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Subsistence: from Social Rights to Human Rights?[1]

Abstract: I will focus here on three perspectives related to the question of the application of social rights as rights to subsistence in European affluent societies. It can be said that the problem of the equalisation between subsistence rights (as social rights) and patrimonial rights did not lead either to narrow distinctions or to acceptable solutions. In fact, if subsistence rights, as many affirm, are social rights entailing duties of assistance from others, the second point should also be self-evident, that is to say, every subsistence right would determine the equal distribution regarding the relation between social services and patrimonial rights. Nevertheless, this problem appears to be hanged on the social structures of control of power.

Keywords: social rights, social policy, human rights, subsistence, international law

1. Premise. Fundamental rights vs. Human Rights

Discussing human rights means linking them, at least instinctively, to fundamental rights. However, it is true that human rights do not coincide with fundamental rights. Fundamental rights pertain to a specific legal system. Hence, they should not be preached as universal. In this perspective, human rights should not be considered a specific legal system, since every legal system has its own set of values. In this sense, one should not speak of the human rights of a specific legal system, even if every legal system has a set of *legal universals*.

As John Finnis says,

> A particular legal norm (rule, principle, standard…) is not the text (whether type or token) whose promulgation or pronouncement is the norm's formal source. More

[1] This article draws upon my previous publication "Human rights, justice, and pluralism" (Sciacca, 2012, pp. 77–84). Republished with permision from Taylor & Francis.

> proximate to the norm is the text's meaning. […] The meaning of those legal universals – call them formal or structural legal universals – has aspects of universality and of particularity. That meaning shifts subtly as one moves from legal system to system, from Brazil to Australia to Byzantine Rome… and so forth. But – speaking only of these formal or structural legal universals – that shift, that particularity, is relatively marginal, I think, compared with the extensive overlap or commonality or shared identity in their meaning. This combination of universality and particularity is a part of what the Roman jurists called *ius gentium* (Finnis, 2008, pp. 2–3).

Fundamental rights are constitutional rights. Therefore, it is acceptable to think that human rights apply everywhere and that fundamental rights apply to a single system in that they reflect cultures, values and forms of life typical of a smaller space. Hence, it is reasonable to have a functional interpretation of fundamental rights, whereby "fundamental" means "functional to a certain system". The relationship between fundamental and functional is the same as that between condition and consequence: fundamental rights are the foundations of the legal system. They have moral strength as they are supported by various philosophical doctrines and moral conceptions.

Do rights have guarantees? If it should be so, by *what* are they guaranteed? The problem, more than pointing out the subject of guarantees *sensu stricto*, regards the adoption of the laws that provide fundamental rights as *criteria* for the recognition of the validity of a legal system. If the key to understanding fundamental rights, as suggested, is not so much democracy as the rule of law, we find ourselves before 'rights in a legal sense' even when corresponding 'primary guarantees' (duties) and 'secondary guarantees' (sanctions) do not exist.

Or are we instead in the presence of empty '(made-of-paper) rights'? Does the right exist even *in absentia* of guarantees? Justifiability seems to be to Hans Kelsen the characteristics of subjective rights. If the guarantees are not an external element from the laws, but internal, when the same are lacking the right does not lose its efficacy: it could become inexistent but not ineffective. A certain legal system is, hence, a guarantee of what rules: in this sense, speaking of 'primary guarantees' and 'secondary guarantees' is meaningless; it is here that the thesis of Kelsen is shared (Kelsen, 2008, p. 100). Real lacunas cannot be attributed to the legal system. On the other hand, objections are expressed on the thesis according to which it is possible to separate the rights from the guarantees, given that the latter are found in other laws. The rights included in the system involve the institutional effort and the difficult autonomy of rights, as carriers of an intrinsic value that has been at the core of a slow juridical route. Starting from Ronald Dworkin, the subject comes out regarding the difficult relationship between rights and

collective ends, that it is also that amongst the 'right' and 'good', present in all of the liberal tradition of contemporary philosophy. Dworkin points out the arch of the critical reconstruction of the debate amongst liberals and communitarians in order to fix the idea that the rights themselves constitute values (that is to say, not *instrumental* for the scope of representing the common good). Therefore, it deals with sustaining the rights, on one hand, as (and if) provided with an intrinsic value and, on the other hand (overcoming a secular doctrine belief), unite them with the side of public ends, *goals*, *without* depriving them of their *deontological charter* (Dworkin, 1978). This opposition also reflects the tension between 'institutional' and 'constitutional': between the tradition of Continental Europe, more inclined to the interpretation of the rights – given that they are laws, and the traditions of the United States of America, which are closer to a question of democracy – and, therefore, inclined to insert into a constitutional debate the problem of that which *is* fundamental.

Fundamental rights must be applied bearing in mind that some principles should not be considered reasons without strength, and that strength should be rationalized based on priorities, including moral ones. In this perspective, the real problem of the legal protection and justification of rights – both fundamental and human rights – lies in the promotion of their effectiveness.

Based on this premise, three points are central to my perspective: a) human rights are not equivalent to fundamental rights (especially if fundamental rights are intended as cultural values); b) not all fundamental values become human rights, as what pertains to a specific culture may not pertain to another; c) if only some fundamental values can become human rights, identifying these values should encourage external humanitarian interference. The foregoing observation is not meant to encourage humanitarian interference for the promotion of values alien to local contexts, but it reflects a restrictive perspective with a view to protecting large groups of human beings from serious violations and deprivations of rights.

The scheme presented herein does not adopt an extensive interpretation of cases of interference, but accepts the *restrictive* theory according to which only *some* fundamental rights become human rights. Our ethical-political intuitions lead us to take a more favourable position to favouring the restrictive hypothesis not so much for reasons of a prudential nature for that which is *structural*: what comes into play is the safeguarding of pluralism and the necessity to not impose a style of life on the whole to those who do not have the same for various cultural reasons. It is due to this, and only for this, that very few values are transformed into rights.

2. What are Social Rights?

Possibly, this point implies the need to rethink the philosophical question of the definition of human rights and renders the question of universalisation quite serious for public institutions. The theories of liberal equality require the absence of discriminations based on morally arbitrary differences such as gender, ethnicity, age, culture and income. Nevertheless, in European countries inequalities among individuals are increasing. Therefore, a way should be found to reduce morally questionable inequalities through reasons based on deep and shared principles of citizenship. The liberal theories of justice (utilitarianism, contractualism and libertarianism) could be used in that they are different reflections of the importance of rights as a set of basic values at the roots of European culture. In these terms, rights can be considered as "the elementary particles of justice", as "the items which are created and parcelled by justice principles" (Steiner, 1994, p. 2). Equality is the goal of egalitarianism and of all other mentioned theories of justice leading to liberal thought. The relevant question here remains *how* institutions can reduce the individual claims of equality in the public sphere of politics. This question is strictly related to the problem of the relationship between *human* rights and *social* rights. Most of social rights are 'subsistence rights'. It is enough to observe that amongst some of the so-called 'subsistence rights', even in the light of important provisions of the law, there are surely (though theoretically) human rights (Sciacca, 2012, p. 83).

Rawls' list of fundamental rights is not a mere appendix or a description of the principles of justice, but an element of the same. The preference given to Rawls for *liberty* rights as the freedom of thought, conscience, politics, association, freedom and integrity of the person and safeguarded rights from the *rule of law*, and the liberties connected to the aforementioned, as the freedom of political expression and freedom of the press (referable to the freedom of thought), the freedom to gather (referable to the freedom of thought and political freedom), the freedom of movement and the freedom of occupation,[2] refer lexically to the most relevant documents on human rights, from the Universal Declaration of Human Rights of 1948, to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, to the International Covenant on Civil and Political Rights of 1966, entry into force 23 March 1976, to the documents related to the same. It is certainly true that the nature of the Universal Declaration of Human Rights (UDHR) is not – *stricto sensu* – that of a legal binding norm. Its bindingness doesn't affect the domain of law, but that (not less relevant) of moral-

[2] Alexy, 1997, p. 263 ff., speaks of "general fundamental freedoms" and "special fundamental freedoms".

ity. As affirmed in the Preamble, the Declaration is a sort of Kantianlike 'common ideal', a "common standard of achievement for all peoples and all nations […] to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance". The International Covenant on Civil and Political Rights (ICCPR), on the other hand, provides the necessity to establish a Human Rights Committee (the Geneva Committee), which "submit to the General Assembly of the United Nations, through the Economic and Social Council, an annual report on its activities".[3] It is true that, in case of violation of human rights, the Committee doesn't play a concrete judicial control: nevertheless, "(a) If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant."[4]

In Rawls' list of basic liberties it could be registered the non-mentioning of the basic *subsistence* rights (Alexy, 1997, p. 13), leaving the matter open to an implicit understanding of the second principle of justice (a principle that nevertheless – neither in whole, nor in part – could be considered for Rawls as an integral part of the constitution; furthermore, if we admit the possibility to consider the subsistence rights as part of human rights, we must infer that Rawls did not include them in the second principle of the law, from the moment that the principle which makes the difference is not extended further than the closed system). Concerning the general problem of the relationship between social and human rights, it seems to me sufficient to observe that amongst some of the so-called public service rights, even in light of significant provisions of the law, are surely human rights. In particular, I refer to the following cases: (a) right to work and right to free choice of employment, to an equal salary for equal work, to a fair and satisfying remuneration[5]; (b) right to a sufficient standard of living; (c) right to education[6]; (d) right to housing[7]; (e) right to health.[8]

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3 ICCPR, art. 28 and art. 45.

4 ICCPR, art. 42 (1)(a).

5 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), art. 5 (e)(i); UDHR, art. 23. The conjugation between the right to work and the right against unemployment could also configure the social right to a steady work.

6 UDHR, art. 25 e 26.

7 ICERD, art. 5 (d)(iii).

8 UDHR, art. 25.

However, other subsistence rights – as rights to public services – could be configured as human rights. Consider the following cases: (a) right to nourishment; (b) right to rest and free time; (c) right to social security insurance; (d) right to information; (e) right to social security; (f) right to indemnification; (g) right to a healthy environment; (h) right to cultural benefits; (i) right to food safety and security of the consumer rights (that could be considered an implicit case of the general right to food); (j) general right to public health care and medical care (that could be considered an implicit case of the general right to health). Consider the right to health care: a right which allows a person to take advantage of social and personal rights. Health problems, in fact, should be high on the political agenda since health is a logical priority. This has direct consequences on our cohabitation since inequalities in the distribution of health care increase the distances among the different social classes and probably the dominance of one group over another, and the denial for some people, and access for others, to services (Russo, 2016, pp. 36–38). The question concerning 'subsistence rights' intended as 'human rights' is certainly not intuitive. The dilemma of the equalisation between subsistence rights (as social rights) and patrimonial rights did not lead either to narrow distinctions or to acceptable solutions. In fact, if subsistence rights are social rights entailing duties of assistance from others, the second point should also be self-evident, that is to say, *every* subsistence right would determine the *equal* distribution regarding the relation between social services and patrimonial rights. However, this is not the case.

As I pointed out elsewhere, there are four unresolved points:

a) subsistence rights, unlike liberty rights as noninterference rights (rights entailing duties of noninterference from others), could be negotiable and/or derogable, given that they are social rights (assistance rights: rights to specific *welfare* services);
b) how do we resolve the problem of the identification of the *asset* to be safeguarded? Probably, in a positive sense, and, hence, social rights safeguard some sort of asset in relation to *individual* expectations, like minimum income, housing, food, health care, and education (Fabre, 2000, p. 4);
c) how are subsistence rights effectively guaranteed, seeing that at a *domestic* level the service is not typically clarified? It is reflected by the fact that it cannot be expected that the protection agencies could/should register themselves completely on a *public* dimension. Think of the funds for each category, insurance contracts or something else: it is this *private* dimension of allocation of rights that could give rise to new problems for the definition of the concept of 'citizenship'; if, therefore, the 'social right' is something that is non-derogable, *de plano* also the specific and correlated assistance becomes the same thing;

d) lastly, it is necessary also to reflect on how much, on a *global* level, it could be considered as harmful, *if* guaranteeing a set of social rights were to equal the ratification of a paternalistic *assistance policy* aimed at the allocation of the rights of somebody, without bearing in mind the urgent necessity of *others*. Therefore, the urgent question remains to safeguard the principle that the *entire* class of human rights, including social rights, cannot set aside the consideration of the right of every individual to live in an acceptable manner, that is to say, decently (Sciacca, 2012, p. 83).

Yet I believe there is more. If subsistence rights are human rights, what value is attributed to a case of violation of human rights? It is necessary to maintain two fixed points that in part regard the problem of justification.

1. The first is a *pragmatic* point: a necessary and sufficient condition for humanitarian interference and the systematic nature of serious violations of human rights, that should be a *continuous* assumption, given that – diversely from what Rawls claims – it is not necessary to adapt an original political justification but to just extend the ethical theory to different contextual scopes (a continuity in the background between the plural structure of the world and our deep moral convictions).
2. The second is a *methodological* point: the problem regards the identification of the *techniques* of interference (more than the armed intervention, to be utilised as *extrema ratio*, it would be necessary to resort to commercial instruments, as for example the freezing of transactions, or diplomatic negotiations or legal-institutional).

Furthermore, it is necessary to not ignore that the fulcrum of the problem of the justification of *human rights* and their violations is constituted from the *freedom*, intended in the sense in which the *Metaphysics of Morals* (not by coincidence, in the *Einteilung* of the *Rechtslehre*), Kant dealt with. Precisely, I refer here to the sense of the Kantian *fundamental liberty*. In this sense, liberty as independence from the constricting power of the others it is the only condition of coexistence with the liberty of any other person according to the universal law, that is to say, "the only original right owed to every man in his humanity" (Kant, 1996, p. 30).

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