

## SOCIAL RIGHTS \*

Fernando Atria  
Constanza Salgado

### INTRODUCTION: SOCIAL RIGHTS IN A NEOLIBERAL AGE

Neoliberalism is the form adopted by capitalism today, a capitalism that has freed itself from the constraints imposed by democracy after the Second World War<sup>1</sup>. Neoliberalism not only refers to a way to organize production and distribution; it is also a rationality. As a rationality that has achieved hegemony, it reinterprets most political concepts. Thus reinterpreted, social rights are minimums, that is, benefits that constitute a safety net for the poor and unfortunate, for those who are not able to get in the market what they need. Just as it would be self-defeating for a safety net to interfere with the acrobatics of trapeze artists, those benefits should operate through the market or in ways compatible with it. Social rights, then, do not challenge but legitimise markets, to the extent that they prevent the most brutal consequences of market operations.

---

\* Publicado en Emilios Christodoulidis, Ruth Dukes and Marco Goldoni (eds) Research Handbook on Critical Legal Theory (London: Edward Elgar, 2018).

<sup>1</sup> Austerity has strengthened neoliberalism. Put differently, many Western governments have been using the economic crisis of 2008 as a means for further neoliberalism entrenchment. In this sense, austerity can be understood as neoliberalism's third phase. As Hendrikse and Sidaway assert, "phase 1 comprised the emergence and implementation of proto- and rollback neoliberalism. Proto-neoliberalism was the intellectual project shaped by Hayek and Friedman (Mirowski and Plehwe, 2009) which then underwrote rollback, via austerity, monetarism, and privatization, undertaken by Pinochet (through force of arms), Thatcher, Reagan, and Lange. Subsequently, during phase 2 of rollout, neoliberalism 'gradually metamorphosed into more socially interventionist and ameliorative forms, epitomized by the Third-Way contortions of the Clinton and Blair administrations... in which new forms of institution-building and governmental intervention have been licensed within the (broadly defined) neoliberal project". Reijer Hendrikse and James Sidaway, "Neoliberalism 3.0" *Environment and Planning A* 2010, volume 42, 2037-38. The third phase would be a return to a neoliberalism without human face.

This chapter defends an alternative (though not novel) understanding of social rights, in which social rights aim to emancipate us from neoliberalism<sup>2</sup>.

#### WHAT WE CAN LEARN FROM THE LEFTIST CRITIQUE OF RIGHTS

##### The critique of rights

The emancipatory value of both constitutional and human rights is not uncontroversial. Here we will revisit three important critiques of rights. Only by considering and taking them seriously will we be able to regard social rights in a way that permits the deployment of their emancipatory potential.

The first is the critique posed by Karl Marx. In "On the Jewish Question" Marx takes issue with the view of Bruno Bauer about what is for Jews to achieve political emancipation. According to Bauer, Jews can only be politically emancipated if they abandon Judaism, and, more generally, to achieve emancipation mankind must renounce religion. But Bauer's answer, claimed Marx, failed to understand what political emancipation means, and failed to notice the difference between political emancipation and human emancipation. Political emancipation leaves religion in existence because political emancipation is freedom of religion, not freedom from religion.

Political emancipation, through civil and political rights, eliminates the political character of civil society. However, the removal of political constraints "meant at the same time throwing off the bonds which restrained the egoistic spirit of civil society"<sup>3</sup>. Thus, on the one hand, the achievement of political emancipation means the removal of property qualification for the right to elect or be elected and the abolishment of distinctions of birth, social rank, education, and occupation. But on the other hand, such abolishment

---

<sup>2</sup> See further: Fernando Atria, "Social rights, social contract, socialism", in *Social and Legal Studies*, volume 24, 201), pp. 598-613, y Fernando Atria, Derechos Sociales y Educación: un Nuevo paradigma de lo público (Santiago de Chile, Lom, 2014).

<sup>3</sup> Karl Marx, "On the Jewish Question"

"allows private property, education, occupation, to act in their way - i.e., as private property, as education, as occupation, and to exert the influence of their special nature"<sup>4</sup>. Hence, inequality, unfreedom and oppression persist in the civil state, through material differences rather than legal status differences. Although civil society achieves emancipation from its political constraints, it does so within the particularity of its material existence.

The problem of rights, "rights of man" as Marx says, is not only that they are the rights of an egoistic man, that is, the rights of a particular individual that is left free but alone in the pursuit of her aims, but that they empower each individual differently, depending on material circumstances. Rights consider individuals as equals, blurring the differences that exist in the civil society, the differences that are produced by unequal social power. Material inequalities are irrelevant before the law, but at the same time, they are irrelevant for the law. Rights, therefore, are not instruments that can emancipate the oppressed. On the contrary, they entrench such oppression by reaffirming and naturalizing the social powers of civil society.

Following some of Marx's insights and Foucault's ideas about power, Wendy Brown develops a penetrating critic of rights<sup>5</sup>. Brown tries to answer a crucial question: what is the emancipatory power of rights claims (or rights discourse) for the oppressed? Note that the question is not whether rights as such are emancipatory but whether some articulations of them are or are not.

Brown's account follows from her Foucaultian understanding of power. Power does not exist in opposition to freedom and rights, as is

---

<sup>4</sup> Ibid

<sup>5</sup> Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton University Press 1995); Wendy Brown, "Revaluing Critique: A Response to Kenneth Baynes", in *28 Political Theory* (2000); Wendy Brown, "Suffering the Paradoxes of Rights", in Brown, W., and Halley, J. (eds), *Left Legalism/Left Critique*. Duke University Press (2002); Wendy Brown, "The Most We Can Hope For. . . ": Human Rights and the Politics of Fatalism", in *The South Atlantic Quarterly*, Volume 103, Number 2/3 (2004).

the standard view. Contrarily, power is ubiquitous -it is everywhere and all the time. Power produces subjects and disciplines them through different mechanisms, including rights. Rights, then, might become the instruments of regulation and domination even when they confer recognition or redress of subject-specific injuries<sup>6</sup>. Given this framework, the emancipatory potential of rights claims needs to be assessed historically and contextually. It is by analysing rights contextually that Brown asserts, following Marx, that "rights emerged in modernity both as a vehicle of emancipation from political disenfranchisement or institutionalized servitude and as a mean of privileging an emerging bourgeois class within a discourse of formal egalitarianism and universal citizenship"<sup>7</sup>.

Rights, then, can both emancipate and dominate. The question is when and whether rights "are formulated in such a way as to enable the escape of the subordinated from the site of that violation, and when and whether they build a fence around us at that site, regulating rather than challenging the conditions within"<sup>8</sup>. One of the ways in which rights dominate or regulate is by depoliticizing the conditions that give rise to them. Note here that the claim that rights may produce depoliticization does not mean that rights remove particular issues from public debate because they are "trumps", as in the standard liberal view. This would be depoliticization in a narrow sense. Consider the case of abortion. According to Brown, that the access to abortion has been both discussed and formulated in the United States as a matter of the right to privacy has not resulted in greater visibility of women's subordination. To the contrary, privacy tends to conceal domestic subordination and abuse of women. "Given the historical privatization of women and reproduction, how has the framing of the abortion issue in terms of privacy rights contributed to the invisibility of women's economic and social subordination through child bearing in an inegalitarian sexual and reproductive

---

<sup>6</sup> Wendy Brown (2000) 477.

<sup>7</sup> Brown (1995) 99.

<sup>8</sup> Brown (2002) 422.

order?" This is the appropriate question to ask, Brown says, if we want to assess whether rights claims open paths of emancipation or instead close them<sup>9</sup>. Why not frame women's right to abortion, instead, as a matter of liberty or equality? The value of rights language, then, is not univocal. It can be either politically emancipatory or regressive.

Brown's view regarding human rights is even more sceptical<sup>10</sup>. Human rights are indeed a defence against political power's ability to inflict pain, indignity, cruelty, and death. According to Brown, however, "there is no such thing as mere reduction of suffering or protection from abuse – the nature of the reduction or protection is itself productive of political subjects and political possibilities"<sup>11</sup>. Human rights, as a project of protection against pain inflicted by the state, carry a particular image of justice, and therefore compete and displace other political projects that also aim for justice. Is the international project of justice articulated through the notion of human rights "the most we can hope for"? This is the question that Brown ultimately poses.

Less critical than Brown, but equally compelling, is Samuel Moyn's account of human rights. According to Moyn, there is a clear difference between early rights and human rights<sup>12</sup>. Early rights, such as those declared in United States in 1776 and in France in 1789 were rights belonging to a political community, while human rights promoted a politics against human suffering. What is crucial is that constitutional rights emerged through the construction of spaces of citizenship, and "these spaces not only provided ways to contest the denial of already established rights; just as crucially, they were also zones of struggle over the meaning of that citizenship, and the place where defenses of old rights, like campaigns for new ones, were

---

<sup>9</sup> Brown (2002) 422.

<sup>10</sup> Brown (2004).

<sup>11</sup> Brown (2004) 460.

<sup>12</sup> Samuel Moyn, The last utopia (The Belknap Press of Harvard University Press 2010).

fought”<sup>13</sup>. Human rights, by contrast, are vested on humanity, rather than within a space of citizenship.

Although human rights appear on the scene in 1940s, with the Universal Declaration of Human Rights of 1948, Moyn shows they were marginal at the time. They were not considered the annunciation of a new age. At that time the human rights discourse was not the hegemonic discourse it would become by the end of the 1970s. It is in the 1970s that human rights gained prominence in the global sphere. Human rights become prominent as maximalist utopias declined, emerging “as the last utopia –one that became powerful and prominent because other visions imploded”<sup>14</sup>. However, for Moyn, human rights gained and still have precedence because of their minimalism.

They offer, in fact, a global but minimalist utopia. Unlike social rights under the Welfare States, human rights do not aim at producing distributive equality. Indeed, human rights even perfectly realized, are compatible with radical inequality<sup>15</sup>. According to Moyn, “precisely because the human rights revolution has focused so intently on state abuses and has, at its most ambitious, dedicated itself to establishing a guarantee of sufficient provision, it has failed to respond to – or even much recognize – neoliberalism’s obliteration of any constraints on inequality”<sup>16</sup>. Moyn, however, takes issue with more radical critiques of human rights, which assert that human rights are a neoliberal phenomenon, that there is a causal interdependence between them. According to Moyn, instead, a better way to frame the relationship between neoliberalism and human rights, “is in terms of parallel trajectories, with the tragic consequence that (as some of Marx's own brilliant work implies) structural insight into the root

---

13 Ibid 13.

14 Ibid 4.

15 Samuel Moyn, “Are human rights enough?”, in Vikerkaar 10–11/2017 (Estonian version) / Eurozine (English version) (2017).

16 Ibid 6.

causes of social suffering went missing at the time that it was badly needed"<sup>17</sup> (more on this later).

### Can social rights be emancipatory?

Should we abandon the language of rights? Are we making a mistake when articulating our claims of justice in the language of social rights, by using a language that undercuts the very claims we are making?

A negative answer to these questions cannot ignore the critiques we have seen. We cannot simply ignore that civil rights empower, through property rights, those already powerful, naturalizing their power and its effects. That is why, if they are to be emancipatory, rights have to provide a basis to contest that power and its operation. They have to challenge, in other words, the oppressive power of neoliberal capitalism.

Constitutional social rights can ground this challenge as human rights cannot. This is because, while the latter are based on a politics of suffering that offers no basis to challenge neoliberalism<sup>18</sup>, the former are based on citizenship. This implies a more ambitious project, as we will see in the next sections: citizenship both contains an egalitarian principle and provides a space to struggle for its realization. Social rights, therefore, have the emancipatory potential that is missing in the idea of human rights.

However, such potential has been neutralized by the same powers they aim to challenge. This is due to the fact that the hegemonic rationality of neoliberalism understands them as rights to minimal provisions that, instead of challenging neoliberalism, provide its legitimation discourse. Unlike Moyn, who sees the relationship between human rights and neoliberalism as "parallel trajectories", we can say that human rights are neoliberalism's utopia. Human rights not only

---

<sup>17</sup> Samuel Moyn, "A Powerless Companion: Human Rights in the Age of Neoliberalism", in *77 Law and Contemporary Problems* (2014) 159.

<sup>18</sup> The low baseline that human rights provide, at least from the point of view of social justice, has encouraged scholars to engage for example in more ambitious subjects such as "global justice".

displace other utopias. The point is more radical than that: human rights discourse is the legitimation discourse of neoliberalism, because it provides a discourse that legitimates the minimal justice that neoliberalism can offer. This discourse accommodates the social justice neoliberalism can deliver, because its natural space is not the political, but courts of law.

Contrary to what happens with human rights, the locus of social rights is citizenship, and therefore the political. Thus, they can use political power to challenge social power.

## TWO UNDERSTANDINGS OF SOCIAL RIGHTS

### Social rights as challenges

The emancipatory potential of social rights unfolds when social rights are understood as challenges aimed to transform the oppressive forces of the extant system, today, the oppressive forces of neoliberalism.

In this understanding, there is a progressive continuity between civil, political and social rights. Here, social rights are not less important than civil and political rights as the hegemonic view of social rights states, but its realization. They are "more important" because they entail a more developed principle of justice, a principle already contained in civil rights but not yet fully developed.

The idea that there is a continuity, in which each category of rights displays a more developed notion of freedom is better explained by looking to T. H. Marshall's seminal Citizenship and Social Class<sup>19</sup>. As is well known, Marshall argues that the emergence of civil, political and social rights has to be understood as successive waves that expand the reach of citizenship, thus aiming to overcome the injustices of social class. In his view, this slow but persistent progress would eventually remove the most important differences of social class, and therefore, the most important source of social conflict.

---

<sup>19</sup> Thomas H. Marshall, Citizenship and social class (Cambridge University Press 1950).



This movement was possible because rights were linked to citizenship. In Marshall's view each type of rights, that is, civil, political and social rights, correspond to a different type of citizenship - civil, political and social citizenship. As Marshall noted, citizenship is not only a distinctive property of modern status systems whose most important feature is the egalitarian principle it contains, but also a structure and ideology that provide the main source of whatever solidarity modern societies possess<sup>20</sup>.

Although civil citizenship contained a principle of equality, it was a formal equality, and therefore, it was compatible with capitalism, that "is a system, not of equality, but of inequality"<sup>21</sup>. Civil rights understood citizenship as a formal status and liberty as equal liberty before the law. Because of this, they were indispensable to capitalism, a crucial condition for the development of markets. Here it is important to see the transition between feudal and modern societies as articulated through the notion of civil rights. In feudalism the legal situation of individuals depended on their social status in a hierarchical system. Individuals' social and legal relations, and therefore, their rights and obligations, were derived from the status each one had in this hierarchy<sup>22</sup>. Civil rights implied the abolition of a feudal order in which property determined social obligations and that there were non-contractual relations entailed mutual obligations. In this sense, the emergence of civil rights was indeed a movement "from status to contract"<sup>23</sup>. Because feudalism was the hostis, and the bourgeoisie the agent of change, civil rights mainly meant freedom of contract and absolute property rights. Even

---

<sup>20</sup> David Lockwood, "For T.H. Marshall" (in *Sociology*, Vol. 8, No. 3 (1974) 364-365). According to Lockwood, with the concept of citizenship Marshall provides "the clearest and most cogent answer to the question which was posed but never satisfactorily posed by Durkheim: namely, what is the basis of the 'organic solidarity' of modern societies?" (p. 365).

<sup>21</sup> Marshall (n X) 29.

<sup>22</sup> Manfred Rebindert, "Status, Contract, and the Welfare State", in 23 Stanford Law Review 1971).

<sup>23</sup> Henry Sumner Maine, Ancient Law,

though individuals were now equal before the law, their unequal economic and social power would determine their social relations.

According to Marshall, since the latter part of the nineteenth century a more substantive principle of equality became relevant. Thus, although citizenship "had done little to reduce social inequality, it had helped to guide progress into the path which led directly to the egalitarian policies of the twentieth century"<sup>24</sup>. The twentieth century was the moment of social citizenship. Before, what we would call today "social provisions" was no more than "poor relief", and its goal, as Marshall claims, "was to abate the nuisance of poverty without disturbing the pattern of inequality of which poverty was the most obviously unpleasant consequence"<sup>25</sup>. Poor relief, by its very nature, was not for citizens and did not aim to challenge social class<sup>26</sup>.

It was during the twentieth century that the idea of social rights became available. Now they are rights and not just "social provisions" because they are incorporated as part of the status of citizenship. This changed their goal: they now aimed not only to eliminate poverty, but also to modify the whole pattern of social inequality. Social rights are able to achieve that goal "by a progressive divorce between real and money incomes" which is seen in the main social services such as health and education<sup>27</sup>. What Marshall meant by this distinction is that the inequality of monetary income should not have any effect on the essential spheres of human wellbeing. The differential ability to pay (the inequality of monetary incomes) would not have distributive consequences because the sphere of social rights would not be

---

24 Marshall (n X) 40.

25 Ibid 46.

26 As Marshall explains, the social provisions contained in the Poor Law of England "treated the claims of the poor, not as an integral part of the rights of the citizen, but as an alternative to them-as claims which could be met only if the claimants ceased to be citizens in any true sense of the word... The stigma which clung to poor relief expressed the deep feelings of a people who understood that those who accepted relief must cross the road that separated the community of citizens from the outcast company of the destitute" Ibid 24.

27 Ibid 81.

organized according to the market principle. In these spheres it would be as if all had the same income (real income), because the ability to pay would cease to be a criterion of distribution of social provisions. For Marshall, universality of social provisions was the way in which inequality (of monetary incomes) could be abolished in some specific spheres.

In this understanding, social rights de-commodify (some) human needs, which occurs when their satisfaction does not depend on the market principle and therefore, on the unequal economic power of individuals<sup>28</sup>.

#### Social rights as minimums

Today, instead, the hegemonic view understands social rights as no more than a safety net, that is, as a net that aims to protect individuals from poverty. Social rights are understood as rights that provide a minimal floor of welfare protection. In this conception, social rights are guided by market forces.

As we saw, social rights imply de-commodification because they replace money, and therefore, they break the inequality of income characteristic of neoliberal societies. Rights - not money - is what everyone has in these spheres. If, however, social provisions adopt the form of means-tested benefits which aim only to prevent poverty, they do not replace money; rather, they act as a functional equivalent to it, and therefore perpetuate the consequences of its unequal distribution. Here social rights join civil rights as (part of) the legal architecture of inequality.

It is important to note how this understanding of social rights is built upon an inversion. From a conception that challenges neoliberalism and the market principle by emphasizing the political nature of certain spheres, in which monetary income is different from real income, they are transformed into a notion that ratifies commodification, by providing those who have no access to the market

---

<sup>28</sup> Gosta Esping Andersen, The Three Worlds of Welfare Capitalism (Cambridge: Polity Press 1990).

the means to do so. Rights, then, become "benefits", and benefits do not make markets irrelevant. If social services are meant to provide means-tested benefits, they have to be compatible with the market principle for those who are not entitled to such benefits. This implies that there must be a noticeable difference between benefits that are provided "for free", and commodities that are bought in the market by those who can afford them. This completes the radical inversion: in neoliberalism, those who receive benefits are "privileged", in the sense that they receive free of charge what others must pay for. The privilege of those who can use their monetary income to access better healthcare, education and pension plans becomes their burden. Thus, the claim to introduce or maintain universal provisions is dubbed a "regressive" reform, a case of making (through taxes) the poor pay for services to the rich.

In this understanding, social rights are reinterpreted to promote rather than challenge neoliberalism.

#### SOCIAL RIGHTS' NEUTRALIZATION AND PROGRESSIVISM

The irony is that this reinterpretation of social rights has not been the work of the Cato Institute and other neoliberal thinkers or institutions, but of lawyers and jurists of a "progressive" self-understanding. This is not anomalous; it is in fact what "hegemony" is about: to the extent that a neoliberal rationality is hegemonic, the neutralization comes not only from the right, but also from "progressive" views.

These "progressive" lawyers and jurists begin by denouncing a significant asymmetry between civil and social constitutional rights: while the former are recognized the full consequences that legal thought assigns to rights (in particular judicial enforceability), social rights are treated as non-binding "promises". This denunciation contains a programme: that of showing that there is nothing in the concept of social rights that warrants this differential treatment, which has to be recognized, therefore, as purely "ideological". A true commitment to social rights would imply the abolition of this

differential treatment; its measure of success is then the (judicial) enforceability of social rights.

This is a three-step programme. The first step is to show that civil and political rights have (used to have) a significantly different legal status vis-à-vis social rights: only the former could ground legal action against the government in a court of law. The second step attempts to show that this differential treatment is not justified by any "structural" differences between rights. The conclusion, then, is that the lack of judicial enforceability is the consequence of a (ideologically motivated) devaluation of social rights, which must be rectified by recognizing judicial remedies against infringements of social rights. Progressive legal thought, therefore, understands that the cause of social rights can be promoted by insisting on the "no-difference" thesis. And in this regard, it has been remarkably successful.

But if there are no differences between civil and social rights, then social rights lack any emancipatory content. In this sense, as a progressive programme, its success is its failure: the more this point is established, the more the aptitude of social rights to challenge neoliberalism is lost.

In what follows we will take a closer look at the last two steps of this programme.

#### All rights have some positive content, all rights have costs

Conservative critiques of social rights used to claim that social rights are structurally different from civil rights in that civil rights ground negative duties or duties of non-interference, while social rights ground positive duties, that is, duties to act. And "positive" rights "are subjected to a problem that defensive rights do not have: scarcity"<sup>29</sup>. Since the defining feature of social rights as opposed to civil and political rights is that they are "positive" rights, their judicial enforceability would give courts power to

---

<sup>29</sup> Otfried Hoffe, Democracy in an Age of Globalization (Springer 2007) 47.

decide on the best way to use public funds, i.e. on issues of public policy that ought to be the realm of legislative and administrative authorities and process. On the other hand, since civil rights are said to be "negative", that is, a set of prohibitions directed against state action, their judicial enforceability would imply no such interference, but only that legislative and administrative decisions are constrained by law.

The second step of the progressive programme identified above was to deny such "structural" differences. In recent decades a growing body of work by progressive legal scholars has successfully argued that civil and social rights have negative as well as positive aspects, given that both categories imply the use of public resources. In this view, all rights are positive and all rights have costs, as Stephen Holmes and Cass Sunstein have famously claimed<sup>30</sup>. All rights require the action of the state to protect them. All rights assume the existence of a whole set of institutions to realize them. Even property rights require title registries, police and judicial structures to sanction or provide some remedy when they are breached. The operation of these institutions depends on allocation of significant resources, typically obtained through taxation. Thus, scarcity is a problem faced not only by social rights, but also by civil and political rights because all rights have costs. Although there is a difference in the amount of resources that civil and social rights demand, this would be a quantitative and not a qualitative difference.

This progressive view, however, ignores the crucial political difference between civil and social rights, a difference that changes the meaning of the correlative duties they entail. It is of course undeniable that civil and political rights require adequately funded institutions. However, the mobilization of resources required by the protection of property and formal freedom (freedom of contract) is

---

<sup>30</sup> Stephen Holmes and Cass Sunstein, The Cost of Rights: Why Liberty Depends on Taxes (W. W. Norton 1999). Also see David Garland, "On the Concept of 'Social Rights'", in 24 *Social and Legal Studies* (2015).

qualitatively different than that required by social rights. The point here is not that civil and political rights do not "have costs" and do not need resources for their realization but rather that there is a difference in the interests these resources are mobilized for.

Civil and social rights entail two different understandings of taxes. In the case of civil rights, taxes are tantamount to prices and therefore, they do not break with the market principle. Thus owners can contribute to the funding of a title registry by paying a registration fee to that effect. In this understanding, the burden of taxation is allocated in proportion to the services received by the State. Taxes, then, are the payment each individual makes for the different benefits provided by the State. This is a view of taxes according to the market principle, because it maintains at least the idea of an equivalence between benefit and payment. The reason why taxation and not the market is the instrument for financing these benefits is simple: markets are not able to provide benefits as a consequence of "market failures". Such failures are, in turn, to be explained because institutions such as the police, courts, external defence and the like are "public goods", in other words, goods that the market is unable to provide because they are either non-rival or non-exclusionary (or, indeed, both). Therefore, its financing through taxes is the only way to ensure its provision. But, if the market were able to provide them, taxation would not be needed.

Social rights, instead, require not only more abundant resources, but resources whose justification is different. With social rights taxes are not prices because they break the link between what each contributes and what each receives from the State. When it comes to universal social rights, each contributes according to ability, and each receives according to need. Taxes are no longer justified by reference to the individual interest of the person who pays them, because they deny, even in principle, the equivalence between benefit and payment. Taxes now become justified because they make social rights possible.

Here we can see Marshall's argument, as appropriated above, at work: once universal social rights are recognized, and the public, de-

commodified space of citizenship has expanded beyond the market (formal status of equality before the law: civil rights) and the political process (universal franchise: political rights), we can use this understanding of citizenship, social rights and taxes retrospectively to reassess the idea of civil and political rights. But the progressive move we are considering now goes in the opposite direction: it aims to understand social rights by making them analogous to civil and political rights, to interpret the political content of social rights through the lens of civil and political rights.

To the extent that social rights are challenges to neoliberalism, there is no equivalence between the resources these rights demand and the services they fund. Social rights are not simply "more expensive". Their claim is to counteract the power of money that through markets, neoliberalism has extended almost to every sphere of human life.

#### Judicialization of social rights

"Social rights are actionable rights", claim progressive legal scholars<sup>31</sup>. Especially in Latin America, for these scholars, the judicial enforcement of social rights is seen as the most important battle to be waged. But this is a mistake.

The reason is that judicial enforcement transforms social rights, neutralizing them. Judicial institutions are unable to articulate the transformative content of social rights. This is because they are claims based on distributive justice, and therefore, they cannot be contained by the structure of adjudication, as determined by the logic of corrective justice<sup>32</sup>. Since the transformative content of social rights cannot be articulated through adjudication, they can only be enforced if they are transformed, deprived of their transformative content. This is why "the institutions most directly associated with

---

<sup>31</sup> See, for example, Víctor Abramovich and Christian Courtis, Los Derechos Sociales como Derechos Exigibles (Madrid, Trotta 2002).

<sup>32</sup> Claudio Michelon "Introducción: derechos sociales y la dignidad de la igualdad", in 4 Discusiones (2004) 12.



civil rights are the courts of justice"<sup>33</sup>. It is a mistake to think of courts as instruments to protect whatever one wants to protect. They serve to protect what they are capable of protecting. When a plaintiff claims her right to healthcare, the original idea of healthcare as a de-commodified sphere, located in the realm of citizenship rather than that of the market, disappears and must be reformulated into a claim that can be grasped by a court of law. It then becomes a particular plaintiff's claim against the State, seeking a particular benefit<sup>34</sup>. Social rights do not get to see their day in court; what sees its day in court is an individual's claim that her interest be served, even at the cost of everyone else's interests. Courts, then, are not the most appropriate forum for addressing matters of distributive justice.

Additionally, decades of litigation have shown that social rights adjudication does not bring with it any deep social transformation. Indeed, there is a clear disconnection between what the enforceability of social rights is supposed to achieve and what it has in reality achieved<sup>35</sup>. Judicial enforceability is supposed to favour the most disadvantaged members of society. However, the empirical reality shows that ultimately it does not favour disadvantaged groups but rather middle and upper classes<sup>36</sup>.

Perhaps for this reason authors like Tushnet and Sunstein argue in favour of a weaker role for courts regarding social rights<sup>37</sup>. Judicial enforceability here is important not on account of its potential for securing results in a particular case. Rather, it helps to identify and highlight problems and shortcomings in the way in which social rights are fulfilled, leaving policy decisions to political and

---

<sup>33</sup> Marshall (n X) 11.

<sup>34</sup> Fernando Atria, "¿Existen derechos sociales?", in 4 Discusiones (2004) 45.

<sup>35</sup> David Landau, "The reality of social rights enforcement", in Harvard International Law Journal, Vol. 53, Number 1 (2012) 403

<sup>36</sup> Motta "Harming the poor through social rights litigation: lessons from Brazil". In: Texas Law Review, Vol. 89 Issue 7, (2011); Jeff King, Judging Social Rights (Cambridge University Press 2012) 83 y 84.

<sup>37</sup> Sunstein (n X); Mark Tushnet, Weak courts, strong rights (Princeton University Press 2008).

administrative bodies. This "weak form" of justiciability, a "dialogical" form as they call it, would be the best way to balance the enforcement of social rights with the lack of both democratic legitimacy and institutional capacity of courts. Enthused by the decisions of the Constitutional Court of South Africa (especially in the case South Africa v. Grootboom), Tushnet, Sunstein and others have seen these rulings as a form of enforcement appropriate for social rights. However, as Landau points out, this weak form of judicial enforcement has not really been used outside of South Africa, and even there has not been entirely effective<sup>38</sup>. The hopes that both Tushnet and Sunstein have for this form of justiciability seem not well founded in light of its minor transformative consequences. This stems from the fact that institutional forms are not totally pliable. Consequently, it appears difficult to escape from the classic model of justiciability, in other words, a contest between plaintiff and defendant as to the legitimacy of the claim of the former against the latter. The reason is that, as we saw, this is the paradigmatic form in which courts discharge their function and for which they are institutionally better prepared.

But the judicialisation of social rights also juridify social rights language, narrowing its horizon. To see how this is the case it is useful to consider Robert Alexy's theory of constitutional rights, possibly the most influential and well-known theory in Latin America<sup>39</sup>. In Alexy's theory, the content of rights is always approached from the point of view of judicial control. In this account, courts only have power to control social rights policies when they are below the minimum. For Alexy this minimum results from balancing all the possible values that could be involved. On the one hand, such policies are required by the principle of freedom; on the other, both the democratic principle and the opposing principles (such as property

---

<sup>38</sup> Landau (n ).

<sup>39</sup> Robert Alexy, Teoría de los Derechos Fundamentales (Centro de Estudios Constitucionales 2008).

rights) must be affected "in a relatively small extent"<sup>40</sup>. Such conditions are met, we are told, "in the case of minimum social rights, that is, in the case of a vital minimum, a simple house, scholar education, vocational training and a minimum standard of medical assistance"<sup>41</sup>. Notice how form becomes substance: the methodological approach that underlies Alexy's theory of constitutional rights determines his understanding of social rights. What social rights demand is what is legally required; what is legally required has to be judicially enforceable; what is judicially enforceable is the minimum standard, otherwise the opposing principles are violated. Hence, what social rights demand is a minimum provision. Social rights become rights to minimum provisions not because of any substantive argument about their true political content, but only because it is necessary for them to be judicially enforceable.

#### Social rights' utopia?

The fact that the neutralization of social rights arises from the progressive side is illustrative of our current political predicament. Today, indeed, social rights as challenges to neoliberalism are deemed utopian. Certainly, they "can function as ideals, as symbolic weapons, and as mobilization devices, and 'history-on-our-side' teleologies - such as Marshall's - may help shape values, create convictions and build public support"<sup>42</sup>. But social rights as challenges would not be "real" social rights. Once we acknowledge that the advent of neoliberalism showed that history was not, after all, on our side, so the argument goes, we must abandon any maximalist understanding of social rights.

But Marshall's understanding of social rights, or at least our interpretation of it, did not imply a teleology, and thus it was not proven wrong by the fact that the crisis of the welfare state was followed by neoliberalism. Social rights as challenges are deemed

---

40 Ibid 454.

41 Ibid 455.

42 Garland (n x) 33.

utopian because neoliberalism has weakened the political. With a toothless democracy, social rights as minimums seem to be the best game in town. Its alternative seems not to be universal social services, but rather, no social provisions at all.

## CITIZENSHIP, DEMOCRACY AND NEOLIBERALISM

### Retrospective self-understanding

Neoliberalism has not proven Marshall wrong. Or at least not in our interpretation. We do not take his idea of waves of rights, or more precisely, of a certain continuity between civil, political and social rights as proposing a sort of teleology (a "history-on-our-side" teleology).

The importance of our appropriation of Marshall's argument is to be found in the idea of movement. A movement where there is neither a pre-defined direction nor a final point driving it. And it is the idea of citizenship what makes this movement possible. It provides both a principle of justice, the principle of equality, and a space - the political space - to claim for the realization of such principle in different spheres. Marshall shows what is for a principle of equality (or, what is the same, of equal freedom), a principle that was already contained in the idea of civil rights, to develop. That is why, according to Marshall, civil, political and social citizenship do not contain three different and independent principles/ideas, but one that each time is more fully realized.

Marshall does not articulate this realization theoretically, but rather his aim is to show that this is a better way to understand how citizenship, in fact, developed. "The limit of my ambition has been to regroup familiar facts in a pattern which may make them appear [...] in a new light", says Marshall in explaining how political and subsequently social citizenship was built from the scaffoldings that previous rights made possible<sup>43</sup>.

---

<sup>43</sup> Marshall (n X) 45.

Equality or more precisely, equal freedom is what civil, political and social citizenship make possible. Civil rights contains a formal and individual conception of equal freedom: freedom means that individuals have no obligation to each other beyond those obligations they assume through contracts. Modern markets are the institutional framework in which this freedom unfolds. But contractual obligations do not suffice to make common life possible; some legal rights and duties are also necessary. However, now that equal freedom protects us from imposed obligations, for law to be legitimate, it must contain everybody's will. Political rights and democratic institutions expand freedom by making political freedom a legitimatory principle of law, and therefore, a legitimatory principle of power. But both freedom of contract and freedom to partake in the formation of the common will are still formal, to the extent that they are secured by legal rules that equally distribute a given status. From the point of view of political rights, however, freedom can no longer be understood as individual: the democratic principle implies a collective understanding of freedom. Social rights, in turn, challenge the formal conception of freedom, securing the material conditions for autonomy. If autonomy (freedom) requires certain material conditions, then equal freedom cannot be understood as equal formal freedom. Rather, it must be understood as securing equally and for all these material conditions.

The movement that Marshall described allows for retrospective self-understanding rather than a predictable fixed path. Today, when it is easier to imagine the end of the world than the end of capitalism, as Fredric Jameson once said<sup>44</sup>, it is extremely important to think Marshall's movement as a movement that is pushed by resistance to commodification rather than pulled from an articulable image of a post capitalist ideal<sup>45</sup>. Now that we can no longer describe

---

<sup>44</sup> Fredric Jameson, "Future City", 21 New Left Review, 2003.

<sup>45</sup> In fact, it is perfectly possible that there is progress in some sense without a predefined direction. Such is the case with Darwinian evolution, in which there is progress without teleology. Here there is

such an ideal, what is relevant is the idea that drives the movement, controlling, to a certain extent, its direction.

#### The tension between private property and citizenship

Upon closer examination, we can see that Marshall's movement toward social rights contains a tension<sup>46</sup>. This movement, then, is better described as a movement in constant tension, which translates into a permanent struggle between capitalism and citizenship. That Marshall saw this tension is evident in his statement: "in the twentieth century citizenship and the capitalist class system have been at war"<sup>47</sup>.

Aneurin Bevan, the founder of the NHS, explained this tension by saying that "society presented itself as an arena of conflicting social forces and not as a plexus of individual striving. These forces are in the main three: private property, poverty and democracy. They are forces in the strict sense of the term, for they are active and positive. Among them no rest is possible. The issue therefore in a capitalist democracy resolves itself into this: either poverty will use democracy to win the struggle against property, or property, in fear of poverty, will destroy democracy"<sup>48</sup>. Bevan's idea is better expressed by using the term "citizenship" instead of "poverty"<sup>49</sup>. With this in mind, Bevan's passage gives us a clue if we understand it in the sense that either citizenship will use democracy to win the

---

a process pushed from the starting point rather than pulled towards a final point.

<sup>46</sup> In Emiliios Christodoulidis' words, "for the radicalized Marshall, then, continuity is understood as antinomic or not at all". Emiliios Christodoulidis "Social Rights Constitutionalism: An Antagonistic Endorsement", in Journal of Law and Society, Vol 44, N 1.(2017).

<sup>47</sup> Marshall (n X) 29. The same statement is then repeated at 68.

<sup>48</sup> Aneurin Bevan, In Place of Fear (Heinemann 1952) 2-3.

<sup>49</sup> Emiliios Christodoulidis called our attention to the fact that this move from "poverty" to "citizenship" is problematic. While the idea of citizenship already implies some dimension of political empowerment, poverty is mute.

e, and is pa because the idea of citizenship implies transition from

struggle against property, or property, in fear of citizenship, will destroy democracy.

A segment of the left always thought that "to win the struggle against property" meant to do away with private property, that is, expropriation. But there was an alternative: to attack the unequal power that property accords owners. In this case, the solution to the tension between citizenship and private property is not expropriation but rather social rights.

One of the main ways in which the unequal power deriving from private property deploys is in action in the market, because the market is a space in which each agent is expected to use whatever power she possesses in her own benefit. Social rights as a challenge to neoliberalism offer a solution to the tension between citizenship and private property by de-commodifying spheres of life, so that in these spheres the unequal power of private property will no longer imply inequality. We have already seen that Marshall understood the aim of social rights to be "a progressive divorce between real and money incomes. This is, of course, explicit in the major social services, such as health and education, which give benefits in kind without any ad hoc payment [... .] The advantages obtained by having a larger money income do not disappear, but they are confined to a limited area of consumption"<sup>50</sup>. Simply put, the opposition between the equality principle that citizenship contains and the unequal power of private property (of "monetary income") is faced not through the abolition of private property, but through forms of de-commodification of some spheres of common life, so that the unequal distribution of private property does not manifest itself in these spheres. Inequalities do not disappear, but they are restricted to a limited area of consumption.

It is important to note here that the issue at hand is not strict equality but the unequal power that property gives<sup>51</sup>. The expansion of

---

<sup>50</sup> Marshall (n X) 81.

<sup>51</sup> Social rights are not concerned with what we might call "brute" equality, i.e., equality of monetary income. The fundamental problem

markets is one measure of that inequality. Social rights challenge that inequality by creating de-commodified spheres. Thus, although social rights do not abolish wage labour markets, as they expand they are able to counteract, to some extent, not only neoliberalism, but also capitalism (witness the current discussion on universal basic income).

In brief, social rights as challenges aim to create spheres of equality through the exercise of political power against the social power of private property.

#### Neoliberalism against democracy: what is left for the left

We saw that the movement towards social rights relies on a tension, on a struggle between "conflicting social forces". Thus citizenship is not only an egalitarian idea but also an agent (the citizenry) that struggles for the realization of this idea. Likewise, private property and more specifically, capital is also an agent that struggles for its own interests.

Bevan said that this tension is resolved, on the side of capital, by destroying democracy ("property, in fear of poverty, will destroy democracy"). But just as the idea of social rights was an alternative way to resolve this tension, on the side of citizenship (alternative, i.e., to expropriation), neoliberalism is an alternative to the destruction of democracy. For destroying democracy could mean either destroying it by violence (as in Chile in 1973) or weakening it to the point in which it becomes powerless vis-à-vis capital. Today it is difficult to deny that this latter possibility is the one chosen by capital. As Wolfgang Streek explains, in the early 1970s, capital

---

we face is not inequality of material goods, but rather the power that property gives, that turns freedom into privilege and makes the many dependent on the few. Equating the idea of equal freedom that underpins social rights to some desiderata of brute equality is usually the first move of an argument designed to discard it as "utopian". For this reason, neoliberal authors discuss inequality of monetary income, ignoring inequalities of power (freedom). This can be seen in their curious fixation with the justification of fortunes made by sportsmen/women, rather than by corporate fat cats.



began to seek to release itself from the "chains" imposed after the Second World War, by citizens through democracy. What is striking is that, as Streeck notes, "it was not the masses that refused allegiance to post-war capitalism and thereby put an end to it, but rather capital in the shape of its organization, its organizers and its owners"<sup>52</sup>. However, not even capitalism's critics were able to see that neoliberal capitalism was coming. According to Streeck, critics underestimated capital both as a political actor and as a factual power capable of generating strategies for its liberation. And they also overrated the capacity of democracy to counteract the power of capital. Much of that error lies, for Streeck, in having understood capital as an object rather than as an agent, as a means of production rather than as a class with power and interests<sup>53</sup>.

Neoliberalism is capital gaining the upper hand in the struggle against citizenship. This implies a weakening of democracy. The progressive reinterpretation of social rights that we criticise can be explained as the consequence of the fact that the strength of democracy has been weakened to the point that it is unable to prevail against capital. Since capital cannot be politically opposed, court-centred legal action is what is left for the left. But this is like waving a white flag.

The alternative is to devise creative forms of political action to advance the cause of social rights. Social citizenship and democracy have interconnected trajectories.

---

<sup>52</sup> Wolfgang Streeck, Buying Time. The Delayed Crisis of Democratic Capitalism (Verso 2014) 16.

<sup>53</sup> One of the most important conclusion of Streeck's book Buying Time, is that it is no longer possible to theorize about democracy without considering capital as a fundamental actor. Today it is not possible to make democratic theory without understanding that the economy, especially in its capitalist configuration, is a space of power. As Streeck points out, "unless the sociology of social crises and the political theory of democracy learn to conceive of the economy as a field of social-political activity, they inevitably fall wide of the mark" Ibid xv.