SOCIAL RIGHTS AS FUNDAMENTAL HUMAN RIGHTS:
THE ABSOLUTE NECESSITY FOR THEM AND THEIR GUARANTEES

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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 rights (economic, social and cultural) 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 state. 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

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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 trivialization (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 fulfillment of civic responsibilities, essential for democracy, requires economic and social reforms and the reshaping of mental attitudes for the effective removal of the obstacles which 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 conceptualize content and techniques which allow reconsidering social rights and their guarantees.

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. 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 reconstruct certain premises in the field of law towards a body of law intended, not only as an instrument of social defense against abuses, but also as an instrument intended to safeguard citizenship itself in an inclusive context and permanent creation of a more human, more just and more democratic model of development, by implementing particular acts aimed at the full exercise of social rights, through all means possible and using available resources to the maximum extent.

What we are seeking in this study, then, is to shed light on the understanding that social rights are fundamental human rights, by contributing to a proposal to be offered for creating and demanding, politically and legally, certain social rights envisioned from another place, in a critical and humanistic way, as well as to help in some way so as to be able to overcome the social apathy of our times through an emancipatory and transformative process of rebellion.

1. INITIAL CONSIDERATIONS: ON HUMAN RIGHTS

One of the great advances of modern social constitutionalism is that it has bestowed upon the international legal status of human rights a binding power, a fact which 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 honored 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 – those rights which 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 notable 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 special 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

[1] This tendency seems to have begun with the Portuguese Constitution, in its well-known Article 16, which establishes that "Os direitos fundamentais consagrados na Constituição não excluem quaisquer outros constantes das leis e das regras aplicáveis de direito internacional" ("Fundamental rights guaranteed by the Constitution do not exclude any other rights established in the applicable laws and rules of international law") and that "Os preceitos constitucionais e legais relativos aos direitos fundamentais devem ser interpretados e integrados de harmonia com a Declaração Universal dos Direitos do Homem" ("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 recognizing 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.

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 who 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, under any pretext, to human rights treaties in such a way that one state may not allege another's noncompliance 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].

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

[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, No. 14038/1988.

[4] Article 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, page 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."

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 which 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[5]when they are institutionalized),without detriment to the level of priority which other treaties may have in the internal system of law. This means that a constitutional system of law can grant constitutional rank in to international human rights laws, without that necessarily meaning that all treaties have such priority[6].

[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 itself, which, while it does impose on states the obligation to promote universal and effective respect for rights and human liberties, contains the expression "fundamental" in Article 8, when referring to the rights conferred upon the individual by the Constitution or by law. In Article 16.3, the family is defined as the natural or "fundamental" nucleus; in article 21.3, the people's will is described as "the foundation" (basis) of authority; and Article 26.2 specifies that education ought to be directed at "strengthening respect for the rights of man and fundamental liberties". Moreover, the preamble also provides for "human rights and fundamental liberties". But, although the expression "human rights" is absolute, in other words, it concerns man regardless of all contexts and apart from any other specific circumstances, the expression "fundamental rights" it is, on the contrary, plausibly open and relative. In other words, what fundamental rights are, from the point of view of their content is, obviously a decision that is above all ethical: for a set of rights, it can (or should) say that they are fundamental. If we assume the absolute inviolability of human rights in any state or culture, we can also seek the inviolability of the so-called fundamental rights, but only insofar as they are considered "fundamental", see Ferrajoli (2005, page 76 and following pages), Humphrey Marshall and Bottomore (1998); and Peces-Barba 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".

On the other hand, and directly related to the foregoing, this favorable 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 recognized by civilized nations are one of the acknowledged sources of international law (as indicated in Article 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 generalized 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, energized by both international and constitutional law, the interpreter of which has forced to choose, by virtue of the principle of advantages (*pro homine*), the standard most favorable to the dignity of persons[10].

[7] Cf. Méndez Silva (2002, page 374 and following pages).

[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 recognized by the litigating states; b) international custom as proof of generally accepted practice with the force of law; c) general principles of law recognized by civilized 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, page 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 which 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 without having to necessarily engage in a debate as to whether the constitution favors 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, then it becomes clear that the legal thinker must apply international human rights regulations internally[12].

But what type of legal system do we mean when we speak of "human rights"?

"Human rights", an expression which 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, ethnicity or nationality. From a more relational point of view, human rights have been defined as the conditions which allow an integrated relationship to be created between the individual and society allowing individuals to be persons, identifying with themselves and with others[14].

Human rights are usually defined as inherent to mankind, irrevocable, inalienable and non-waivable[15]. By their own definition, the concept of human rights is universal (for all human beings) and egalitarian, as well as incompatible with systems based on the

[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 y Vega (1996, page 42 and following pages).

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

[14] Cf. Morales Gil de la Torre (1996, page 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 which occur between social groups, as well as the institutions in which they are articulated and the logic which inspires social relations. These transfers of power may or may not be effective and may be more or less precarious. For Herrera 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 this sense, see Thierry *et al.* (1986).

superiority of a caste, race, people, group or social class and, by extension, also incompatible with systems of classification or hierarchy of persons. Human rights, heirs of the notion of natural rights, are an idea with great moral power and have growing support: the doctrine of human rights extends beyond law and forms a minimum ethical and moral basis, which should lay the foundation to govern the modern geopolitical order[16].

Human rights have gone from being considered a universal abstract, inherent to "ius-naturalism", towards the particular features of particular circumstances, which correspond to positivization in states, so as to end up as a concrete manifestation of the universal, ascribed to positivization at the international level[17]. We speak of abstract universality because human rights are predicated for all human beings, but the materialization of its sense is still precarious. This last aspect is the one which evolves towards specific referents which, in the end, are universalized. When human rights were considered only as "natural" rights, the sole defense possible against their violation by the state was what has been referred to as the "law of resistance". Later, constitutions which recognized the legal protection of some rights caused the right of resistance to be transformed into a positive right in order to bring a legal action against the state. In the end, universal declarations arose for the purpose of protecting those citizens in states which did not recognize human rights as rights worthy of protection.

So it is this way that human rights are a product, not of nature, but rather of human civilization (culture). Moreover, as

[16] Beyond the positivist theories reviewed by authors such as Hans Kelsen, Alf Ross, Herbert Hart and Norberto Bobbio, the dualist theory of rights formulated by Peces-Barba (cf. Ramos, 2006), which incorporate some elements from theories of Natural Law [Ius-naturalism], conceives of rights as the crossroads between the legal and the ethical, and as a legal translation of the values of dignity, freedom and equality, while simultaneously serving as legitimators of government. The theory of legal protectionism or guarantism, advocated by Ferrajoli (1990), affirms that the state of law possesses both a formal and another tangible form of legitimizing: formal legitimizing refers to the empire of law, while tangible legitimizing, refers to the link between all the powers of the state and the satisfaction of fundamental rights, of which, according to the Italian jurist, human rights are a subclass. For further considerations on this point of view, see Torre Rangel (2006, page 167 and subsequent pages).

[17] In fact, human rights have a growing legal force when they are integrated into constitutions and, in general, the legal systems of states, as well as within the scope of the international community, based on its recognition of numerous international treaties – those of a general nature as well as of particular, universal, and regional nature – and, based on the creation of jurisdictional or quasi-jurisdictional entities or those of any other type required for their defense, promotion, and protection. Furthermore, due to their acceptance, various human rights are considered part of international common law, as international bodies such as the Committee on Human Rights or the International Court of Justice, have affirmed.

clearly historic rights, they are always changing, in other words, they are capable of transformation and expansion: thus, in the initial stages of positivization, emphasis was placed on documents and mechanisms of general protection; on the opposite hand, during the last decades, advances are projected in specific documents which intervened on more concrete matters and protected specific populations.

So then, the Universal Declaration of Human Rights has become a key reference in the ongoing ethical and political debate, and the language of rights has been deeply incorporated into the collective consciousness of many societies. Nevertheless, there exists a permanent debate within the spheres of philosophy, political science and law about the nature, foundation, content and even the existence of human rights, and whether or not such rights are independent of time and of social and historical contexts. Problems also arise as to their exercise, since a large disproportion exists between violations that have occurred and the guarantees offered on the state level. Moreover, the various modern debates on the validity and legitimacy of great proclamations on human rights usually oscillate between the issue of the universal scope of rights labeled as human and the particular nature of that label when referring to the singular historical experience of each society, group or culture, its diversity and its references of identity and memory, and even its forms of expression and modes of creating, doing and living.

In this way, the label of the universal rights of man and of citizens seems to belong to the space of Western culture, at least, since the last decades of the 18th century. Declarations which enunciate human and universal rights are deeply characterized, then, by the contrast between the universal and the particular, as well as by the Eurogenic-Eurocentric duality. The label of human rights exists with the intention of being valid for all and any human beings under any circumstances. In this sense, its universal nature removes human beings from the concrete (historic) reality in which they actually live. If, in fact, the universalizing argument accepts the European origins of the label of human rights without greater objections, as stated and reproduced since 1776 with certain variations[18],

[18] On May 15, 1776, the Convention of Virginia declared the independence of the North American colonies from the British Empire. Shortly afterwards, it adopted the Declaration of Rights of Virginia, a document which influenced the Declaration of Independence and the Declaration of Rights. The Declaration of Virginia is the first document in Western history which contains a specific catalogue of the rights of man and of the citizen. Another transcendent impulse in the cause of human rights occurred in Paris, after the historic sessions of 1789, with the Declaration of the Rights of Man and of the Citizen, adopted by the French Constitutional Assembly and accepted by the King of France on October 5, 1789, and with the Declaration of 1793, which the French National Convention approved on June 23, 1793 and which was incorporated as the preamble in the Constitution of June 24, 1793. With the French Revolution,

then it does not admit under any circumstances that this universal nature can be relativized, a position which is grounded in a metaphysical premise: European experience would allow the complete inducement of the concept of "man".

So it is that the particular (or culturally relative) perspective of human rights would be restricted to the circumstance of origin, the assertion that the experience originating in Europe and its world-culture in the last decades of the 18th century colored in a definitive way the label of rights of man. Under such a premise, and given the successful itinerary of the systematic adoption of the Eurocentric methodology of human beings, especially since 1948[19], the elements which define and distinguish the cultural particularities of each group or society usually happened to be perceived as "different" or "foreign"[20].

This debate, if not a true dilemma, became constant in the last fifty years by virtue of the moral and political shock of the European authoritarian political systems of the 20th century and the atrocities committed by them, which are still felt to this day and which have given rise to the creation of the United Nations (U.N.) as the international political forum based on the universal proclamation of human rights.

In truth, the history of human rights is the history of a "macro-ethics of humanity"[21], as yet unedited and still being developed in our time, whose practical relevance has been recognized, however, within various geopolitical, social, and cultural spheres. The great controversies which this same history reveals, indicate, moreover, in what way the philosophical issues surrounding its foundations, apparently abstract despite its distancing from empirical reality (or, perhaps, because of it), may have great value for that reality.

This historical verification can, perhaps, explain the passion with which certain philosophers criticized human rights, while other thinkers celebrated them with enthusiasm as the most important legacy that the Western spirit has left to a humanity who is slowly

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the castle of feudalism crumbled with all its privileges and a new understanding of law emerged, based on the idea that all men are equal by nature and before the law.

[19] On December 10, 1948, the General Assembly of the United Nations approved the Universal Declaration of Human Rights.

[20] Cf. Kluxen (1997, pages 11-26) and Bielefeldt (1997, pages 256-268).

[21] In this sense, see Apel (1992).

progressing forward[22]. In fact, the adoption of the Universal Declaration of Human Rights in 1948 by the General Assembly of the United Nations produced profound changes in the international legal order. Moreover, it also influenced numerous constitutions all over the world and within conditions of relationship under which sovereign states to this day act as collective agents in an international arena, with great practical success[23]. Since then, there have been so many and such diverse resolutions of the United Nations Organization, official declarations and national constitutions which refer back to this declaration, that an important part of their content – fundamental freedoms and economic, social and cultural rights of man in the face of the power of the state – can be considered an essential component of international law.

Human rights begin, both historically and in the rational order of their establishment, as a finite set of moral duties, for which (on behalf of everyone and for all mankind) universal validity is sought after. This is consonant with the premises of that formulation, that it is possible to overcome the particular nature of human rights until a more universal claim can be asserted.

To the particular nature of content, which gives us reason to universalize those moral duties, belong certain dramatic collective experiences of injustice and destruction of life and other innumerable humiliations, which were revealed – and sometimes were concealed – over the course of recent historical processes, experiences and times which should never be repeated. We are speaking here about bitter, deeply degrading experiences for mankind[24]. In this way, the collective experiences of extreme suffering, called "sad stories"[25], are deeply ingrained in the history of the 20th century, prodigious in wars,

[22] In this sense, see Waldron (1987).

[23] In this sense, see Maxwell (1990) and Jones (1989).

[24] Cf. Margalit (1997, page 141 and following pages).

[25] One of the more well-known examples of these experiences are the forced work camps of Nazi Germany, intended to hold in custody, if not outright extermination, of ethnic and religious minorities and political prisoners, as well as the concentration camps of Dachau, Buchenwald and Sachsenhausen, in Germany, Mauthausen-Gusen, in Austria, and Auschwitz-Birkenau and Treblinka, in Poland. In Spain, the experiences of suffering caused by the regime of Franco left wounds which, even today, continue to be open: Franco's regime, between 1936 and 1947 made use of forced labor camps, if not of disguised extermination, intended to guard not only common prisoners, but also political prisoners and sexual minorities, in camps such as Los Merinales in Sevilla; Miranda de Ebro, in Burgos; and Castuera, in La Serena.

dictatorships and genocides from start to finish[26], subjects of successive moral interpretations, and make up the basis of the so-called negative "moral wisdom"[27]. For those who possess that knowledge, the imperative urgency with which to implant protections needed to avoid repeating those experiences of persecution and collective suffering in the form of a regulating framework of a legal system of positive law[28].

This being the case, a current important criticism of human rights, certainly to be taken seriously and until now, neither resolved nor silenced by the ongoing crisis of modern capitalism (perhaps even dramatically aggravated by the invasion of Western countries to countries in the Persian Gulf), states that the Declaration of 1948 systematically glorifies representations of the heritage of values of "Western culture", secularized and liberal, with special emphasis on the individual. Therefore, the claim to universal validity of human rights would be an ideological perpetuation of colonization: the globalization of the legal documents of modern human rights started in 1948 would not only be Eurogenic (there can be no doubt about that), but also equally and irreparably Eurocentric.

[26] The 20th century is notorious for its prodigious numbers of genocide, from start to finish: between 1904 and 1907, the Germans exterminated the Herero people in Southwest Africa (Namibia), inaugurating the first genocide of the 20th century, which, alongside other colonial "policies" served as a model for the genocide of the Jews and other ethnic minorities by Nazi Germany; now, at the end of the century, a massacre occurred in Rwanda in 1994, which lasted 100 days and left 800,00 dead, when French soldiers, sent by the United Nations to establish a protected zone in that country, permitted Hutu extremists to enter Tutsi minority camps. These "sad stories" did not start, however, in the 20th century: genocide has colored the entire experience of European colonial expansion, although it has only collided with the European peoples when, at the height of the struggles which had originated in industrial capitalism of the 20th century, it managed to reach European soil itself. Thus, it can be said that the plantations implemented on such a large scale by Europeans in their colonies were little more than true concentration and forced labor camps and they served as a laboratory for what some authoritarian regimes would later try to implant in Europe itself from the 1930's on, including the Franco and Nazi regimes. But these experiences were radicalized in the 20th century: as Bauman (1998, page 32) points out, the Hobbesian world of the Holocaust did not emerge from a completely unmarked grave, but rather appeared riding in a vehicle of industrial production, wielding weapons which only the most advanced science could supply and following a route laid out by a scientifically administered organization. Modern civilization (and industrial capitalism) was not the *sufficient* condition of the Holocaust, although it was, truly, a *necessary condition*.

[27] That observation is based on the so-called "evolutionary psychology of morals", according to which we can admit that the coercive force of moral duty imposes on the individual forms of behavior learned in these "sad stories". In this sense, see Edelstein and Nunner-Winkler (1998).

[28] According to Habermas (2003, page 124), in the majority of articles referring to human rights, the echo of injustices suffered resounds, which comes to be denied, so to speak, word by word.

The 1981 Banjul Charter on Human Rights (African Declaration of Human Rights) begins with the rights and duties of man and peoples. In this sense, the well-known debate in Valladolid between Bartolomé de las Casas and Juan de Sepúlveda and, afterwards, the legalistic-theological academic studies of the School of Salamanca, directed at finding the location of indigenous Americans in the chain of being and in the social order of an emerging colonial state, culminated in the enunciation of the "rights of peoples", the ancestor of the rights of man and citizens, which allowed the indigenous peoples to be classified as vassals of the King of Spain and servants of God[29]. In addition, the Universal Declaration of Human Rights gives as the basis for the legal authority of human rights formulated in its various articles: the human dignity of human beings who have the capacity for morality[30]. The Banjul Charter on Human Rights adopts an argument of the same type, but changes the subject of such rights in Articles 19 and 20[31].

Interpretation of the legal content of texts proclaiming human rights depends decisively, then, on the human dignity of individual personal beings, capable of morality; that is the spirit of the traditional understanding of human rights for political liberalism, which concentrates all its relevance on the defense of the individual against the state and on the rights of political participation of that individual within the former.

Another aspect of that dependency involves whether it should be placed or not, at the center of the deciding principles about the relevance of human rights of concrete ethnic and political communities – "peoples" – and their right to a balanced, participatory and distributive development of resources. That is the perspective that characterizes the Banjul Charter on Human Rights, having a communitarian and developmental vision of the society and the economy.

[29] Cf. Mignolo (2003, page 84).

[30] "Article 1. All human beings are born free and equal in dignity and rights, and, endowed as they are with reason and conscience, and should behave fraternally towards each other".

[31] "Article 19. All peoples shall be equal: they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of one people by another. Article 20. 1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy which they themselves have freely chosen. 2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community. 3. All peoples shall have the right to the assistance of states which are parties to the present Charter in their struggle for freedom against foreign domination, be it political, economic or cultural".

A modernizing revision of human rights which resorts to critical argumentation and social and international agreement, by reconciling those different perspectives, could activate mechanisms for the education of critically and politically relevant public opinion, which could have an effect in all national, international and community, regional and supra-regional, institutional and inter-institutional levels, by restoring the initial starting point of human rights, that was the seed of political liberalism.

Nevertheless, it is important to indicate that political liberalism and economic liberalism do not coincide with each other[32]. The moral core of political liberalism remains in the discursive understanding of human rights: it reflects the demand that all collective processes of self-determination be standardized by the problem to which they refer, as well as, within such processes, that freedom for self-determination (autonomy) of each individual must be preserved, strengthened and protected, in such a way that the autonomy of one person does not depend on questioning the operational autonomy of another. The moral core of economic liberalism, on the contrary, involves the protection of the exchange of benefits contracted between the parties. However, market regulation through the notion of efficiency[33] cannot replace the central concept of political liberalism, which involves a sense of fairness between equal citizens[34].

[32] On the definition of political liberalism, see Rawls (1993, page 43 and following pages) and Ulrich (1998, page 296 and following pages).

[33] In Neoclassical economic theory, the notion of efficiency, drawn by Pareto, refers to the efficiency of a system, with efficiency understood to be the notion that there is no way to improve the well-being of an individual other than having someone else be left in a worse position than before. An efficient distribution of resources, in this sense, is not a distribution in which all persons can manage to improve their well-being, or in which resources are offered to persons who might have most need for them, but rather it is a simple distribution in which no one manages to improve his own well-being without diminishing the well-being of someone else. The idea of efficiency is related to the concept of elite, defined and composed, in turn, of the "better elements" of society. This involves a theory which greatly influenced Italian fascism and which, paradoxically, continues to sift its way through current conservative economic thought. For a fuller understanding of efficiency in this context, see Pareto (1988) and Diez Alvares (2007).

[34] As Thurow indicates (1996), democracy and capitalism depart from very different beliefs about the appropriate distribution of power. The former is based on an egalitarian distribution of political power, "one man, one vote", while capitalism believes that it is the duty of those who are economically fittest to expel those who are not fit from business and eliminate them. The "survival of the fittest" and the inequalities in purchasing power are the basis of capitalist efficiency. What is essential is personal gain and, therefore, companies become efficient in order to enrich themselves. Thus it happens that today, the more developed the markets become, the more vulnerable equality among men seems to be.

The universal form of human rights lies in the demand for a world order in which all people can effectively enjoy all particular human rights, the content of which remains to be specified.

The process of specification and claim to content particular to the universal form of human rights is an empirical and collective process of moral and political learning. Its procedural dynamic must reflect defined or definable standards of negotiable argumentative discourse on disputed moral standards, at least so that the agreements reached in the – and by the – specific real community of communication and argumentation[35] can be formulated and presented as valid for all men.

Instrumentally, then, rights of information, communication and argumentation are the more relevant content because all other content depends on three factors: a) that each person would wish to have a correct idea of how other men in other places might want and/or need to live; b) that we all compare those ideas in an equal manner, and c) that we agree about them in terms of the essence of the matter and not in terms of the limits that the most powerful may have decided to set.

So that we may compare such analogous ideas within the framework of cultural diversity and come to an agreement in that respect, there is no need for a particularly ambitious or specialized method of reasoning, nor, perhaps, not even a culturally relative one. For this purpose, the reasoning which we usually use is enough to establish a dialogue and to offer and assess arguments: the reasoning behind argumentation. It is assumed that each can rely on "sufficient reasoning power" (rationalism) to carry on a dialogue with another using discursive argumentation about issues common to both. In this context, the reasoning of argumentation or discursive rationality consists on the ability and knowledge about how to articulate (or review) our claims of validity, our foundational beliefs, and our experiences without forgetting those of others[36].

The articulation of all processes of possible collective self-determination in regard to the problem at hand, in which the autonomy of each person is preserved, fortified and protected without having the

[35] One example of a complex community of this type was the Conference of the United Nations on Human Rights in Vienna in 1993. In the conference, the representatives of states, commissioners of non-governmental civil organizations and human rights advocates formed a community of argumentation and communication clearly guided by the search to give concrete form to the content that effectively implements the universal rules which human rights allegedly are.

[36] In this sense, see Apel and Kettner (1996).

operational autonomy be sacrificed to the benefit of the autonomy of another, is what human rights have in common with political liberalism – and what they have to do with social rights, as we will explain later on. Therefore, it has little – if anything at all- to do with economic liberalism, whose modern version still seems to succeed in the form of what is nowadays called globalization, which it is suspected to be a new way of practicing hegemonic economic policy with the same old Euro-centric model.

The foundation for the argument in favor of the presumptive universal validity of human rights must be able to be grounded in the appropriate notion of human dignity. Human dignity, then, is the essential element for building the foundation, regardless of legal form, for human rights. Human rights must be capable of positivization in human dignity, the foundation on which such a milestone must occur, is a "strong premise", in other words, it is present in all positivizations, but does not lose itself in them. That idea of human dignity has to create a solid universal legal foundation (which does not lend itself to be relativized because of the cultural diversity of its interpretations), from all the specific declarations of human rights.

Of course, it would be appropriate to ask if, in fact, we do have such a concept of human dignity. One of the first points to be addressed is the objection that presumptive human dignity is the specific perspective of a given understanding of man, an understanding linked to its Christian genealogy and its Eurogenic and Eurocentric political path of development. A European tradition with such features, used as an analytic and evaluative tool for all other traditions, seems to reflect that concept of human dignity. Its definition does not seem to have been reached yet, but only in a negative and indirect way, such that the expression of human dignity is considered only as a label of rights whose violation would also represent the violation of the dignity of man. Despite this evidently vicious circle, that indirect definition could be stated in the following terms: human dignity consists of that which would be violated if we deprived man of: (a) the essential goods needed for life; b) minimum freedoms; c) if physical and/or deep and lasting psychological pain were inflicted on him; d) if his legally accorded status were denied or diminished. This retroactivity makes clear the positing nature of that universal and transcultural basis of human rights.

The central core of the idea of human dignity as the universal basis of culturally "specified" human rights requires, therefore,

variation concerning the approaches of the Kantian moral imperative[37]: it is demanded that any man treat another man in the same way in which he would like to be treated and not as the circumstances – legal, religious, political, economic, etc. – would dictate.

Provisionally, it can be concluded that the understanding of human rights, philosophically and historically, does not have to be constrained to the choice between the universal and the particular[38]. The premise of *humanitas*, insofar as it involves politicization and historicity, is intrinsic to the human rights program. The issue that remains is that of retracing the journey from the interpretation of *humanitas* as identical to the problematic idea that only the European culture reflects the essence of the human species.

Human rights are, therefore, a cultural or educational matter more than a political or economic one. In the public sphere, discussion of *de facto* discrimination pollutes rational debate grounded, *de iure*, on the understanding, the conviction and practice of human rights, whether civil, political or social. The personal, collective, and civic awareness is produced through a long-term process whose stage is that of ideas.

Human, civil, political and social rights must be a universal matter, not only on an abstract or intellectual level, but also generalized to all segments of society. It is necessary to demand generalization and universality for human, civil, political, and social rights – generalization in the sense that such rights belong to everyone and are for everyone; universality in the sense of the metaphysical component of the understanding itself of the human being, regardless of his race, color, religion, sexual preference, culture or gender[39]. Moreover, it is necessary to

[37] The principle of human dignity was developed, above all, after and from studies on Immanuel Kant. In fact, it was the German philosopher who, attempting to provide justification for one of the universal categorical imperatives formulated by him, demonstrated the unique and end-oriented nature of being human itself: "Act only according to that maxim whereby your act can become, through your will, a universal law of nature" (Kant, 1974, page 224, trans.). Thus, he points out that "man and, in a general sense, any rational being exists as an end in itself", not only as instruments for the arbitrary use of this or that will. On the contrary, in all his acts, those which are directed at himself as well as those which are directed at other rational beings, he (i.e., man) "always has to be considered simultaneously as an end" (Kant, 1974, page 229, trans.).

[38] Cf. Villoro (1993, page 131 and following pages).

[39] In the field of human rights related to issues of gender, Álvarez (2000, pages 408-409) points out the importance of rejecting cultural relativism against the rights of women, affirming that, on this subject, the principle of harm helps to clarify which ones are the practices that filter out

awaken society, by calling it to reason and pointing out its iniquities, since today no one is just one thing; mere labels, such as Latin, female, Muslim or European, no longer serve as starting points, which based on concrete experience are shortly left behind. Imperialism, colonialism, and capitalism have consolidated a mixture of cultures and identities on a global scale, buts its worst, and more paradoxical legacy is to have people believe that they are only black or white, Western or Eastern[40]. Nevertheless, since human beings forge their own history, they also forge their own cultures and identities: the lasting continuity of traditions, customs, national languages, and cultural geographies cannot be denied, but no reason seems to exist, apart from fear and irrational prejudice, to continue insisting on the separation and distinction between human beings, by classifying or ranking them.

It is appropriate, then, to pose the question of human rights as something similar to a great existential struggle between resistance and affirmation[41]. It is incumbent upon each and every one of us, not being possible to delegate it to third parties – or even to the state – under penalty of loss of autonomy, dignity, and respect. Society, slowly but surely, now perceives that the state is no longer the supplier of utopias. Generous acts of unconditional supply of well-being have passed from the hands of the impersonal state to the reality of the laws of the marketplace and competition of the fittest, dictated by modern capitalism. Cultural delay in continuous expectations as a primary feature of mental attitudes, making affirmative action not a duty of the state (which may, perhaps, be one of its more significant allies), but rather a task for each and every citizen, regardless of origin or conviction. If such a cultural and mental revolution does not occur, it will be of little or no good, for the ruling-state to revise the attitude of an enlightened despot.

In summary, for those who still do not accept the idea of human dignity as a palpable value, accepted by the legal order and believing it to be too abstract a form and with only the obligation to serve

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the autonomy of women, whatever the culture: "where there is intrusion into the sphere of women's freedom, it becomes necessary to intervene in order to reverse this situation".

[40] Cf. Said (1993, page 383 and following).

[41] In this sense, Zambrano's thought (2008), for whom life cannot be lived without an idea, but an idea which cannot be abstract: it must be an informing idea from which is derived the continual inspiration for each act, at each instant. Thus things, acceptance and resistance, seem to be the ultimate condition of life, in other words, life ought to be open to accept, but must also be strong enough to resist: acceptance leads it to partake of action, movement, constant transformation; resistance, to persevere. The former is an incessant action, the latter, preservation.

as the basis for applying other fundamental principles, such as privacy, self-determination, psychological and physical integrity, etc., it will be necessary to juxtapose the particular and self-applicable character of human dignity, expressed in the specific reality of each subject and viewed from the perspective of the Habermas paradigm of communicative reason: language is the essential condition that makes human existence possible[42]; hence, life is not only the first and foremost fundamental right to be safeguarded by any legal order, but also the essential condition that makes other rights possible. The understanding of the absolute supremacy of human life – a life which, in order to be understood as such, must be lived with dignity.

This paradigm makes you think of life in its material aspects, in other words, the starting point for this model is life with an entirely material content, since life is, above all, biological[43]. In this context, the core of the principle of dignity does not serve merely to guarantee protection of human dignity in the sense of assuring an individual, in a generic and abstract way, of non-degrading treatment, nor does it mean the mere offer of a guarantee of the integrity of the human being: in that context, of a renewed humanism, human vulnerability will be safeguarded as a priority wherever it manifests itself, in such a way that preference will be given to the rights and needs of certain groups considered to be , in one way or another, the weakest, and for whom special protection will be demanded: children, the elderly, those afflicted by physical or mental disabilities, consumers, workers, the unemployed or members of ethnic minorities, among others[44].

It is clear that, in this dimension, it would be impossible to reduce all that which makes up the essence of human dignity to a generic and abstract formula. Thus, it can be said that the discussion regarding the respect for dignity and the establishment of the limits of its content can be done only in a concrete sense in which an effective affront to the dignity of the individual can be perceived. Under those circumstances, it seems clear to us that the materiality of the principle of dignity rests on the so-called "existential minimum"[45].

[42] In this sense, see Habermas (2003).

[43] Thus, it can be affirmed that life can never be reduced to an idea, an abstraction, given its concrete, physical, and biological substratum. In this sense, see Maturana and Varela (2001).

[44] Cf. Bodin de Moraes (2003, pages 116-117).

[45] According to Barcellos (2002, page 198), the existential minimum reflects 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.

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, 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 economic, social and culturally dependent existential minimum. This implies the need to address again the process of trivialization (which, in practice, strips human rights of their authority) and theoretical fragmentation of human rights (rights of first, second and subsequent "generations")[46], through re-education about such rights and their guarantees, since implementation of the so-called "social" rights cannot be considered separately from the consolidation of democracy itself: the fulfillment of civic responsibilities, essential for democracy, requires economic, social and cultural reforms for the removal of obstacles which impede democracy[47].

In fact, the very social meaning of "personhood" is related to the different positions held by each and through which each one acts within a given field[48], and these positions, the set of which makes up our social definition of personhood, are defined within each field in such a way that they are the ones that allow us certain social practices and restrict us to others[49]. It can be concluded from all of this that, within each field, the positions are not egalitarian, but rather that one of the most prominent features of such fields is the distinguishing distribution of certain attributes among positions. This distinguishing distribution is what makes up the basis of certain social definitions, differentiating ones with respect to others; the different positions have established the manner in which they should relate to each other: as equals, in relation of superiority (one with more power over another), in relation of inferiority or even not being able to relate to each other[50]. Poor, different, migrant, or renegade determines

[46] Cf. Sampaio Ferraz Junior (2007, page 517 and following pages)

[47] Cf. Dimenstein (2006, page 22 and following pages).

[48] Cf. Bourdieu (2000, page 112).

[49] In this sense, Zambrano (1996) advocates for a social utopia, for the equality of all human beings, and, by extension, supports the acceptance of differences and inclusion in the face of exclusion of such differences in the course of history, returning, in his reflections, to one of his most cherished notions: the oscillation between the individual and his persona, in order to postulate the notion that Western man throws away his mask, ceases to represent and be, in this way, a tragic person, and definitively affirm himself as a person, capable of opening himself up to others and of accepting the other in his multicultural nature.

[50] Cf. Zino Torrazza (2006, page 27 and following pages).

the position of individuals and, consequently, establishes a given treatment on the part of the other agents in the field, while, at the same time, makes those who hold such a position expect a given treatment from all the others, in a cultural process of institutionalization of differences and discriminations as part of a scheme of social reproduction and domination[51].

In this context, in terms of human rights, the position of the person as nexus between the abstract idea of personhood and our praxis as to the set of positions would be reflected in the set of rights – and implicit duties – which are recognized there. However, the social existence of individuals is characterized, in fact, by a constant restriction and violation of those rights as a result of various practices and definitions which are established. Thus, it can be concluded that abstract rights are given concrete expression in each field through practices resulting from the interaction between the different positions. Equality ceases to exist since each field is a distribution of attributes or goods which are considered scarce and which adopt the nature of privileges. In order to sustain this unequal distribution of attributes and goods, each field has organized some reproductive mechanisms which act synchronously and diachronically and which tend to affect – and often emphasize – the treatment given to the rights and duties in these positions.

Control of these reproductive mechanisms also leans towards the positions of privilege in each field, either because whoever holds them exercises direct control over these mechanisms, or rather because they exercise symbolic control[52]. Therefore, the very concept of society is shaped as a structure of fields in which individuals, by means of their positions (with their definitions and privileges) are related to each other, social practices are established, and diverse rifts – of race, color, social or economic status, gender, etc. – are perpetuated, as well as unequal distributions of goods and economic, social, and cultural rights.

[51] Thus, for instance, in current societies, marked by capitalist consumerism, the power of consumption has been progressively replacing the fundamental rights of people. The concept itself of happiness is today directly related to how many products and services can be consumed; human dignity is reduced (or is measured) by the capacity to acquire certain goods, the adoption of a certain life style, and the possibility of frequenting certain spaces. With globalization, the market, by guaranteeing exclusions, becomes a more prolific and less controlled "assembly production line" of human waste or wasted people. As Bauman points out (2005), the concept of "waste" in a society of consumers is comprised of people lacking material resources and, therefore, incapable of consuming.

[52] Cf. Althusser (1977, page 301 and following pages).

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 conceptualize content and techniques which permit re-education about social rights and their guarantees[53].

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[54]. 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 defense against abuses, but also as an instrument intended to safeguard citizenship itself in an inclusive context and permanent b 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.

2. 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 which belongs in particular to the fields of political and legal philosophy and constitutional law[55], often refer

[53] In that sense, see Unes Pereira and Fonseca Dias (2008).

[54] 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 cooperation of social agents anchored in the autonomy-solidarity duality, then their materialization 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 which takes into account the internalization of values (cf. Habermas, 2001, page 129).

[55] 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 postwar period, within the context of the so-called state of well-being or social status (Esping-Andersen, 1998), and they are, according to Abramovich and Courtis (2006, page 17), the "fruit of the attempt to

to matters related to basic expectations of human dignity, but rather, to the satisfaction of vital needs[56]and, consequently, are stated as authentic fundamental human rights[57], essential for promoting human development and for freedom, democracy, justice and peace in the world, since they are expressed as rights which 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[58]. 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 globalization process[59], transcend local, regional, and even national limits),

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, 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".

[56] 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 recognized 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 Article 2 that each of the states who are parties to the PIDESC pledge to adopt measures, both individually and through international assistance and cooperation, 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 which, in and of itself, is not contingent or limited by any other consideration.

[57] 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.

[58] According to Pisarello (2007, page 11), "this characterization 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".

[59] As we have already discussed, we are using the term "globalization" in the meaning that

goods protected by social rights, involved in positional disputes[60], highlight material equality[61] 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 which 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[62].

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[63], concerning the satisfaction of such

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Souza 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 transnational interactions which paradoxically, although they have been radically transformed, have intensified hierarchies and inequalities. The definition given to this term by Giddens (1990, page 64, trans.) is also valid: "intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa".

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

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

[62] According to Barcellos (2002, page 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 behavior 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, recognizes 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 which 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.

[63] Regarding the connection of private to fundamental rights, see Cascajo Castro (1988), Peces-Barba Martínez (1988) and Reis (2005). In fact, private rights can assume responsibility for providing social rights, since social rights enjoy a "double face": they are exercised with regard to public authorities as well as in relations between private parties. What lies behind these

expectations and, therefore, the effective promotion of human development. 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[64]. Furthermore, the gap

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arguments is that social rights are not reduced to a simple obligation of the state, but rather also involve private parties. In effect, full respect of social rights becomes difficult without including private rights within the mandate of the law. It perhaps might be easier to explain it within the context of labor relations. Labor law regulates private activity between the employer and workers due to the real inequality which exists in said relationship. The state intervenes in that private relationship through regulation and reveals its role as guardian, which it plays in this context on behalf of the workers. This same process is repeated, in a similar manner with the other social rights. Thus, it seems admissible to say that the right to enjoy an adequate environment, or the right to the protection of health, or the right to strike and the freedom to organize into unions, should be considered as operational legal situations, both in terms of government and in legal relations between private parties. In an identical manner, Perez Luño (1999, page 93), upon studying German doctrine and jurisprudence on *Drittwirkung der Grundrechte* (exercise of fundamental rights towards third parties), holds: "In summary, what is involved is the application of fundamental rights, not only in relations between the state and its citizens, but also in the relations between private persons. Objections have been raised, in some doctrinal sectors, that this thesis is the fruit of an incorrect logical connection, unaware of the authentic nature of fundamental rights, since it understands that such rights are public subjective rights intended to regulate relations of subordination between the state and its subjects, but that it cannot be 'logically' projected into the sphere of private relations, presided over by the principal of coordination. From this perspective, fundamental rights are conceived as legal precepts which have arisen to protect citizens from the omnipotence of the state, but they do not have a reason to exist in relations between subjects of the same rank, where relations are developed between private persons. It is easy to notice the ideological nature of this reasoning, linked to a purely formal understanding of equality among various members comprising society. But it is a well-known fact that, in modern neo-capitalist society, formal equality does not presuppose material equality, and that the full enjoyment of fundamental rights in such a society is seen to be threatened, on many occasions, by the existence of centers of power in the private sphere, not less important than those belonging to public entities. From this vantage point, individuals have had to resort to a series of measures intended to overcome obstacles which, in fact, oppose the exercise of fundamental rights on the part of citizens as a whole in a context of equality. Repercussions of the principle of *Drittwirkung* on the level of legal recognition of social rights have been clear [...]. Explicitly, and with special reference to social rights, the Federal Court of Labor has pointed out that these fundamental rights do not only guarantee freedom of the individual with respect to government, but also that they contain principles ordering social life, which also have immediate relevance for private-legal relations".

[64] 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

between recognized rights and their effective exercise, too often is cause for the words and discourse which proclaim them to be empty and without any practical effect.

In this context, despite the extraordinary expansion of institutional behavior devoted to their development[65], 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[66] under the aegis of the so-called "state of well-being" or "social state", the reality outlined from the neoliberal counterreformation movements of the 1970's, starting with the great crisis in the hegemonic model which had guaranteed the growth of the central capitalist countries during the postwar period (1945-1973), whose effects have extended until the current times and are revealed to be (to once again disguise themselves)

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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, page 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.

[65] 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 which 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 which is developed, even though it may be a society which is growing in economical terms.

[66] 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 which 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 constitutionalization of social rights observed in the Mexican (1917) and Weimar (1919) constitutions, and through the attempt of inter-nationalization of those rights through the creation of the International Labor Organization (ILO). The period which 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.

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 bureaucratization, 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 globalized 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 behavior of the traditional state of law[67].

[67] 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 between supply and demand of goods and services. The "first great crisis of globalization" 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 generalized 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 savior, 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.

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[68]. 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[69]. 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"[70], are proof of this (new) market law[71].

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 behavior 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 which 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 which lend themselves to generalization, 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 which, more than equalizing what is unequal, tend to

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

[69] Cf. Cabo Martín (2006, page 11).

[70] 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 materialization of social rights. We discuss this topic in greater detail further on.

[71] In reference to the legal effectiveness of the social state and social rights, Ibáñez (1996, page 35) affirms that, by the 1990's 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".

operate as effective discretional concessions and, therefore, revocable, when not serving as authentic measures for control of the poor[72].

What we have been seeking to demonstrate throughout this chapter is that, despite their appeal to technical discourse, this devalued perception of social rights rests, above all, on myths forged by ideological prejudices[73]. We are thus attempting to refute the primary myths conveyed in the political and legal mainstream which currently shape the perception of social rights and, by extension, public policies themselves. 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[74], a panoply of economic, social and cultural goods which 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[75]: in synthesis, the concept of the free human being, liberated from fear and misery, cannot be accomplished

[72] Vuolo *et al.* (2004, page 14), when analyzing the policies of the war against poverty in Argentina and other regions in Latin America, affirm that "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".

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

[74] 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.

[75] Appointed as spokesman of the commission in charge of examining the Draft of the Tracy's Act, submitted to the Chamber of Deputies in France in 1839, which proposed the progressive emancipation of the slaves in the French colonies, De Tocqueville called to the attention of the deputies the impossibility of making emancipation contingent upon the eradication of poverty: "There are those who, while admitting that slavery cannot last forever, long to delay the moment of emancipation, alleging that it is necessary to prepare the black man for independence before breaking his chains. […] But if all these preparations are incompatible with slavery, to demand that they be done before slavery is abolished, would this not mean, in other words, does this not affirm that it can never be ended?" (De Tocqueville, 1994, pages 30-31, trans.). Civil and social rights are openly interrelated, in such a way that we cannot make the latter contingent upon the effective implementation of the former, and vice versa.

unless conditions are created allowing each person to enjoy his economic, social and cultural rights as well as his civil and political ones.

Certainly, the persistent violation of social rights is related, in an intrinsic way, to asymmetrical relations (inter-subjective and collective) of power existing in current societies and to the solution given to persistent positional problems within the social context. However, the role which symbolic and ideological perception of these relations of inequality plays in such residual violations is not diminished[76]. Thus, if decisions depend, in current societies, to a large degree on the perception of reality that is held, an essential assumption for the removal of obstacles for the achievement of social rights is the denial of the conservative political and legal reading which usually is made of such rights. In summary, it is our intention below to (re)state the political and legal guarantees of social rights from a protectionist and democratic perspective[77].

It is protectionist because it starts from the perception that law has traditionally been revealed, above all, as a mechanism for maintaining the *status quo*, protecting the interests of the "strongest", but also it is able to operate in the face of social hardship, as an instrument in the service of the weakest or "neediest" subjects[78]. If legal institutions can be instruments of social oppression (and most times, in fact they are), it is also true that, with democracy and the support afforded by citizenship, the

[76] In this sense, see, for example, the theory of ideological apparatuses of the state derived from Althusser (1998). In this same sense, also see Pisarello (2003; 2007).

[77] In this sense, we seek to adopt and to follow, along general lines, a protectionist [or guarantist] vision, deriving from Ferrajoli (1990; 2001; 2006), along the principles of a revitalized social and protectionist constitutional construction, drawn by authors such as Abramovich and Courtis (2002; 2006) and Pisarello (2003; 2007).

[78] As we will demonstrate in this work, this conclusion is valid, above all, within the field of labor law. Directly related to the process of capitalist accumulation and class struggle, this right traces its origin to the correlation of social forces. It is revealed to be, above all, a mechanism for maintaining the workforce, inherent to the capitalist system. Although it is usually shown in the form of a "concession" or "gift" of capitalism, the right of labor is, in truth, intrinsically related to the demands of capitalism itself for the full effectiveness and exercise of this right. The right to work, therefore, does not always have, as its purpose, service of the expectations of workers; on the contrary, it often follows the path laid down by capitalism. However, within a context in which the right to work establishes a link between capital and the workforce, anchored in acts of effective intervention in social reality, this notion frequently acts in opposition to confrontations in the social arena, in the sense of satisfying given expectations of the workers and not just those of capital. Thus, the right of labor presents itself, from its genesis, as useful to capital, with interest also to the workers, but for opposite reasons. On one hand, it makes small concessions to capital, which reduce the social tensions, siphoning off force from the class struggle; on the other hand, it manages to limit the exploitation to which the worker is subject.

law can be a potential collective institution of freedom. It is clear that the existence of the logic of protectionism, in and of itself, does not ensure the automatic satisfaction of rights and, particularly, of social rights. However, this logic makes it possible to articulate a critical discourse, which escapes mere empiricism (a discourse that is not only political, but also legal), suitable for delegitimizing the behavior of forces which, in one way or another, block the possibility of ensuring present and future generations the satisfaction of their basic needs[79].

It is democratic and participatory to the extent that it draws on the perception that participatory democracy involves an open, never closed, system, such that the question of the guarantee of social rights can be registered within a process of continual (re)democratization, both within an institutional framework as well as in other social spheres, beyond the institutional setting. We cannot reach another possible world through a tremendous storm, imaginary and mythic, but rather through renewed experiences in democratic participation and social inclusion, real and not illusory, capable of finding concerted, consistent and coherent solutions to social problems. This would imply radically democratizing access to information regarding the behavior of institutions, and, consequently, of making it viable, in fact, to evaluate the capacity of those institutions to give expression, through the appropriate channels, of different social demands, beginning with those of the most vulnerable segments[80]. In summary, it is necessary to expand democracy, not only as a formal political system, but also as a form of government which would allow – or rather, should provide – full citizenship by driving active participation of various social agents and their commitment to decisions related to the promotion of human development.

Better guarantees and more democracy, in essence, are the central elements in the task of (re)construction of the legal and political status of social rights. Their adequate theoretical and practical articulation has been shown to be fundamental, therefore, to the removal of traditional material obstacles and for surmounting ideological prejudices which explain the still

[79] As we have already indicated, the point of view which we have adopted is rooted, above all, in the framework of a revitalized social and protective constitutionalist construction, the outlines of which have been drawn by authors such as Abramovich and Courtis (2002; 2006) and Pisarello (2003; 2007).

[80] Many have sought to elucidate .the *deliberative and participatory* understanding of democracy. Despite some specific instances where there has been a lack of agreement and a diversity of methodological affinities, the ideas which we are affirming have their origins in critical reconstructions proposed by authors such as Haberman (2005) and Santos (2003).

weakened position of social rights in the majority of contemporary legal systems[81].

3. CONVERGENCE AND COMPLEMENTARITY OF FUNDAMENTAL HUMAN RIGHTS

Rights identified as "social" usually, and within the context of the history of both law and legal sociology, appear as rights belonging to the generation that is later than that of civil and political rights. Social rights, according to this perspective, *come after* such civil and political rights, which is assumed to confirm, in more functionalist terms, that the problem of satisfying social rights should be solved historically only after civil and political rights have been satisfied, which would include, obviously – if not primarily – proprietary rights.

Apart from their wide dissemination, even for instructional purposes, this traditional perception of social rights as rights of late onset is based on preconceptions which are tendentiously restrictive and deterministic and which justify, in theory, a devalued protection of social rights.

It is true that the modern history of social rights had its beginnings in the great social revolutions of the 19thcentury. Nevertheless, together with that "history" properly speaking, it is possible to verify the existence of a rich "prehistory" marked by various institutional policies directed at resolving situations of poverty and social exclusion which predated the actual emergence of the modern European state and which, in a definite way, are similar to modern demands in terms of social rights[82].

Thus, we can say that the expectations which correspond to what are usually called "social rights" always existed, just as mechanisms and programs intended for intervention within the social sphere have always existed. In this way, different institutional mechanisms existed in medieval and ancient times, whether or not they belonged to the state, and were clearly directed at fulfilling the needs of individuals in conditions of greater vulnerability within the social setting[83]. At times, these measures had, in and of themselves, an egalitarian sense[84]; other

[81] In this sense, see Abramovich and Courtis (2002; 2006) and Pisarello (2003; 2007).

[82] In this sense, see Pisarello (2007).

[83] Cf. Ritter (1999, page 33).

[84] In this sense, for instance, the assistance which guaranteed access to the public baths in the Athenian *polis* and the agrarian laws of Republican Rome, which ensure access to land or to a minimum quantity of food. In pre-Colombian America, we find in the Incan empire one of the first manifestations of a system of social security, understood as a rational system of

times, the purpose of these mechanisms was to resolve issues of exclusion in a blatantly authoritarian way, by controlling the more vulnerable segments and forcing individuals to (re)enter exploitative labor relationships[85].

Over the course of existence of modern states, that contention between conservative and preventive policies and egalitarian policies recurs. Frequently, the mechanisms aimed at providing relief of the poor and job centers were cut from the same cloth as that of policies of public order intended to control the conditions for perpetuation of productive structures.

In many cases, aid to individuals in conditions of greater vulnerability within the social sphere, initially discretional, prompted tangible benefits which reflected claimable rights[86]: during more egalitarian episodes of modern revolutions, the claim of rights to assistance and access to scarce or centralized resources, such as land and food, was stated as a recurring demand of the popular sectors, almost always accompanied by a request for the extension of the rights of participation[87].

Thus, for example, in England, the claim for rights of participation and access to land and social assistance was a common element in the charters motivated by the "levelers" and "diggers" over the course of the seventeenth century[88]. On the one hand, distribution of land, assistance to the more vulnerable segments and the establishment of mechanisms of participation in the colonies of North America were present in different charters, some of which included anticipation of advanced

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conjugation of collective effort in order to provide a type of social security: the property system in existence at that time provided for the cultivation, through common labor, of certain lands, whose product was directed at meeting the nutritional needs of the elderly, the ill or the disabled and orphans, all of whom lacked the ability to be productive on their own (Velloso de Oliveira, 1989, page 181).

[85] That was the sense, for instance, of laws on poverty, which, during incipient capitalism, tended to replace the ancient idea of *charity* or *beneficence* by that of *reeducation for work*. As Castel points out (1995, page 47), in countries of both Catholic and Protestant tradition, the distinction was introduced, also in legal terms, between the *deserving poor,* willing to work in exchange for assistance given, and the *undeserving poor,* devoted to *vice* and *idleness,* and, therefore, dangerous to society.

[86] Dean (1997, page 3) characterizes this process as *juridification of well-being*.

[87] In this sense, see Abramovich and Courtis (2002; 2006) y Pisarello (2003; 2007).

[88] About these popular revolts, Thompson *apud* Fontana (1982, page 81) emphasizes that what was at stake, in reality, was not the civil right to property, but alternative definitions of the right to property, such that claims made by the popular classes clearly became social issues.

experiments in agrarian democracy[89]. Thus, the Declaration of Independence, although it did not resolve problems automatically such as slavery, it addressed and recognized certain rights to be "self-evident" truths, such as the right to life and the pursuit of happiness, clearly related to the hopes that today are connected to "social rights", although it attempted to exclude rights of ownership which were elevated to the constitutional rank only in the Constitution of Philadelphia (1787)[90].

In France, the issue pertaining to the extension of social rights and rights of participation always occupied a central place throughout the course of the revolution. Thus, the Constitution of 1791, although monarchic, included issues pertaining to the right to assistance to the poor and public education; on the other hand, in 1793, with the advent of the Jacobin Democratic Constitution, recognition of social rights for citizens called into question the inviolable nature of private property, and was linked to a expansion of participation rights[91]. The declaration of rights contained in the preamble of the Constitution granted, together with equality of citizens' rights, that of contributing to the law-making process and the right to the appointment of legal representatives (Article 29)[92], the obligation of the state to institute public aid needed for the subsistence of the more vulnerable citizens (Article 21)[93] and the right to gain access to public education for all (Article 22)[94]. All these rights were protected by

[89] For example, Article 79 of *Body of Liberties* de Massachusetts, written in 1641 by the Reverend Nathaniel Ward, established that if a man, upon his death, did not leave his wife a pension sufficient to sustain her, she would be relieved afterward, upon submitting a complaint to the General Court: "If any man at his death shall not leave his wife a competent portion of his estate, upon just complaint made to the General Court she shall be relieved".

[90] In this sense, see Austin Beard (2004).

[91] According to Pisarello (2007, page 22), "the expression 'social rights' appeared in a draft submitted to the Convention of 1783 by the agronomist Gilbert Romme […]. In its session on April 24, 1783, Robespierre, for his part, proposed to the Convention, in the name of 'fraternity', the need to moderate great fortunes through a progressive tax and to 'make poverty honorable', by guaranteeing everyone the right to freedom and existence".

[92] "Chaque citoyen a un droit égal de concourir à la formation de la loi et à la nomination de ses mandataires ou de ses agents" ("Each citizen has an equal right to contribute to the creation of the law and to the appointment of its representatives or agents").

[93] "Les secours publics sont une dette sacrée. La société doit la subsistance aux citoyens malheureux, soit en leur procurant du travail, soit en assurant les moyens d'exister à ceux qui sont hors d'état de travailler" ("Public assistance is a sacred debt. Society owes subsistence to its wretched and miserable citizens, whether finding work or providing them with the means of existence for those who are unable to work").

[94] "L'instruction est le besoin de tous. La société doit favoriser de tout son pouvoir les progrès de la raison publique, et mettre l'instruction à la portée de tous les citoyens" ("Everyone needs

mechanisms of social guarantees relying upon the actions of all, to guarantee each person's enjoyment of his rights (Article 23)[95] and on the rights and obligations to revolt in the event that such rights were violated by the government (Article 35)[96].

In the case of France, after the conservative liberal counterrevolution, the development of liberal capitalism was gradually eroding any improvements in the general conditions of life of the more vulnerable segments of society; especially of the proletariat. Notwithstanding and paradoxically, it simultaneously it bred the objective conditions that would allow individuals to organize around alternatives allowing them, through mobilization, to be ensure, although in a limited form, certain material interests required for the existential minimum. New forms of association permitted workers to establish bonds of solidarity and, at the same time, allowed them to gain access to basic resources needed for subsistence: unions, mutual aid societies and production/consumption cooperatives, for example. In a parallel way, the "social issue", with all its implications, emerged as part of the political and institutional plan under pressure from the intellectual and working classes[97].

The revolutionary cycle begun in 1848 was, perhaps, the greatest turning point in the history of the demand for social rights, since an element appeared at that time that neither the most formalistic reading on generations of rights would be able to underestimate: the existing structural contradiction between the generalization of civil, political and social rights and the recurring maintenance of the tendentiously absolute nature of private property and contractual freedoms[98]. In fact, the Constitution of November, after the revolt of 1848,

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an education. Society must promote public education with all its power and put education within the reach of all citizens").

[95] "La garantie sociale consiste dans l'action de tous, pour assurer à chacun la jouissance et la conservation de ses droits; cette garantie repose sur la souveraineté nationale" ("Social guarantee consists of action by all, in order to ensure each individual of the enjoyment and preservation of his rights; this guarantee rests on the national sovereignty").

[96] "Quand le gouvernement viole les droits du peuple, l'insurrection est, pour le peuple et pour chaque portion du peuple, le plus sacré des droits et le plus indispensable des devoirs' ("When government violates the rights of the people, insurrection is, for the people and for each segment of the people, their most sacred right and most essential duty").

[97] According to Pisarello (2007), those strategies of self-organization and pressure never managed to conjugate themselves fully, but help us to understand the dynamic still operating today for claims to social rights.

[98]In this sense, De Tocqueville (1994, pages 34-35) states about the period that "the French Revolution, which abolished privileges and destroyed all exclusive rights, has allowed one such

kept alive the "social issue" in its preamble by establishing the duty of the Second Republic to ensure needy citizens of subsistence, by providing them with work, suited to their capabilities, or by granting them assistance in the case of those unfit for work[99]. Despite its limitations, the events of 1848 and the brief experience of the Commune of Paris later in 1871[100], played an essential role in the subsequent developments in social rights[101].

After an intense cycle of social conflict which extended from the last third of the 19th century until the mid-20th century, states and their legal decisions experienced, with more or less intensity, an open process of "socialization" which affected different branches of law[102]. Labor law emerged, then, by virtue of the enormous social problems originating in the Industrial Revolution, by stimulating a growing intervention by the state in the labor market for protectionist purposes, which tended to inhibit abuses of capital and to make the material expansion of social rights viable, by institutionalizing rights unthinkable

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right to subsist and in an ubiquitous way: that of property [...] Today, that the right of property does not appear but as the last relic of an aristocratic world which has been destroyed […] a political struggle will ensue between those who have and those who have not. The great battlefield will be property and the primary issues of policy will turn on modifications, more or less profound, which will have to be introduced into property law".

[99] "La République doit protéger le citoyen dans sa personne, sa famille, sa religion, sa propriété, son travail, et mettre à la portée de chacun l'instruction indispensable à tous les hommes; elle doit, par une assistance fraternelle, assurer l'existence des citoyens nécessiteux, soit en leur procurant du travail dans les limites de ses ressources, soit en donnant, à défaut de la famille, des secours à ceux qui sont hors d'état de travailler. - En vue de l'accomplissement de tous ces devoirs, et pour la garantie de tous ces droits, l'Assemblée nationale, fidèle aux traditions des grandes Assemblées qui ont inauguré la Révolution française, décrète, ainsi qu'il suit, la Constitution de la République" ("The Republic must protect citizens themselves, their family, their religion, their property, their work, and make education, needed by everyone, available to all: it must, through fraternal assistance, ensure the existence of its neediest citizens, whether by finding them work, within the limits of its resources, or by providing, in the absence of family, assistance to those who are unable to work. – In view of the accomplishments of all these duties, and in order to guarantee all those rights, the National Assembly, faithful to the traditions of the great Assemblies which inaugurated the French Revolution, does hereby declare, as naturally follows from the foregoing, the Constitution of the Republic") (Preamble to the French Constitution of 1948, Paragraph VIII).

[100] On the milestones of the Commune of Paris, see Marx (1972).

[101] In this sense, see Abramovich and Courtis (2002; 2006) and Pisarello (2003; 2007).

[102] The idea about *socialization* of law and, consequently, of traditional civil and political rights themselves, was upheld between the 19th and 20th centuries by various authors, such as the German Ferdinand Lasalle, the French Léon Duguit and George Gurvitch, the Austrian Anton Menger and the Harold Laski. For more information, see Lasalle (1904), Duguit (1922), Gurvitch (1932), Menger (1886; 1890) and Laski (1932).

until then, such as unionism, strikes and collective bargaining[103]. However, if the notion of social rights was deeply derivative of the right to work, it also was confirmed that this notion should not be used solely as the basis of the right to work, but also for all those legal expressions of a model organized around the basis of collective action, the search for parity and their linkage to social relations in which groups are identified as disadvantaged. Civil law went on to allow criteria of objective responsibility, by abandoning the idea of guilt, for damages caused by private parties who enjoyed a special position of power within the context of commercial relations or consumption. Finally, the penal code moderated its deeply repressive function, by incorporating criteria of re-socialization.

This tendency was established with the Keynesian pacts in the post-war period and with a relative consolidation of different spheres of the welfare state created in prior decades. Civil and political rights were extended to sectors excluded until then from their influence, and specific rights were recognized in economic, social and cultural fields which safeguarded hopes and expectations relating, for example, to issues concerning work, education, health and housing[104].

In these contexts, it is clear that, if we can conceive the idea that social rights reflect rights that have been won – especially by the working class -, we should recall that the expansion of social rights corresponds, concomitantly, to the objective needs of the capitalist system, by permitting the reproduction and qualification of the labor force and, at the same time, by extending the possibilities of consumption[105]. . States in the post-war period did not truly reveal themselves as protectionist or democratic, or they did so in a sufficiently attenuated manner. Nevertheless, conditions in

[103] Palomeque López (2002) raises the idea about the formation of the right to work as a right that has been won and granted at the same time: concession and victory, then, would constitute the double face of modern labor law. But we will expand on this idea in greater detail below.

[104] For an historical and institutional categorization of those different models, see Esping-Andersen (1998, page 9 and following pages).

[105] As history shows, the abolition of slavery and the overcoming of the model of forced servitude, of feudal inspiration, were crucial – and reflected, therefore, real premises – for the development of capitalism: capital was only able to develop itself as a system of obtaining surplus value in the form of buying and selling between equals, through the use of a free labor force In one of the classic tales of the episodes of 1917, Serge (1993) indicates the year 1861 as the initial milestone of the processes which would involve Russia in the whirlwind of transformations of modern capitalist society, the year in which the Czar Alexander II decreed the abolition of serfdom of the peasants, by formally abolishing feudalism in the Russian Empire. It was not an accident that the War of Secession of the United States started during the same period, motivated, among other things, by the problem of the freedom of the labor force from the bonds of slavery (cf. Menezes Delfino, 2007, page 20).

the regulation of the labor market improved, as did the access to consumer markets and to basic services for an important segment of society, although states may have permitted the proliferation of foci of arbitrariness, by letting themselves be colonized by the bureaucratic and commercial powers and especially by using the practice of concentrated decisions which excluded or stigmatized groups that were more vulnerable[106].

In this way, although the "modern" history of social rights has its beginnings in the great social revolutions of the 19th century, which, from a formal point of view, social rights acquired only a constitutional status in the period in the 20th century after the Second World War[107], we point out that it is possible to redeem a more complex history that leads to conclusions different from those usually extracted from the traditional literature. Here, we can emphasize situations in which the expansion of social rights was vindicated simultaneously with the expansion of civil and political rights and the restriction on proprietary rights and contractual freedoms[108].

In summary, the idea of reducing social rights to rights of recent recognition, always secondary to more traditional and more standard fundamental, civil, and political rights minimizes the breadth and complexity of the history of those same rights. Such a history, nevertheless, helps us to understand the profound differences existing between social policies, more or less discretional and implanted according to the economic, cultural and political events of the time, and the demand for social rights, which are more or less stable over time and, therefore, essential to the existing powers. Such an understanding allows us, then, to evaluate certain policies as conservative and preventive, related to a limited recognition of social rights on the one hand, and, on the other, as other substantially egalitarian and democratic policies, linked to the simultaneous satisfaction of civil, political and social rights.

In addition, expanding on the theory that hosts a linear trajectory of "generations" of rights allows us to perceive the multiplicity of ways, scales and aspects related in a substantial way to the claim of social rights, by emphasizing the truly simultaneous, convergent and complementary nature of the claim for civil, political and social rights.

[106] For a critique of the "social" state from a protectionist and democratic perspective, see Habermas (1986).

[107] Without prejudice, however, to the experiences of the constitutionalization of social rights in the historic constitutions of Mexico of 1917 and of the Weimar Republic of 1919.

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

Thus, all distinctions disappear between institutional and extra-institutional means for claiming human rights and between local, regional, national and international scales, as well as distinctions between individuals and citizens as intended beneficiaries of social rights.

In those contexts, social rights can only be considered as essential in order for us to give material content to individual and political rights connected with freedom and the autonomy of individuals and citizens, that paradoxically and simultaneously, are also shown to be essential to ensuring social rights.

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 it is necessary to coordinate efforts in favor of the right to education in order to fully enjoy the right of freedom of expression, it is necessary to take measures directed at reducing infant mortality, hunger, epidemics and malnutrition, in order to enjoy the right to life.

4. THE INTERDEPENDENCE AND INDIVISIBILITY OF FUNDAMENTAL HUMAN RIGHTS

When, from the perspective of history which offers us the theory that hosts the trajectory of generations of rights, we move to the legal perception of the grounds on which social rights rest, we are usually presented with an image of such rights relegating them to a subordinate position in relation to traditional civil and political rights[109], axiologically speaking.

That perspective allows for different approaches. The first, fairly current, is the approach which maintains that civil and political rights are very closely related to interests which are, in fact, fundamental to everyone, including life, liberty, privacy, and by that (or with that), dignity itself, whereas social rights are not. On the other hand, the idea that civil and political rights are restricted to values and principles such as freedom and security, whereas social rights are restricted to the promotion of equality, is an approach that is sufficiently well-disseminated. So, as a consequence, by accepting such propositions, we are forced to choose: either we are concerned about promoting civil and political rights, relegating the idea of promotion of equality to a secondary level, or we are concerned with promoting social rights, relegating the guarantee of personal liberties to a secondary level.

This involves, however, a truly contradictory perspective, one which is based on ideological premises that include, in

[109] Cf. Añón y Añón (2003, page 115 and following pages).

fact, obvious discursive inconsistencies. In a certain way, the axiological grounds of all rights leads to the idea of equality[110]. What converts a right grounded in valorative terms and allows such categorization, is its egalitarian structure, that is, the fact that it refers to interests, which have the tendency to be generalized or inclusive, and accordingly, are truly inviolable and inalienable[111]. Nevertheless, the principle of equality is a relational principle[112], and questions about subjects and the object of equality have admitted different answers.

As to the subjects involved, the truth is that, in modern states, an extensive number of rights, civil, political and social, have been linked to the category of citizenship, which has emerged as a clearly inclusive idea, and was converted, especially in a society such as the current one, characterized by migrations and massive internal and external relocations, into an authentic exclusive and excluding status of privilege: when we speak of human rights, international law, at least in a tendentious manner, seeks to attribute them to persons generally, and not only to citizens, thus introducing a key idea on which to expand egalitarian understanding of the subject of rights. As to the object of equality, confronted by the theory reducing the categorization of rights to an excluding axiological foundation, we can easily verify that, in reality, all rights – civil, political and social – are based on the notion of equal satisfaction of certain needs held to be basic for all people, as well as their equality, dignity, freedom and security[113].

Another debatable approach refers to social rights as rights – as opposed to others, such as civil and political – intrinsically related to equality, and not to dignity. In essence, the principle of dignity is consubstantial with the individual's right to object to the imposition of oppressive or humiliating conditions of life[114], and constitutes a central

[110] On equality as a fundamental principle in the discourse on rights, see Dworkin (2005).

[111] This would be precisely what would distinguish a *fundamental right* from a privilege, whose structure is, by definition, tendentiously selective, exclusive, and alienable, as Ferrajoli stresses (1990 and 2006).

[112] According to Pisarello (2007, page 38), "the principle of equality is a relational principle, whose terms of comparison must be defined: equality, yes, but between whom? And for what?".

[113] In this sense, see Carter (2005) and, in particular, Balibar (1992).

[114] According to the Jacobean Constitution of 1973, resistance to oppression is a consequence of all the other rights of man: "La résistance à l'oppression est la conséquence des autres Droits de l'homme" ("Resistance of oppression is the consequence of the other Rights of man". (Article 33).

element in the modern justification for human rights, and their recognition is assumed, in fact, in any democratic debate on rights held to be fundamental, including those discussions concerning their correct categorization as such. Thus, in normative terms, the specification of what we could consider a "dignified life" or "undignified life" is related to negative and positive elements[115]. From a utilitarian perspective, for example, the idea of dignity – or of a dignified life – is better related to a set of conditions that allow the physical and psychic integrity of the individual to be maintained, and, in consequence, seeks to minimize situations of unease, injury or oppression; from another constructivist perspective, the idea of dignity is more tightly related to autonomy and free development of personal identity[116], something closer to what we would call "human development".

In reality, these perspectives are not reciprocally exclusive or contradictory. If the action of avoiding situations of unease, injury or oppression can have, in legal terms, relevant value, which is justified, among other reasons, because those actions are true premises on which to seek the free development of status and, as a result, participation in public affairs. A greater or lesser degree of assurance of equal dignity depends, therefore, not only on the preservation of physical and psychical integrity, but also on the very possibilities of exercising these personal freedoms and, for that reason, the democratic nature of a given society.

[115] The principle of dignity of the person is inscribed in ethical and political traditions different from traditional liberal thought on socialist ideology. In positive terms, it is recognized by Article 10.2 of the Universal Declaration of the Rights of Man (1948) and in different constitutions, of which the following constitutions, in addition to the Brazilian of 1988, are examples: the German Constitution of 1949 (Article 1: "1. Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt. 2. Das Deutsche Volk bekennt sich darum zu unverletzlichen und unveräußerlichen Menschenrechten als Grundlage jeder menschlichen Gemeinschaft, des Friedens und der Gerechtigkeit in der Welt" - 1. The dignity of man is untouchable. All public authority has the duty to respect and protect it. 2. With this, the German people declare the rights of human beings to be inviolate and inalienable, as the foundation of all human communities, peace, people and justice in the world); the Spanish Constitution of 1978 (Article 10: "1.1 The dignity of the individual, the inviolate rights inherent to him, his free personal development, respect for the law, and the rights of others, are the foundation of public order and social peace") and the Colombian Constitution of 1991 (Article 1: "Colombia is a social state of law [...] founded on the respect for human dignity, work and solidarity between the persons comprising it and in the general interests [of society]"). On the scope of the principle of dignity in modern constitutional thought, see Gutiérrez (2005) and, in particular, Wolfgang Scarlett (2002, page 29 and following pages).

[116] From that perspective, therefore, the principle of dignity is more closely related, in reality, to the satisfaction of interests required for each person to freely pursue his objectives and life plans and participate in the construction of a social life (Fabre, 2000, pages 12-13).

Therefore, only from a conservative, restrictive and erroneous understanding can we reduce the notion of dignity to the simple satisfaction of certain basic civil rights, such as the right to life, to privacy and to freedom, which would justify, according to this understanding, a weakened guardianship of other rights, such as the social rights (allegedly) indifferent to the dignity of individuals. If it is true that dignity appears as the foundation for individual rights, it is obvious that true interdependency and indivisibility of civil, political and social rights are essential in order to gain access to it: the right to life does not, in its tangible expression, do away with the right to adequate access to health. The right to privacy or to the unfettered development of the individual cannot, in its tangible expression, do away with the right to shelter. The right to freedom, both freedom of expression and of ideological freedom, cannot, in its tangible expression, do away with the right to a quality and critical education[117]. In summary, the rights that we usually recognize or classify as "social" are strictly related to the claim for, and real exercise of, civil and political rights, as well as those which are related, in turn, to the claim and real exercise of the so-called "social" rights[118].

From the characterization of social rights as rights effectively related to the equal dignity of persons, approaches according to which civil and political rights, as rights related to liberty, stand in opposition to social rights, also lack coherence. The distinction between rights of equality and rights of liberty prevailed, in fact, during the so-called "Cold War", when the international community reached the point of recognizing them in separate covenants, both in 1966; the Covenant of the Economic, Social and Cultural rights (PIDESC) and the Covenant on Civil and Political rights (PIDCP)[119]. Ratification of one or the other even

[117] According to Pisarello (2007, pages 40-41), "Without basic social rights, the most personal civil rights run the risk of distortion of their content. In a similar way, in the face of the argument that the right to freedom of expression or association would mean nothing for someone who was suffering from hunger, lacking shelter or a job to assure him of support, it could be affirmed that winning the right to food, housing or work depends, to a large degree, on whether civil and political liberties which would allow him to claim such rights are provided".

[118] We emphasize even that traditional civil and political rights, such as the right to information, participation, and due process, are fundamental, in order to ensure not only the exercise of social rights within the sphere of healthcare, housing, education or labor policies, for instance, but also their legitimacy; in other words, they serve as instruments to make it possible to measure the capacity of public policies that appeal to the autonomy and dignity of their intended beneficiaries.

[119] The PIDESC was adopted by the Organization of the United Nations (U.N.) in 1966 and it contains, together with the International Covenant on Civil and Political Rights (PIDCP), the primary commitments arising from the Universal Declaration of Human Rights.

reached the point of being considered, for states at the time, an ideological matter: either civil and political rights were chosen, along with liberty, or economic and social rights were chosen, along with equality[120].

After the cold War, with the fall of the European Communist bloc led by the Soviet Union, objective conditions for adopting the theory which would eventually be claimed by the Declaration of Human Rights of Vienna (1993), that of the indivisibility and interdependency of all rights, arose. Nevertheless, the crisis of the traditional social states, added to the phenomenon of globalization[121], favored the theory of the traditional comparison between civil and political rights and social rights, increasing even more than the preeminent position of civil and political rights over social rights, the idea of the near absolute primacy of proprietary rights, in such a way that the real juxtaposition that occurred did not pit liberty against equality, since they were relational concepts[122], but rather against civil rights, and, above all, proprietary rights against social equality.

As we can see, the notion of liberty, just like the notion of dignity, is problematic, since it can encompass different values and meanings, leading us to distinguish both a negative and a positive dimension to this notion: negative liberty would correspond to a kind of immunity, characterized by the absence of arbitrary interference by the state or private agents; positive liberty would correspond to the individual's possibility of defining his own life plans and of taking part in the discussion and deliberation of public affairs[123].

[120] On the origin and discussions involving ratification of covenants, see Craven (1995).

[121] The concept of globalization was introduced in the 1980's in various universities in the United States (Harvard, Columbia and Stanford, for example) to replace concepts in neoclassical economics or neo-liberalism, expressions which began to wear out, due to the negative effects of application in various countries on the periphery and also because of the "demonization" of these concepts by the critics: "the serious deterioration in social conditions caused by neo-liberalism […] led to its demonization by neo-Structuralists and Marxists, for which reason their theorists invented the idea of the term "globalization" to hide the international principles of the current school of thought" (Morales, 2001, page 20).

[122] According to Balibar (1992, page 124 and following pages), one of the clear consequences of the French Declaration of Rights of 1789, and, with it, modern discourse on rights, is precisely the identity between equality and liberty (*égaliberté*, according to Balibar), which would allow future generations to articulate a principle of mutual implication, historically open, by virtue of the fact that it would not be appropriate to conceive of dismantling or restricting personal liberties which do not lead to social inequalities, or removing or restricting social inequalities which do not suppress or restrict liberties.

[123] On the distinction between negative and positive liberty, derivative of the distinction made by Benjamin Constant between *modern liberty and liberty of the ancients*, see Berlin (1998).

In this context, although discourse about liberty has usually been saddled with the distinction that these two dimensions – the negative and the positive – are contradictory, it seems possible to us that it would be better to characterize them as "reciprocally complementary", rather than "reciprocally related" and as factors necessary for achieving a broader "real freedom"[124], an equation whose core involves the protection of social rights: the exercise of real liberty – and, with it, the satisfaction of civil, political and social rights – is linked to negative immunities and to positive powers[125].

Thus, negative liberty, by abandoning the conservative understanding according to which almost all public interference into the personal sphere is arbitrary, especially when private property and contractual liberties are at stake, can be seen as the right to not endure arbitrary interference over the enjoyment of resources corresponding to basic needs, not just for survival but also for the carrying out of individual and collective life goals, issues that involve access to shelter, health, education and work, for example. On the other hand, from a democratic and egalitarian perspective, interference whose purpose may have been the satisfaction of basic needs would not only be legitimate, but would also make up the true corollary of the principle of equal liberty, or "real liberty". Positive liberty, in this context, would be associated with the right of persons to receive – and have access to – resources allowing them to live an emancipated life, free from domination by others, and the concomitant possibility of creating, along with others, a common public standard in conditions that come close to equality[126]. Therefore, while the traditional conservative perspective is built upon from a selective and excluding notion of immunities, a democratic and egalitarian perspective allows us to conceive them only as rights capable of generalization and inclusion.

That distinction between interests capable of generalization and inclusion, on the one hand, and interests of selection and exclusion, on the other, allows us to better understand the structural tension between civil rights, in their proprietary expression (private property and contractual liberty) and social rights. To the extent that the exercise of civil, political and social rights, under conditions of approximate equality, is linked to the control of certain resources, the exercise of such rights

[124] This perspective on true liberty, as a result of overcoming the dichotomy between *negative liberty and positive liberty*, is defended by Añón y Añón (2003, pages 71-126).

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

[126] For an in-depth discussion of these perspectives, see Bertomeu *et al.* (2005).

maintains a close relationship with the right of property, understood as a right which can be generalized, in the sense that, if the more or less egalitarian distribution of goods and resources necessary for human development is possible only through measures which tend to avoid concentration and which guarantee distribution, such exercise can be guaranteed only by adopting a position of conflict with the right to private property and contractual liberties, tendentiously excluding rights which are usually the sources of various abuses and privileges[127].

The Mexican Constitution of 1917, a pioneer in the recognition of social rights, tried, in that sense, to establish a set of institutes which considerably enriched legal protections of labor relationships, in an effort to deal with issues such as limiting the work day to eight hours, prohibition of employment of children less than 12 years of age and limiting the work day for children less than 16 years of age to six hours, the maximum night shift to seven hours, a weekly day off, maternity leave, minimum wage, equal pay, overtime pay differential, maternity leave, the right to strike, the right to syndication, compensation for expenses, occupational hygiene and safety, social security and protection against work accidents – to the point of exercising a strong influence over the text of the Declaration of the Rights of Working and Employed People which would be adopted in revolutionary Russia by the 3rdPan-Russian Congress of the Soviets in Article 27 – an enormous advance in the sense of protection for the human [working] person, by relativizing the "sacred" right to private property and submitting it unconditionally to the interests of all the people. With that, the legal groundwork was established for a radical reformation of property through broad agrarian reforms, which were the first to occur on the American continent. Popular pressure from the reforms and the Zapatista Revolution gave it a singular prominence in the Mexican Constitution of 1917[128].

However, control over the marketplace and removal of private obstacles impeding real freedom does not imply elimination of the

[127] On the distinction between the right *of* property and the right *to* property, see Waldron (1990, pages 20-24) and Krause (2003, page 191 and following pages).

[128] The Mexican Constitution of 1917 tried to establish that "[o]wnership of land and water […] belonged originally to the nation, which had and still has the right to transfer ownership to private persons, thereby creating private property. The nation will have, at all times, the right to impose upon private property those determinations handed down in the interests of the public, as well as to regulate the use of all natural resources capable of appropriation, for the purpose of undertaking an equitable distribution of public wealth and for its preservation. With this end in mind, the measures needed for subdividing the large landed estates (or *latifundia*) will be pronounced".

existence of property rights, but rather only the promotion of those forms of property – and, in particular, control over resources – which are demonstrably generalized and non-exclusive: from social and cooperative property, especially the great productive resources, up to the enjoyment of other forms of personal property[129]. And, in order to be consistent with the goal of expanding autonomy and avoiding arbitrariness, those limitations should be proportional to the size and capacity for activity of the private powers: its purpose, consequentially, would be to assure a more egalitarian (re)distribution of autonomy, beginning exactly with groups less endowed with autonomy in the society, and preventing or even penalizing the abusive exercise or anti-social use of powers and rights, such as private property or freedom of enterprise[130]. It is clear that we should not let these limitations be transformed into a new source of power concentration, whether of the market or the state. So, these limitations and controls would not produce deterioration of the system of freedoms, as liberal theories

[129] This is a perspective which, in Brazil, is shown to be perfectly consistent with constitutional provisions about respect for the rights of property and free enterprise, limited by issues which assume a social function. For example: "A República Federativa do Brasil [...] tem como fundamentos: [...] os valores sociais do trabalho e da livre iniciativa" (Article 1, Section IV: "The foundations on which the Federated Republic of Brazil […] rests are: […] the social values of work and free enterprise"); "a propriedade atenderá a sua função social" (Article 5, Section XXIII: "Property will fulfill its social function"); "São direitos dos trabalhadores urbanos e rurais, além de outros que visem à melhoria de sua condição social: [...] participação nos lucros, ou resultados, desvinculada da remuneração, e, excepcionalmente, participação na gestão da empresa, conforme definido em lei" (Article 7, Section XI: "The following are rights of urban and rural workers, in addition to others aimed at improving social conditions: […] profit-sharing or sharing of earnings, not linked to remuneration and, rarely, sharing in the management of the company, as defined by law"); "Compete à União instituir impostos sobre: [...] grandes fortunas, nos termos de lei complementar" (Article 153, Section VII: "It is incumbent upon the Union to impose taxes upon: […] large fortunes, under the terms of a supplementary law"); "A ordem econômica, fundada na valorização do trabalho humano e na livre iniciativa, tem por fim assegurar a todos existência digna, conforme os ditames da justiça social, observados os seguintes princípios: [...] função social da propriedade" (Article 170, Section III: "The purpose of the economic order, based on the valuation of human labor and free enterprise is to ensure that all men have an existence with dignity, in accordance with the dictates of social justice and in observance of the following principles: […] social function of property"); "A lei disciplinará, com base no interesse nacional, os investimentos de capital estrangeiro, incentivará os reinvestimentos e regulará a remessa de lucros" (Article 172: "The law will sanction, based on national interests, investments by foreign capital, it will incentivize reinvestment, and it will regulate the remittal of profits"); "A lei reprimirá o abuso do poder econômico que vise à dominação dos mercados, à eliminação da concorrência e ao aumento arbitrary dos lucros" (Article 173, paragraph 4: "The law will repress the abuse of economic power aimed at market domination, elimination of competition, and allowing arbitrary increases in profits"); "A lei apiary e simulacra o cooperatives e outgas formats de associativismo" (Article 174, paragraph 2: "The law will support and encourage cooperation and other forms of association").

[130]For an analogous proposal, based on a rereading of the *principle of difference* of Rawls, see Santiago Nino (1989).

affirm, but, on the contrary, would reinforce those personal and collective liberties[131].

From that perspective, all civil, political, and even social rights can be considered rights of "real freedom": the objective of those rights is, precisely, to satisfy the basic needs of individuals, allowing them to enjoy their own autonomy in a stable way and without arbitrary intervention. Therefore and in fact, there is no opposition between social and civil rights as long as they are rights of real freedom. On the contrary, social rights appear here as instruments indispensible to liberty, understood with a real and stable content over time and intended to ensure the material conditions which make decision-making possible, both in the private sphere and in public procedures[132].

In any case, although social rights can be viewed as rights of freedom, civil and political rights as rights of equality can also be considered as such[133]. Thus, all civil, political and social rights can be related to the principle of formal equality, which prohibits discrimination, and to the principle of substantial equality, which requires compensation for or elimination of actual inequalities. From a formal perspective, civil and political rights, for example, could include rights such as those of association and ideological freedom; from a substantial perspective, those same rights would be related to material conditions allowing the exercise of the right of association and ideological liberty, and with the removal of public and private obstacles which, in fact, impede the exercise of those rights[134].

We emphasize, however, that equal guardianship of civil, political and social rights – and with it, of personal liberties – does

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

[132] Thus, from different perspectives, Habermas (2005, page 147) and Fabre (2000, page 111 and following pages).

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

[134] This dual principle was recognized for the first time in Article 3 of the Italian Constitution of 1948: "[...] É compito della Repubblica rimuovere gli ostacoli di ordine economico e sociale, che, limitando di fatto la libertà e l'uguaglianza dei cittadini, impediscono il pieno sviluppo della persona umana e l'effettiva partecipazione di tutti i lavoratori all'organizzazione politica, economica e sociale del Paese" ("It is the duty of the Republic to remove all economic and social obstacles which, by limiting the freedom and equality of its citizens, impede the full development of human beings and effective participation by all workers in the political, economic and social organization of the country"); this passage is known as the "Basso Clause", in honor of the Socialist deputy who conceived it.

not aspire to – nor would it assure – automatic equality of results or levels of achievement in life, but it does for equality of opportunities, that is, it guarantees all persons of the conditions needed to be able to participate in social life and to define, revise and maintain one's own life plans, in such a manner that each person may assume responsibility for himself[135] and, with that, the consequences emanating from the free exercise of rights: the position that a person occupies in society – economically, socially and culturally determined – does not now necessarily depend on what he does or does not deserve, nor on his own responsibility, since situations of privation and loss of various types exist, for which the individual should not be held accountable, but rather compensated in some way[136].

Taking such premises into account, a plan which could ensure, in fact, equality of opportunity for people should propose, before all else, removal of structural causes that place people in situations of vulnerability and draw them closer to material conditions that would allow them to exercise their freedom, not only initially, but throughout the entire dynamic process of promoting equality[137].

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[135] We are using the term *responsibility* here in the sense in which it is used in conventional psychoanalytic literature, in other words, as equivalent to acting with discernment and consciousness in response to the effect produced by individuals on themselves and on others. Consciousness and discernment are those qualities which allow human beings to recognize themselves as individuals and, at the same time, as agents free to choose and make decisions about their attitudes, in addition to self-awareness as individuals to whom the consequences of their actions can be attributed.

[136] One of the contributions of Rawls to the construction of egalitarian thought which inspired other authors, such as Dworkin and Cohen, was the idea that people could assume responsibility for their ambitions, but not for their physical or mental capabilities. According to Rawls (1997), the natural talent of some people is due to *brute luck*, and not to *luck of choice*. For this reason, only the more fortunate have a right to benefit from *luck* if, with this, there is some improvement in the condition of those who find themselves in the worst circumstances in society. Cohen (1989) criticizes the terms of the *principle of difference* of Rawls because he considers it "blackmail" of the more fortunate who, because they are more fortunate, do not have, in reality, a right to put forward additional benefits under the excuse of improving the life of the less fortunate: Cohen proposes *deep* equality of opportunity which denies benefits to those who, in an irresponsible way, waste valuable resources. In addition to the removal of inequalities resulting from "bad luck", some authors, such as Callinicos (2003, page 95 and following pages) defend the idea of the limitation on all inequalities which arise from "illegitimate" appropriations of the physical or mental capabilities of others, such as those which arise from speculative activities or exploitative relations. In Spain, in particular, the Statute of the Autonomy of Catalonia entails the idea of liberty and autonomy as values offered in juxtaposition to the idea of exploitation: "All people have the right to live with dignity, security and autonomy, free from exploitation and mistreatment and all forms of discrimination, and they have the right to the free development of their personal identity and work capabilities" (Article 15.2).

[137] According to Aranguren (1994, page 436), "Justice does not simply consist in giving to someone 'once and for all' what belongs to that individual, but rather 'restoring it', establishing

Finally, one last apparent tension between equality and diversity should be pointed out when we refer to the philosophical and normative perception of social rights: the theory according to which social rights stand guard over a type of social homogeneity, to the detriment of pluralism and cultural diversity. If we accept the fact that all human beings are intrinsically related through equality, dignity and freedom, we can easily conclude that, as instruments enabling individuals to participate in social life and choose their own life plans, social rights, as the very notion of liberty, carries within itself the kernel of pluralism and cultural diversity[138]. That being the case, civil, political and social rights are based on the need to satisfy the broadest right to equal liberty and equal diversity of all people[139].

To summarize, the idea of axiological subordination of social rights to civil and political rights cannot be sustained[140]. On the contrary, all those rights – civil, political and social – can be considered indivisible and interdependent, heirs to a common foundation: equality in dignity, liberty and diversity of all people. It is clear that this approach does not exclude the possibility of situations of conflict between rights[141], which should be submitted to the resolution process of deliberation[142].

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ownership, by way of repetition [*iterato*], *once again*, again and again" since "justice neither was nor can be established once and for all time […] distribution is continual process of becoming unbalanced, and we always become, by way of repetition, creditors and debtors".

[138] About the link between capability and freedom and between capability and diversity, see, for instance, Sen (2006, pages 9 and 86).

[139]We wish to point out, however, that, within the context of commodification of various spheres of life, satisfaction of the basic needs of individuals and the definition of what those needs are demands that we view civil, political, and social rights as rights of equal freedom, but rights with limitations. The expansion of autonomy, identified with emancipation, cannot be linked to the indiscriminate possession of things. Thus, expansion of the circle of solidarity which envelops social rights and the right to human development implies the establishment of limits on the absolute exercise of rights, in particular, the tendency that such rights assume a tendentiously cumulative and excluding structure, inherent to proprietary rights. A redistribution of resources does not disregard an egalitarian renunciation of certain goods and services by privileged minorities, which are not characterized by solidarity or capable of generalization. Although important for the extension of autonomy, not all tastes and preferences can be considered legitimate, especially when others fail to gain access to basic needs. Emancipation, therefore, includes cooperation which is reached within the scope of social groups and which, based on dialogue and a participatory role played by members of such groups, acquires a certain capacity to judge and justify tastes, preferences, and real needs with respect to themselves, other individuals in the group, and other groups (Barbosa de Souza Gustin and Fonseca Dias, 2006, page 11).

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

[141] In addition, in the majority of modern political and economic systems, it is possible to verify

the existence of structural conflicts which entail tensions, more than between rights, between rights and powers. This is the case, for instance, with property rights, which, when they operate tendentiously in an unlimited manner, tend to be transformed into true power and to place the validity of other fundamental rights at risk. This is also the case of rights related to political participation, which can be converted into bureaucratic power, which might threaten personal liberties. In this sense, Bourdieu (2001, page 15 and following pages) emphasizes the ambiguity inherent to the logic of the delegation of power, by which, if the representative, on one hand, contributes to the existence, on a political level, of the group which he is representing, on the other, he runs the risk of distancing himself from its collective will. The very act of delegation, in systems in which institutional representation is the product of choice, brings with it the tendency towards personal and self-serving concentration of political power and even bureaucratization.

[142] Cf. Zagreblesky (2005).

5. 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 recognize that social rights are not simply rights of late onset, which *come after* the so-called fundamental, civil, and political rights and which, 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 which 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 which are claimable and, in addition, easily protected, while social rights would be positive rights which 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 which 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[143].

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

[143] On different variations of that approach, see Abramovich and Courtis (2002, page 21 and following pages).

rights can be characterized solely as negative rights of abstention, nor can social rights be characterized 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 which can guarantee compliance of contracts involving property.

In a similar manner, the political right to vote contains a broad and burdensome infrastructure which 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 which 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[144]. 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 which 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

[144] The idea that all rights have a cost makes up the central argument of Holmes and Sunstein (1999).

which 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[145].

On the other hand, one of the primary obligations which 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 Organization of the United Nations[146], obligates public authorities to not adopt policies and, consequently, to not allow rules which 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)[147] as a corollary of the constitution with normative power and of the minimum or essential content of rights recognized therein, and it was extended to various other legal systems, such as the Portuguese[148], the Spanish[149], the Colombian[150], the Brazilian[151]and the French[152].

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

[145] Shue (1980, pages 52-53) distinguishes between the wide spectrum of attendant obligations of all civil, political and social rights for public authorities, concentrating, above all, on three: to avoid deprivation, to protect, and to aid.

[146] The Committee on Economic, Social and Cultural Rights of the Organization of the United Nations is the entity charged with supervising compliance with the International Covenant on Economic, Social and Cultural Rights [PIDESC] (1966). According to the Committee, "any deliberatively regressive measure […] would require the most careful consideration and should be fully justified in reference to the totality of rights provided under the Covenant and within the context of full exploitation of the maximum resources available". (cf. Courtis, 2006, page 79).

[147] On the German case, see Franco *apud* Courtis (2006, page 361 and following pages).

[148] In Portugal, Gomes Canotilho (1999, page 449) points to the existence of implicit constitutional clauses which prohibit a "reactionary evolution" or "social regression".

[149] In Spain, the subject of the irreversibility of social rights was discussed by Ojeda Marín (1996, page 91 and following pages).

[150] Cf. Arango *apud* Courtis (2006, page 153 and following pages).

[151] Cf. Wolfgang Scarlett *apud* Courtis (2006, page 329 and following pages).

[152] According to Roman (2002, page 280), the French Constitutional Council has made use, although irregularly, of the so-called *cliquet anti-retour* (reverse-lock ratchet).

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 which 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 program or of an action which is apparently regressive, on the subject of social rights, can be contrasted[153], in such a way that it would allow the state to justify the program or policy, without prejudice to the recognition of an absolutely protected minimum core[154] and against which there can be no limitation whatsoever, even if it is "proportionate"[155].

The duty of non-regression on the subject of social rights is related to the duty of progressivity[156]. This principle authorizes public authorities to adopt programs 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[157]. On the contrary, it

[153] According to Bernal Pulido (2003), there are basic elements which comprise the proportionality "test" in some modern legal systems, such as the German, to which we can refer through comparative law. These principles include: a) the *legitimacy* of the measure under consideration, in other words, its linkage to the legal system, and above all, to the prescribed ends; b) the *suitability* of the measure under consideration, in other words, if its nature is truly appropriate to the protection of the ends prescribed; c) the *need* for the measure under consideration, in other words, its essential nature, and first and foremost, the non-existence of less onerous measures for the rights affected; and d) the *proportionality*, in a strict sense, of the measure under consideration, in other words, if it engenders more benefits and advantages for the general interest than can be derived from other conflicting goods and values.

[154] On the so-called "absolute theories" of the essential content of rights, see Alexy (1994, page 288 and following pages).

[155] According to the Committee on Economic, Social and Cultural Rights of the Organization of the United Nations, that duty of non-regression is imposed in times of economic crises, in such a way that, despite the problems caused externally, the obligations derived from the Covenant continue to be applied and are, perhaps, more relevant in times of economic recession. Therefore, it seems to the Committee that a general deterioration in living conditions […], which could be directly attributable to general policy decisions and to legislative measures of the states which are parties to the Covenant, and in the absence of concomitant compensatory measures, would contradict the obligations emanating from the Covenant" (General Observation No. 4, 1991).

[156] Cf. Pertence *apud* Courtis (2006, page 117 and following pages).

[157] Budgetary scarcity, in and of itself, cannot be raised as a sufficiently solid argument for withdrawal of the imperative for implementing fundamental social rights. Although public resources are limited, the state should assign specific budgetary resources to satisfy social rights

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 materialization 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[158].

On the other hand, social rights are usually characterized 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 which 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

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to the extent possible, but always exerting maximum effort to promote the guarantee of such social rights.

[158] We observe here a clear mandate directed at political power: if there is a more vulnerable group and resources are limited, possible policies should be directed, as a priority, towards the needs of the most vulnerable groups. In this context, the justification for the *reserve of the possible* entails a comparative judgment between what *cannot be done* and what *is being done* and always demands that it be demonstrated that maximum resources have been used: if there is a *tax surplus*, for example, the exposure of individuals to degrading conditions of life is not justified on the basis of the reserve of the possible.

consequential obligations of a right could cut off the democratic space from the social dialogue in regard to its scope[159]. 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[160].

Terms associated with traditional civil rights, such as honor, 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"[161], circumscribed by linguistic convention and hermeneutical practices which 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 "gray 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[162].

Nothing prevents, therefore, development of criteria or indicators which 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[163]; 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 which, despite the legal structure which they possess, are not mandatory in nature.

[159] In this sense, see M. Daly's report to the European Committee for Social Cohesion (Daly, 2003).

[160] Cf. Pisarello (2007, page 67).

[161] In this sense, see Adolphus Hart (1963).

[162] Cf. Alexy (1994, page 490).

[163] In addition, inaccurate, incorrect or even falsified data tend to be determining elements in many violations of social rights. The existence or non-existence of *sufficient resources* for the financing of public policy and support of the principles of preparation, application and evaluation of policies guided by arguments such as *reasonability* and *suitability* are open questions subject to proof, including through the use of statistical data, and such arguments advanced would always be open to objection by others.

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[164].

In this sense, for instance, various courts have recognized 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[165], or to that of material equality[166], or the social state[167]. 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[168], 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 to satisfy them, nor the identification of the individuals involved, are issues that fall outside the scope of the jurisdictional bodies.

We emphasize 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

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

[165] Article 1: "Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verflichtung aller staatlichen Gewalt" ("The dignity of the human being is intangible. All public authorities are obligated to respect and protect it").

[166] Article 2.2: "Jeder hat das Recht auf Leben und körperliche Unversehrtheit. Die Freiheit der Person ist unverletzlich. In diese Rechte darf nur auf Grund eines Gesetzes eingegriffen werden" ("Each person has a right to life and physical integrity. Personal freedom is inviolable. Limitation of such rights cannot be done except through the law").

[167] Article 20.1: "Die Bundesrepublik Deutschland ist ein demokratischer und sozialer Bundesstaat" ("The Federal Republic of Germany is a federal, democratic, and social state"). In this sense, see Alexy (1994, pages 414-494).

[168] "The linkage between the concept of vital minimum and conditions of constitutional emergency was analyzed by the Court, for instance, in its Judgment T-1150 de 2000 on forced displacement". (Torres Ávila, 2002, page 163).

pension fund administrators. This linkage of private parties to fundamental rights can be the product of recognition expressed by the constituent legislator[169] 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[170].

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[171].

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 which 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

[169] Article 18.1 of the Portuguese Constitution, for example, establishes that "os preceitos constitucionais respeitantes aos direitos, liberdades e garantias são directamente aplicáveis e vinculam as entidades públicas e privadas" ("the constitutional precepts respecting rights, liberties, and guarantees are directly applicable and are binding upon public entities and private persons"). Article 9 of the Spanish Constitution stipulates that "citizens and public authorities are subject to the Constitution and other bodies of laws".

[170] In the United States, the system traditionally does not admit that private persons are bound to constitutionally-established fundamental rights, so that the system of law in the United States tends to impede the possibility of protecting fundamental rights within the scope of inter-subjective private relations. One exception has been admitted, which is expressly binding, not only on public authorities, but also on private agents in their inter-personal relations, referring specifically to the Thirteenth Amendment prohibiting slavery in the United States.

[171] This is, for instance, the principle of linkage which is binding on private individuals, established by the Promotion of Equality and Prevention of Unfair Discrimination Act (2000), the South African law designed to promote equality and prevent unfair discrimination, is expressed in Article 27.2: "The Minister must develop regulations in relation to this Act and other Ministers may develop regulations in relation to other Acts which require companies, closed corporations, partnerships, clubs, sports organizations, corporate entities and associations, where appropriate, in a manner proportional to their size, resources and influence, to prepare equality plans or abide by prescribed codes of practice or report to a body or institution on measures to promote equality".

disputes. However, what we wish to emphasize 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[172].

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 which 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[173].

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 categorization would involve admitting that the existence of a continuum between certain rights, without the obligations which 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 generalized and exclusive privileges.

All human rights are indivisible and inter-dependent. 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 coordinate 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.

6. HOW FUNDAMENTAL HUMAN RIGHTS CAN BE EXERCISED AND GUARANTEED

[172] If, on one hand, no one affirms today that freedom of expression entails, in fact and within a democratic environment, free and unconditional access by anyone, in any circumstance, to the spaces in the communications media, radio, and television, neither can we affirm, for example, that the right to housing or to healthcare would entail the automatic and unconditional duty of public authorities to provide free housing or medications for all persons and under any circumstances. In this sense, see Pisarello (2007).

[173] In this sense, see Häberle (2003).

Despite the existence of various arguments denying the theory according to which social rights are structurally different from civil and political rights, that characterization, from a dogmatic point of view, has had a strong impact on the issue of guardianship of social rights, which traditionally are seen as non-fundamental rights and thus with weaker protection, since they do not have available mechanisms of protection and guarantees analogous to those enjoyed by civil and political rights.

That approach implies, on the one hand, that social rights would appear as rights freely created by legislatures, that is, rights whose fulfillment would remain at the discretion of the authorities currently in power, who would decide what to do without our being able to impose greater limits or restrictions on that discretionary power, and, on the other hand, that social rights are not rights subject to the jurisdiction of the courts, in other words, they could not be invoked before the courts so that the particular jurisdictional entity would be in a position to render decisions establishing remedial measures when confronted with violations of such rights by political powers or private agents.

Initially, and on an axiological level, as we have already stated, what characterizes a right as fundamental is, above all, its claim to protect interests or basic needs linked to the principle of real equality. It is the nature of those interests which enable them to be generalized to all persons, which, in short, makes a right inalienable and non-waivable, so that fundamental rights, human rights and individual rights have, from that perspective, analogous meanings.

From a dogmatic point of view, however, the situation looks a little more complex. Along general lines, we have a situation in which the rights referred to as fundamental are those to which greater relevance can be attributed within a given legal system, a relevance which can be measured from the inclusion of such rights into precepts of greater value under the scope of internal codes of law, such as constitutional codes or international treaties and covenants[174].

That being the case, it is possible that certain rights, which could be considered fundamental from an axiological point of view, are so from a dogmatic perspective as well, but that connection is not always made, so codes of law could incorporate, discriminatory or excluding interests and needs as fundamental, always the object of criticism from an axiological point of view[175].

[174] In this sense, see Peña Freire (1997, page 1120).

[175] Thus, for instance, the Constitution of the United States guarantees as fundamental the right to bear arms, while the European Constitutional Treaty (2004) establishes the clear priority of

In any case, over and against the theory according to which social rights are weakly guarded rights, we state that it is not, in fact, the specific guarantees of that given right allow it to be classified as fundamental. On the contrary, it is precisely the inclusion of a right into the positive body of law as fundamental which requires legal operatives to maximize the mechanisms needed to guarantee and protect it. Therefore, if, from an axiological point of view, we can say that a certain equivalence exists between the expressions "fundamental rights", "human rights" and "individual rights", from a dogmatic perspective we can say that there is also a definite equivalence between the expressions "fundamental rights" and "constitutional rights"[176].

In current bodies of law, recognition of a right as fundamental, in and of itself, implies that we attribute to it a minimum content and, with that, the imposition of certain basic obligations on the public authorities, including (or primarily) obligations of non-discrimination, non-regression and progressivity. That does not really prevent the scope of certain laws from depending on that which the codes of law stipulate. There are constitutions, such as the Brazilian Constitution of 1988, which developed the content of social rights in a very meticulous way[177]; others offered only minimal regulation of social rights or relegated those rights to the scope of merely implicit rights[178]. Some constitutions stipulate in detail the obligations which recognition of a right entails for the public authorities and also for private agents, while others only allude to those obligations[179].

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market freedom over social rights. In this sense, see Abramovich and Courtis (2002; 2006) and Pisarello (2003; 2007)

[176] In this way, the potential absence of legislative and jurisdictional guarantees of a constitutional right – whether civil, political, or social – does not lead to the conclusion that it does not involve a fundamental right, but rather, on the contrary, it demonstrates the absence of compliance, or of insufficient compliance, with the implicit mandate for the behavior of political and legal operatives, consistent with the legal standard. It is not the right which is not fundamental, but rather the political powers who engage in behavior which distorts those rights or who fail to act, all of which delegitimizes this behavior. In this sense, see Ferrajoli *et al.* (2001, page 45).

[177] Also in this sense, the Italian Constitution of 1947 and that of Portugal of 1976. The South African Constitution of 1996 incorporates emerging social rights, which go beyond traditional rights, such as the right to water.

[178] For example, the Constitution of the United States.

[179] The Constitution of Ecuador (1996), for example, stipulates in Article 96 that "At least thirty percent of the budget from current revenue of the central government is allocated to education and the eradication of illiteracy".

If insertion into a constitutional text indicates the fundamental nature of a social right, it does not, however, constitute an essential requirement, given the principle of indivisibility and interdependency of all rights, since any constitution which includes the principle of equality in matters of basic, civil and political rights, would raise, as an underlying principle, a mandate of generalization which would require inclusion, at least indirectly, of social rights linked to them[180]. This has occurred, currently, in various codes of law which do not explicitly recognize social rights or grant them the status of fundamental rights. Thus, for example, in those codes of law, the right to decent housing has been logically inferred from other rights, such as that of the inviolability of the home, privacy, or private and family life[181].

When we assert that social rights are rights created by legislatures, the idea that comes to mind is that, despite their constitutional recognition, those rights can be claimed only from the time that they are raised by the legislator, within a context in which they, representing the express will of the ballot box, have a nearly unlimited discretional margin to proceed, or not, with that development. Those ideas, however, cannot stand on their own[182].

All rights, not just the social , but also the political and those of participation, are rights created by legislatures in the sense that, for their full exercise, legislative intervention is essential in one way or another. The law, both by virtue of its formal legitimacy of the bodies from which it originates, as well as due to its ability to be generalized in scope, is a privileged source of legal production in modern legal systems and constitutes a primary guarantee of the satisfaction of any rights[183].

All rights – civil, political, and social – must be established by legislatures[184] which can, of course, be varied in scope.

[180] Let us recall here the idea that all human rights are indivisible and inter-dependent.

[181] In the case of *López Ostra v. Spain* (1994), the European Court of Human Rights (ECHR) considered that the absence of control by the public authorities on a polluting industry which negatively affected the health and safety of persons living in the immediate surrounding area constituted a violation of the right to privacy and family life. In this case, rights to the environment, health and shelter were implicated in an inter-related way. In this sense, see Pisarello (2007)

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

[183] In this sense, see Sheinin *apud* Eide (1995, page 54 and following pages) and Liebenberg *apud* Eide (1995, page 79 and following pages).

[184] Thus, for instance, the exercise of the right to healthcare presupposes laws which avoid discrimination against access to basic healthcare services or which intervene in the market to

Greater or lesser regulation certainly can strengthen or weaken the possibility that the rights in question can be legally claimed through the courts, but does not, in and of itself, prevent those rights from having, at least a minimum content, which lies beyond the reach of the authorities currently in power and is susceptible, for that very reason, to some type of jurisdictional guardianship, even in the absence of legislative regulation.

The Committee on Economic, Social, and Cultural Rights of the United Nations has maintained that public authorities have the duty to ensure, at any time and even in times of crisis or real economic and political difficulties, at least the essential content of those rights. Likewise, different codes of law recognize the duty of states to honor the minimum or essential content of rights recognized in constitutions or international covenants and treaties[185], content which is dependent upon the context in which such rights are applied and which allows historic rights to be updated on an ongoing basis[186].

In any case, that minimum will always be a barrier that

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ensure basic drugs at a low cost.

[185] For example, Article 19 of the Fundamental Law of Bonn (1949): "1) Soweit nach diesem Grundgesetz ein Grundrecht durch Gesetz oder auf Grund eines Gesetzes eingeschränkt werden kann, muß das Gesetz allgemein und nicht nur für den Einzelfall gelten. Außerdem muß das Gesetz das Grundrecht unter Angabe des Artikels nennen. 2) In keinem Falle darf ein Grundrecht in seinem Wesensgehalt angetastet werden" ("When, in accordance with the present Fundamental Law, a fundamental right can be restricted by law or by virtue of a law, this should be enforced in a general way, and not only for a specific case. A fundamental right, in addition, should be stated in the law, with a reference to the specific article in question. This should not, in the instant case or in any case whatsoever, have any effect as to whether a violation of the substance of a fundamental right has been committed), as Article 18 of the Portuguese Constitution (1976) establishes: "1) Os preceitos constitucionais respeitantes aos direitos, liberdades e garantias são directamente aplicáveis e vinculam as entidades públicas e privadas. 2) A lei só pode restringir os direitos, liberdades e garantias nos casos expressamente previstos na Constituição, devendo as restrições limitar-se ao necessário para salvaguardar outros direitos ous interesses constitucionalmente protegidos. 3) As leis restritivas de direitos, liberdades e garantias têm de revestir carácter geral e abstracto e não podem ter efeito retroactivo nem diminuir a extensão e o alcance do conteúdo essencial dos preceitos constitucionais" [(1) Constitutional percepts in observance of rights, liberties, and guarantees are directly applicable and are binding on public and private entities. 2) The law may only restrict rights, liberties and guarantees in cases expressly provided in the Constitution, restrictions in this regard limited only to what would be necessary to safeguard other rights or constitutionally protected interests. 3) Laws restricting rights, liberties and guarantees should adopt a general and abstract nature and may not have retroactive effect or diminish the scope and reach of the essential content of constitutional precepts".

[186] The essential content of those rights does not presuppose an abstract or transcendent understanding: the border between what we may consider essential or basic and what we may characterize as additional, or non-essential, is always moveable, historic, and open.

cannot be crossed, which requires a permanent delineation demanding real integration between justice and politics, and between judges and legislators. What we maintain is that constitutional recognition of social rights entails, under any circumstances and even in times of economic crisis, an untouchable core by the existing authorities, even for jurisdictional bodies, as a result, none of those powers can fail to recognize them and, therefore, all persons must be assured of them, specially, those who find themselves in more vulnerable positions[187].

In summary, all rights – civil, political and social – are structurally, or for reasons of convenience, political rights freely created by legislatures - whose exercise is tied to the discretion of the existing authorities – or are, as we insist, rights whose limits, positive or negative, are beyond the reach of the parties in power, including legislative majorities and jurisdictional bodies. We are assuming, then, the normative concept of a constitutional democracy or of a democracy in which the satisfaction of a right linked to material security and individual autonomy is not subject to the discretion of any power.

Finally, we refute the notion that social rights are rights which are not subject to the jurisdiction of the courts, in other words, that they are not rights which can be claimed before a court of law or safeguarded by it. The issue as to whether a right can be claimed through the courts is not absolute (yes or no), but rather contains a gradual concept. The ability to demand a right before a court of law should, above all, be analyzed in its various aspects – preventive, punitive, or supervisory, although the purpose of such aspects is to prevent the violation of a right from remaining unchallenged by establishing some mechanism which, in one way or another, would force legislative or administrative bodies to publicly justify the reasons for their non-compliance and, therefore, determine their legitimacy or lack thereof[188].

[187] Thus, according to Langford (*apud* Pisarello, 2007, page 86), "In essence, not only would there exist a minimum or essential content attributable to each civil, political, or social right in an isolated way, but also a minimum population, comprised of collective groups under conditions of greater vulnerability, whose protection, above all in times of crisis, should be established as a priority by the public authorities".

[188] It is, moreover, a basic principle of the guarantee of all rights that a legal action may be brought in their defense as a matter of law (in other words, there always exists the possibility of bringing an action before the judicial authorities). Thus it is that, wherever there is a violation or attempted violation of a right (any right), there will be the space needed to institute an action before the judicial authorities. In the Brazilian Constitution of 1988, Section XXXV in Article 5, even in its label of fundamental rights and guarantees endowed with immediate effect, provides that "the law does not exclude from consideration by the Judiciary injuries or threats to rights". The Spanish Constitution indicates that "citizens and public authorities are subject to the Constitution and all the other codes of laws" (Article 9) and that "all persons have a right to

When we speak about the capacity of rights to be decided by the courts, however, we usually confirm the existence of two central arguments which tend to refute the fullness of the behavior of jurisdictional bodies: on the one hand, the lack of democratic legitimation of jurisdictional bodies[189], and, on the other hand, technical incompetence of the judges to handle economic issues[190].

According to the argument of democratic legitimation of the jurisdictional bodies, admitting that the capacity of social rights to be claimed through the courts would introduce an inadmissible anti-democratic element into participatory systems of popular representation, since elected representatives, in that context, would see their actions supplanted, within the scope of public policies, by agents who have no political responsibility[191] and who, in the final analysis, may have the last word on these issues. Moreover, such control would distort the function that constitutions perform in complex modern pluralistic societies: by intervening in certain public policies, bodies of judicial power would indirectly, in reality, be acting to "constitutionalize" a given model of economic development, in such a way that the constitution would, therefore, cease to contain an open and pluralistic mandate[192], in which a variety of political doctrines would be appropriate.

On the other hand, according to the argument about the lack of technical competence of the judges to handle economic issues, it could very well be dangerous to let those judges intervene in complex issues, given their lack of knowledge about specific questions in economic and social issues. Moreover, such intervention might tend to be ill-conceived due to a lack of awareness of restrictions of a budgetary nature and irresponsible from the point of view of the respective financial impact,

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obtain effective protection from judges and courts in exercising their rights and legitimate interests, without resulting in the possibility that such individuals would be left in a state of defenselessness" (Article 24).

[189] About the democratic absence of judicial authorities with regard to the Supreme Court of the United States, see Bickel (1986).

[190] Cf. Fabre (2000, page 128 and following pages) and Abramovich and Courtis (2002, page 122 and following pages).

[191] That absence of political responsibility of judges originates from the fact that judges are not directly elected by the people (with a few exceptions in some countries), and, therefore, are held accountable for their actions to the electorate, unlike what usually occurs with the Chief of the executive branch and members of the legislative branch.

[192] About the idea of an "open Constitution", see Díaz Revorio (1997, page 3 and following pages).

which could lead to a type of judicial "populism", a context in which popular participation itself would end up weakened, since it might encourage citizens to abandon, or at least, have less regard for, electoral contests and various forms of social mobilization, thereby favoring intervention by the courts[193]. And, finally, the courts would lack adequate tools and procedural mechanisms to enforce the guardianship that social rights usually require.

These criticisms are, in reality, not, by any means, without grounds. However, from a perspective which seeks to assess all possible means for protecting social rights, we cannot consider them conclusive. Lack of democratic legitimacy of judges, more often than not, is neither expressly revealed nor necessarily true; on the contrary, the courts when they act as guardians of social rights by controlling actions or omissions by other public authorities or private individuals, in violation of rights, do not act solely in accordance with democratic principles, but can even strengthen them, by assuring compliance with the law and, above all, with constitutional provisions, and by protecting them from perverse or arbitrary behavior. This being so, the behavior of the courts has been shown to be legitimate and democratic in many situations[194].

[193] About the likely "fetichization" regarding the exercise of rights, see Brown and Williams (2003).

[194] For example, in the case *Himachal Pradesh State v. Sharma* (1986), the Supreme Court of India ordered the government to construct a highway about which there already existed an administrative decision, corroborating the thesis that government (the executive branch) assumes the commitment to provide benefits by the fact that it is unable to act against its own actions *(venire contra factum proprium non valet)* ("No one may set himself in contradiction to his own prior conduct"). On that occasion, the court decided: "It is not in dispute whether the state government sought to construct the highway, since it had approved the budget allocation to do so. The legal and constitutional duty of the state to provide highways to inhabitants of that area is not the subject of debate. Therefore, this lawsuit does not need to examine up to what point its obligation to construct highways extends". In 1997, the Supreme Court of Finland confirmed the decision made by another court which ordered a certain municipal government to compensate a person who had been unemployed for a long time for having failed to provide a job for him in six months, when it had promised to do. In Brazil, two decisions by the Court clearly demonstrate interference by the judicial branch in the creation or execution of public policies: on those occasions, the Federal Regional Court of the Fourth Region, on one hand, urged the government to split a highway in the State of Santa Catarina in the southern part of the country, in view of the state's liability for deaths and mutilations, which were the result of frequent traffic accidents along this highway that was maintained by the Federal Union; on the other, it determined that the state should move to demand that the text "alcohol can cause dependency and excess consumption can be harmful to health" on the labels of all alcoholic beverages, based on the Consumer Defense Code. On these decisions, see Pisarello (2007, page 91) and Nogueira Broliani (2005, page 130).

In fact, let us not forget the phenomenon usually referred to as an "eruption of juridification" (*Verrechtlichungshüb*). As we have previously explained, this phenomenon consists on the expansion, diversification, and sophistication of legal mechanisms by which the government, above the power of the law, proceeds to interfere in social relations, historically and originally conceived as control of the marketplace or of custom. It is necessary to pay attention to the fact that this phenomenon, although it may have intensified during the course of expansion of the European welfare state and could be seen as its concomitant by-product, is present in all modern legal experiences.

Extension of jurisdictional control, an incontestable reality far from being characterized by a lack of democratic legitimation, has, on the contrary, reached the point where it can enforce the democratic paradigm by overcoming the so-called "counter-majoritarian difficulty"[195]. Therefore, at least under the present circumstances, guardianship of fundamental rights and principles related to the social and democratic status of the law in a true representative democracy cannot remain restricted solely to legislative bodies, naturally sensitive to pressures – of the majority – and barely sensitive to demands which do not, by themselves, produce immediate electoral benefits, or even to those demands which escape the standard pattern of political priorities established by a certain "party logic"[196].

In this context, it is precisely the assumed element characterized as "anti-democratic" (the lack of political responsibility of judges and the independence emanating from it) that converts judicial power into an "ideal" instrument (while not the only one, nor necessarily the main one) for exercising a certain level of control over the other branches, more politically sensitive on matters of civil, political, and social rights, especially insofar as it concerns the interests of the "minorities", which are nearly invisible and inaudible, politically speaking – sometimes, the true majority– marginalized by traditional representative channels[197].

[195] About the so-called "counter-majoritarian difficulty", see Bickel (1986).

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

[197] The process of defining public policies for a society reflects conflicts of interest, arrangements made in the spheres of power, which pass for institutions of the state and society. However, if the ends of the state itself can be described as the tangible expression of human dignity and the promotion of fundamental human rights, including social rights, it is clear that the judicial branch would be able to intervene in those policies, including against the choice of the executive or legislative branches, since there are minimum legal principles in the very text of the Constitution, which should be offered with priority, in such a way that as long as these principles are not offered, other policies without the same level of priority must first wait until the fundamental objectives have been given concrete expression. In addition, for the public

This is the case, for instance, of prisoners and immigrants who not infrequently find the protection which political and administrative bodies have denied them in the context of the courts[198].

Jurisdictional control over economic and social policies is not revealed, therefore, as an expression restrictive of democracy; on the contrary, it becomes a true condition for its preservation over time and for the suitability of actions by political powers in the beginnings of the social state itself. The control of constitutionality appears, above all, as a paradoxical instrument for unblocking the demands to be represented in the decision-making process, by guaranteeing the proper operation of democratic procedures and avoiding political obligations in terms of civil, political and social rights from becoming subject to technocracy or partisanship[199].

The old myth of immunity of the discretional powers in the field of public policy, which had lent prestige to the political at the expense of the legal, and had fortified resistance to control by the court, therefore, comes tumbling down: it cannot sustain the independence which gives the executive branch absolute immunity, as much due to a modern re-reading of separation of powers, today much more of a constitutional separation of functions, as to the emergence of the material and valuable concept of democracy, nor can it speak sufficiently about formal democratic control through the ballot box in order to legitimize its decisions. The fullness of the constitutional system requires a multiplication of control, both external and internal, on the activities of state powers, not by substituting the judge for the politician and the administrator, but rather based on the recognition that it is incumbent upon the former to watch over the law[200].

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administration, alternatives proven to be ineffective for attaining the constitutional objectives can be eliminated. In this sense, see Barcellos (2005).

[198] "When referring to these assumptions in the United States, Judge Brennan, member of the U.S. Supreme Court, affirmed that 'the courts have emerged as a critical force behind efforts to improve inhuman conditions'. Attempting to explain the reasons for this role, he argued: 'Isolated, as they are, from political pressures and invested with the duty to apply the Constitution, the courts are in the best position to insist that unconstitutional issues be remedied, even if the economic cost is significant" (Uprimny, 2001, pages 164-165).

[199] We wish to point out, however, that a justification of interventions of this type by the courts in economic and social policies cannot be seen as a justification, without further qualification, for judicial intervention. We are only trying here to offer coverage for those acts of intervention directed at the standard enforcement of rights based on democratic procedures, even basic social rights, in refutation of others which so frequently tend to restrict the scope of these rights.

[200] In this sense, see García de Enterría (1983).

On the other hand, the introduction of jurisdictional controls over the legislative majorities in certain circumstances, aimed at safeguarding social rights on behalf of minorities in conditions of vulnerability or truly marginalized majorities, would not weaken the "open" nature of constitutions nor political pluralism, nor even of the democratic principle itself. On the contrary, those controls would only establish a greater probability of material expression, in a form appropriate to the principle of the social state[201].

Insofar as it concerns the alleged deficiency in technical capacity of judges to handle economic issues, neither is this, in fact, a valid reason for distancing justice from social rights[202].

The courts are usually called upon to resolve conflicts about economic issues. Thus, jurisdictional solutions on the subjects of labor law, tax law, inheritance law, economic and corporate law, for example, contain many issues surrounding the management of assets, the stipulation of damages and injuries, the calculation of interest and loss of income, and other issues of indisputable complexity, which, in their majority, require a certain technical knowledge and which, for that reason, are not immune to jurisdictional intervention. The judge, when resolving certain complex issues, may make use of experts, although he is not bound by their conclusions.

Similarly, we underscore that the potential impact of jurisdictional decisions in matters of social rights regarding financial and budgetary issues cannot be used as an obstacle to the capacity to raise the issue of social rights before the courts. On one hand, as we have attempted to explain, many of the jurisdictional behaviors related to the safeguarding of social rights do not have, in and of themselves, greater financial or budgetary repercussions. They may consist, therefore, of cautionary measures against evictions or orders directed at the legislator or public

[201] According to Gomes Canotilho (1995, page 9 and following pages), a constitutional "opening" is not equivalent to neutrality, and if we wish to extend it over time, we have to be capable of preserving the material bases which support the processes of democratization: a constitution which recognizes social rights or which, on behalf of the principle of the social state, imposes positive and negative duties on public authorities, and the marketplace cannot be considered "neutral" in economic terms, in the same way that a constitution prohibiting torture and guaranteeing due legal process is not "neutral" on the subject of criminal policy. Thus, according to Uprimny (2001, page 190 and following pages), legislative majorities cannot, for instance, invoke democratic principles to justify a strategy of behavior against crime which is based on systematic torture and on mass disregard of the rights of citizens, in the same way that they cannot do so in order to justify elimination of the right to strike or a deliberate regression on the subject of social rights.

[202] In this sense, see Abramovich and Courtis (2002; 2006) and Pisarello (2003; 2007).

administration in the sense of completing the regulatory milestone of a particular social right[203]. On the other hand, if it is inevitable that many of the court's decisions pertaining to social rights have financial and budgetary repercussions, what is true is that this also occurs in relation to the guardianship of other civil and political rights, even for traditional

[203] In Brazil, the "Injunction Order" (understood as an order to obligate or to force), set forth in Article 5, Section LXXI, of the 1988 Constitution, is one of the constitutional remedy-guarantees, consisting of a constitutional action for a summary judgment in a specific case, whether individual or collective, so that the Judicial Branch, through the Federal Supreme Court [STF] reports to the legislative branch about omissions in the regulations which make the exercise of constitutional rights and guarantees and prerogatives inherent to nationality, sovereignty, and citizenship unviable. The grounds on which the action rests, therefore, is that there was a failure to regulate constitutionally guaranteed rights and that it was therefore appropriate to bring such actions exclusively against public authorities, due to a failure of omission on the part of the legislative branch to legislate in regard to this right. Until 2007, the Federal Supreme Court, the majority of times, limited itself to stating that there existed a legislative omission and nothing more. However, the Federal Supreme Court now gives signs that it is not satisfied with its role as a mere spectator and that it is ready to apply the law by adopting a concrete position. A step in the evolution of the case law decided by the Federal Supreme Court is expressed by Minister Marco Aurélio de Mello, in Injunction Order No. 721, which reads: "It is time to reflect on the initial timidity of the Supreme Court insofar as it concerns the scope of the Injunction Order, the excess of zeal, by taking into account the checks and balances of the branches of government. It is time to perceive the frustration generated by the Court's initial position, transforming the Injunction Order into a simple action declaring this act as an omission, which resulted in something which is not of interest here, in and of itself, insofar as it concerns the jurisdictional benefit to citizens, as stated in Section LXXI of Article 5 of the Federal Constitution. The Injunction Order was not requested to obtain a certificate of omission by the authority charged with regulating the right to constitutional liberties and prerogatives inherent to nationality, sovereignty and citizenship. The Judiciary is sought after in trying to win over the supremacy of the Fundamental Law: the jurisdictional benefit which distances itself from the nefarious consequences of the legislator's inertia. It was for this reason that the Supreme Court, as it is currently composed, called for reversing the position that it had initially formulated, understanding, even so, that it would diminish the actions of the Courts of Labor, inasmuch as the Constitution had reserved collective lawsuits to them and even legislative actions, since, consistent with the provisions set forth in the 2nd paragraph of Article 114 of the Federal Constitution, minimum legal provisions on the protection of labor are to be respected". On October 25, 2007, the change in position of the Federal Supreme Court was given concrete expression. On that same day, the Federal Supreme Court handed down three injunction orders at the same time (Injunction Order Nos. 670, 708, and 712). The central matter around which all of them revolved was a single issue: the right of public servants to strike, prevented by the absence of regulation on the part of the National Congress, since the Brazilian Constitution, in Article 37, Section VII, makes the exercise of the statutory right to strike by public servants dependent upon the issuance of a specific law. The Court accepted the petition for an injunction order to recognize the delay of the National Congress in issuing regulations for Article 37, Section VII, of the Constitution. But, in addition, it determined that, until the National Congress were to issue such regulations, Law No. 7,783 of 1989, applicable to employees of private companies, could be applied to regulate the right of public servants to strike. By formulating regulations of this type in a supplementary way, the judicial branch exercised a legal, and not a legislative, function; for this reason, according to the Federal Supreme Court, the allegation of harm to the separation of the branches of government lacks substance.

proprietary rights, which at times include monetary compensation and expenditures not provided for in the budget[204].

In reality, the financial and budgetary impact of the actions of the judiciary in regard to the guardianship of civil, political, and social rights is inevitable, if we accept the conditions that, at least on a formal level, characterize a constitutional democracy. The existence of certain basic interests, essential for the powers in office, involve an insurmountable barrier to the free configuration of public costs. In addition, limitations on the free configuration of public costs are a corollary to honoring the minimum or essential content of those rights[205].

It seems clear to us, however, that the fact that the free configuration of public costs is not absolute does not mean that intervention by the courts should never take into account the consequences, not only budgetary and financial, but also political and social, of their actions. However, a certain sensitivity about the consequences of their own behavior cannot be confused with the pragmatic ideology, according to which all intervention by the judicial branch having economic repercussions naturally places the budgetary balance at risk, or constitutes an unlawful intervention in an arena reserved to politics. Moreover, in practice, the courts have directed their actions, in that context, towards the search for a possible middle ground between the guarantee of basic civil, political and social rights, the principle of the separation of powers, and the budgetary balance[206].

The argument regarding the lack of resources and the reserve of the possible cannot be considered as an absolute and definitive argument to remove judicial control. On the contrary, the courts on many occasions have demonstrated that the public behavior required was not so complex or onerous as public entities have stated and they have relied on numbers and alternative data which demonstrated the fallacy of certain impossible assumptions, or have included costs in those numbers and data,

[204] According to Langford (2005, page 91), "In the United States, for instance, protection of certain proprietary rights connected to common law is considered an essential piece in a more or less far-reaching legal framework What often remains hidden when this framework is invoked is that the guarantee of the right to property and contractual liberties calls for numerous acts of intervention by the state and said interventions constitute, in reality, a structure on which the modern capitalist system rests".

[205] Cf. Arango (2002, page 118 and following pages).

[206] Cf. Langford (2005, page 106).

for instance, which were deliberately excluded, such as those which the deferral of a given policy could involve in the future[207].

In fact, the idea of the reserve of the possible is accompanied by three fallacies raised by the liberal-conservative thought for the purpose of negating the possibility of demanding fundamental social rights[208].

The first of these fallacies, already discussed in some depth in this work, rests on the argument that social rights are rights of second order, second generation or dimension, perhaps even "second-hand". This notion contrasts with the fact that social rights are not justified simply as a means of compensating for social inequalities, but rather reflect an integrating and legitimizing essential core of the common good, since it is through them that security, freedom, support and the continuity of human society can be guaranteed[209].

The second fallacy is related to the argument that the ability to demand fundamental social rights is dependent upon the economic force of the state. However, what is true is the argument that the existence of available public resources provided to make those rights possible is associated with public elections, which will define the use of such resources through the public policies. In this way, the argument about the need for a strong economy is not true, since some political will would be sufficient to allocate the resources needed in accordance with the size of the economy and the real priorities of society.

The third fallacy is more closely related to the argument of the reserve of the possible[210]. The materialization of social rights cannot,

[207] In this sense, Langford (2005, page 94) cites the case of *Auton* of 2000. In that case, the government of British Columbia, in Canada, resorted to the argument about the reserve of the possible so as not to finance a treatment program for autistic children. The Provincial Supreme Court rejected this argument, in the belief that the basic right of persons affected by autism not to be the subject of discrimination had been violated. In order to justify its decision, the Court availed itself of two principles which took the public budget into account. On one hand, it held that the costs demanded by the program to treat minor children who were at an age for educational and social development would be considerably inferior to what would be required for their treatment over the long term if the aforementioned program was not implemented. On the other hand, it countered the argument by the provincial government with the fact that other regions in the Canadian territory had implemented similar programs, thereby weakening the argument that the scientific value of the program did not justify such an expense.

[208] In this sense, see Barreto (2003, page 118 and following pages).

[209] Cf. Barreto (2003, page 119).

[210] About the reserve of the possible as a limit on the exercise of social rights, see Bigolin (2006).

however, be linked to the existence of resources by overlooking that costs are inherent to the tangible expression of all rights, even civil and political ones, in such a way that the establishment of a relationship of continuity between the scarcity of resources and the affirmation of rights ends up resulting in a threat to the existence of all rights. Furthermore, the reserve of the possible is not a type of legal standard, since it does not determine the state of things to be achieved, nor is it an order for optimization. In truth, it cannot even be identified as a principle. What is being contemplated is not the reserve of the possible, but the scarcity of resources which it involves[211].

However, there exists a substantial difference between the non-existence of resources and the choice of priorities in the distribution of existing resources. If it is true, insofar as it concerns compliance with the budgetary function of the state, that the theories regarding the cost of rights and its corollary about the reserve of the possible are presented in the clearest way, this argument must be refuted from the perspective that there are no non-existent resources, but instead, that the tangible exercise of fundamental social rights is refuted by virtue of economic issues, such as the payment of interest rates and fees to international institutions or choices made based on the interests of the elite class[212]. There exists, then, a need to distinguish between what is not possible because of a lack of sufficient means, even with observance of constitutional rules which determine the allocation of resources to sensitive areas, such as education and healthcare, and what is not possible because the means available were assigned to other priorities[213].

[211] According to Maselli Gouvêa (2003, page 20), it is in the poorest countries where the issue of allocation of resources is effectively translated into a dramatic choice, where to deliberate about making a given expense in contemplation of a certain project means reducing or suppressing resources that would be needed for another activity.

[212] Cf. Krell (2002, page 99).

[213] While there is no lack of resources, there are decisions in regard to where to apply available resources when billions of dollars are donated, in the form of aid packages, to banks and companies as a result of the worldwide economic crisis. In Brazil, through the Stimulus Program for Restructuring and Strengthening the National Financial System (known by its acronym as PROER), more than R$ 30 billion were given to Brazilian banks during the period from 1995 to approximately 2000, amounting to approximately 2.5% of Brazilian GDP (Gross Domestic Product). At 2005 prices, this would be equivalent to approximately R$ 44.23 billion. In principle, it was a supportive measure intended to protect financially weakened institutions. However, when seen from another perspective, numerous banking and financial institutions carried out monetary diversions in the inflationary period which were usually "hidden" by inflation, in other words, the devaluation of the currency occurred so rapidly that any amount would be almost immediately absorbed, thereby preventing audits from easily uncovering such occurrences. With monetary stability after 2000, numerous balance sheets were left in an uncovered position and institutions were financially weakened. It can be said, from that point of view, that PROER was a reward for corruption. In such contexts, we cannot speak about the

To the extent, therefore, that all rights depend, to a greater or lesser degree, on financial resources in order to be materialized in tangible terms, the issue of the allocation of such resources, in other words, to determine which legal assets will be promoted as a priority is shown to be relevant and plausible as an issue to be argued before the courts. Thus, it becomes necessary to distinguish an argument stemming from the non-existence of resources needed for the material expression of a constitutional duty from the assignment of resources which has been done contrary to constitutional provisions.

On the other hand, on many occasions, the decisions in question are not made solely by the courts, but rather have been adopted from a dialogue which is not necessarily condescending towards other public authorities who have been urged to provide a remedy for actions and omissions deemed unconstitutional, as they relate to social rights[214]. Thus, in some countries, such as Brazil and Portugal, the courts have pronounced judgments in which they affirm that a given policy has unconstitutional elements, but, in order to avoid undesirable economic or social consequences, they have not immediately revoked such decisions, and instead have summoned the legislator or public administrator to adapt them to the constitutional dictates within a reasonable time frame[215].

At times, the traditional behavior of the courts in the face of serious violations of rights has given rise to judgments which do not merely declare such violations to be unconstitutional, but have led to true

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lack of resources, for example, needed to fight hunger in Brazil, but rather about the alternatives which would openly benefit the financial system and investors. In this sense, we should point out the relevance of the development of specific instruments which allow for citizen participation in the budgetary preparation process. It is necessary, then, to activate different forms of participation by people in order to make the budgeting process transparent, in other words, in order to prevent this process from becoming opaque and remaining subject only to the dynamic inherent to the political system. This goal is essential for installing a clear discussion about what are the decisions which should be made in budgetary matters in order to exercise those rights granted by the Constitution, in agreements on human rights, and by law. This becomes a critical moment for discussing which priorities should be set by the state and for making this process transparent and for deciding by what economic means the state intends to allocate resources so as to ensure the satisfaction of those rights. Moreover, the movement for greater scrutiny by citizens of the budgetary process can unite the agenda of human rights organizations with other agendas, which are focused on the demand for greater transparency in political decision-making, greater access to public information, and greater control of corruption.

[214] About the European system, see Actúe (1998) and Pisarello (2003; 2007).

[215] In Brazil and Portugal, these declarations or referrals would allow for the emergence of control over situations of unconstitutionality originating from acts of omission by legislatures. In this sense, see Fernández Rodríguez (1998) and Villaverde Menéndez (1997).

structural injunctions[216], decisions which determine the concrete measures to be adopted by the public authorities, setting a timetable for implementation and specifying other measures to assure the enforcement of their own decisions[217]. In those cases, the severity and the complexity of the situation even justify a far-ranging dialogue between the courts, public authorities, and the affected individuals themselves, which is also extended to the enforcement phase of the judgment[218].

One of the mechanisms which has recently been used by the courts to check this is the use of the principle of proportionality, which allows them to inquire whether a given public policy is consistent with constitutionally legitimate ends, if it is appropriate or not to achieve those ends, and if it has made use of all possible means which are reasonable and less onerous to the rights affected by it. This type of proportionality is, in reality, closely associated with the control of reasonableness (weighted reasonableness[219]), through which some courts have managed, such as the

[216] In Brazil, as we have already indicated, the Federal Supreme Court when it issued a decision on Injunctions Nos. 670, 708, and 712, in which the legal standing to exercise the right of public servants to strike assumed legislative center stage, so that the right provided under the Constitution could be expressed in tangible terms. The Brazilian Constitution of 1988 recognized the right of public servants to strike; however, it established that such a right could be exercised within the limits defined by a specific law which the legislators ended by not promulgating. In this context, the Court, after declaring a legislative omission insofar as it concerns the constitutional duty to publish the law governing the exercise of the right to strike in the public sector, by informing the legislative branch of its delay to enact this legislation, took the initiative in making the current law on the right to strike in the private sector also applicable to the public sector.

[217] According to Fiss (2003), structural injunctions have a long-standing tradition in the United States, where they were used, for instance, to introduce penitentiary and political reforms to eradicate racial discrimination in the schools.

[218] The Constitutional Court of Colombia, for instance, developed the concept of the *unconstitutional state of things* in order to describe "those situations of violation of fundamental rights which have a general character, insofar as they affect a multitude of individuals and whose causes are structural in nature; in other words, they generally do not originate exclusively from an authority in its capacity as defendant, and therefore, their solution demands joint action on the part of various entities" (Decision T-153, 1988).

[219] According to Sampaio Ferraz Junior (2007, page 40 and following pages), the reasonableness of an act, a judgment, or a law should emerge from the consideration of three aspects: its reasonableness means the appropriate subsumption: an act is *essentially* appropriate when it is given by virtue of the legal rule; *existentially* appropriate when it is given by virtue of a standard of legal behavior; and *truly* appropriate when it is given by virtue of a principle of justice adopted in the legal code. Assessment of reasonableness, arrived at after weighing alternatives, takes place through consideration of a given legal standard or alternative perspective, the background facts, and the benefits to be derived from the consequences of the act, since an assessment of reasonableness demands comparison, at the very least, between two standards or alternatives and the manner in which a set of facts are attributed to certain consequences and not

South African courts, to include a "duty of priority to the most vulnerable"; in other words, the duty which analyzed public policy offers responses in the short, medium, and long terms, if not for all society, at least for a considerable sector of the most vulnerable groups, with the most urgent needs[220].

In this context, resolution of conflicts involving redistribution, achieved through various procedural stages, can be easily raised as a substantially democratic justification of the jurisdictional function, which seeks to attribute to it, not the last word on issues relevant to social rights and their guarantees, but rather the function of preserving the deliberative quality of the legislative process itself and its implementation. From this point on, one of the primary obligations of political entities, whose behavior is subject to oversight by the courts, would be to provide adequate information about issues relevant to each case, to listen to individuals affected by a given public policy, to focus its attention, above all, on the most vulnerable groups, and to offer the public opinion with a forum for an open discussion of the reasons for its action or omissions in regard to the matter.

In short, the public authorities cannot, in fact, be forced to do the impossible. However, what is possible – or impossible – in the economic, social and cultural sphere should be tested, and not merely presumed. Thus, as we have pointed out, political entities should also demonstrate that they are making the maximum effort and using maximum resources in order to satisfy the rights in question, that they are disclosing sufficient and clear information, and that they listen to the recipients of the rights in question, that they are making an effort to oversee and monitor effective compliance with policies and programs already in existence, in addition to planning for the future, and that the solution lies at the heart of the policies and programs which are being planned or implemented, in the short, medium or long term, for problems affecting society and primarily the groups most in need.

The courts, as a result, can and should control the reasonableness of the responses of the public authorities to social demands, honoring the principle of the separation of powers and paying attention to the consequences of their decisions, but also without distancing themselves from their duty to enforce compliance of civil, political, and social rights

to others. In order to understand whether something is reasonable after weighing the alternatives, it is necessary to understand what effect a technical-social or political evaluation supporting the legal assessment may produce.

[220] Cf. Sunstein (2001, page 221and following pages).

granted by the Constitution[221]. In this context, the various practices of judicial activism, although exercised moderately by the courts, are converted into an institutional need when the other entities of the public administration are inhibited from acting or delay in acting[222].

When we discuss the issue of the effect and exercise of policies concerning social rights, we should keep in mind that, in order to be able to speak with propriety about any rights, specially about social rights, it is necessary to identify the mechanisms guaranteeing those rights; otherwise, the exercise of such rights remains dependent on the good will of the powers in office or on the private individuals who are responsible for obligations.

Thus, next to the idea that it is necessary to reconstruct the perception of social rights and their guarantees from a protectionist and democratic participatory perspective, based on the recognition that the best guarantees and the greatest democracy are central elements in the task of that reconstruction, we will now proceed to analyze different types of guarantees of social rights, both institutional and extra-institutional.

We are using the term "guarantees" to refer to mechanisms and techniques for safeguarding rights which are intended to ensure that they can be exercised[223]. These guarantees, in accordance with those who affirm them in their capacity as agents committed to protecting such rights, can be classified as institutional, whether political or jurisdictional, and extra-institutional (in other words, social).

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

[222] This constitutionally appropriate understanding of judicial activism in a democratic state of law logically proceeds from the following conclusions: a) social laws depend, for their exercise, on the intersection between law and politics, since it is through the implementation of emancipatory public policies–a task of a democratic public administration–that it is possible to transform the premises of the concept consubstantiated in constitutions and in human rights treaties into physical reality; b) the creation and implementation of public policies should be based on procedures which guarantee the discursive formation of the public will and opinions; c) normative acts defining public policies and their practical implementation should observe the parameters established by commitments assumed by states in human rights treaties, or, at least, by constitutional law, for which reason they lend themselves to control by the judicial branch; d) fundamental social rights do not constitute programmatic standards looking towards the future, but instead are effective rules, which are capable, therefore, of being argued before the judicial branch; e) modern constitutions establish a series of mechanisms to guarantee the exercise of social rights in the event of omissions by the public authorities, it being incumbent upon the judicial branch, through argumentation based on principle, to guarantee social rights in specific cases.

[223] In this sense, see Ferrajoli (1999, page 37-72) y Pisarello (2003, page 23-53).

Institutional guarantees of social rights refer to the behavior of public authorities: political and jurisdictional guarantees. They include primary guarantees, whose purpose is to specify the content of social rights, establishing the obligations and responsibilities which pertain to them, and secondary guarantees, which are intended to operate in the event of a violation of social rights as a result of the failure to comply with these obligations and responsibilities by individuals who are obligated to do so. In a general sense, primary guarantees are political, while secondary guarantees are jurisdictional; however, some political guarantees may also act as secondary guarantees[224].

Political guarantees of social rights are related to safeguarding mechanisms conjoined with the powers which have political responsibility. In a democracy, the executive and legislative branches have the duty of accounting to the electorate. These guarantees are of vital importance for social rights, in two ways at least: on one hand, it is necessary for the political powers to define the content and scope of social rights and to determine the means needed to exercise them; on the other hand, access by broad social sectors which cannot pay for services offered by private companies for essential rights connected with the existential minimum, such as healthcare, education or housing, depends, to a large degree, on state activities within the scope of the legislative and executive branches.

Constitutional recognition of social rights constitutes, within this context, a political guarantee of the excellence of such rights[225]. Constitutional rigidity itself, in other words, the foresight of mechanisms which impose effective limits on the possibility of ordinary reform of the constitution, even foresight in matters of rights, which make those rights untouchable to a certain degree by the existing powers, can be considered a significant instrument of prohibition against arbitrary retreats and, in the final analysis, of ample protection for the preservation of democratic procedures themselves[226].

The prohibition against regression, recognized above all by the Organization of the United Nations, within the scope of the

[224] Cf. Abramovich and Courtis (2006, page 56).

[225] Cf. Pisarello (2007, page 115 and following pages).

[226] However, as Cabo Martín has shown (2003, page 9 and following pages), if constitutional clauses with qualified protection are those which protect proprietary rights and the principles of the marketplace, constitutional rigidity runs the risk of being transformed into an obstacle to political and economic transformations which is required if social rights are generalized.

International Covenant on Economic, Social, and Cultural Rights (1966), obligates the public authorities not to adopt measures and policies and, consequently, not to allow rules which might come to undermine, without a justifiable reason, the condition of social rights in the country. This same principle of irreversibility of social victories was formulated in constitutional terms in Germany, with the approval of the Fundamental Law of Bonn (1949)[227], as a corollary of the legal power of the constitution and of the minimum or essential content of rights recognized therein, and it was extended to various other legal codes.

Together with these procedural constitutional guarantees, there exist many others, which consist, above all, of endowing rights protected under the constitution with specific content, on the stipulation by the created powers charged with ensuring observance of such rights, and on the indication of the obligations and duties linked to them.

Thus, the constitution is the level of jurisdiction from which the state power is drawn and upon which the protection of such rights is binding. Given its more or less democratic character, therefore, constitutions organize state powers under forms which are more or less founded on principles of diffusion, plurality, representativeness, and public awareness of political power[228]: the representative principle and the pluralistic composition of legislative bodies also constitute guarantees of a political nature. In this context, one of the primary political guarantees of social rights lies in the power of the constitution to protect various bodies – legislative, executive and judicial, which can place limits and can control each other[229].

[227] On the German case, see Franco *apud* Courtis (2006, page 361 and following pages).

[228]In this sense, the revocability itself of public authority is a guarantee provided in various legal systems. From a revolutionary point of view, the declaration of rights contained in the preamble of the Jacobin Democratic Constitution (1793) granted the right-duty of insurrection in the event that the rights of individuals may have been violated by the government: "When government violates the rights of the people, insurrection is, for the people and for each segment of the people, their most sacred right and most essential duty" (Article 35). On the other hand, the Venezuelan Constitution of 1999 establishes that "the government of the Bolivarian Republic of Venezuela and the public entities comprising it are and will always be democratic, participatory, elected, decentralized, alternative, responsible, pluralist, and holding revocable mandates" (Article 6), and further, that "all offices and judgeships elected by the people are revocable" (Article 72).

[229] The typical division of power in a democracy, and the existence of a system of mutual and competitive control, or "checks and balances", constitute a guarantee, instrumental in nature, which provides mutual observance of compliance with obligations by each of the branches. An example of that system of guarantees, which can be relevant on the subject of social rights, is the Brazilian Constitution of 1988, which specifies the mechanisms by which information from the Congress can be requested in regard to ministers and other agents of the executive branch

On another level, political guarantees refer to the effective concrete configuration of social rights, in other words, to the definition of their content, the indication of their beneficiaries, the forms in which they may be exercised, the obligations emanating from them, the individuals entrusted with the duty to comply with such obligations, and the resources intended to be used for their enforcement.

In specific terms, legal guarantees of social rights, which result from the legislative process (that is, from the recognition of social rights in pluralistic and representative demands) are also primary political guarantees of the quintessential type, linked not only to the principle of the legal reserve, but also to principles of generality and universality of law[230].

In fact, the minimum or essential content of rights recognized by constitutions entails, for the institutional bodies, a series of obligations which they cannot ignore. The legal guarantee of rights assumes the duty, more than the possibility, that Parliament, in appropriate conditions of public dissemination of information and pluralistic confrontation of various points of view and political forces, which comes to establish the general system within which the power to legislate may be exercised, is fairly linked to various entities and agents in the public administration, both directly and indirectly – the executive branch – on the subject of social rights and public policies[231].

This formal guarantee, procedural in nature, is supplemented by the perception that the legislative development of rights cannot be directed in an arbitrary way towards specific subjects (generality), nor can certain groups be excluded as holders of such rights (universality) in an unjustified way. This is essential in order to avoid multiplication of policies and programs arbitrarily focused, discretional and exposed to clientelistic practices, if not to corruption and violation of legality itself, practices which place policies at the service of the existing powers and which, in the configuration of constitutionally recognized social rights, do not fulfill the minimum requirements for rationality and

(Article 50), establishment of parliamentary files (Article 58, paragraph 3) and of parliamentary inspections of various entities in the public, accounting, financial and budgetary administrations. Surprisingly, such mechanisms could manage to deliberate about whether the current chief executive should remain in office: in the Brazilian constitutional system, the prerogative is given to the Senate of trying and judging the chief executive for crimes involving responsibility, as well as for those acts which constitute an attack on the exercise of social rights (Articles 52, Section I; and 85, Section III).

[230] Cf. Cabo Martín (2002, page 73 and following pages).

[231] In this sense, see Peña Freire (1997, page 195 and following pages).

legitimacy for their regulation. In that sense, we can point out the expansion, grounded on principles of generality and universality, of the content of rights, such as the right to education and healthcare, as well as the inclusion in the political agenda of other new rights, such as the unconditional access to social assistance programs and basic income for all who need it..

We should emphasize, however, that general and universal legislative guarantees of social rights do not exclude the possibility of adopting differentiated legislative guarantees linked to specific needs of certain groups and individuals[232], or, in addition, which establish different burdens for individuals, proportionate to their size, resources and influence[233]. Within a context of democratic reconstruction of legal guarantees we could demand the creation of rules to interpret or protect those persons who occupy positions of subordination or dependency, or in the final analysis, of vulnerability, in the face of those who hold power of any type, whether public or private[234].

[232] According to Pérez Portilla (2005, page 137), one of the justifications which allow those measures establishing differentiated rights, based on criteria such as sex or gender, ethnic origin or physical or mental deficiency, is that, with them, "an attempt is reasonably made to compensate these groups for damages and injuries done to them, thereby seeking substantial or tangible equality".

[233] According to Seabra de Godoi (2005, pages 156-157), "indispensability" of the fiscal state arises from taxation, and from that indispensability, the fundamental duty to pay taxes is derived: "As a fundamental duty, taxation cannot be assumed to be merely a power of the state, nor merely a sacrifice by citizens, constituting, as it does, the essential contribution to life organized in a fiscal state" (trans.). In that context, the duty to contribute to the financing of state activities through the payment of taxes is a central institution of the modern state, seen as a "projection of the principle of social solidarity in the area of public office" (trans.), which, in turn, is limited to its effect on citizens through the principle of the individual capacity to contribute (Greco, 2005, page 168-189). In addition to the taxation aspect, the duties imposed on private individuals can also refer, for example, to the prohibition against accumulating certain commonly used resources, the introduction of labor, commercial, and ecological obligations and restrictions, and penalties for the antisocial use of property.

[234] Thus, according to Pisarello (2007, page 118-119), "differentiated guarantees on behalf of the weakest *(favor debilis)* would be the agrarian laws assuring rural residents of their rights in the face of the power of the landowners; labor laws safeguarding the rights of workers in the face of the power of employers; civil laws protecting the rights of tenants in the face of the power of building owners, urban or real estate developers; laws protecting the rights of consumers and users in the face of private or public educational services, healthcare, transportation or potable water service providers; laws protecting the rights of women in those working, family or political contexts which put them in positions of unequal power relations with men". In the Brazilian setting, we can cite the recent issuance of the "Maria da Penha" Law (Law No. 11,340/2006), which creates mechanisms to inhibit domestic and family violence against women.

Those differentiated legislative guarantees, which rest on a factual inequality, can adopt, on the other hand, the form of measures of affirmative action, such as scholarships, subsidies, or quotas that allow certain underrepresented groups or groups whose rights have been historically deferred, to gain access to certain economic, social, and cultural resources, including employment and political representation[235].

Finally, as we have indicated, within the scope of those political guarantees, there are limits to the legislative configuration of social rights, developed from studies prepared by the Committee on Economic, Social and Cultural Rights of the Organization of the United Nations, the entity entrusted with monitoring compliance with the International Covenant on Economic, Social and Cultural Rights. Thus, the ranking of international treaties at the constitutional level, or, at least, at substantially privileged legal levels, imposed on parliaments a limit which assumes respect for what is usually called the "essential content" or "essential minimum content" of constitutional rights[236]. This implies that, inasmuch as they have been given constitutional expression, social rights have an irreducible core which the legislator must not ignore[237], from which emerges a guarantee of reasonable regulation.

Even within the scope of political guarantees, a technique of the secondary political guarantees is the so-called "police power", conferred upon the public administration[238]. Through the exercise

[235] In this sense, for example, the Brazilian experiences with Law No. 8,112/90, which provides, in paragraph 2 of Article 6, that a quota of places in the public sector recruitment exams for positions in the federal public administration be reserved for people with disabilities; Law No. 8,213/1991, which provides in Article 93 that "a company with one hundred or more employees shall be obligated to fill 2 to 5% of its positions with participants in rehabilitation programs or persons with disabilities"; and Law No. 10,836/2004, which created the "Family Fund" program, intended to transfer income to family units which are living in conditions of poverty or extreme poverty.

[236] In Argentina, for instance, since 1994 those treaties led to a constitutional hierarchy; in Spain, a special hierarchy arose from the duty to interpret fundamental rights in light of duly ratified treaties on human rights. For a Reading on "the essential content" or "minimum essential content" of constitutional rights, see Gavara de Cara (1994) and Martínez-Pujalte (1997).

[237] Thus, for instance, the Argentine constitution affirms in Article 28 that "the principles, guarantees, and rights recognized in the preceding articles shall not be modified by laws regulating the exercise thereof".

[238] According to Article 78 of the Brazilian Tax Code (Law No. 5,172/1966), "police power is considered to be an activity of public administration which, by limiting or penalizing a right, interest or freedom, regulates the practice of an act or an abstention thereof, by virtue of the public interest in matters concerning safety, hygiene, order, customs, control of production and the market, the exercise of economic activities dependent on concessions or authorizations granted by public authorities, for the public peace or respect for property and individual or

of that power, public agents control and penalize practices which could violate rules and legal standards. That guarantee is especially relevant in matters involving social rights, since the exercise of a right depends, in many cases, on compliance with certain obligations by private individuals. This is what happens, for instance, in issues related to the right to education and healthcare when the respective benefits fall under the responsibility of private providers; the right to occupational safety and hygiene, which cannot disregard benefits from employers; and the right to the environment when injury, either actual or potential, proceeds from the activities of the private industry.

We can mention, in addition, the emergence, primarily from the constitutions of the 20th century, of new entities of external control, such as the Court of the Comptroller General, consumer protection services, public prosecutors, and people's councils. These entities have usually been endowed with the typical functions of political control, which are expressed through the issuance of reports and recommendations in response to complaints about violations of the rights of citizens and rules of financial, proprietary and budgetary administration of the state. On the other hand, some of these entities may even receive complaints and can potentially supervise the use of public resources and propose actions through the courts in response to violations when a solution is not possible through any other means.

Jurisdictional guarantees are typically secondary, intended to allow a power which is more or less independent of public bodies or private individuals obligated to enforce social rights to receive and consider complaints regarding the failure to comply with those obligations and, if applicable, to enforce compliance and/or to establish remedies or penalties. This function is usually attributed to the judicial branch, although there may exist other jurisdictional guarantees, such as administrative courts and courts of arbitration, and even other agents and entities which use non-judicial methods to resolve disputes, provided that they are characterized by impartiality and independence in relation to the parties with the conflict.

From a democratic perspective, the role of the normal channels of jurisdictional proceeding are usually associated with ensuring the service and compliance, not only with rights and duties contemplated under the constitution and international treaties, but also with the laws promulgated by public entities. Precautionary measures, actions aimed at declaring and establishing rights and duties, mandates of compliance with

collective rights" (trans.).

obligations – even remedies for damages and injuries – are some of the tools by which the regular courts can safeguard social rights, in the face of private parties as well as the public administration itself, in conflicts which contemplate, for instance, labor rights, social security, housing, education, and healthcare. On the other hand, the special jurisdiction of the courts, in the form of superior or constitutional courts, acts to establish mechanisms of control and remedy in those cases in which the ordinary judicial guarantees have been violated or are insufficient, or in cases in which the injury to rights can be attributed to the legislator himself.

The role of special or constitutional judicial guarantees has been the subject of a number of criticisms, due to the lack of direct democratic legitimacy of the courts in the face of the legislative branch, as well as the result of an alleged lack of technical ineptitude of judges to handle economic issues, as we have mentioned before. To these criticisms, we can add the fact that, historically speaking, constitutional courts have been more conservative when safeguarding social rights than when they act to safeguard civil rights, particularly with proprietary rights and freedoms of the marketplace[239].

[239] A certain conservative tendency of supreme courts in some countries cannot be denied. The conservative tendency of the Supreme Court of the United States is well known, for instance. In the case of Allen v. Wright of 1984, parents of students at a school with a majority of black students filed a legal action to order the IRS (the U.S. Internal Revenue Service) to deny a tax exemption to schools which practiced racial discrimination. The parents won the lawsuit in the lower court and the court of appeals affirmed the judgment. The subtle issue raised was the possibility as to whether the case could be litigated before the federal courts without alleging a violation of personal rights. The Supreme Court of the United States changed the decision of the lower court. In a decision written by Sandra O´Connor, it was decided that this matter could not be litigated before the federal courts if it had not been proven that a personal right had been violated. According to the decision, the Supreme Court was not willing to consider generic violations of generalized rights. The case of Poe v. Ullman of 1961 also involved consideration of the issue of competence of the federal system of justice in the United States. In 1961, the State of Connecticut maintained the constitutional validity of a law prohibiting the sale of contraceptives in that state. Although the law was not respected, given that contraceptives were sold in that state, a group of women filed a legal action in the federal system of justice of the United States, to call into question the unconstitutionality of the ruling. The group argued that the law prohibited women from receiving adequate information or guidance about birth control. During that period abortion was not yet a topic of hot debate in the United States courts. The Supreme Court analyzed the issue and a majority of the judges affirmed that the subject was not yet ripe, in other words, that the discussion had not yet matured and had not adopted a sufficiently concrete form so as to allow it to be litigated. It was decided that there was not a sufficient number of cases objecting to the cited law and that, therefore, the subject did not warrant intervention by the Supreme Court. Finally, in the case of Goldwater v. Carter of 1979, the subject of the judicialization of politics was brought up for consideration. President Jimmy Carter, without listening to Congress, had signed a treaty with Taiwan. Some representatives believed that the U.S. President did not have the power for such an act; among them, was Goldwater, who had filed the lawsuit, winning in the lower court and on appeal. President Carter, through a writ of *certiorari*, raised this issue before the Supreme Court. Once again, a recurrent problem involving the competence to hear and judge political issues was brought up

Despite the fact that these criticisms are not, in reality, groundless, none of them is, in fact and as we have already shown, absolutely insurmountable. In addition, without prejudice to their preponderantly conservative function, the courts have shown, above all, when social rights, explicitly recognized in the constitution or in international treaties, are at stake, that they offer the possibility of ideal jurisdictional channels through which to protect interests which are politically nearly invisible and inaudible for "minorities", the most vulnerable and under-represented groups and individuals in the usual spaces. At many times, the courts have thus effectively limited legislative behavior resting on the principles of the "logic of the game" or on technocracy, forcing the existing powers to justify themselves before public opinion, and with the entire delegitimizing burden which this can entail, to explain what are their real priorities when allocating public resources and why have they committed the acts or omissions, which, on the face of it, seem to injure fundamental rights[240].

One technique with which the national courts have used in various countries in South America and Europe, as well as the international courts such as the International Court of Human Rights and the European Court of Human Rights, when confronted with certain difficulties in directly safeguarding social rights, consists of an "indirect guardianship" of those rights by invoking other simultaneously violated rights, about which there can be no doubt as to the competence of the courts to exercise its judicial authority[241]. For example, the violation of social rights can also affect the principle of equality and the prohibition against discrimination[242], the right to due legal process[243], civil rights[244] or even other social rights[245].

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before the Supreme Court of the United States and the Constitution did not specifically address this matter. It was decided that the Supreme Court could not consider the issue because it involved a political problem confronting the executive and legislative branches, which had to be resolved by those branches: the issue was referred back to the court of appeals, with the determination that the Supreme Court would not rule on it. As a backdrop to these events, Carter's policy should be kept in mind, in the sense of a rapprochement with China, and what treaties with Taiwan would represent in this context. It should be remembered also that Carter was a Democrat and that, at that particular time, a transition in the composition of the majority on the Supreme Court was shifting to the Republican side (cf. Schwartz, 1995, page 430). In this sense, also see Pisarello (2007, page 121).

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

[241] In this sense, see Abramovich and Courtis (2002, page 168-248).

[242] This occurs, for instance, when a sector or social group, such as that of women, the children of immigrants or persons with a mental or physical deficiency, is discriminated against when attempting to gain access to a social right, such as health, education, or work.

This behavior is perfectly justified from a democratic perspective, which requires the involvement of the courts in order to protect civil, political and social rights, essential for reinforcing the material bases of autonomy and thereby reinforcing the capacity of the individual to participate in public affairs.

At the same time, and without detriment to the significant role which a diffuse state power, whose actions are monitored in protectionist terms and controlled from a democratic point of view, so as to enable institutional guarantees to become more effective, could play in terms of safeguarding social rights, a lesson learned over the course of the last few centuries is that, effectively, no strategy intended to protect rights can, in realistic terms, derive solely from the powers of the state – the executive, legislation and judicial branches – which would attempt, in a "virtuous" way to give them tangible form through their own means[246].

Rights without duties do not exist, nor can exist obligated individuals without individuals who are capable of obligating[247]. In this way, although the role of institutional guarantees (political and jurisdictional) are shown to be essential in order to endow civil, political and social rights with effective power, any constitutional program of guarantees, no matter how exhaustive it may be, would be incomplete and, therefore, incapable of providing enforcement and effectiveness, by itself alone, to the means intended to implement full citizenship without the concomitant existence of multiple spaces of popular pressure, capable of assuring such rights, not only through the state powers, but beyond the state itself, or, in extreme cases, even against the state at truly revolutionary

[243] For instance, when social rights are refused to someone through a denial of guarantees, such as the right of defense or the right to resort to jurisdictional bodies.

[244] For example, denial of the right to healthcare can also imply a denial of the right to life itself; the denial of union rights may be an attack against the right of association, and injury to the right of education may affect the right to autonomy and the free development of one's personal status.

[245] For instance, violations of rights inserted into or related to matters of education, shelter, and healthcare, can constitute simultaneous violations of the rights of the consumer.

[246] Ferrajoli (1990, pages 940-941), for instance, warns against *protectionist fallacies*, for which the reasons behind a good law, endowed with advanced systems of constitutional guarantees, are sufficient to contain the powers [acting against it] and through fundamental rights which are safe from its deviations and politicized fallacies, which, on the contrary, rely on the strength of a *good power* to satisfy the function of safeguarding rights.

[247] According to Pisarello (2007, page 122), "There are no rights without duties, just as there are no subjects obligated without subjects capable of obligating".

moments when severe injury has been done to civil, political or social rights.

Guarantees beyond formal institutions, or social guarantees, are, in summary, those instruments and means for safeguarding or defending rights which, without detriment to intervention by the state, depend on the actions of those who hold such rights. Activation of those instruments of guarantee, therefore, involves the initiative of citizens, which is not, in any real sense, subordinate to the actions of the public authorities. It requires, in reality, active participation by social agents and their commitment to the decisions which are incumbent upon them, and it is grounded in the perception that the effective interaction of a law or program with its intended beneficiaries, and the behavior of each one in defense of the interests and rights of all is the best guarantee that can be accorded to social rights. When confronted with the attitude of conservative public policies which seek to enforce only selective, discretional and revocable concessions by the existing powers, if not measures intended to stigmatize and control the poor, broad social participation is seen as an essential tool, not only to avoid the paternalistic appropriation of the rights and needs on which they rest, but also to prevent policies from turning into perversions of power or corruption of institutionally established authorities[248].

Within the scope of extra-institutional social guarantees, we can distinguish between indirect guarantees, directed at encouraging participation in the process of creating institutional guarantees of social rights and related in this way to the claim for the satisfaction of needs and interests, and direct guarantees, which adopt more intense forms of true self-protection.

One of the primary indirect social guarantees of rights requires observance of the possibility of electing – or, in some cases, even removing – agents and entities entrusted with the duty to safeguard such rights. Included among these guarantees, for instance, are the rights of citizens, the right to vote, to join a political party, and to petition the public

[248] According to Abramovich and Courtis (2006, page 71), "Extra-institutional or social guarantees are instruments of defense or guardianship of rights which depend directly on their holders. The activation of these instruments of guarantee involves, therefore, the initiative of citizens themselves, and is not subordinate to the behavior of the public authorities. Active participation of citizens in defense of their rights constitutes an essential means to impede the paternalistic appropriation of rights and the needs on which they are based, and their conversion into mere raw materials of the state bureaucratic administration. It also means the existence of forms of citizen control over the decision-making process, control over the implementation of public policies and control over acts of corruption and abuses of power by the public authorities".

authorities, as well as the rights of association and assembly, and the right to freedom of expression without prior censure, all of which constitute effective guarantees in the strictest sense.

If we bear in mind the indivisibility and inter-dependence of civil, political, and social rights, we can easily conclude that the tangible representation of some civil and political rights, at least, constitutes a prerequisite for the true exercise of those guarantees, but that their exercise also requires satisfaction of certain basic economic, social and cultural needs, identified with the existential minimum, which is possible only through the satisfaction of certain social rights. In summary, satisfaction of social rights is essential for the true exercise of civil and political rights, but this exercise is also shown to be essential for controlling compliance with obligations emanating from such social rights. Without this observance, the state would end up appropriating the discussion about the unsatisfied needs of certain social groups and would eliminate the possibility for criticism and change by the citizens[249].

The various forms of participation by citizens in the decision-making process, as things stand, give shape to true social guarantees. In addition to the vote, the right to popular legislative initiatives, the mechanisms for deliberation through public hearings, the different forms of inquiry of citizens – among which are the plebiscite and the referendum – and popular mechanisms for challenging acts of the public authorities are examples of these forms.

In all these cases, efforts are directed at establishing a true channel through which beneficiaries of rights would be able to take an active role in the discussion and decision-making process about matters which are of interest to them and which could affect those rights. In the Brazilian case, the most radical examples of experiences of this sort are the participatory budget and municipal councils, mechanisms by which citizens can participate and exert control over the public budget, by making decisions about the allocation of public costs and supervising the implementation of policies related to such costs[250].

[249] In this sense, Sen (1982; 2000), when studying certain cases, reaches the conclusion that "countries in which fatal famines occurred during the 19th and 20th centuries were characterized by the non-existence of freedom of the press and of a public sphere independent of the state and channels of participation and political criticism".

[250] In this sense, Ganuza Fernández and Álvarez Sotomayor (2003) emphasize, for example, experiences with the participatory budget of Porto Alegre, in Brazil, and also of Kerala, en India. For a more complete view of the experiences with participatory budgets in Brazil, see Genro and Souza (1998) and Villasante and Garrido (2002).

As we have already indicated, it is necessary to develop specific instruments which allow citizen participation in the preparation of budgets. It is necessary, then, to activate various forms of popular participation in order to make the budgeting process transparent, in other words, in order to prevent that process from becoming opaque and remaining subject solely to the dynamic inherent to the political system. This goal becomes absolutely essential in order to initiate an open discussion about what decisions to make in budget matters in order to enforce rights established in the constitution, in human rights covenants, and in accordance with law. This becomes a critical moment in which to discuss what priorities the state should adopt and what are the economic means which it will allocate to ensure satisfaction of those rights. The movement for fiscal inspection of the budget process by citizens can unite, in particular, the agenda of human rights organizations with other agendas, which are focused on the demand for greater transparency in political decisions through access to public information, and control of corruption.

Another fundamental guarantee in defense of social rights by those who hold such rights is the right of access to information. Article 19 of the Universal Declaration of Human Rights recognizes the right of all men to be free, without interference, to hold opinions and to seek, receive, and transmit information and ideas through any means and regardless of borders[251]. Thus, information about the acts of government, in fact, constitutes an essential asset for controlling and expressing criticism of state activities, for engaging in public debates on policy, for controlling

[251] In this sense, Martín-Barbero (1987) points out the importance of popular literature in Spain and France in the 17th century: with the access of people to written language, the means were created to question the differences and distance between the nobleman and the common man (plebian). The literature written by authors such as Lope de Vega, for instance, stands out, which, on one hand, disseminated the "image" of the common man among the nobles and, on the other, allowed the classes of the masses, through stories and burlesque and satirical verse, which often included blasphemy, a greater understanding of their *daily world* and a critical vision of the nobility, the clergy, and the outside world. Mandrou (1964) shows that popular reading was spreading at that time; the village peasantry met together after work around a fire to hear something read aloud. The iconography and literature thus involved a critical vision of the nobility and, in particular, of the Catholic Church, with allegorical representations of the word awash in wickedness, the transformation of the figure of the Pope into a donkey, bishops and cardinals into foxes, and saints as figures from mythology and representations of daily life. In this sense, Martín-Barbero (1987, page 148) recalls a fragment from the book *The Ingenious Nobleman Don Quijote de La Mancha*, by Cervantes: "[…] when it is harvest time, the reapers flock here on holidays, and there is always one among them who can read, and who takes up one of these books in his hands, and we gather around him, thirty or more of us, and we cluster around, listening to him with such delight that it makes our gray hairs grow young again". In the 18th century, criticism of the Catholic Church in iconography and literature was replaced by the construction of a middle-class scene, which portrayed an ideal way of life and not the salvation of the soul. (Martín-Barbero, 1987, page 155 and following pages).

corruption and for holding the existing powers politically accountable. One of the basic principles of a democracy involves respect for the public proclamation of the acts of government, which should even contemplate the practice of facilitating, in all its aspects, access of citizens to information about public management, above all, through the administration itself. Similarly, access to information should extend to the actions of certain private agents, such as employers, companies which provide public services or companies which engage in activities generating collective risk, such as industries with a high potential for causing environmental harm and other risks which could affect social rights or the public welfare.

On the subject of social rights, access to information should offer individuals the possibility for them to become informed and also to evaluate public policies using indicators which reflect the content of those policies and their results, both real and potential. Therefore, the state should take great pains to produce and place at the disposal of all people real information about the situation in the various areas of activity at the level of social rights, primarily when knowledge of that kind would require explicit measurements using specific indicators and the real content of public policies, whether in the developmental or planning phases, with specific reports about their foundation, objectives, time frames for implementation and resources involved. Access to information is highly needed, in addition, in order to monitor activities, works and measures which might have an irreversible impact on social rights[252].

The free and true exercise of the right of association, the right to information, and above all, the right to be heard by the public authorities constitutes the expression of what we identify as social guarantees of rights, essential for maintaining a true democracy and for ensuring the exercise of rights, starting with social rights[253].

In this regard, we point out the following as examples of guarantees of participation in the development of administrative and legislative processes: popular initiatives of legislative reform and public

[252] Thus, for instance, legislation relevant to the environment usually requires an environmental impact assessment prior to undertaking potentially harmful activities and work in environmental terms. In this same sense, consumer defense laws usually require those who produce, import, distribute, or market material goods or provide services, to supply consumers with sufficient truthful information about the essential features of such goods or services.

[253] In this sense, we indicate that, as Moral Cabello de Alba (2008) emphasizes, institutional participation by the union (and, therefore, also the exercise of the right to unionize) has special significance as a meta-institutional guarantee of social rights. Further on, we will explore union participation in forums of social dialogue and in public institutions as a qualified model on which to build guarantees of rights.

hearings prior to decisions by legislatures or public administrations, as well as various possible forms of inquiry, information and challenge by the people in regard to policy proposals on the part of public agents and entities, including the experiences previously described about the preparation, at least in part, of public budgets with collective input from the public.

If, within the scope of actions taken by the executive and the legislative branches, the demand for adequate information, available to citizens, and observance of due process, and the exercise of rights such as freedom of expression and free association, are shown to be essential to the extensive guardianship of rights, their importance is not less so in the jurisdictional spaces, which can, as we have already stated, be used as channels for criticisms and struggles as they pertain to public and private actions tending toward violation of civil, political, and above all, social rights, in particular, when political petitions are blocked or adequate response to the demands of minorities in conditions of greater vulnerability is not forthcoming[254].

The right to effective judicial guardianship, which ranges from full and free legal assistance to the right of information and equitable distribution of the burden of proof in legal proceedings, constitutes the central element needed to demand other rights – civil, political and social. In that context, the traditional procedural mechanisms of court proceedings, conceived to resolve individual disputes, are slowly undergoing adaptation and transformation to better accommodate collective and diffuse claims, including recognition of the legitimacy of groups and associations for the proposal of collective actions[255].

[254] In this sense, see Sarat and Scheingold (1998).

[255] Thus, for example, Law No. 8,078/1990 in the Brazilian code of law, which provides for the protection of the consumer, establishes that defense of the interests and rights of consumers and victims may be exerted in lawsuits individually or by way of class action lawsuits (Article 81), making it clear that, in the only paragraph of that same article, a collective defense should be exerted whenever it involves: "diffuse interests or rights, thus understood […] as transindividual rights, indivisible in nature, held by individuals, indeterminate and related through circumstances of fact"; "collective interests or rights, thus understood [...] as transindividual held by a group, category or class of persons related to each other or to the opposing party through a legally-based relationship"; and "uniform individual interests or rights, thus understood as those consequential rights of common origin" (trans.). Moreover, legitimate defenders of the collective interest are such entities as the Government Attorney's Office (the Public Prosecutor), the Union, the states, the municipalities, and the federal district, the entities and bodies of public administration, whether direct or indirect, even without having the status of a legal entity and specifically charged with defending the interests and rights of consumers, and civil associations lawfully incorporated for at least one year, which have, among their objectives, the defense of interests and rights of consumers (Article 82). Law No. 7,347/1985, as amended, among other laws, by Law No. 8,078/1990 and by Law No. 8,884/1994, penalizes

From a protectionist perspective, however, the idea of social participation in justice cannot be limited to the time of access to jurisdiction, but rather should extend its reach to all acts and phases of the process, above all, at the time of execution of the court's judgments. Thus, guarantees of participation in the access to justice should be added to the guarantee of participation in the execution of justice, which includes, yet again, the right to information, to association, and to speak one's mind – in particular, during the procedural phase of the execution of justice – which has shown, in the final analysis, to be essential for true satisfaction of the interests at stake[256].

Finally, together with those social guarantees of indirect participation in institutions, there exist others, of self-protection, which correspond to direct action in defense or demand of a social right. Some of the channels of direct action may consist, for instance, in the creation of cooperatives of production and consumption or self-managed companies which would allow individuals to achieve, by themselves, the needed goods and resources which pertain to social rights.

However, consolidation of those spaces of self-management tends not to be produced without conflict[257]. The history itself of concessions and victory in the area of social rights is identified with a historical process of conflict, marked by the implementation of actions of self-protection at the limits of the law, or even, clearly against the law, many of which were elevated afterwards to an institutional level. This is the case, for instance, with the mechanisms of self-protection which initially were prohibited by law and which, as a result of social pressure, were legalized and regulated, such as the right to strike[258]. At other times, the use

public civil acts as liable for diffuse or collective damages and injuries, thereby also ensuring civil associations of legal standing to bring collective lawsuits. Article 5, paragraph LXXIII, in the Brazilian Constitution of 1988, establishes that "any citizen can be a party with standing to bring an action on behalf of the people, which would lead to annulling a harmful act to the public welfare or on behalf of the entity in which the state participates, which would be harmful to administrative morality, the environment, and the historical and cultural heritage" (trans.). In Argentina, Article 43 of the amended Constitution of 1994 contemplates the possibility of instituting collective actions "against any form of discrimination and in matters pertaining to the rights protecting the environment, competition, the user and consumer, as well as the rights of collective involvement in general", admitting the active standing of civil associations, in addition to their function as "defender of the people", to bring these lawsuits. For a more in-depth reading on the collective access to jurisdictional channels of proceeding, see Ovalle Favela (2004).

[256] Cf. Abramovich and Courtis (2006, page 79).

[257] Cf. Pisarello (2007, page 126).

[258] In this sense, see Baylos Grau (1991; 2004).

of certain mechanisms of self-protection either do not correspond to actions which have a perfectly outlined legal status or which correspond to a more or less conventional expression of civil and political rights, as occurs in the case of popular protests, the occupation of public spaces, and boycotts by consumer and end-users of services.

These forms of expression and the claim of social rights tend to spread in conditions of serious and systematic injury of rights, when institutional means of protection have not become aware of the problem. Thus, for instance, conditions of extreme exclusion or social emergency may lead to the occupation of abandoned factories, uncultivated lands, or unoccupied homes, as well as actions of civil disobedience and active resistance[259]. In these conditions, the usual legal response of the existing powers is the criminal penalty, which is revealed, however, as a disproportionate and inadequate mechanism for resolving social issues and usually covers the anti-social and abusive exercise of certain rights by affected third parties, primarily rights of a proprietary content[260].

In that context, especially in those cases where institutional channels of dialogue are blocked, the use of mechanisms of protest -- and even of disobedience, illegal on their own fact – may be characterized as a qualified exercise of the right to petition or of freedom of expression, which gives rise to dissent through the only direct means available – the extra-institutional one[261]. In that case, such actions would be, in reality, closely related to the very essence of democracy, which requires real guarantees and channels of participation which are wide open

[259] Cf. Abramovich and Courtis (2006, page 76).

[260] According to Pisarello (2007, page 127), "The admissibility or lack of admissibility of the means needed for protection, not only from a moral, but also a legal, perspective requires, moreover, taking additional factors into account. In the first place, the seriousness of the violation of the social rights at stake and their impact on the survival and autonomy of those affected and the rest of the community must be considered. Secondly, we must consider the responsibility of the public authorities or private agents in creating the injuries. The third factor involves the true existence of public or private channels which are at the disposal of those affected and which would allow them to voice their claims and, potentially, to challenge, with a reasonable prospect of success, violations of the rights in question. Finally, we have the intensity of the impact which the measures needed for protection might assume for the rights of third parties. In effect, the more urgent the need which is at stake and the greater the situation of 'constitutional emergency', the greater the justification for resorting to the means provided for protection. Naturally, this will also depend on the responsibility attributed to the public authorities or private individuals for this situation. Thus, in view of a situation of persistent abandonment of factories, land or real estate, anti-social use of the property, whether public or private, cannot take priority over behavior whose purpose is, precisely, to return the resources at stake to society, by linking them to rights such as shelter or work".

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

and anchored to it, up to the point in which they become justified as legitimate channels of defense of the principle of the social and democratic status of law, as well as of claims, and even of the systematic implementation of constitutional rules, which have been seriously injured, is achieved. We find the true exercise of especially protected rights, which have priority over other rights, such as the right of way or of commerce, in those direct actions undertaken in defense of a social right, rather than behavior which would warrant punishment[262].

In summary, the lack of access to institutional channels of participation or the manifest ineffectiveness of public policies – especially those which involve matters related to the survival of individuals with dignity, such as the access to freely choose work and decent working conditions, health, education, food and shelter – generate or should generate more radical actions of self-protection, capable of affecting, to a greater or lesser degree, other benefits, such as free circulation, public tranquility – sometimes even true apathy --, strict respect for the law and the property of others. These actions will not be illegitimate, nor will they be incompatible with the principles of democracy, if they respond to conditions of serious and systematic violation of social rights and extend, in particular, to the rights and interests of those who bear some responsibility for the existence of conditions of vulnerability, whether they are the public authorities or private individuals, and such actions of defense should be related to them in a manner proportionate to their size, influence and resources.

Thus, what we seek to stress is the absolutely essential role of extra-institutional guarantees for safeguarding social rights. These extra-institutional guarantees are not limited to a merely formalistic participation in the deliberations about matters which affect the respect for citizens, but rather the real and free exercise of the right of association, of information, and, above all, the right to voice one's concerns to the public authorities.

We are speaking, then, about channels of popular participation which, when blocked, can, in extreme situations, force the public authorities and private individuals themselves to recognize – or at least tolerate – the acts of self-protection of social rights which, despite limiting – or even violating – the rights of third parties, are intended to preserve a greater good, the very survival and dignity of individuals or expansion of the democratic quality of the "public" sphere[263].

[262] In this sense, see Gargarella (2005), Habermas (1994) and Ugartemendia (1999).

[263] In summary, social guarantees, whether direct or indirect, are forms of active expression of

In summary, even in societies in which conditions needed for the full implementation of an adequate deliberative process is not yet available, it is possible to guarantee that the public interest which the state should pursue has priority over implementation of conditions which would make citizens ready to participate and exert their influence in the process of deliberation about the legal, material, and administrative actions of the state. A democratic state of law requires that various social groups, above all, those who are the most far removed from discussions, are not "kept in their proper place" in an attempt to segregate them, who also have the possibility and the intentional capacity to participate and co-exist in the same spaces of dialogue as the other groups, which means, before anything else, a difference in the recognition of the difference. We are not seeking to determine for others what would good for them; what matters now is overcoming that model through a truly participatory democratic vision, open to plurality of views and with a reciprocal possibility in which all people can participate and recognize themselves as co-authors of the law.

In modern societies, immersed in a context of pluralism characterized by a wide breadth of differentiated perceptions and by deep moral disagreement which winds up by excluding metaphysical justifications of legal order and power, legitimation of actions of the state apparatus is possible only through their dependence on the will of those to whom they are subject. An attempt is made, then, to affirm that an understanding of democracy is no longer bound to the popular prerogative of electing representatives, but rather that it assumes, beyond elections, the possibility of public deliberation of issues which must be decided. From that perspective, only the possibility of popular deliberation, through the give-and-take between arguments and counter-arguments, which are put to the test publicly, will allow legitimation of the *res publica* [i.e., public affairs]. For that, it can be affirmed that, if a given political proposal overcomes the criticisms formulated by other deliberating parties, it can be considered – at least at first glance – as legitimate and rational[264].

However, so that collective deliberation can promote a legitimate and rational solution of public issues of greater relevance, it

citizens intended to question appropriation by the state of the management and safeguarding of rights and to open new channels of expression in the face of bureaucratization or politicization of actions by the public authority (Abramovich and Courtis, 2006, page 77). For an important discussion regarding this subject, see Olivas Díaz (2005, page 51-72).

[264] Cf. Pereira Souza Neto (2005, page 7).

should occur in an open, free and egalitarian atmosphere, that is, an atmosphere in which everyone effectively has equal possibility and ability to be heard, to engage in dialogue, to influence, and to persuade. The fullness of equality and capacity among all agents participating in the deliberating process demands implementation of a multiplicity of material conditions. Those conditions are, at least, the fundamental social rights, rights which, in the last analysis, derive from human dignity itself, as we have shown. In order for citizens to exert an influence on the process of collective deliberations, the minimum conditions, which are circumscribed by the possibility of living life with dignity, must be satisfied.

7. FINAL CONSIDERATIONS: SOCIAL RIGHTS AND THE EXERCISE OF CITIZENSHIP

The concept of "citizenship", in its more generic approaches, is usually connected with access to, and effective exercise of, certain civil and political rights. However, by having an effect on an individual's freedom and autonomy, citizenship cannot be reduced to a purely formal status[265]. Citizenship includes civil and political rights, but is not limited to them. Those rights explain the idea of a legal, basic equality but they do not guarantee, by themselves, the capacity to exercise such equality autonomously by citizens. In order to be a citizen and participate fully in public life, especially in the decisions that concern him, a citizen should have a minimal economic, social and cultural condition.

Civil and political rights, when associated with social rights needed to assure their exercise, endow subjects with larger and better capacity to protect their interests against the arbitrariness of authority, not only from the power of the state, but also the other established powers and that of the marketplace, by minimizing the effects of the asymmetrical power relationships which are established and reproduced in the various spheres of social life. In other words, citizenship is attained when a harmonious association is reached between liberty and equality: equal liberty, or "real liberty", which is the fundamental basis of democracy[266]. In that context, social rights constitute instruments essential to liberty, which, although a relative concept (what liberty?, or liberty for what?) should be understood with a real and stable minimal content in time, effectively intended to ensure the material conditions which make this liberty possible,

[265] In this sense, see Añón (2002).

[266] We are not trying to affirm, however, that liberty requires egalitarianism or equality of all, but rather, from the perspective of Bobbio (1995), *equality of all,* which each community should define or agree upon and which evolves historically.

both in the private sphere and in the public procedures used in the decision-making process[267].

Even if the notion of complete citizenship implies the perception that citizenship is not based solely on access to, and exercise of, certain formally established civil and political rights, but also on access to economic, social and cultural resources, it seems to us that it is essential to endow full citizenship with a structure which would have the capacity to provide mechanisms to allow civil, political and social rights to be exercised and, in fact, to be interrelated.

So, the greater or lesser degree of exercise of citizenship, in the full meaning of the term, is always linked to the solidity of a tripartite structure, composed of the wide recognition of civil and political rights, guarantees of social rights – and, therefore, a more equitable distribution of economic, social and cultural resources – and also of procedural rules that involve popular participation: each element plays a fundamental role in supporting the others and, at the same time, lends a reasonable equilibrium or balance to the whole. Civil and political rights, then, require social rights and also rules of procedure for popular participation; but, at the same time, those rights, interests and rules also establish limits between to one another in their interrelation, in such a way that none of them imposes itself on the others.

The more harmonious, balanced and synergistic this relationship is, the greater the capacity for access and exercise of full citizenship will be; the less harmonious, balanced and synergistic this relationship is, the lesser the capacity for access and exercise of real citizenship will be and, consequently, the greater the inequality and exclusion of the individual.

In that context, each society can present distinct situations of greater or lesser balance in the system, and those situations are not static. Consequently, in order for us to be able to identify what is at stake in the inclusive/exclusive relationship in each society at any given historical moment in time, we must observe that system's state of equilibrium (more or less) or, better still, the complex process of establishing equilibrium in that equation between the wide recognition of civil and political rights, guarantees of social rights and procedural rules surrounding popular participation[268].

[267] Thus, from different perspectives, Habermas (2005, page 147) and Fabre (2000, page 111 and following pages).

[268] In this way, if full citizenship is grounded in the recognition of civil and political rights, the distribution of economic, social and cultural resources and effective mechanisms of participation, a limited or weakened citizenry, based on exclusion, is defined from a condition in

Accordingly, we emphasize the importance of the prior adoption of the critical reference built upon from the first sections of this work, which have to do with a reconfiguration of the usual perception of guarantees of social rights from a protectionist and democratic perspective as premise for the effective removal of obstacles which impede the materialization of social rights.

If we do not adopt measures related to a more equitable distribution of economic, social and cultural resources which, in addition to strengthening the guarantees of rights themselves, provide, by all possible and potentially effective means, real access to full citizenship, that distribution which is attained when there is a harmonious association between liberty and equality, the "real liberty", the fundamental basis of democracy, then we are unable to say that a society is truly free and autonomous.

In that context, the exercise of social rights is essential to liberty, but it is interrelated with popular participation: as we already stated, we understand that the effective interaction of a standard or a program with its intended beneficiaries and the behavior of each one in defense of his rights and in defense of the rights of all people is the best guarantee that can be attributed to social rights.

It is necessary, therefore, to spread democracy, not only as a political system, but also as a search for full, inclusive citizenship with the active participation of social agents and their effective commitment to decisions that affect human development.

For that reason, throughout this study, we have always attempted to use the expressions "public policies" and "social policies" indiscriminately[269], If the policy corresponds to a multi-faceted selection

which, together with the existence of civil and political rights formally recognized as fundamental and with a reasonable degree of stability in the mechanisms of democratic institutionalization, we can see that there would be an eroded or markedly unequal access to economic, social and cultural resources. This imbalance in the distribution of economic, social and cultural assets necessarily leads to a limitation on real access to effective forms of participation for reproducing and transforming needs into demands and, therefore, leads to an eroding of access itself and the effective exercise of formally established civil and political rights, which we understand to be fundamental.

[269] However, within the scope of literature and political language, it is customary to use the term "social policies" to identify a particular set of "public policies". Thus, "social policies" would refer solely to those policies devoted to implementing social rights (education, shelter, healthcare, etc.). On the other hand, public policies, in addition to social policies, would also include other policies, such as environmental and macroeconomic policies (which refer to fiscal and monetary policies). In this sense, see Schmidt (2007).

process of instruments to implement the objectives of governments[270] which assumes the participation of private interests, in addition to public agents, it is certain that public or social policies, by having popular participation within their creation, implementation and control, a substantial premise of their own legitimacy and effective power[271], transcend the normative tools of the program of government, inserting themselves into a broader plan. It is necessary for us to make a few brief observations on the true meaning of the term "public".

In fact, there subsists a frequent association between public and state, public and state action, public and state policy. Now, we see that the state does not hold a monopoly over policy, nor are all actions or state policies necessarily public. That last error resides in the frequent inability to identify how undemocratic the state can be, in such a way that its actions and policies reproduce, with more or less clarification, the economic, social and cultural rifts of society. The association between public and state, by this measure, is obviously ideologically and politically perverse, either because it reproduces a colonizing ethic of the state over civil society – by depriving private agents of their nature as titleholders of sovereignty - or because it takes away from these same private agents the possibility of creatively exercising forms of action other than through the state. Another categorical association, equally dangerous, consists in attributing non-governmental actions, carried out primarily through non-governmental organizations in the third sector, projections invariably democratic and committed to the interests of the community. We must, therefore, delink public from state, and non-state actions from those pertaining to what is democratic and socially just[272].

Finally, here we defend the idea that the terms "public" and "social" cannot be dissociated. A state action of social intervention constitutes, in fact, *public and social* policy. State interventions, within the scope of the economic and financial order, then, are also modeled by public expectations[273]. The modern state, as a normative agent and regulator of

[270] According to Dallari Bucci (2002, page 241), public policies can be understood as "governmental action programs which seek to coordinate the means available to the state and private activities, for the carrying out of socially relevant and politically determined objectives" (trans.).

[271] The idea of exercising political power is currently associated with the idea of *authorizing force* of popular sovereignty. Thus, the great challenge imposed upon the modern democratic state is overcoming deficits of inclusion and political participation.

[272] For fuller development of this approach, see Rodrigues de Freitas Júnior and Zapparolli (2007).

[273] Article 173 of the Brazilian Constitution of 1988 provides that the direct operation of an

economic activity, usually models its activities, or at least justifies them to attain social ends of economic nature, which include the priority of the social function of property, defense of the environment and the reduction of inequality.

On the other hand, even when actions and social intervention programs are led by private agents, their effects usually allow their insertion, without much resistance, into the label of public policies, because, usually, even when not directly subordinated to the decisions of public authorities, those agents, in some way, are connected, if not tightly associated, with them.

Thus, for example, not-for-profit entities, social organizations, philanthropic entities, or even those that are for-profit, such as those inserted into the context of modern public-private collaborations, have their actions contingent upon the support and incentives that involve direct or indirect public costs, such as waivers or postponement of public income, exemptions, immunities or differentiated tax systems. If it were not like this, the action would not be social in nature, nor public either.

In summary, definite expression of citizenship, insofar as it refers to liberty and autonomy of individuals, requires certain conditions in order to be carried out, conditions essential to avoiding the possibility that such citizenship would be reduced to a merely formal status[274]. Those conditions refer to access to certain basic resources for the exercise of rights and, even, duties. Such resources, which correspond, in their minimum expression, to the existential minimum, are basically economic, social and cultural. So, equal access, or, at least, not so unequal, to those resources, which are involved in positional disputes, constitutes a necessary condition for full citizenship in such a way that the expression of full citizenship requires, instead of selective interventions which often, more than acting to level inequalities, tend to operate as effective discretional concessions, if not as outright measures aimed at controlling the poor, (re)thinking the guarantees of social rights from a democratic and protectionist perspective[275].

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economic activity by the state "will only be permitted when it is necessary due to imperatives of national security or collective interest as defined by law" (trans.).

[274] In this sense, see Añón (2002).

[275] In this sense, see Campero (2007).

Citizenship includes civil and political rights, but is not limited to them. Those rights assume the idea of a legal, fundamental equality, but do not guarantee, by themselves, the capacity to exercise such equality autonomously by individuals. In order to be a citizen and participate fully in public life, especially in decisions that pertain to public life, the individual must be in minimum economic, social and cultural position. The notion of citizenship, therefore, cannot be independent of a protectionist, democratic, and participatory perspective of rights: to be a citizen cannot be reduced to the level of formal titleholder of civil and political rights; it requires, before (or, in a more specific way, concomitantly), the satisfaction of social rights. Thus, the real conditions needed to exercise capabilities and participate in the deliberating processes and in the social outcomes are incorporated into the concept of citizenship.

Civil and political rights, when associated with social rights needed to assure their exercise, endow subjects with larger and better capacity to protect their interests against the arbitrariness of authority, not only from the power of the state, but also from the other established powers and that of the marketplace, by minimizing the effects of the asymmetrical power relationships which are established and reproduced in the various spheres of social life. In other words, citizenship is accomplished when a harmonious association is reached between liberty and equality: equal liberty, or "real liberty", which is the fundamental basis of democracy. But, in that context, social rights constitute instruments essential to liberty, understood with a real and stable minimal content in time, effectively intended to ensure the material conditions which make this liberty possible, both in the private sphere and in the public procedures used in the decision-making process. Popular participation itself is essential for ensuring protection of those rights, whether civil, political or social, not only through the powers of the state, but beyond those, or even against them, by avoiding the violation of rights by the government in power.

In this context, without detriment to the significant role which institutional, political and jurisdictional guarantees exercise to protect social rights, the latter require, for concrete expression, the wide use of the tools and means for safeguarding or defense, which, without prejudice to state interventions, depend on the exercise of such rights by those who hold them. Laws and programs are important, but it is precisely in the effective interaction of a law or program with its intended beneficiaries, and in the behavior of each one in defense of his rights and in defense of the rights of all people, where the strongest guarantees granted to rights resides. Therefore, it becomes necessary to spread democracy, not only as a political system but also as the goal in the search for full inclusive

citizenship, in conjunction with the active participation of social agents and their effective commitment to decisions affecting human development.

The problem which we raise here is the usual bureaucratic and centralizing tendency of the policy decision-making process that distances citizens from the effective opportunity to participate and debate about the issues in question. Traditional institutions of democracy have linked public policies to a diminished idea of democracy, one of simple technique of institutional procedures. It is undeniable that the system of political institutional representation is experiencing through a process of a crisis in legitimacy, confirmed in the abstention, the indifference and low rates of affiliation with the political parties of the electorate, in addition to the general absence of political and social involvement[276]. However, in this context, the idea of the state, as the very subject of democracy and political power, goes through the evaluation of the implementation and legitimacy of procedures used to engage in the management of various public interests and their own outlining from the perspective of new spaces of communication and new instruments of participation, if not of true self-protection: the grassroots organizations, town-hall meetings, labor unions, private-sector agreements, etc., which widened, as a historical practice, the democratic dimension of the social construct of a full modern citizenship, representative of the conscious intervention of new social individuals in that process[277].

Access to information is an essential asset for control and criticism, by those who hold the status of citizens, of activities of the state, for the existence of a public debate on policies, for control of corruption and other diversions, and for holding the government in power as politically responsible.

In that sense, we reaffirm the idea that, in terms of social laws, access to information should offer individuals not only the possibility of being informed, but also of evaluating public policies. For that end, the state should insist on producing and placing at everyone's disposal information about the true situation in different areas of activity within the sphere of social rights, mainly when that knowledge requires express measurements using definite indicators, and information on the true content of public policies, whether in development or planned, with express reports

[276] For example, despite the compulsory nature of the vote and even though electoral abstention rates in Brazil have been decreasing, during the first round of presidential elections in 2006, the abstention rate reached 16.75% of the electorate, which amounted to 21,092,366 absent voters (Mattedi, 2006).

[277] Cf. Gesta Leal (2006, page 33 and following pages).

on their foundation, objectives, timeframes for implementation and resources to be used. Access to information is particularly necessary, even for monitoring of activities, work, and measures which could have an irreversible impact on social rights[278].

The free and true exercise of the right of association, the right to unionize, the right to information and, especially, the true right to be heard by public authorities, which allow their rights-holders to make their presence seen and heard within the process of the very creation of rights -, together with the right of reviewing of laws, regulations and decisions, including court decisions, which can constitute, by their very appearance, violations of fundamental rights, constitute the expression of what we identify as social guarantees of rights essential to maintain a true democracy and to ensure the exercise of the rights themselves, starting with social rights.

On the other hand, if we are in possession of the indivisibility and interdependence of civil, political and social rights, we can easily conclude that the particular expression of some of those civil and political rights, at the very least constitutes a premise necessary to the genuine exercise of those guarantees, but that that exercise also demands the material satisfaction of certain basic economic, social and cultural needs, identified with the existential minimum, which is only possible by satisfying certain social rights.

The exercise of political rights – above all, of the rights of citizens to vote, to join political parties, to petition the public authorities – and the right of association and assembly and the right to freedom of speech without prior censorship have shown themselves to be essential in the struggle against modern forms of domination. The vote, in particular, is still the most efficient means to hold political agents accountable for their actions in defense of or against civil political and social rights. Political participation of workers cannot be relegated to a symbolic level, since democracy offers the opportunity to carry out some of their most immediate interests through certain organizations. Not participating, in this context, represents delegating their "representation" to the dominant institutions, with the risks and harm which would result from such delegation[279]. In addition, the possibilities that the citizen body could

[278] Thus, for instance, legislation pertaining to the environment usually requires an environmental impact assessment prior to undertaken potentially harmful activities and work in environmental terms. In this same sense, consumer defense laws usually require those who produce, import, distribute, or market material goods or provide services, to supply consumers with sufficient truthful information about the essential features of such goods or services.

[279] In this sense, see Przeworski (1989).

impose or gain new mechanisms for making themselves heard or for negotiating in critical issues, such as labor legislation and social security, could lead to true coordination/cooperation through social dialogue[280].

In addition to voting, therefore, citizens should incessantly seek to overcome the conservative political model which characterizes some states[281], by opening new channels of discussion and social participation, so that beneficiaries of rights may exercise an active role in discussion and in decisions about matters of interest to them and which can affect civil, political and social rights. Among the things which this involves, therefore, is the substitution of a formal model of time-limited political equality (in elections) with a substantial model of permanent political equality (in the government), in such a way that the main political right ceases to be the vote, centered on the concept of the voter, and becomes the intervention through citizen participation: strengthening the participation of individuals from all sides, giving them back the decision-making power, by legitimizing daily government actions and, in a similar way, bolstering full political participation[282].

The importance of social participation in legal spaces is no less important than it is elsewhere, which can, as we have already stated, be used as channels for criticism and confrontation with respect to public and private actions tending towards violations of civil, political and social rights, especially when political demands are blocked or are insensitive, and do not offer an adequate response to claims by minorities in situations of greater vulnerability.

Finally, citizenship should be focused even on those direct actions to defend or claim rights. The use of certain mechanisms of self-protection, such as popular protests, occupation of public spaces, consumer boycotts, and, above all, occupations of properties which do not serve a social function – as well as others that seem to be, *prima facie*,

[280] The expression "social dialogue" refers, in the strictest terms, to relations in communications, consulting, and negotiation which are established between the government, employers, and worker representatives – especially the unions– on issues of common interest. In its widest sense, this expression can be used to refer to horizontal relations between the state and various organizations in civil society, for the purpose of approaching social problems jointly and helping to devise solutions in a shared and consensual way. Cooperation, in this sense, refers particularly to a tripartite social dialogue, involving public authorities, various sectors of business and the workers through their respective unions. For a reading on the social dialogue, concerted social action and its implications, see Villasmil Prieto (2002). On the possibilities arising from institutional participation in unions, see Mora Cabello de Alba (2008).

[281] In this sense, see Draibe (1993).

[282] In this sense, see Vargas (2002).

illegal or deprived of specific legal status – in the face of institutional channels, it should be characterized as a qualified exercise in democracy, which requires genuine guarantees and truly open channels of participation, to the point of being justified as a legitimate path, if not a real duty of citizenship.

If citizenship is not limited to merely formal participation in deliberations on matters which concern it, it is legitimate that, since channels of popular participation are blocked and in extreme situations, public authorities and individuals themselves may be obligated to recognize (or at least, tolerate) exercises of self-protection of social rights which, despite limiting – or even violating – the rights of third parties, are intended to preserve the greater good: survival itself and the dignity of individuals or the widening of the democratic quality of the "public" sphere.

The creation of a new model of production and consumption which has the goal of social and environmental sustainability, involves, in fact, a redefinition of the dynamic in relations between state, society and the marketplace, with a reassignment of roles among the various agents involved and of each one of them in particular[283]. Creation of sustainability assumes that company management is based on the search for harmonization between economic growth and socio-environmental development; it must be translated into a new type of company vision with respect to its social role, internalized as management culture, a new culture founded on ethics and applied to the various processes and relationships of the organization's practice, which, in turn, implies raising again, through improvements in the respective quality, of all relationships held by companies with their shareholders, suppliers, employers, consumers and the communities in which they operate[284].

In summary, then, the notion of the "good company", which is of interest to citizens and consumers, refers to companies which adopt socially responsible practices of management, practices which prove themselves to be relevant for a long-term return on investment and which also improve their public image and reputation, elements which, while

[283] Cf. Grajew (2004, page 213 and following pages).

[284] The idea is that a new entrepreneurial culture should be based on a wide vision which associates entrepreneurial goals with significant objectives for society, such as the elimination of poverty and degrading working conditions. Good business performance cannot be based and measured solely by profits, just as the performance of a country, including the economic sphere, cannot be measured solely by its Gross Domestic Product. This means that businesses will have to redefine the very notion of cost: it is not sufficient to seek the lowest cost of production if the social or environmental cost invested is extremely high.

intangible, can be perceived as a certain differential advantage, expressed, for instance, as customer loyalty and greater ease of access to markets. A "good" company is, therefore, one which is a good place to work in, to have co-workers, to invest in, and to purchase its products and services[285].

Many of the issues which have been raised here, in essence, point to the configuration of a multi-institutional, participatory, and poly-faceted collection of guarantees for human, civil, political and social rights. Enhancing such guarantees and improving the quality of democratic spaces are central elements in a program intended to achieve the concrete expression of human rights, capable of re-empowering institutional and social guarantees of rights at all levels.

But, in addition, the concrete expression of social rights today depends on an ethical change in society. It is contingent upon a new attitude towards the "other", in such a way that, when speaking about the "other", each person discovers his own reflection, moving away from it being built upon on the basis of mutually exclusive dualities – nature/culture; good/bad, subject/object; employer/worker; national/foreign; normal/different – to another in which one recognizes oneself as a part of a plural, diversified whole, sharing a vision in which the "other" and the "different" are no longer objects of estrangement, objectification, exploitation, or invisibility, but rather are seen as human beings, and therefore, as people who hold legitimate rights and possess their own dignity. What this means is that there should be no attempt to dominate, label or rank others.

Neutralization or elimination of the other, of what is different, is a practice which is always readily available as a solution and goes along the same path, since today, within the conservative context of the world order, inequalities in distribution, so characteristic of class-divided capitalist societies, are becoming ever more pronounced, with the intensification of the gradual process of disintegration experienced by such societies. It is necessary to reinforce standards aimed at generating a social and political culture which will be able to knock down barriers of exclusion and social closure.

As things stand, the issue of the concrete expression of social rights demands political will, articulated and concerted planning of actions, and the definition of objective goals, but above all, it requires thinking about a more human, more just, and more democratic model of development, for which a greater commitment, if not true ethical changes, will be needed by civil society.

[285] Cf. Grajew (2004, page 216).

Capitalism is developed through mechanisms of domination, neutralization, and estrangement and brought about a structural violence to modern societies, producing a tremendous internal and external divisiveness, which is increasingly expressed in our daily reality: fights, disputes, conflicts, injustices, confrontations, antagonisms, etc. But the central core of the problem is not whether or not it will be possible for us to co-exist with capitalism, but rather if we can continue tolerating the outrages of over-exploitation of people, hunger, and enormous economic and social inequalities, factors which are essential to sustain the current model of economic growth along the path laid down by capitalism, thus denying social rights and their rightful place in the label of fundamental human rights.

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