[16]. It is clearly not possible to have meaningful citizenship without democracy, nor is it possible to have a substantially democratic model of democracy without participatory citizenship. This being so, it is necessary to recreate certain premises in the field of law towards the body of law intended, not only as an instrument of social defence against abuses, but also as an instrument intended to safeguard citizenship itself in an inclusive context and permanent by creation of a more human, more just and more democratic model of development, by implementing concrete acts aimed at the full exercise of social rights, through all possible means and using available resources to the maximum extent.

3. Social rights: the need for (re)construction of their legal foundation from a protectionist and democratic perspective

Economic, social, and cultural rights, most commonly called "social rights", an expression that belongs in particular to the fields of political and legal philosophy and international law[17].

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[11] This does not mean that that debate does not have any relevance in this field of human rights, since it continues to be important. However, the privileged constitutional treatment, mentioned above, by international rules of human rights greatly facilitates their application by national legal experts, who are no longer familiar with the dilemmas with which national judges may previously have faced.

[12] Cf. Graham and Vega (1996, p. 42 and ff.).

[13] Cf. Papacchini (2005, p. 44). Similarly, see Nino (1989, p. 40).

[14] Cf. De la Torre (1996, p. 19). For Helio Gallardo and Joaquín Herrera Flores, human rights are supported on a social framework, by inter-subjective relations and experiences. According to Gallardo (2000), the foundation of human rights are transfers of power that occur between social groups, as well as the institutions in which they are articulated and the logic that inspires social relations. These transfers of power may or may not be effective and may be more or less precarious. For Flores (2000), along a similar line of thought, human rights are the practices and means by which spaces of emancipation are opened, which incorporate human beings into the processes of reproduction and maintenance of life.

[15] In that sense, see Pereira and Dias (2008).

[16] It does not seem to be difficult to perceive that, if the rules are created by the very parties interested in seeing them enforced, through the co-operation of social agents anchored in the autonomy-solidarity duality, then their materialisation is much more present in autonomy than in cases of anomia or heteronomy – it is necessary, then, to involve all participants in the production, interpretation and application of the rules, hence their legitimate legal exercise – and the legal model of action is, moreover, associated with a clearly democratic model of learning and self-awareness that takes into account the internalisation of values (cf. Habermas, 2005, p. 129).

[17] Social rights are associated with systems of social security, health, education, protection of the family, supply of food, etc., which are created and consolidated in Europe and in many Latin American countries between the last third of the 19th century and the second post-war period, within the context of the welfare state or social state (Esping-Andersen, 1998), and they are, according to Abramovich and Courtis (2006, p. 17), the "fruit of the attempt to translate into expectations (individual or collective), legally supporting the access to certain goods configured in consonance with the logic of this model". A common trait of the legal regulation of these spheres, then,

Often refer to matters related to basic expectations of human dignity, but rather, to the satisfaction of vital needs[18] and, consequently, are stated as authentic fundamental human rights[19], essential for promoting human development and for freedom, democracy, justice and peace in the world, since they are expressed as rights that act as the premises on which to exercise other, equally fundamental rights related to freedom and autonomy of the individual.

Therefore, the discussion regarding the scope of guarantees of social rights often seems to be solely associated with persons in situations of greatest vulnerability within the social sphere – generally emphasis is placed on the fact that entitlement to social rights is a problem more related to the groups who cannot satisfy their basic needs, in other words, with the "most needy" – for whom the access to necessary resources to satisfy those basic needs tends to be residual, or even non-existent[20]. However, the truth is that social rights are of interest to everyone, given that they involve guiding principles in socio-economic policy within various geopolitical spheres (which, marked by the intensification of the globalisation process[21], transcend local, regional, and even national limits), goods protected by social rights, involved in positional disputes[22], highlight material equality[23] and are related to the existential, social and culturally outlined minimum, necessary not only for survival under conditions adequate with the dignity inherent to the individual as a human being, but also in order to guarantee the material conditions that allow for the true exercise of other rights, such as civil and political rights, related to the freedom and autonomy of individuals and necessary to promote participatory democracy and full citizenship[24]. The progressive recognition of expectations related to social rights on the constitutional level and in international treaties – and their integration into the internal legal system of each country — impose obligations, both positive and negative, on public authorities and also, to a greater or lesser degree, to individuals, concerning the satisfaction of such expectations and, therefore, the effective promotion of human development.

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would be the use of the power of the state for the purpose of balancing situations of material inequality, "whether based on an attempt to guarantee a minimum standard of living, better opportunities for deferred social groups, to compensate for differences of power in the relations between private parties, or to exclude a specific good from the free interaction of the market".

[18] Thus, included among the social rights is the right to work (with the enjoyment of fair and satisfactory working conditions), along with other social rights to leisure, education, health , housing, security (including social security), protection of mothers and children, social assistance, etc. Social rights are recognised as fundamental in the International Covenant on Economic, Social, and Cultural Rights (PIDESC), ratified by various countries, such as Spain (1977) and Brazil (1992), which provides in Art. 2 that each of the states who are parties to the PIDESC pledge to adopt measures, both individually and through international assistance and co-operation, in particular economic and technical, up to the maximum level of their available resources, in order to achieve progressively, and through all appropriate means (including and, in particular, the adoption of legislative measures), full exercise of social rights, a commitment that, in and of itself, is not contingent or limited by any other consideration.

[19] When we speak about fundamental rights, we hold a functional understanding of the underlying character of rights, suggesting that to possess such a nature reflects the acquisition of a specific functional role in the ordering of a democratic state of law, in addition to assuming a substantial content of "human" rights.

[20] According to Pisarello (2007, p. 11), "this characterisation of social rights as rights which are most needed explains that their exercise and enshrining by law tend to recruit adherents among those who possess an egalitarian sensibility".

[21] As we have already discussed, we are using the term *globalisation* in the meaning that Santos (2005) used to identify a multi-faceted, pluralistic, and contradictory phenomenon, with economic, social, political, cultural, religious and legal implications, interrelated in a complex way, which developed in the last decades of the 20th century from a dramatic intensification of trans-national interactions that paradoxically, although they have been radically transformed, have intensified hierarchies and inequalities. The definition given to this term by Giddens (1990, p. 64, trans.) is also valid: "intensification of worldwide social relations that link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa".

[22] We are emphasising here the idea that the problem of guaranteeing social rights is, above all – but not uniquely, as we shall see further on – a positional programme.

[23] Cf. Luis Prieto Sanchís *apud* Carbonell, Parcero and Vázquez (2001, p. 39-46).

[24] According to Barcellos (2002, p. 198), as we have already pointed out, the existential minimum corresponds to the set of material situations essential for human existence with dignity: the existential minimum and the material core of human dignity reflect the same phenomenon. There exist, then, a tight linkage between social rights and satisfaction of basic needs of individuals, revealing an egalitarian sense in the behaviour of the state. Its purpose is equality through the satisfaction of basic needs, without which many people would be unable to achieve the level of human existence needed to enjoy individual, civil and political rights and to participate fully in political life. The PIDESC Covenant, in its preamble, recognises that, consistent with the Universal Declaration of Human Rights, the concept of the free human being, liberated from fear and misery, cannot be accomplished unless conditions are created that permit each person to enjoy his economic, social and cultural rights, as well as his civil and political rights. In this sense, according to Kliksberg (1997), access to the exercise of citizenship is a fundamental right, the first of the rights, because without it, there can be no access to any others. What is in play here is the right of people to inclusion in a highly complex and competitive society, which tends to exclude within a context in which human development has been severely undervalued.

However, if social rights, from their foundation within the label of human rights, with their economic and cultural variations, have formed part of their legal heritage, they have also been the subject of strong criticism for their inclusion in this label, and conservative legal doctrine even now continues to debate whether social rights can be adapted within the legal framework of human and/or fundamental rights.

In a similar way, positive recognition itself of social rights has not proven to be useful for converting them into fully demandable expectations, nor into instruments truly suitable for satisfying the needs of the respective holders of these rights[25]. Furthermore, the gap between recognised rights and their effective exercise is too often cause for the words and discourse that proclaim them to be empty and without any practical effect.

In this context, despite the extraordinary expansion of institutional behaviour devoted to their development[26], with the establishment of broad systems of compensation and inclusion throughout the last third of the 19th century and, above all, in the first two thirds of the 20th century[27] under the aegis of the so-called "welfare state" or "social state", the reality outlined from the neoliberal counterreformation movements of the 1970s, starting with the great crisis in the hegemonic model that had guaranteed the growth of the central capitalist countries during the post-war period (1945-1973), whose effects have extended until the current times and are revealed to be (to once again disguise themselves) more intense with each new crisis of capitalism, became common the point of view by which public authorities (and, therefore, the use of the state's power for the purpose of achieving equilibrium in material inequality or excluding certain goods from the free interaction of the markets) would be an inevitable source of undesirable bureaucratisation, and the rights related thereto, burdensome, real "traps", which would tend to trim economic effectiveness, personal liberties, and market freedoms, while they are not rights truly incompatible with those of freedom, or perhaps merely programmatic rights, imposing, despite their formal validity and the extension of social rights in many constitutions and international treaties, a new law of the ever more globalised market, which weakens the binding nature of the exercise of social rights and, with it, the true scope of the democratic principle and of social behaviour of the traditional state of law[28].

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[25] Historically speaking, reformist social states, within capitalism, as well as the so-called "real socialism" states, allegedly outside of it, attempted the "de-commodification" of the supply of certain basic resources, either in whole or in part, of their market value, in order to ensure the survival of people, as Esping-Andersen points out (1998, p. 35). But these experiences are seen, with certain frequency, to be contingent within their democratic scope and capacity for social inclusion by external and internal factors. In addition, the degree of satisfaction of social rights, above all in the most privileged regions, has been intimately related to asymmetrical relations of power existing between regions and central and peripheral countries: the widening of Access of people at growing levels of consumption in central countries and regions, including in the form of rights, has been carried out, at least in part, at the expense of evident impoverishment and denial of basic rights to people in peripheral countries and regions.

[26] When we speak about development, it is important to stress that all development is social development, just as poverty is not an exclusively economic problem and economic growth is not development, since it is not enough to grow economically in order to promote social development. According to Franco (2002), development is a synergistic movement, which is confirmed in that class of social changes in which there are modifications in human and social factors guaranteeing the stability of social systems: in systems that are highly complex and removed from equilibrium, as human societies are, the development only occurs when internal patterns (among the components of the whole) and external patterns (with the surrounding environment) of interaction manage to install themselves, which better assure conditions of existence of the whole, in other words, of society itself. A society in which just a few individuals improve their living conditions, but in which the rest of the population – the majority – cannot manage to improve their general living conditions is not a society that is developed, even though it may be a society that is growing in economical terms.

[27] In the period spanning the two great world wars (1914-1918/1939-1945), and during the post-war period, the "social" states implemented many policies that sought to compensate for the excluding effects of asymmetrical growth, breaking down the political system of that time with the liberal paradigm of state absenteeism. The end of the First World War, above all, marked the start of an era of expansion of social rights, defined by the initiative of "constitutionalisation" of social rights observed in the Mexican (1917) and Weimar (1919) constitutions, and through the attempt of inter-nationalisation of those rights through the creation of the International Labour Organisation (ILO). The period that runs from the end of the Second World War until the decade of the seventies, on the other hand, reflects the period of greatest development of social rights. In that period, the great pillars on which such rights are structured were integrated into national constitutions and into the great international declarations of rights.

[28] In this sense, see Pisarello (2007). We point out that the recent crisis of the financial markets, however, provoked panic throughout all countries of the world, causing anguish and desperation to hundreds of millions of persons who, horrified, stood by observing the deterioration of their economies, the drama of unemployment and recession, and, in the United States, the loss of their homes, raising, as a result, the issue of intervention by the state in the economy and demonstrating the evils caused by the lack of regulation outside of the market. The world financial system was destroyed, and it led the "real", productive economy to a depression only comparable to that of the decade of the 1920's in the last century. From the United States, the crisis crossed the Atlantic, reaching the countries of the European Union and Russia, and continued towards the East. Not only is the geographic extent of the disaster frightening, but its profound impact on the economic system is equally disturbing. Due to the fact that it is rooted in the financial markets, the crisis penetrated and perverted businesses, companies, and the precarious balance

Thus, contemporary discourse in regard to the legal, and not merely political, character of modern constitutions has not been extended to the scope of social rights. Insofar as concerns the latter, the capacity to which they can be exercised has remained relegated to a secondary level in relation to some or other rights, such as civil and political rights, above all if they are compared with proprietary rights such as property rights and the freedom of economic initiative[29]. In a similar way, institutional guarantees of social rights – legislative and administrative – have been shown to be eroded in the face of robust mechanisms for the protection of property rights and jurisdictional authorities have contributed little, in fact, to remove this tendency[30]. The insistent validity, among the more traditional legal agents, of the theory according to which social rights entail mere guiding principles or simple programmatic clauses, or the idea that jurisdictional entities neither can nor should do anything to guarantee them, as well as the recurrent idea of the *reserve of the possible*[31], are proof of this (new) *lex mercatoria*[32].

In that way, the traditional democratic state, far from being converted into an authentic constitutional social state, has often operated in a residual way and as a simple legislative and administrative body, with contributions limited to complementing and correcting the actions of the markets and behaviour aimed at keeping the poor in their place and at ensuring, above all, public order and security in the service of those markets. With few exceptions, the "hard core" of social policies that have been adopted after the crisis, in the decade of the seventies, from the traditional Welfare State, is not related to the guarantee of social rights that lend themselves to generalisation, in other words, of stable expectations removed from the political context and, therefore, unavailable to the powers on duty: public policies have been patterned for selective intervention, related to the capacity with which certain segments can demand them and that, more than equalising what is unequal, tend to operate as effective discretional concessions and, therefore, revocable, when not serving as authentic measures for control of the poor[33].

What we have been seeking to demonstrate throughout this paper is that, despite their appeal to technical discourse, this devalued perception of social rights rests, above all, on myths forged by ideological prejudices[34]. We are thus attempting to refute the primary myths conveyed in the political and legal mainstream that currently shape the perception of social rights and, by extension, public policies themselves.

between supply and demand of goods and services. The "first great crisis of globalisation" triggered a recession in the central countries and left the "free market" on its knees, begging for assistance from the state. The doctrine of neo-liberalism and the prophets of the "end of the world" fell silent, perplexed and confused before the extent of the damage after disintegration of the Soviet Union. The crisis revealed the cruel face of the system, which caused loss of employment, housing, savings and the hope of a better future for the majority of humanity. While waves of speculation were extended to concentrate even more wealth in the hands of a tiny minority, half of the world's population lives in poverty. We cannot yet fully conceive of the extent of the effects of this crisis: will it be the end of the myth of "free enterprise", of the innovative entrepreneur and of the superiority of the markets pressured by the need for salvation through intervention by the state, with tremendous implications for political and social structures in the years ahead? It seems to us that such expectations are slightly naive: late Keynesianism, in other words, the generalised expectation that the state will come to rescue the financial system, although it may involve a passing relief from the effects of the crisis, no longer seems to be in a position to assume that role of *deus ex machina*, of saviour, as Roosevelt's New Deal was in the 1930's in the last century. Furthermore, as history has shown, it may very well be that, insofar as the market recovers its strength after this assistance from the state, it has permitted executives from institutions in bankruptcy to receive rewards valued at hundreds of millions of dollars for the effectiveness with which they knew how to betray people's confidence and appropriate real fortunes, neoliberals returned with the same old song-and-dance about the supremacy of the "free market". For them, the use of the power of the state for the purpose of balancing situations of material inequality or of excluding specific goods from the free interaction of the market is pathological, such that, this crisis having been surmounted, reactions against the presence of the state will return, allegedly as inhibitor of economic effectiveness, personal freedoms, and market freedom.

[29] In this sense, see Pisarello (2003; 2007).

[30] Cf. Martín (2006, p. 11).

[31] The idea of the *reserve of the possible* is being used as an argument by governments for citizenship, in the sense of justifying the lack of materialisation of social rights. We discuss this topic in greater detail further on.

[32] In reference to the legal effectiveness of the social state and social rights, Ibáñez (1996, p. 35) affirms that, by the 1990s already, "social character, with a much thicker brushstroke, had already been transformed into social principle, and social principle, in turn, was transformed into more than a few rules to be exercised on their own".

[33] Vuolo *et al.* (2004, p. 14), when analysing the policies of the war against poverty in Argentina and other regions in Latin America, affirm: "current policies 'against' poverty are as poor as the intended beneficiaries of such policies. In reality, they are policies 'of' poverty, whose purpose is to administer and manage the poor, while keeping them in a socially static position so that they do not upset the operation of the rest of society."

[34] In this sense, see Pisarello (2003; 2007).

What we are defending, in synthesis, is that the current idea according to which social rights are "second generation" rights – or even "second dimension" rights, in other words, "second-hand" rights, while property rights would be first generation, first dimension, or "first-hand" rights – is raised as a simple ideological option, and that we cannot speak about the enforcement of other rights, including civil and political rights themselves, related to the freedom and autonomy of individuals (truly essential for a democracy and full citizenship), without the guarantee of the existential minimum[35], a panoply of economic, social and cultural goods that reflect what is usually denominated as "social rights". We are seeking to demonstrate in this context that we cannot guarantee social rights from the assumption of the prior and necessary accomplishing of exclusively civil (individual) and political rights, nor even, on the contrary: in synthesis, the concept of the free human being, liberated from fear and misery, cannot be accomplished unless conditions are created allowing each person to enjoy his economic, social and cultural rights as well as his civil and political ones.

4. How fundamental human rights can be determined and protected

Included among those who, having abandoned the technical drawing of the generations of rights, are inclined to recognise that social rights are not simply rights of late onset, which come after the so-called fundamental, civil, and political rights and that, despite the usual philosophical and normative perception of the foundation of social rights, manage to conceive of civil, political and social rights as rights with a common foundation, there are those individuals who are convinced that social rights can be structurally distinguished from civil and political rights, possessing a structural difference that influences, first and foremost, notions about how it may be possible to safeguard social rights.

In this context, civil and political rights are traditionally identified as negative, non-onerous rights that are claimable and, in addition, easily protected, while social rights would be positive rights that impose a burden, are indefinite and exercised in an indirect way; they are dependent, in their specificity, upon criteria of reasonability or availability, with reserve of the possible, in other words, dependent on contingencies that are, above all, economic within a clear context of positional struggles. In synthesis, social rights serve, in and of themselves, as mere guiding principles or programmatic clauses, and, given their collective dimension, certain forms intended to safeguard social rights before jurisdictional entities would not be possible, which, in view of the reserve of the possible, could do nothing to guarantee them .

Many of these perceptions involve, in and of themselves, historical and axiological arguments for their justification, as we have already seen. But, once again, we will attempt to refute these arguments, by offering, as a standard, and by demonstrating that those same arguments, used to support an already weakened vision of social rights, can easily be extended to all rights, including civil and political ones. The allegation that civil and political rights traditionally generate negative obligations, of abstention, and for this reason, they are 'cheap' rights, easily safeguarded, as opposed to social rights seen as positive, requiring intervention, which would then be 'costly' rights, difficult to safeguard, and unsustainable, since neither civil and political rights can be characterised solely as negative rights of abstention, nor can social rights be characterised solely as positive rights requiring intervention.

Civil and political rights are also positive rights with social benefits. Therefore, the right of property, for example, does not demand, as traditional liberal thought usually points out, only the absence of arbitrary interference, but rather a wide number of public benefits imposing burdens, which extend from the creation and maintenance of registries of various types (automobile, real estate, or industrial property, for example) to the creation and maintenance of security forces and jurisdictional entities that can guarantee compliance of contracts involving property.In a similar manner, the political right to vote contains a broad and burdensome infrastructure that includes minimal issues, such as ballot boxes, paper ballots, etc., to others that are more complex, such as polling clerks, counting devices, recounts and registries, logistics, jurisdictional entities, etc. All civil and political rights, in summary, entail in a similar manner to social rights, a distributive dimension, the satisfaction of which requires multiple resources, both financial and human. In sum, it is not only social rights that imply costs for the state; civil and political rights, insofar as they require the abstention of the state and/or of the individual; that is to say, non-intervention in the spheres of autonomy and freedom of individuals depend on a burdensome state structure in order to become a reality.

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[35] The very definition of the *existential minimum* moves through social dialogue, which demands wide participation of the beneficiaries of social rights in the preparation, application and evaluation of public policies.

What is usually at stake, therefore, is not how to guarantee 'costly' rights, but rather to decide how and with what kind of priority those resources will be assigned, which all rights – civil, political and social – require in order to be satisfied.Likewise, social rights, although usually associated with social benefits (positive rights) also entail duties of abstention. Thus, the right to housing requires respect, not only for the demand of policies that allow access to housing, but also the right not be arbitrarily evicted and not to include abusive clauses in rental agreements or real estate purchase contracts. The right to work is fundamentally related to the protection against arbitrary dismissals, which involves a duty of abstention on the part of companies.

We can affirm, in short, that all rights, whether they are civil, political or social, establish, in one way or another, claimable negative obligations of abstention or respect, as well as positive obligations that require intervention or satisfaction from the public authorities, and, in addition, obligations concerning their protection against violations arising from acts or omissions by private individuals . On the other hand, one of the primary obligations that social rights generate for the public authority involves respect towards a negative duty, grounded in the principle of non-regression, which, according to the Committee on Economic, Social and Cultural Rights of the organisation of the United Nations, obligates public authorities to not adopt policies and, consequently, to not allow rules that would erode, without justification, the status of social rights in the country.

That same principle of irreversibility of social achievements has been articulated in constitutional terms since the approval in Germany of the Fundamental Law of Bonn (1949) as a corollary of the constitution with normative power and of the minimum or essential content of rights recognised therein, and it was extended to various other legal systems, such as the Portuguese, the Spanish, the Colombian, the Brazilian and the French.

The idea of non-regression does not remove from the state the possibility of promoting certain reforms within the context of its social policies, which are prima facie regressive [i.e., regressive at first sight], for instance, by (re)assigning the resources needed for the social inclusion of certain groups who are in conditions of greater vulnerability. Indeed, public authorities always have to demonstrate to the citizens that the changes that they are seeking to promote will be beneficial, in the final analysis, to the greater protection of social rights.

Paying attention to certain criteria, the reasonableness or proportionality of a programme or of an action that is apparently regressive, on the subject of social rights, can be contrasted, in such a way that it would allow the state to justify the programme or policy, without prejudice to the recognition of an absolutely protected minimum core and against which there can be no limitation whatsoever, even if it is "proportionate".

The duty of non-regression on the subject of social rights is related to the duty of progressiveness. This principle authorises public authorities to adopt programmes and policies intended to develop social rights in a gradual way, to the extent that there exist available resources (the reserve of the possible), but does not allow states to defer indefinitely the satisfaction of rights established as a standard. On the contrary, it requires specific actions, beginning with the act of demonstrating that the maximum effort is being made and that the maximum resources available are being used (human, financial, technological, etc.) in order to satisfy, at least, the essential content of social rights and to find solutions, on a priority basis, for groups in situations of greater vulnerability.

In summary, if the idea of the reserve of the possible can be used as an argument for citizenship by governments in a context of positional struggles, in the sense of justifying the lack of materialisation of given social rights, if all rights – whether civil, political or social – are, to a greater or lesser degree, burdensome, and if what is at stake, in reality, is how to decide and with what priority to assign the resources which civil, political or social rights require in order to be satisfied, the political powers, by invoking the reserve of the possible, should always be able to demonstrate that they are making the maximum effort possible (in all fields: financial, personal, technological, etc.) and that they are giving priority to the most vulnerable groups .

On the other hand, social rights are usually characterised as 'vague' or indefinite rights. Thus, formulas such as 'the right to work' would tell us very little in regard to the effective content of the right in question, as well as about what are obligations derived from it, for which reason social rights traditionally entail certain obligations of outcome, but leave the specific instruments of action to achieve them undefined. Civil and political rights, on the contrary, not only stipulate the outcome to be pursued, but also, and at the very least, indicate the means needed to avoid violating them.

Once again, the argument that points to the conclusion that social rights are rights that are difficult to protect is not supported. A certain degree of uncertainty, even in semantic terms, is inherent, not only to the legal language, but to the natural language itself.

In the case of human and/or fundamental rights guaranteed in international treaties or constitutions, this uncertainty can arise from a demand derived from legal pluralism, since an excessive regulation of content and of consequential obligations of a right could cut off the democratic space from the social dialogue in regard to its scope . Thus, it is not the case that the relative openness in the creation of social rights has the effect of making them unintelligible, nor is it the case that uncertainty involves an insurmountable barrier. Terms associated with traditional civil rights, such as honour, property and freedom of expression, are not less obscure than those commonly found within the sphere of social rights. All rights are provided with a 'core of certainty', circumscribed by linguistic convention and hermeneutical practices that are not absolutely static, but instead, dynamic, and which, for this very reason, even contemplate, at any time, the possibility of interpretive development and of 'grey areas'. Within these contexts, if greater efforts made in legislative, jurisdictional and doctrinal activity are devoted to civil and political rights, this does not reflect a greater structural obscurity of social rights, but rather a deliberate and clearly ideological choice.

Nothing prevents, therefore, development of criteria or indicators that outline a more appropriate meaning for a given social right. Rather, establishment of those parameters or indicators is, more than desirable, absolutely essential for monitoring compliance with obligations by the state on the subject of social rights, even for distinguishing, for instance, whether non-compliance of a duty arises from the lack of capability or from a true absence of political will ; or to justify if, in a given legal system, a situation of regression, stagnation or progress on the subject of social rights is produced in a certain period of time. Many of these criteria are what we call 'soft law'; in other words, they merely constitute interpretive standards that, despite the legal structure they possess, are not mandatory in nature. However, their invocation by the intended beneficiaries of those rights and their consideration by the public authorities could help, in an effective way, to define the content of the social rights and the obligations originating from them, whether for public authorities or private individuals.

In this sense, for instance, various courts have recognised the theory about the existence of minimum or essential frameworks on the subject of social rights, mandatory for public authorities as well as for private agents, from the perspective of international law or under frameworks protected by the constitutional codes themselves. Thus, the German Constitutional Court understood that, despite the fact that social rights were not explicitly granted in the Fundamental Law of Bonn, it is possible to derive a law of vital minimum from it, whether linked to the principle of the dignity of man, or to that of material equality, or the social state. In a similar way, the Constitutional Court of Colombia deduced the right to a 'vital minimum' from the text of the Constitution, which consisted of those goods and services needed for a life with dignity, above all in situations of urgency, extending the scope of this 'minimum' to the definition of rights as they pertain to health, housing and social security. Thus, neither the determination of the content of social rights, nor the stipulation of actions required satisfying them, nor the identification of the individuals involved, are issues that fall outside the scope of the jurisdictional bodies. We emphasise here that social rights obligate state authorities, whether through the executive, legislative, or even the judicial branch, but they can also obligate private parties, such as employers, service providers in the area of healthcare or education, and retirement and pension fund administrators. This linkage of private parties to fundamental rights can be the product of recognition expressed by the constituent legislator or it can even derive from different legal principles: from the prohibition against discrimination and good intention clauses up to the principle of protection of the weakest contractual party or of the social function of property.

It is clear that obligations pertaining to social rights are also not projected on all private agents under all circumstances, because not all private individuals responsible for providing goods and services are in the same position of power and superiority in regard to third parties. Thus, the degree of linkage to observation and satisfaction of social rights by private parties is directly and proportionately related to their size, influence and resources. In summary, then, all fundamental human rights, whether civil, political or social, have a complex formulation, part positive and part negative, and all are burdensome, in one way or another, as well as enforceable through the courts. We do not deny that, when dealing casuistically with a given right, certain elements can have a stronger symbolic effect than others, and that rights dealing with social benefits, which require greater financial expenditures, are more difficult to guarantee than other rights that do not require such costs, either because of financial and budgetary issues, or due to the conflictive nature with which the contributions and transfers of resources appear in a context of positional disputes. However, what we wish to emphasise is that none of these problems refers solely to social rights, but rather that such issues are related to all fundamental human rights within their social benefit dimension, whether they are civil, political or social rights.

If what is at stake, however, are not simple revocable concessions, but rather human rights, the powers in effect should observe a set of obligations that cannot be indefinitely postponed: from the duty of non-regression of social rights, up to the adoption of measures intended to protect social rights in the face of possible abuses by private agents within relationships of power, without prejudice to the duty to guarantee, in a permanent way, the minimum content of social rights, as it relates to what can be defined, even culturally, as the existential minimum. From that perspective, attributing a specific expectation of an individual — living his life with dignity, preserving his health and making autonomous decisions about the aspects of his life – to the label of civil rights or of social rights, reveals itself to be nearly a semantic question. A rigorous categorisation would involve admitting that the existence of a continuum between certain rights, without the obligations that they entail, nor the more or less indefinite nature of their formulation, could be converted into real elements of categorical differentiation. Thus, what is most relevant would not be to oppose civil and political rights against social rights, but rather to highlight the contrast existing between rights that can be generalised and exclusive privileges.

All human rights are indivisible and interdependent. Violations of social rights, in this context, are often related to violations of civil and political rights in the form of repeated denials. In the same way that, for the full enjoyment of the right to freedom of expression, it is necessary to co-ordinate efforts to advance the right to education. For the full enjoyment of the right to life, it is necessary to take measures aimed at reducing infant mortality, hunger, epidemics and malnutrition.

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