Arguments For and Against Social Rights*

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Received 1 October 2008; accepted 28 December 2008

Abstract
I investigate the semantic and practical complexity of social rights, together with the obligations which correspond to the public authorities in terms of putting them into practice. I also discuss the role of meaningful economic equality in the discourse of social rights, explaining the points at which the two concepts interact, and the ways that formal equality can be improved. Finally, I reach the conclusion that there are two distinct meanings of the concept of discrimination, one which is equivalent to any violation of the general principal of equality, and another stricter one, which is the infringement of equality when any of the proscribed differentiating factors are present (race, sex, etc.). The legal aspect of the mandate to exercise and guarantee social rights is manifest in the programmed objective, as well as in the fact that the measures aimed at this objective are protected from the possibility of compliance.

In this way, social rights constitute subjective rights, representing a programme through which goods would be distributed evenly among public, collective and private interests. This results in a singular structure with a special mechanism by which the State has to provide assistance and services, and create, strengthen and promote the conditions allowing individuals and groups to satisfy their needs. Thus their obligations are also related to the prerequisites for exercising positive liberty. The main point of departure is that individuals are moral subjects endowed with dignity. It defends the idea that we all have real capacity for choice and that we all direct our existence towards certain aims in life.

Keywords
social rights, liberty, equality

1. A Starting Point: Some Challenges of Social Rights

Indeed, with changes that have taken place, the liberal paradigm now considers that members of a society are actors in a market economy which

guarantees the real conditions ensuring individual rights. Thus the recognition of an individual right represents the exercise of private autonomy by the stipulation of contracts and the acquisition of goods or services from others. In this kind of State, the structure of rights assumes that women, racial minorities, gays, the disabled etc., fit into the present scheme for ‘natural’ reasons, without taking into account the underlying problem. The process of transformation takes shape in a number of forms: the move from formal competence towards substantive content; the use of ‘recognition rules’ and ‘fundamental and structural values’; the increase in ‘protection clauses’; the proposals for ‘weighting clauses’, ‘identity’, ‘hierarchy’ and ‘compensation’ guarantees; the constitutional development of ‘operational rules’; and the extension of fundamental rights thanks to ‘rules governing the applicable law’.

There was no formal mention of constitutionalized social rights until the Mexican (1917) and Weimar (1919) Constitutions, which were created according to a series of political, economic and ideological factors adapted to the industrial and post-industrial age. The precursors are von Stein (Geschichte der sozialen Bewegung, 1850) and his doctrinal mentor Heller (Rechtsstaat oder Diktatur, 1929). The Basic Law of the Federal Republic of Germany of 1949, a little later, is also worth highlighting because it includes the idea of the social State (articles 20 and 28), with demands linked to objectives that increase the reach of liberal States based on the rule of law, guaranteeing ‘freedom’, ‘property’, ‘equality’, ‘legal security’, and ‘rights of political participation’. In this scheme, the public authorities are responsible for providing the citizens with the means which individuals need to develop their personalities and integrate socially, eliminating abstentionism.

The actions of the State have to be directed towards ensuring individual freedom and protecting the autonomous development of subjects. The State organization and its regulation have to be governed by rational principles, which can be transferred to the law as a basic element. As a result, this system tries to ensure that the State and its organs can only act in accordance with the powers granted them by the legal system, by which they are thus limited. In this way, legislation applies to all on an equal basis and arbitrariness in public powers is eliminated.

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2) Häberle 2003, p. 108.