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Review

A new approach to fundamental social rights: social rights, democracy and citizenship

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From the point of view of democracy and citizenship, what we are seeking in this paper is to expose some of the premises for a new approach to fundamental social rights. If we think about the absolute supremacy of human life, a life that, to be understood as such, must be a life lived with dignity, we have to think about life from a material point of view and, therefore, in a priority status to the so-called “social” rights, since social rights (economic, social and cultural) address issues as basic to life and human dignity as food, health, shelter, work, education and water. 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. This implies the need to address the process of trivialisation (which, in practice, strips human rights of their authority) and theoretical fragmentation of rights since the implementation of the social rights cannot be considered separately from the consolidation of democracy and citizenship itself. What we are seeking in this paper, then, is to shed light on the understanding that social rights are fundamental human rights.

Keywords: Citizenship, Democracy, Fundamental Rights, Human Rights, Social Rights.

INTRODUCTION

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

Recognition of social rights cannot be, therefore, a mere listing of good intentions on the part of the states in

international law. Social rights are fundamental rights, which are for all men, can be exercised by everyone and are essential to life and human dignity. Nevertheless, that leaves much to be done so that these rights can be put on a par with civil and political rights insofar as legal status is concerned.

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

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

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

Initial considerations: on human rights

One of the great advances of modern social constitutionalism and international law is that it has bestowed upon the international legal status of human rights a binding power, a fact that makes the legal content itself of human rights compulsory supra-legal law, a fundamental axis generally with constitutional standing, to be applied by state officials and effectively honoured by private individuals. This being the case, beyond the complex legal debate over the relationship between international law and internal law – monism and dualism – it is true that, with more or less emphasis, modern constitutions contain clauses conferring special force on international treaties on human rights (This tendency seems to have begun with the Portuguese Constitution, in its well-known Art. 16, which establishes that “Fundamental rights guaranteed by the Constitution do not exclude any other rights established in the applicable laws and rules of international law” and that “Constitutional and legal precepts pertaining to fundamental rights must be interpreted and integrated harmoniously with the Universal Declaration of Human Rights”. In Latin America, the Peruvian Constitution of 1979 seems to present an innovation on the special treatment given to treaties on human rights, followed by the Constitutions of Guatemala in 1985 and Nicaragua in 1987. Modern constitutions of other countries, such as Brazil, Spain and Venezuela, show, to a greater or lesser degree, this tendency of modern social constitutionalism and, in particular, Ibero-American social constitutionalism, by recognising the status and special hierarchy given to treaties on human rights) for a very

simple reason: the investment by a social and democratic state must necessarily begin with the idea of a constitutional democracy as a system deeply anchored in human rights. Human rights are – or, better yet, the effective respect for human rights are – those rights that thus make up, currently, the primary principle of reference for evaluating the legitimacy of a legal-political system of law¹ 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).

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

In addition, upon approving these treaties on human rights, the states submit to a legal order within which they assume, for the common good, obligations not in relation to other states, but rather towards the individuals under their jurisdiction, whether nationals or foreigners. This point has been brought up repeatedly by the doctrine of law decided by the courts¹ (See, among other things, the Advisory Opinion of May 28, 1951 to the International Court of Justice on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide and Judgment of July 7, 1989 by the European Court of Human Rights, in the case of Soering vs. United Kingdom, N. 14038/1988) and has, at least, one transcendental legal consequence: the principle of reciprocity is not applied to human rights treaties in such a way that one state may not allege another's non-compliance with the human rights treaty for the purpose of excusing its own violations of these standards. This is so for the simple

reason that such treaties have the particular feature that their rules make up guarantees benefiting individuals: obligations are imposed on the states, not for their mutual benefit, but rather to protect human dignity. Therefore, states may not invoke their internal sovereignty to justify human rights violations because they have made a commitment to respect them (Art. 27 of the Convention of Vienna on the Law of Treaties establishes that no state signing any treaty can fail to perform it by invoking its internal law. According to Dulitzky *apud* Martin, Rodríguez and Guevara (2004, p. 91), insofar as it concerns treaties on human rights, “the particular nature of agreements of this type justifies the special treatment which various constitutions [...] dispense to rights internationally protected by treaties. It is clear that the internal and international effect produced by ratification of a general international treaty is not the same as that produced by a treaty protecting human rights. This is one of the justifications by which the constituents are concerned with giving a special treatment to international conventions on human rights”).

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

On one hand, this approach allows us, in legal terms, to remove, at least in part, human rights treaties from the complex debate about the relationship between international law and internal law, to the extent that the constitution itself usually attributes a special power to international law on human rights (which become constitutional rights and fundamental rights when they are institutionalised¹ It is not an accident that the expression “human rights” is generally used in its common sense meaning of “fundamental rights” and vice versa: it is evident that the degree of uncertainty with which expressions such as “human rights” and “fundamental rights” are used, including in the Universal Declaration of the Rights of Man. See Ferrajoli (2005, p. 76 and ff.), Marshall and Bottomore (1998), and Martínez (1995) for more considerations on the distinctions between “human” rights and “fundamental” rights), without detriment to the level of priority that other treaties may have in the internal system of law. This means that a constitutional system of law can grant constitutional rank into international human rights laws, without that necessarily meaning that all treaties have such priority (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 favourable internal treatment of human rights treaties allows for ongoing and dynamic feedback between constitutional and international law in the evolution of human. Hence, constitutions are, to a certain degree, linked almost automatically to international developments in human rights through the references to international human rights law made by the constitutional texts (Cf. Silva (2002, p. 374 and ff.)).

In turn, and by taking into account that general principles of law recognised by civilised nations are one of the acknowledged sources of international law (as indicated in Art. 38.1 of the Statute of the International Court of Justice¹ “The Court, whose function is to rule on the disputes submitted to it pursuant to international law, shall apply: a) international conventions, whether general or specific, which rules expressly establish rules recognised by the litigating states; b) international custom as proof of generally accepted practice with the force of law; c) general principles of law recognised by civilised nations; d) court decisions and doctrines published by the most prestigious scholars in the various nations as a supplementary means of determining the rules of law without prejudice to the provisions set forth in Article 59.”)), it thus becomes reasonable that international law take into account advances in constitutional law in terms of human rights for the development of international law itself, since the generalised constitutional adoption of certain human rights laws can be considered an expression of the establishment of a general principle of law.

So then, at least on the subject of human rights, a real “international constitutional law” or “law of human rights” (As Dulitzky *apud* Martin, Rodríguez and Guevara (2004, p. 34) indicates, the expression *law of human rights* is drawn from Ayala Corao, while the expression *international constitutional law* has been simultaneously put forward by Flavia Piovesan) has emerged from the dynamic convergence between constitutional law and international law, which mutually aid each other in the

protection of human dignity. The development of human rights law is, therefore, energised by both international and constitutional law, the interpreter of which is forced to choose, by virtue of the principle of human advantages (*pro homine*), the standard most favourable to the dignity of persons¹ On the material level, we should not speak (or it is irrelevant to do so) about ranking the rules governing human rights, since the rule that most defines the status of a right, of a freedom or of a guarantee will always be applicable (in the specific case). Speaking in material terms, therefore, it is not the status or ranked position of the rule that counts, but rather its content (because that which is most assured by law will always prevail).

The method of special and privileged constitutional treatment of human rights treaties enables national judges to apply, directly and with priority, those international standards (the international law) without having to necessarily engage in a debate as to whether the constitution favours the theory of monism, dualism or integration of the relationship between international and internal law (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). If the constitution is the applicable standard in which such treaties are integrated, it becomes clear that the legal thinker must apply international human rights regulations internally (Cf. Graham and Vega (1996, p. 42 and ff.)).

“Human rights”, an expression that belongs to the spheres of political philosophy and international law, encompass those guarantees, powers, freedoms, institutions or demands relative to primary or basic needs, which include all human beings by virtue of the simple fact of their human condition, for the guarantee of a life lived with dignity¹ Cf. Papacchini (2005, p. 44). Similarly, see Nino (1989, p. 40)); they are, then, independent of particular factors, such as personal status, sex, gender, ethnicity or nationality. From a more relational point of view, human rights have been defined as the conditions that allow an integrated relationship to be created between the individual and society allowing individuals to be persons, identifying with themselves and with others (Cf. De la Torre (1996, p. 19). For Helio Gallardo and Joaquín Herrera Flores, human rights are supported on a social framework, by inter-subjective relations and experiences. According to Gallardo (2000), the foundation of human rights are transfers of power that occur between social groups, as well as the institutions in which they are articulated and the logic that inspires social relations. These transfers of power may or may not be effective and may be more or less precarious. For Flores (2000), along a similar line of thought, human

rights are the practices and means by which spaces of emancipation are opened, which incorporate human beings into the processes of reproduction and maintenance of life).

To speak of human rights, then, is to speak of making rights accessible to groups of human beings who usually do not have access to them. In other words, an attempt is made to open up a new path, alternative and real in a true sense, leading to non-exclusive citizenship, democratic in the sense that it is participatory and oriented towards an authentically transformative praxis of society. Implementing this new path, of course, requires tremendous energy and tenacity and also the capacity to conceptualise content and techniques that permit re-education about social rights and their guarantees (In that sense, see Pereira and Dias (2008)).

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 freedom¹ It does not seem to be difficult to perceive that, if the rules are created by the very parties interested in seeing them enforced, through the co-operation of social agents anchored in the autonomy-solidarity duality, then their materialisation is much more present in autonomy than in cases of anomia or heteronomy – it is necessary, then, to involve all participants in the production, interpretation and application of the rules, hence their legitimate legal exercise – and the legal model of action is, moreover, associated with a clearly democratic model of learning and self-awareness that takes into account the internalisation of values (cf. Habermas, 2005, p. 129)). It is clearly not possible to have meaningful citizenship without democracy, nor is it possible to have a substantially democratic model of democracy without participatory citizenship. This being so, it is necessary to recreate certain premises in the field of law towards the body of law intended, not only as an instrument of social defence against abuses, but also as an instrument intended to safeguard citizenship itself in an inclusive context and permanent by creation of a more human, more just and more democratic model of development, by implementing concrete acts aimed at the full exercise of social rights, through all possible means and using available resources to the maximum extent.

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

Economic, social, and cultural rights, most commonly called “social rights”, an expression that belongs in particular to the fields of political and legal philosophy and international law (Social rights are associated with systems of social security, health, education, protection

of the family, supply of food, etc., which are created and consolidated in Europe and in many Latin American countries between the last third of the 19th century and the second post-war period, within the context of the welfare state or social state (Esping-Andersen, 1998), and they are, according to Abramovich and Courtis (2006, p. 17), the “fruit of the attempt to translate into expectations (individual or collective), legally supporting the access to certain goods configured in consonance with the logic of this model”. A common trait of the legal regulation of these spheres, then, 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”), often refer to matters related to basic expectations of human dignity, but rather, to the satisfaction of vital needs (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) and, consequently, are stated as authentic fundamental human rights (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), essential for promoting human development and for freedom, democracy, justice and peace in the world, since they are expressed as rights that act as the premises on which to exercise other, equally fundamental rights related to freedom and autonomy of the individual.

Therefore, the discussion regarding the scope of guarantees of social rights often seems to be solely associated with persons in situations of greatest vulnerability within the social sphere – generally emphasis is placed on the fact that entitlement to social rights is a problem more related to the groups who cannot satisfy their basic needs, in other words, with the “most needy” – for whom the access to necessary resources to satisfy those basic needs tends to be residual, or even non-existent (According to Pisarello (2007, p. 11), “this characterisation of social rights as rights which are most needed explains that their exercise and enshrining by law tend to recruit adherents among those who possess an egalitarian sensibility”). However, the truth is that social rights are of interest to everyone, given that they involve guiding principles in socio-economic policy within various geopolitical spheres (which, marked by the intensification of the globalisation process (As we have already discussed, we are using the term *globalisation* in the meaning that Santos (2005)

used to identify a multi-faceted, pluralistic, and contradictory phenomenon, with economic, social, political, cultural, religious and legal implications, interrelated in a complex way, which developed in the last decades of the 20th century from a dramatic intensification of trans-national interactions that paradoxically, although they have been radically transformed, have intensified hierarchies and inequalities. The definition given to this term by Giddens (1990, p. 64, trans.) is also valid: “intensification of worldwide social relations that link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa”), transcend local, regional, and even national limits), goods protected by social rights, involved in positional disputes¹ We are emphasising here the idea that the problem of guaranteeing social rights is, above all – but not uniquely, as we shall see further on – a positional programme), highlight material equality¹ Cf. Luis Prieto Sanchís *apud* Carbonell, Parceró and Vázquez (2001, p. 39-46)) and are related to the existential, social and culturally outlined minimum, necessary not only for survival under conditions adequate with the dignity inherent to the individual as a human being, but also in order to guarantee the material conditions that allow for the true exercise of other rights, such as civil and political rights, related to the freedom and autonomy of individuals and necessary to promote participatory democracy and full citizenship¹ According to Barcellos (2002, p. 198), as we have already pointed out, the existential minimum corresponds to the set of material situations essential for human existence with dignity: the existential minimum and the material core of human dignity reflect the same phenomenon. There exist, then, a tight linkage between social rights and satisfaction of basic needs of individuals, revealing an egalitarian sense in the behaviour of the state. Its purpose is equality through the satisfaction of basic needs, without which many people would be unable to achieve the level of human existence needed to enjoy individual, civil and political rights and to participate fully in political life. The PIDESC Covenant, in its preamble, recognises that, consistent with the Universal Declaration of Human Rights, the concept of the free human being, liberated from fear and misery, cannot be accomplished unless conditions are created that permit each person to enjoy his economic, social and cultural rights, as well as his civil and political rights. In this sense, according to Kliksberg (1997), access to the exercise of citizenship is a fundamental right, the first of the rights, because without it, there can be no access to any others. What is in play here is the right of people to inclusion in a highly complex and competitive society, which tends to exclude within a context in which human development has been severely undervalued).

The progressive recognition of expectations related to social rights on the constitutional level and in international

treaties – and their integration into the internal legal system of each country — impose obligations, both positive and negative, on public authorities and also, to a greater or lesser degree, to individuals, concerning the satisfaction of such expectations and, therefore, the effective promotion of human development. 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 (Historically speaking, reformist social states, within capitalism, as well as the so-called “real socialism” states, allegedly outside of it, attempted the “de-commodification” of the supply of certain basic resources, either in whole or in part, of their market value, in order to ensure the survival of people, as Esping-Andersen points out (1998, p. 35). But these experiences are seen, with certain frequency, to be contingent within their democratic scope and capacity for social inclusion by external and internal factors. In addition, the degree of satisfaction of social rights, above all in the most privileged regions, has been intimately related to asymmetrical relations of power existing between regions and central and peripheral countries: the widening of Access of people at growing levels of consumption in central countries and regions, including in the form of rights, has been carried out, at least in part, at the expense of evident impoverishment and denial of basic rights to people in peripheral countries and regions). Furthermore, the gap between recognised rights and their effective exercise is too often cause for the words and discourse that proclaim them to be empty and without any practical effect.

In this context, despite the extraordinary expansion of institutional behaviour devoted to their development¹ When we speak about development, it is important to stress that all development is social development, just as poverty is not an exclusively economic problem and economic growth is not development, since it is not enough to grow economically in order to promote social development. According to Franco (2002), development is a synergistic movement, which is confirmed in that class of social changes in which there are modifications in human and social factors guaranteeing the stability of social systems: in systems that are highly complex and removed from equilibrium, as human societies are, the development only occurs when internal patterns (among the components of the whole) and external patterns (with

the surrounding environment) of interaction manage to install themselves, which better assure conditions of existence of the whole, in other words, of society itself. A society in which just a few individuals improve their living conditions, but in which the rest of the population – the majority – cannot manage to improve their general living conditions is not a society that is developed, even though it may be a society that is growing in economical terms), 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 (In the period spanning the two great world wars (1914-1918/1939-1945), and during the post-war period, the “social” states implemented many policies that sought to compensate for the excluding effects of asymmetrical growth, breaking down the political system of that time with the liberal paradigm of state absenteeism. The end of the First World War, above all, marked the start of an era of expansion of social rights, defined by the initiative of “constitutionalisation” of social rights observed in the Mexican (1917) and Weimar (1919) constitutions, and through the attempt of inter-nationalisation of those rights through the creation of the International Labour Organisation (ILO). The period that runs from the end of the Second World War until the decade of the seventies, on the other hand, reflects the period of greatest development of social rights. In that period, the great pillars on which such rights are structured were integrated into national constitutions and into the great international declarations of rights) under the aegis of the so-called “welfare state” or “social state”, the reality outlined from the neoliberal counterreformation movements of the 1970s, starting with the great crisis in the hegemonic model that had guaranteed the growth of the central capitalist countries during the post-war period (1945-1973), whose effects have extended until the current times and are revealed to be (to once again disguise themselves) more intense with each new crisis of capitalism, became common the point of view by which public authorities (and, therefore, the use of the state’s power for the purpose of achieving equilibrium in material inequality or excluding certain goods from the free interaction of the markets) would be an inevitable source of undesirable bureaucratisation, and the rights related thereto, burdensome, real “traps”, which would tend to trim economic effectiveness, personal liberties, and market freedoms, while they are not rights truly incompatible with those of freedom, or perhaps merely programmatic rights, imposing, despite their formal validity and the extension of social rights in many constitutions and international treaties, a new law of the ever more globalised market, which weakens the binding nature of the exercise of social rights and, with it, the true scope of the democratic principle and of social behaviour of the traditional state of law (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 globalisation” triggered a recession in the central countries and left the “free market” on its knees, begging for assistance from the state. The doctrine of neo-liberalism and the prophets of the “end of the world” fell silent, perplexed and confused before the extent of the damage after disintegration of the Soviet Union. The crisis revealed the cruel face of the system, which caused loss of employment, housing, savings and the hope of a better future for the majority of humanity. While waves of speculation were extended to concentrate even more wealth in the hands of a tiny minority, half of the world’s population lives in poverty. We cannot yet fully conceive of the extent of the effects of this crisis: will it be the end of the myth of “free enterprise”, of the innovative entrepreneur and of the superiority of the markets pressured by the need for salvation through intervention by the state, with tremendous implications for political and social structures in the years ahead? It seems to us that such expectations are slightly naive: late Keynesianism, in other words, the generalised expectation that the state will come to rescue the financial system, although it may involve a passing relief from the effects of the crisis, no longer seems to be in a position to assume that role of *deus ex machina*, of saviour, as Roosevelt’s New Deal was in the 1930’s in the last century. Furthermore, as history has shown, it may very well be that, insofar as the market recovers its strength after this assistance from the state, it has permitted executives from institutions in bankruptcy to receive rewards valued at hundreds of millions of dollars for the effectiveness with which they knew how to betray people’s confidence and appropriate real fortunes, neoliberals returned with the same old song-and-dance about the supremacy of the “free market”. For them, the use of the power of the state for the purpose of balancing situations of material inequality or of excluding specific goods from the free interaction of the market is pathological, such that, this crisis having been su

mounted, 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⁽¹⁾ In this sense, see Pisarello (2003; 2007)). 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 (Cf. Martín (2006, p. 11)). 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*⁽¹⁾ The idea of the *reserve of the possible* is being used as an argument by governments for citizenship, in the sense of justifying the lack of materialisation of social rights. We discuss this topic in greater detail further on), are proof of this (new) *lex mercatoria*⁽¹⁾ In reference to the legal effectiveness of the social state and social rights, Ibáñez (1996, p. 35) affirms that, by the 1990s already, “social character, with a much thicker brushstroke, had already been transformed into social principle, and social principle, in turn, was transformed into more than a few rules to be exercised on their own”).

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

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

What we have been seeking to demonstrate throughout this paper is that, despite their appeal to technical discourse, this devalued perception of social rights rests, above all, on myths forged by ideological prejudices (In this sense, see Pisarello (2003; 2007)). We are thus attempting to refute the primary myths conveyed in the political and legal mainstream that currently shape the perception of social rights and, by extension, public policies themselves. 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 (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), a panoply of economic, social and cultural goods that reflect what is usually denominated as "social rights". We are seeking to demonstrate in this context that we cannot guarantee social rights from the assumption of the prior and necessary accomplishing of exclusively civil (individual) and political rights, nor even, on the contrary: in synthesis, the concept of the free human being, liberated from fear and misery, cannot be accomplished unless conditions are created allowing each person to enjoy his economic, social and cultural rights as well as his civil and political ones.

How fundamental human rights can be determined and protected

Included among those who, having abandoned the technical drawing of the generations of rights, are inclined to recognise that social rights are not simply rights of late onset, which come after the so-called fundamental, civil, and political rights and that, despite the usual philosophical and normative perception of the foundation of social rights, manage to conceive of civil, political and social rights as rights with a common foundation, there are those individuals who are convinced that social rights can be structurally distinguished from civil and political

rights, possessing a structural difference that influences, first and foremost, notions about how it may be possible to safeguard social rights.

In this context, civil and political rights are traditionally identified as negative, non-onerous rights that are claimable and, in addition, easily protected, while social rights would be positive rights that impose a burden, are indefinite and exercised in an indirect way; they are dependent, in their specificity, upon criteria of reasonability or availability, with reserve of the possible, in other words, dependent on contingencies that are, above all, economic within a clear context of positional struggles.

In synthesis, social rights serve, in and of themselves, as mere guiding principles or programmatic clauses, and, given their collective dimension, certain forms intended to safeguard social rights before jurisdictional entities would not be possible, which, in view of the reserve of the possible, could do nothing to guarantee them.

Many of these perceptions involve, in and of themselves, historical and axiological arguments for their justification, as we have already seen. But, once again, we will attempt to refute these arguments, by offering, as a standard, and by demonstrating that those same arguments, used to support an already weakened vision of social rights, can easily be extended to all rights, including civil and political ones.

The allegation that civil and political rights traditionally generate negative obligations, of abstention, and for this reason, they are 'cheap' rights, easily safeguarded, as opposed to social rights seen as positive, requiring intervention, which would then be 'costly' rights, difficult to safeguard, and unsustainable, since neither civil and political rights can be characterised solely as negative rights of abstention, nor can social rights be characterised solely as positive rights requiring intervention.

Civil and political rights are also positive rights with social benefits. Therefore, the right of property, for example, does not demand, as traditional liberal thought usually points out, only the absence of arbitrary interference, but rather a wide number of public benefits imposing burdens, which extend from the creation and maintenance of registries of various types (automobile, real estate, or industrial property, for example) to the creation and maintenance of security forces and jurisdictional entities that can guarantee compliance of contracts involving property.

In a similar manner, the political right to vote contains a broad and burdensome infrastructure that includes minimal issues, such as ballot boxes, paper ballots, etc., to others that are more complex, such as polling clerks, counting devices, recounts and registries, logistics, jurisdictional entities, etc. All civil and political rights, in summary, entail in a similar manner to social rights, a distributive dimension, the satisfaction of which requires

multiple resources, both financial and human. In sum, it is not only social rights that imply costs for the state; civil and political rights, insofar as they require the abstention of the state and/or of the individual; that is to say, non-intervention in the spheres of autonomy and freedom of individuals depend on a burdensome state structure in order to become a reality. What is usually at stake, therefore, is not how to guarantee 'costly' rights, but rather to decide how and with what kind of priority those resources will be assigned, which all rights – civil, political and social – require in order to be satisfied.

Likewise, social rights, although usually associated with social benefits (positive rights) also entail duties of abstention. Thus, the right to housing requires respect, not only for the demand of policies that allow access to housing, but also the right not be arbitrarily evicted and not to include abusive clauses in rental agreements or real estate purchase contracts. The right to work is fundamentally related to the protection against arbitrary dismissals, which involves a duty of abstention on the part of companies.

We can affirm, in short, that all rights, whether they are civil, political or social, establish, in one way or another, claimable negative obligations of abstention or respect, as well as positive obligations that require intervention or satisfaction from the public authorities, and, in addition, obligations concerning their protection against violations arising from acts or omissions by private individuals .

On the other hand, one of the primary obligations that social rights generate for the public authority involves respect towards a negative duty, grounded in the principle of non-regression, which, according to the Committee on Economic, Social and Cultural Rights of the organisation of the United Nations, obligates public authorities to not adopt policies and, consequently, to not allow rules that would erode, without justification, the status of social rights in the country.

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

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

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

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

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

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

Once again, the argument that points to the conclusion that social rights are rights that are difficult to protect is not supported. A certain degree of uncertainty, even in semantic terms, is inherent, not only to the legal language, but to the natural language itself. In the case of human and/or fundamental rights guaranteed in international treaties or constitutions, this uncertainty can

arise from a demand derived from legal pluralism, since an excessive regulation of content and of consequential obligations of a right could cut off the democratic space from the social dialogue in regard to its scope. Thus, it is not the case that the relative openness in the creation of social rights has the effect of making them unintelligible, nor is it the case that uncertainty involves an insurmountable barrier.

Terms associated with traditional civil rights, such as honour, property and freedom of expression, are not less obscure than those commonly found within the sphere of social rights. All rights are provided with a 'core of certainty', circumscribed by linguistic convention and hermeneutical practices that are not absolutely static, but instead, dynamic, and which, for this very reason, even contemplate, at any time, the possibility of interpretive development and of 'grey areas'. Within these contexts, if greater efforts made in legislative, jurisdictional and doctrinal activity are devoted to civil and political rights, this does not reflect a greater structural obscurity of social rights, but rather a deliberate and clearly ideological choice.

Nothing prevents, therefore, development of criteria or indicators that outline a more appropriate meaning for a given social right. Rather, establishment of those parameters or indicators is, more than desirable, absolutely essential for monitoring compliance with obligations by the state on the subject of social rights, even for distinguishing, for instance, whether non-compliance of a duty arises from the lack of capability or from a true absence of political will; or to justify if, in a given legal system, a situation of regression, stagnation or progress on the subject of social rights is produced in a certain period of time.

Many of these criteria are what we call 'soft law'; in other words, they merely constitute interpretive standards that, despite the legal structure they possess, are not mandatory in nature. However, their invocation by the intended beneficiaries of those rights and their consideration by the public authorities could help, in an effective way, to define the content of the social rights and the obligations originating from them, whether for public authorities or private individuals.

In this sense, for instance, various courts have recognised the theory about the existence of minimum or essential frameworks on the subject of social rights, mandatory for public authorities as well as for private agents, from the perspective of international law or under frameworks protected by the constitutional codes themselves. Thus, the German Constitutional Court understood that, despite the fact that social rights were not explicitly granted in the Fundamental Law of Bonn, it is possible to derive a law of vital minimum from it, whether linked to the principle of the dignity of man, or to that of material equality, or the social state. In a similar way, the Constitutional Court of Colombia deduced the

right to a 'vital minimum' from the text of the Constitution, which consisted of those goods and services needed for a life with dignity, above all in situations of urgency, extending the scope of this 'minimum' to the definition of rights as they pertain to health, housing and social security. Thus, neither the determination of the content of social rights, nor the stipulation of actions required to satisfy them, nor the identification of the individuals involved, are issues that fall outside the scope of the jurisdictional bodies.

We emphasise here that social rights obligate state authorities, whether through the executive, legislative, or even the judicial branch, but they can also obligate private parties, such as employers, service providers in the area of healthcare or education, and retirement and pension fund administrators. This linkage of private parties to fundamental rights can be the product of recognition expressed by the constituent legislator or it can even derive from different legal principles: from the prohibition against discrimination and good intention clauses up to the principle of protection of the weakest contractual party or of the social function of property.

It is clear that obligations pertaining to social rights are also not projected on all private agents under all circumstances, because not all private individuals responsible for providing goods and services are in the same position of power and superiority in regard to third parties. Thus, the degree of linkage to observation and satisfaction of social rights by private parties is directly and proportionately related to their size, influence and resources.

In summary, then, all fundamental human rights, whether civil, political or social, have a complex formulation, part positive and part negative, and all are burdensome, in one way or another, as well as enforceable through the courts. We do not deny that, when dealing casuistically with a given right, certain elements can have a stronger symbolic effect than others, and that rights dealing with social benefits, which require greater financial expenditures, are more difficult to guarantee than other rights that do not require such costs, either because of financial and budgetary issues, or due to the conflictive nature with which the contributions and transfers of resources appear in a context of positional disputes. However, what we wish to emphasise is that none of these problems refers solely to social rights, but rather that such issues are related to all fundamental human rights within their social benefit dimension, whether they are civil, political or social rights.

If what is at stake, however, are not simple revocable concessions, but rather human rights, the powers in effect should observe a set of obligations that cannot be indefinitely postponed: from the duty of non-regression of social rights, up to the adoption of measures intended to protect social rights in the face of possible abuses by private agents within relationships of power, without

prejudice to the duty to guarantee, in a permanent way, the minimum content of social rights, as it relates to what can be defined, even culturally, as the existential minimum .

From that perspective, attributing a specific expectation of an individual — living his life with dignity, preserving his health and making autonomous decisions about the aspects of his life – to the label of civil rights or of social rights, reveals itself to be nearly a semantic question. A rigorous categorisation would involve admitting that the existence of a continuum between certain rights, without the obligations that they entail, nor the more or less indefinite nature of their formulation, could be converted into real elements of categorical differentiation. Thus, what is most relevant would not be to oppose civil and political rights against social rights, but rather to highlight the contrast existing between rights that can be generalised and exclusive privileges.

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

How fundamental human rights can be exercised and guaranteed

Despite the existence of various arguments denying the theory according to which social rights are structurally different from civil and political rights, that characterisation, 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 fulfilment 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 characterises 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 that enable them to be generalised 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 that 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.

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.

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 that requires legal operatives to maximise 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'.

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 progressivism. 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; others offered only minimal regulation of social rights or relegated those rights to the scope of merely implicit rights. Some constitutions stipulate in detail the obligations that recognition of a right entails for the public authorities and also for private agents, while others only allude to those obligations.

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 that includes the principle of equality in matters of basic, civil and political rights would raise, as an underlying principle, a mandate of generalisation that would require inclusion, at least indirectly, of social rights linked to them. This has occurred, currently, in various codes of law that do not explicitly recognise 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.

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 discretionary margin to proceed, or not, with that development. Those ideas, however, cannot stand on their own.

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 generalised in scope, is a privileged source of legal production in modern legal systems and constitutes a primary guarantee of the satisfaction of any rights .

All rights – civil, political, and social – must be established by legislatures, which can, of course, be varied in scope. 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 recognise the duty of states to honour the minimum or essential content of rights recognised in constitutions or international covenants and treaties, content that is dependent upon the context in which such rights are applied and that allows historic rights to be updated on an ongoing basis.

In any case, that minimum will always be a barrier that 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 recognise them and, therefore, all persons must be assured of them, especially those who find themselves in more vulnerable positions.

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 that are not subject to the jurisdiction of the courts, in other words, that they are not rights that 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 analysed 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 that, 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.

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

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 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 'constitutionalise' a given model of economic

development, in such a way that the constitution would, therefore, cease to contain an open and pluralistic mandate, 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, 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 mobilisation, thereby favouring intervention by the courts.

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 that 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 behaviour. This being so, the behaviour of the courts has been shown to be legitimate and democratic in many situations.

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 of 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 characterised 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'. 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 that do not, by themselves, produce immediate electoral benefits, or even to those demands that escape the standard pattern of political priorities established by a certain 'party logic'.

In this context, it is precisely the assumed element characterised 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 – marginalised by traditional representative channels. This is the case, for instance, of prisoners and immigrants who not infrequently find the protection that political and administrative bodies have denied them in the context of the courts.

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.

The old myth of immunity of the discretionary 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 that 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 legitimise 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.

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 marginalised 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.

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.

The courts are usually called upon to resolve conflicts about economic issues. Thus, jurisdictional solutions on the subjects of labour 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 behaviours 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 administration in the sense of completing the regulatory milestone of a particular social right. 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 proprietary rights, which at times include monetary compensation and expenditures not provided for in the budget.

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, characterise a constitutional democracy. The existence of certain basic interests, essential for the powers in office, involves an insurmountable barrier to the free configuration of public costs. In addition, limitations on the free configuration of public costs are a corollary to honouring the minimum or essential content of those rights.

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 behaviour 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.

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 behaviour required was not so complex or onerous as public entities have stated and they have relied on numbers and alternative data that demonstrated the fallacy of certain impossible assumptions, or have included costs in those numbers and data, for instance, which were deliberately excluded, such as those which the deferral of a given policy could involve in the future.

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.

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 legitimising essential core of the common good, since it is through them that security, freedom, support and the continuity of human society can be guaranteed.

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. The materialisation of social rights cannot, 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 optimisation. 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 that it involves.

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. 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 that 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.

To the extent, therefore, that all rights depend, to a greater or lesser degree, on financial resources in order to be materialised 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 that 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 that 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. 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.

At times, the traditional behaviour of the courts in the face of serious violations of rights has given rise to judgments that do not merely declare such violations to be unconstitutional, but have led to true structural injunctions, decisions that 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. 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.

One of the mechanisms that 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 that 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), through which some courts have managed, such as the South African courts, to include a 'duty of priority to the most vulnerable'; in other words, the duty that analysed 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.

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 behaviour 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 programmes already in existence, in addition to planning for the future, and that the solution lies at the heart of the policies and programmes that 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, honouring 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 granted by the Constitution. 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.

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 analyse 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 that are intended to ensure that they can be exercised. 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).

Institutional guarantees of social rights refer to the behaviour 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 that 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.

Political guarantees of social rights are related to safeguarding mechanisms conjoined with the powers that 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 that 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. Constitutional rigidity itself, in other words, the foresight of mechanisms that 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.

The prohibition against regression, recognised above all by the Organisation of the United Nations, within the scope of the 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 that 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), as a corollary of the legal power of the constitution and of the minimum or essential content of rights recognised 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 organise state powers under forms that are more or less founded on principles of diffusion, plurality, representativeness and public awareness of political power: 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.

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 .

In fact, the minimum or essential content of rights recognised by constitutions entails, for the institutional bodies, a series of obligations that 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 .

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 programmes arbitrarily focussed, discretionary and exposed to clientelistic practices, if not to corruption and violation of legality itself, practices that place policies at the service of the existing powers and that, in the configuration of constitutionally recognised social rights, do not fulfil the minimum requirements for rationality and 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 programmes and basic income for all who need it.

We should emphasise, 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, or, in addition, which establish different burdens for individuals, proportionate to their size, resources and influence. 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.

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.

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 Organisation 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 that assumes respect for what is usually called the ‘essential content’ or ‘essential minimum content’ of constitutional rights . This implies that, inasmuch as they have been given constitutional expression, social rights have an irreducible core that the legislator must not ignore, 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. Through the exercise of that power, public agents control and penalise practices that 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 that 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 that use non-judicial methods to resolve disputes, provided that they are characterised 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 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 that contemplate, for instance, labour 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.

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 recognised in the constitution or in international treaties, are at stake, that they offer the possibility of ideal jurisdictional channels through which to protect interests that 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 behaviour 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 de-legitimising burden that this can entail, to explain what their real priorities are when allocating public resources and why have they committed the acts or omissions, which, on the face of it, seem to injure fundamental rights.

One technique that 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. For example, the violation of social rights can also affect the principle of equality and the prohibition against discrimination, the right to due legal process, civil rights or even other social rights.

This behaviour 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 that 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 learnt 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.

Rights without duties do not exist, nor can exist obligated individuals without individuals who are capable of obligating. 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 programme 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 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 that, 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 that are incumbent upon them, and it is grounded in the perception that the effective interaction of a law or programme with its intended beneficiaries, and the behaviour of each one in defence 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 that seek to enforce only selective, discretionary and revocable concessions by the existing powers, if not measures intended to stigmatise 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.

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 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 interdependence 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.

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 that are of interest to them and that 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.

As we have already indicated, it is necessary to develop specific instruments that 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 the economic means are that 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 organisations with other agendas, which are focussed on the demand for greater transparency in political decisions through access to public information, and control of

corruption.

Another fundamental guarantee in defence 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 recognises 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. 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 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 that provide public services or companies that engage in activities generating collective risk, such as industries with a high potential for causing environmental harm and other risks that could affect social rights or 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 that 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 that might have an irreversible impact on social rights.

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.

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 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.

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.

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.

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

However, consolidation of those spaces of self-management tends not to be produced without conflict. 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 that were initially prohibited by law and that, as a result of social pressure, were legalised and regulated, such as the right to strike. At other times, the use of certain mechanisms of self-protection either do not correspond to actions that have a perfectly outlined legal status or that 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. 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.

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 characterised 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. 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 that are wide open and anchored to it, up to the point in which they become justified as legitimate channels of defence 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 defence of a social right, rather than behaviour that would warrant punishment.

In summary, the lack of access to institutional channels of participation or the manifest ineffectiveness of public policies – especially those that 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 tranquillity – 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 defence 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 that 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 that, when blocked, can, in extreme situations, force the public authorities and private individuals themselves to recognise – or at least tolerate – the acts of self-protection of social rights that, 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.

In summary, even in societies in which conditions needed for the full implementation of an adequate deliberative process are not yet available, it is possible to guarantee that the public interest that the state should pursue has priority over implementation of conditions that 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 recognise themselves as co-authors of the law.

In modern societies, immersed in a context of pluralism characterised by a wide breadth of differentiated perceptions and by deep moral disagreement that 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 that 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.

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

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. 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 minimising the effects of the asymmetrical power relationships that 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. 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 that make this liberty possible, both in the private sphere and in the public procedures used in the decision-making process.

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 that 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.

Accordingly, we emphasise 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 that impede the materialisation of social rights.

If we do not adopt measures related to a more equitable distribution of economic, social and cultural resources that, in addition to strengthening the guarantees of rights themselves, provide, by all possible and potentially effective means, real access to full citizenship, that distribution that 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 programme with its intended beneficiaries and the behaviour of each one in defence of his rights and in defence 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. If the policy corresponds to a multi-faceted selection process of instruments to implement the objectives of governments that 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, transcend the normative tools of the programme 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 colonising 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 organisations in the third sector, projections invariably democratic and committed to the interests of the community. We must, therefore, de-link public from state, and non-state actions from those pertaining to what is democratic and socially just.

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 modelled by public expectations. The modern state, as a normative agent and regulator of 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, defence of the environment and the reduction of inequality.

On the other hand, even when actions and social intervention programmes 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 organisations, 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 was not like this, the action would not be social in nature, or 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. 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 that often, more than acting to level inequalities, tend to operate as effective discretionary concessions, if not as outright measures aimed at controlling the poor, (re)thinking the guarantees of social rights from a democratic and protectionist perspective.

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 minimising the effects of the asymmetrical power relationships that 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 that 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 that 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 defence, which, without prejudice to state interventions, depend on the exercise of such rights by those who hold them. Laws and programmes are important, but it is precisely in the effective interaction of a law or programme with its intended beneficiaries, and in the behaviour of each one in defence of his rights and in defence 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 that we raise here is the usual bureaucratic and centralising 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. 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 organisations, town-hall meetings, labour 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.

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 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 that could have an irreversible impact on social rights.

The free and true exercise of the right of association, the right to unionise, 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 defence 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 organisations. Not participating, in this context, represents delegating their ‘representation’ to the dominant institutions, with the risks and harm that would result from such delegation. In addition, the possibilities that the citizen body could impose or gain new mechanisms for making themselves heard or for negotiating in critical issues, such as labour legislation and social security, could lead to true co-ordination/co-operation through social dialogue.

In addition to voting, therefore, citizens should incessantly seek to overcome the conservative political model that characterises some states, 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 that can affect civil, political and social rights. Among the things that 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, centred 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 legitimising daily government actions and, in a similar way, bolstering full political participation .

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 focussed 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 that do not serve a social function – as well as others that seem to be, *prima facie*, illegal or deprived of specific legal status – in the face of institutional channels, it should be characterised 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 that 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 recognise (or at least, tolerate) exercises of self-protection of social rights that, 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 that 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 . Creation of sustainability assumes that company management is based on the search for harmonisation between economic growth and socio-environmental development; it must be translated into a new type of company vision with respect to its social role, internalised as management culture, a new culture founded on ethics and applied to the various processes and relationships of the organisation’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.

In summary, then, the notion of the ‘good company’, which is of interest to citizens and consumers, refers to companies that adopt socially responsible practices of management, practices that prove themselves to be relevant for a long-term return on investment and that also improve their public image and reputation, elements that, while 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 that is a good place to work in, to have co-workers, to invest in, and to purchase its products and services.

Many of the issues that 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 programme intended to achieve the concrete expression of human rights, capable of re-empowering institutional and social guarantees of rights at all levels.

However, 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 recognises 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.

Neutralisation or elimination of the other, of what is different, is a practice that 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 that 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.

Capitalism is developed through mechanisms of domination, neutralisation 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 and antagonisms, etc. However, 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 that 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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