

REASONS FOR THE CONSTRUCTION OF A LEGAL THEORY OF SOCIAL RIGHTS AS FUNDAMENTAL RIGHTS

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Abstract: The present research article will relate about the theory of social rights, essentially, it will address the study of some reasons for the construction of a legal theory of social rights as fundamental rights. In this way, it seeks to deny the supposed difference between the categories of civil and political rights and social rights sustained by reasons of history, provision, indetermination, cost and a subjective character. Thus, good arguments will be provided to defend the constitutionalization (positivization) and the development of the features of fundamental social rights (subjective and objective dimensions).

Keywords: Social rights; civil and political rights; indetermination; costly; subjective.

Summary: I. PRELIMINARY ISSUES; II. ON THE DISTINCTION BETWEEN CIVIL AND POLITICAL RIGHTS AND SOCIAL RIGHTS. SUPPOSED CHARACTERIZATION OF SOCIAL RIGHTS; III. THREE SUPPOSED DIFFERENCES. A CRITICAL ANALYSIS FOR THE CONSTRUCTION OF A LEGAL THEORY OF SOCIAL RIGHTS AS FUNDAMENTAL RIGHTS; III.1. Social rights are highly indeterminate (these are not fundamental rights); III.2. Social rights are expensive and dependent on the economic capacity of the state (social rights are not fundamental rights); III.3. Social rights are not genuine subjective rights (not fundamental rights); IV. CONCLUSIONS.

I. PRELIMINARY ISSUES

It is necessary to point out we have mentioned previously in another work the historical construction, the concept and foundation of social rights (JANAMPA 2016: 33-49). The current study will focus on the reasons for building a legal theory¹ of social rights as fundamental rights, faced with certain arguments consolidated in legal dogmatic and philosophy of law, which presents a defense on the substantial differences between the categories of civil and political rights and social rights. Such differences classified as *sui*

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¹ Legal theory is understood as “that which occurs when we focus our interests on the features and characteristics of juridification (in our days and our systems the latter would be replaced by Constitutionalization) of rights”. ANSUATEGUI (2010: 47)

generis in their condition, highlight their historical, provisional nature, their high degree of indetermination, their costly character and the denial in the configuration as subjective rights of fundamental social rights².

This situation makes evident the following question: the fact that social rights are not stated in the Constitution or not taken as real fundamental rights, responds to an exclusively ideological and reductionist construction? Therefore, are these classified as secondary, devalued, fragile and second-rate rights? Faced with a possible positive response, the objective of the present study will be to provide reasons and arguments to support the hypothesis that places social rights as true fundamental rights³.

To this end, it shall be underpinned that the differential treatment of the rights from a sector of legal literature is only surrounded by an ideological mantle⁴ essentially of liberal roots, which would aim to support a different protection of social rights. This situation makes depend the projection of the legal theory of social rights as fundamental rights and it conditions the constitutionalization of certain demands of morality ethically justifiable (ANSUATEGUI 2010: 51)

To justify our hypothesis, we firstly address the development of the historical construction of the terminological difference between civil and political rights and social rights. This will allow evaluating and verifying that the differences have had a pure ideological origin and, above all, to observe how the ideology has influenced from the international perspective in the configuration of the internal regulations, introduced as watertight compartments.

Then, the arguments that affect the differentiation will be analyzed, in order to criticize each of the supposed justifications that advocate it, with the aim of maintaining that social rights are true fundamental rights. The position of the author also underlies an ideological content, but is not in any case a reductionist one.

² These supposed characteristics have allowed that the social rights, can only be presented like mere programmatic norms, end-norms of the State or objective mandates –whose effectiveness will become mediate–. This situation evidences the ideological intention that underlies the argument. An example of this description is found in the theoretical proposal made by E.-W. Böckenförde, who argues that the social claims for benefits are reduced to legal-objective mandates and that these mandates are addressed to both the legislator and the administration. BÖCKENFÖRDE (1993: 81-82).

³ Cruz Villalón argues that fundamental rights are recognizable “in terms of their general linkage, direct effectiveness, respect for their essential content by the legislator and judicial protection. However, fundamental rights are not defined only by its content but mainly by the “connection of meaning” of fundamental rights with the Constitution, what means that fundamental rights are born with the Constitution and end with the Constitution”. CRUZ VILLALÓN (1989: 35-62 ff.)

⁴ “In any case what we are going to find behind these historical, moral, economic, legal reasons, there are political (in the sense of ideological) approaches. (...) Such ideological approaches inevitably appear in any discourse of rights (...)”. ANSUATEGUI (2010: 50).

II. ON THE DISTINCTION BETWEEN CIVIL AND POLITICAL RIGHTS AND SOCIAL RIGHTS. SUPPOSED CHARACTERIZATION OF SOCIAL RIGHTS

It is pertinent before starting this paragraph to make clear the following: although there is a great variety of classifications of rights, including: a) civil and political rights, on the one hand, and social rights on the other, b) individual rights and social rights, c) rights of abstention and rights of benefit, d) right of autonomy and rights of benefit (ALEXY 2007: 482), hereinafter the analysis will take the first classification to refer to the “alleged difference of categories of rights”, in order to make this study more comprehensive.

The distinction between civil and political rights (first generation rights) and social rights (second generation rights) was born from the publication of Thomas Humphrey Marshall's book *Citizenship and Social Class*, where the English sociologist made a historical description of the progressive evolution of rights, relating directly to the expansion of the concept of citizenship. Civil rights, political rights and social rights would correspond to different demands for the expansion of citizenship, which were built between the political and ideological vindication of certain groups and the social and economic conditions in which the state was developed. His work helped to adopt a certain generational idea of rights, which roughly understood could lead to assume that social rights were secondary rights as rights of appearance e after civil and political rights. As far as social rights came later, attention over them must also be later, that is, after having satisfied civil and political rights (PISARELLO 2007: 19-36).

Thus, such a distinction of civil and political rights and social rights was emphasized in the 1966 Human Rights Covenants⁵. These have consolidated the historical fracture of Human Rights in two watertight compartments, on the one hand, civil and political rights and, on the other hand, economic, social and cultural rights.

Accordingly, since the substantive difference made by the Covenants, civil and political rights and social rights have been characterized differently: civil and political rights may be stateless, without institutional protection, while economic, social and cultural rights need indefectibly of the political and legal organization of the State (PRIETO 1995: 9 ff.).

In this sense, from the beginning the liberal formula has advocated a contrast between civil and political rights and social rights, creating ideological justifications. It has been generally held –Liborio Hierro has been a descriptive one regarding this, since he does not share such a difference–, that authentic civil and political rights, ergo, universal, have

⁵ It is known that the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights were adopted by General Assembly resolution 2200 A (XXI) on 16 December 1966. The first one entered into force on 3 January 1976 and the second one on 23 March 1976.

an absolute character. According to this doctrine, these are eminently definitive insofar as their mere statement defines its content; also, these are characterized by their immediate effectiveness against the State and have a guarantee of justifiability. The entire contrary happens with social rights, which are specific rights with a relative character that requires a certain institutional form, whose effectiveness would depend on the implementation of costly means and that would not be justiciable, since they would be conditioned to legislative development regarding to their concrete protective actions (HIERRO 2009: 165-166).

These rather topical dimensions undoubtedly refer to the identification of social rights as benefit rights, where the content that would identify them would be a “benefit or a right to something” that can be claimed only before the State. In this sense, a certain majority sector of the academy (COSSIO1989: 45-46) has manifested that this benefit character has become a relevant and decisive factor to differentiate civil and political rights from social rights, i.e., such dissimilarity is promoted by the compulsory character that corresponds to each right⁶; social rights have a character of benefit and civil and political rights have a character of abstention. Freedoms create a kind of simple legal relationship where individuals know perfectly what their reciprocal rights and duties are about, whereas these other rights require a prior network of organizational rules –by the way, lacking in enforceability– which in turn generate a multiplicity of legal obligations of different subjects (PRIETO 1995: 19). This description has resulted in different treatment of social rights, not only caused by the absence of provision by the State but also by an inefficient and inadequate provision of the right in question.

These differences strongly defended nowadays constitute a problem and a complexity for social rights, while these are not considered autonomous fundamental rights but only programmatic norms or, simple political aspirations, without objectionable and justiciable content by individuals with an ownership position.

So, it is surprising that a distinction emerged and consolidated by such contingent historical factors could penetrate as deeply as it has done in the theory of rights, both in legal philosophical thinking and in constitutional legal doctrine (HIERRO 2009: 168). However, these differential characteristics assumed by the liberal position are not shared from the socialist perspective, since they consider that social rights are authentic rights, universal, substantive, primary –once satisfied, social rights allow individual rights to be

⁶ “After civil and political rights there are legal duties, usually abstention, which represent primary rules or behavior usually with a universal obligated subject; On the other hand, after social rights, there are also secondary or organizational rules which stand between law and obligation, between the creditor and the debtor (...)” PRIETO (1995: 19).

enjoyed—, immediate —these should be directly satisfied by the political organization— (HIERRO 2009: 166-167) and benefit rights⁷.

Although social rights are delivery rights, this is only one of the main dimensions that has a relation with the positive obligations of the State⁸, since it also has a dimension of abstention, whose main responsible is the State. Notwithstanding the above, it is pertinent to state that civil and political rights also have this double dimension, as will be seen below.

Thus, the differences previously maintained by the liberal position, leads to conclude the following. The distinction between civil and political rights and social rights, in order to deprive the latter of their full juridical effectiveness, clearly had not only an ideological origin or historical genesis, but they have also been shaped and structured by contextual situations, which leads to maintain that both are irreducibly distinct categories. However, these differences are not such, since there are grounds for the distinction to be diluted.

For this reason, the next section will address the various paths taken by the alleged distinctions of civil and political rights versus social rights. Ultimately, the objective is to verify and confront whether such a difference is the product of only an imposed ideology, or whether both categories share the same essential properties that characterize fundamental rights, which will test the hypothesis.

⁷ “It has come to be said that it is very easy to refer to and identify social rights as benefits rights, that is, as those rights that, instead of being satisfied by an abstention of the obligated subject, require in turn a positive action that normally translates in the provision of some good or service” PRIETO (1995: 9).

⁸ The mandatory character of social rights would be constituted, in this context, by material benefits (economic goods or services) that must be provided to the people for their satisfaction. Thus, the rights to health or education, for example, would be satisfied with the corresponding public services implemented for their protection; the rights to social security and to the pension would be covered by the economic benefit that is given to the people who suffer some contingency; the right to food or housing would be covered by the direct subsidy given to people who cannot enjoy their exercise; all material elements, whose provision could only be the responsibility of the State.

III. THREE SUPPOSED DIFFERENCES. A CRITICAL ANALYSIS FOR THE CONSTRUCTION OF A LEGAL THEORY OF SOCIAL RIGHTS AS FUNDAMENTAL RIGHTS

III.1. Social rights are highly indeterminate (these are not fundamental rights)

This thesis is supported by the idea of the indeterminacy of constitutional disposition containing benefit norms (social rights)⁹ that are characterized by prescribing some ends that must be sought or achieved. The realization of these ends can be carried out through infinity of means, but the Constitution rarely specifies which of these means should be adopted by the legislator, nor does it describe the opportunity in which they should be put into practice (BERNAL 2007: 370).

Following this argument, it is understood that this condition is even more acute because the provisions interpreted according to the Social State do not contain any criterion about the extension of the guarantee of social budget. So, what is the extent of the guarantee, a minimum, one half or the maximum of such budgets? Or, how does the holder of the fundamental right relate with the benefits?

This leads to observe that the concretizations of benefits can be implemented in a myriad of forms –indetermination of means as opposed to civil and political rights that constitute negative norms of conduct concretized in the form of specific abstention mandates or not interference–, which leads to the conclusion that this type of provisions suffer a structural lack of determination that affects the possibility of its normative configuration as subjective rights. This idea can be observed in different ways: the provisions do not respond to an immediate application to the extent that it must previously be developed by the legislator, for example, the right to health or the right to housing. On the contrary, civil or political rights apply immediately, e.g., rights to life or freedom of expression.

In this sense, this structural difference causes the fundamental rights of freedom to be imposed on their own, so they can be realized directly at the level of the Constitution by way of concrete legal claim. This analysis would not be possible in social rights of benefit (social rights). The constitutional provisions are so general, abstract and vague that concrete legal claims cannot be inferred by means of interpretation, e.g., regarding the right to housing, it cannot be argued that there is an obligation to build and distribute housing maintained by the state, nor the existence of housing prices state fixation or the granting of rental subsidies in a free housing market framework. Also, it is not possible to state the extent that self-responsibility and self-care must be applied and what size or housing

⁹ “We can nominate “disposition” to any statement belonging to a source of law and reserve the “norm” name to designate the meaning content of the provision, its meaning, which is a dependent variable of interpretation”. GUASTINI (1999:11).

equipment should be considered adequate, or whether the provision of housing should benefit all citizens or only the least well-off or needy (GUASTINI 1999: 76-77).

It is worth to comment the defense of the “objective mandates thesis”¹⁰, where the suppression of the figure of the active subject in the structure of the juridical positions in which social rights are concretized is justified in the premise that social rights prescribe only purposes and not specific legislative measures (object of the provision). In this way, the object becomes an indeterminate provision that would lead to the absolute discretion of the legislator. It is the reason the active subject has no claim immediately enforceable as it depends on regulatory authorization¹¹.

According to Robert Alexy, following the same argument, he describes that it has been argued that the most important objections against fundamental social rights can be grouped into two formal and one material argument (ALEXY 2007: 450). The first one that is interesting for this section implies that the thesis of the non-enforceability of fundamental social rights or the minimum enforceability is based on the argument that these are very indeterminate (ALEXY 2007: 450).

To affirm this idea, the author provides an example: What is the content of the fundamental right to work? –indetermination of content–. The scale of conceivable interpretations extends from a utopian right of each one to have a wanted job, everywhere, in case of unemployment until gaining an unimaginable amount of money, or only to work the hours wanted. But what should be the economic amount? The problems relating to other fundamental social rights are not very different, so that the complexity of determining the minimum vital or the realization of their exact content of rights remains. Therefore, the thesis of judicial enforceability is deficient because it must enforce something more, which is outside the semantic and structural indeterminacy of fundamental social rights, i.e., it is impossible to arrive with specific legal means to an exact determination of the content and structure of fundamental social rights abstractly and vaguely formulated. This precision allows concluding that the right does not offer enough guidelines to achieve this. Now if the

¹⁰ “The only argument advanced is the indeterminacy of the subject of the claim (...) social rights prescribe only purposes and no specific legislative measures to achieve them. These legislative measures are the object of the provision of legal relations derived from those rights; then since the object is indeterminate, the possibility of attributing to the subject any right or enforceable claim must be eliminated, because if it is attributed an enforceable claim, the judge would have to specify the object, which contradicts the principle according to which in a democracy, the realization of the object of the obligations arising from the delivery rights belong primarily to the legislature” GUASTINI (1999:76).

¹¹ Apparently, the thesis of objective legal mandates has been advocated and followed in Spain, in relation to delivery rights included in Chapter III of Title I of the Spanish Constitution. In this regard, M. Carrillo has appeared on social rights, saying that these “typify purposes that can be fulfilled only by a multiplicity of state behavior imaginable. These provisions do not indicate, however, which of these behaviors are oriented: if they neither are all, if they’re just some, or if it is not any, nor establish the timing of these actions should be deployed” CARRILLO (1999: 69 ff.).

law lacks sufficient guidelines, then the decision about the content of fundamental social rights is a matter of politics” (CARRILLO 1999: 69 ff.).

In sum, the possibility of deriving specific mandates from the constitutional provisions of social rights is null and void, both in terms of the indeterminacy of the means and in the indeterminacy of the content of social rights, so, legal requirements binding as obligations or as subjective rights cannot be directly derived from the referred provisions. In any case, the social rights norms would only act as program norms, end-norms or realistic mandates –guiding principles on the political authorities– but not as requirements that give rise to an obligation or a definitive subjective right or that have a legal immediate effect.

The critique of the indetermination of social rights is caused by their own inconsistency, incoherence and instability about the structural difference and the indeterminacy of the same. The first dart relates to the affirmation of the structural similarity of civil and political rights and social rights. It is understood that neither social rights are always rights that demand positive benefits, nor civil and political rights are rights of abstention. This results in the acquiescence of affirming a similar structure as civil and political rights –taking into account that if any difference is observed, it is a question of degree– while its protection corresponds to different deontic obligations, comparable to the ones which correspond to civil and political rights. This will result in a similar consideration of the indeterminate character of both the constitutional provisions on social rights and civil and political rights.

A first example is in the structure and indeterminacy of the right to effective judicial protection. This one not only has a negative side, but also a facet of benefits, so the State is prohibited to generate situations affecting the right, that is, it should not affect access to justice, but rather should assign minimum guarantees in the process within a reasonable time, as well as ensuring that the guardianship is effective. This framework will be guaranteed only through the institutional designs of the judiciary, which implies not only legislative measures, but also administrative, procedural, institutional decisions, public action, material and human resources. This is predicable about all types of rights without exception, although there may be difference of degree or intensity.

Another example –in this case to make a contrast– is the right to health, the level of protection of this right entails from positions of defense to eminently helpful positions. Thus, the State not only has the obligation to provide adequate medical centers for the access of citizens to this essential service, but also entails the obligation of the State not to generate situations that may endanger the health of the population, such as the case of the authorization of concessions, installations or projects that may harm health. Therefore, both civil and political rights and social rights are linked since, alongside the rights of freedom, the right to strike or bargaining will be found. Also, the rights to health or education will be

correlated to rights to effective judicial protection or to due process and, of course, the right to life.

In addition, the Committee on Economic, Social and Cultural Rights (hereinafter CDESC) has drawn up relative resolutions that have given rise to two broad areas of obligation, alongside to the generic obligations –respect, protection and compliance (guarantee and promotion). On one hand, there are “medium and minimum obligations”, the latter related to those obligations to which a State is linked in a mediate manner at the same time as ratifying a Human Rights Treaty. On the other hand, CDESC has strongly expressed on the “obligation of progressivity”¹², which has become denser because of the Committee's interpretative work. This is an obligation which requires the signatory State to act “progressively” and use the “maximum resources available” (AÑON ROIG 2010: 18 ff.).

As these obligations are observed, they respond to a complex structural configuration, where they are not only refueled to negative obligations but also to positive obligations, and where the obligation does not respond to a specific type of rights, but without ideological, historical or structural reasons to all kind of rights. Thus, the structure of obligations gives rise to guarantees and their correspondent effectiveness.

In this way, it has been argued that the difference between civil and political rights and social rights are not such as advocated in a sector of legal literature, but rather respond to doctrinal taxonomy that operates more because of ideological and pedagogical grounds than legal reasons. Hence, it is not only incorrect to affirm such a distinction from a structural point of view and its indeterminacy, but also is inconvenient or dysfunctional in assessing the obligations, violations and responsibilities that may arise from the State or individuals.

These statements lead us to consider rigorously the relativization of the simplistic position conceived in the distinction between civil and political rights and social rights because of structural issues¹³ and therefore of indeterminacy of constitutional provisions. This option is shared by some authors who have analyzed the issue of the alleged

¹² The progressive realization tends to have much complexity in the actions and resources required to effectively guarantee the effective enjoyment of these facets of protection of a right. Democratic decision about the degree of protection to be provided to a fundamental right in their delivery facets, and the adoption and implementation of specific ways to ensure their effective respect, protection and fulfillment, assume that compliance with such obligations will be progressively attained. In this regard, compliance with such obligations is not satisfied with the simple state action, it must be adjusted to the Constitution, so it should be aimed at ensuring the effective enjoyment of rights.

¹³ The Colombian Constitutional Court through Sentence T-769-2008 –dated 31 July 2008– stated that between civil and political rights and social rights, there is no such sustained difference, and it is only possible to use that argument for methodological issues, not because of its benefit right character, because all the rights have a positive side.

distinction and observed that such distinctions are based solely on a skewed view of liberal ideological content¹⁴. The separation of social rights, on the one hand and civil and political rights on the other, respond more to a matter and approach of political order and not to its own nature-structure (ABRAMOVICH 2002: 24) of the right or the deontic-logic plane (AÑON ROIG 2006: 120 ff.)

This alleged difference –divided view– lies in the supposedly different structure of traditional civil rights, initialed as abstention rights, from social rights, which have a label of “rights to benefit”. This thesis has led to see social rights as reduced or undervalued rights; a linear, flat, harmonic, institutionally univocal vision of a fruitless process, that may prevent a clear observation about these rights, turning the interpretation into a “varnished ideology of dogmatic” in Revenga’s words.

The ideal view would be conceiving rights in continuity (AÑON ROIG 2008: 21-26 ff.), because rights cannot be seen as categories in isolation but should be appreciated from a unitary, interdependent and indivisible perspective. As a result, all the rights are interconnected and founded on the principle of human dignity. This thesis on the interdependence of human rights has been widely accepted in the literature (regarding relationship arguments and connection rights) (AÑON ROIG 2010: 26 ff.)

Apparently, if there is any difference between the rights in question, it could only refer to a “difference of degree”, depending on the greater weight that the obligations of defense or provision have in the right in question, rather than an eminently substantial difference. Thus, it is certainly more obvious and visible to recognize a facet of obligations to social rights, so these may be called rights to benefits, although it is easier to demonstrate the existence of obligations of abstention (ABRAMOVICH and COURTIS 2002: 23-25).

This consideration is present in several social rights, such as the right to health that entails a state obligation to not to harm health, or regarding the right to education to not to affect education, and the right to the preservation of a healthy environment implies the obligation to not to destroy the environment. In addition, they also carry a state benefit, which for them truly represents the substance, the hard core, i.e. what in terms of Häberle would be the essential content of fundamental rights¹⁵, in cases such as the right to health

¹⁴ “These distinctions are based on a totally biased view and naturalist role and functioning of the state apparatus, which coincides with the position of a minimalist state, guarantor only of justice, security and defense” (ABRAMOVICH 2002: 2-3)

¹⁵ Professor Häberle says: “the essential content of the fundamental rights is delimited against legal assets of equal or greater value, through the inherent limits that protect the substance, according to the principle of weighting goods. Immanent limits are the limits that correspond to the substance or encircle this. This formula makes clear that the essential content of fundamental rights is not a measure to be deducted “in itself” and regardless of the set of the Constitution and the legal rights recognized by such rights. Also, the essential content of a fundamental right and permissible limits of it constitute a unit” HÄBERLE (2003a:58-59).

care or free education, the absence of a state benefit automatically implies the denial of the right.

In the same way, it is possible to support the thesis of the open or vague texture of both social rights and civil and political rights, whereas the problem of indeterminacy is not exclusively of a specific typology, because it is a character implying any right to provide in broad sense (ALEXY 2007: 393)¹⁶ –rights to protection, organizational and procedural rights and rights to benefits strictly in terms of Robert Alexy–. However, from this assertion cannot be deduced the defense of an absolute idea of indeterminacy, since there will always be a degree of determination of rights and a greater degree in relation to social rights.

As it is pointed out, it is possible to establish a difference between the interpretation of social rights and the rest of the rights, in which the relative indeterminacy of all rights is a central issue. This implies that from the interpretation of rights in general, it is possible to affirm how, from the point of view of content, the interpretation of social rights is less indeterminate than that of the rest of the rights. The idea Professor Rafael de Asís seems to have in mind is the ease of signal when an interpretation is contrary to the content of social rights (DE ASIS 2009: 5-6 ff.).

Generally, it has been assigned a *prima facie* character not only to civil and political rights but also to social rights, which means that human rights require institutional commitments to become final rights. It means that the establishment of the content and means are conditioned to legislator's will, however, it is also possible to appreciate these characteristics in civil and political rights, e.g. in the right to suffrage, whose institutionalization implies the power to vote with decisive force, the freedom to choose between various options, certain immunities (secret vote) and endless pretensions to the state (to convene elections, to conduct censuses and to publish lists). So, these preliminaries are necessary to enshrine all rights in *definitive* rights, because “the final shape of a right always depends on further institutional developments and that clarity, reality or intensity of the law in question does not depend of the effective possibilities to satisfy or protect it, although it required this to get its final configuration” (HIERRO 2009: 183)

Consequently, the configurations of social rights will depend on further institutional clarification –because of its indeterminate nature– and not on its mere literal or semantic statement. This feature emerges from all rights considered as principles¹⁷ –civil, political or

¹⁶ In the same vein, Carlos Bernal says: “(...) we have seen also the provisions defining liberties suffer from indeterminacy. This is not an exclusive property of the benefit rights. It is often argued that the kind of indeterminacy of these provisions is different, and this different character affects the type of bonding that occurs to the legislature (...)” BERNAL (2007:371).

¹⁷ “The principles are rules that order something to be done to the greatest possible extent within existing legal and real possibilities. Therefore, the principles are optimization commands, which are characterized by

economic, social and cultural rights included–. It is necessary to depart from this argument, since it is considered wrong to maintain that rights in general enjoy absolutely a *prima facie* character and not regarding its definitive features. As we have already pointed out before, the constitutional provisions are not in any case indeterminate, on the contrary, there are always minimum determinations, most clearly in the case of social rights, which constitutes a limiting criterion to the legislator or any other body or authority that interprets the Constitution.

Considering the previous approach, Gerardo Pisarello points out that “in reality, nothing allows to infer that concepts such as honor, dignified life, property or freedom of expression are less obscure or more precise than the highest possible level of health, basic education or decent or stable work. Thus, all rights have gray areas and a core of certainty, from which content and basic duties can be extracted to the public powers” (PISARELLO 2007: 67). Therefore, only conceptions under simple ideological prejudices will argue that social rights are the only ones that obey a sort of an insurmountable structural dark (PISARELLO 2007: 68).

In conclusion, the distinction from the approach of indeterminacy is especially spurious and nothing consistent. Holding the opposite –the absolute indeterminacy of social rights– would suppose leaving meaningless the right and it undermined the normative character of the Constitution¹⁸.

III.2. Social rights are expensive and dependent on the economic capacity of the State (Social rights are not fundamental rights)

Defensive imprint of this approach is related with the scarcity of economic resources which makes condition the lack of legal effectiveness of social rights¹⁹. It is also known as the absence of economic or budgetary availability, which means that social

varying degrees of compliance and that the measure of compliance due not only depends on the real possibilities, but also legal” ALEXU (2007:68).

¹⁸ “The circumstance related to the lack of prescription about the means that the legislature must implement regarding benefit rights, cannot allow deducing a normative force loss of the prescription of its purposes. Ends are prescribed in any case, and consequently, the legislature is at least ordered to adopt one of the possible means and to achieve a minimum level of satisfaction of the established aims” BERNAL (2007: 371)

¹⁹ It has been noted that “(...) a fundamental right is primarily a subjective right, i.e. a legal empowerment (content of law) that the Constitution attributes to a subject to defend, ensure or hold certain expectations (object the right). That empowerment will consist in the possibility to require a third party, with the normative force of the Constitution, whether a public authority or a private individual, the fulfillment of a duty (to act, in some cases, or refrain from acting, in others). The fundamental rights are only the ones involving the fundamentality of the fundamental rule of law, the constitution, which means it sets out these rights and gives them availability for its potentially immediate starter, as a legal source directly applicable and as a source of other sources of order. It preserves the fundamental rights from their alteration or infringement by infraconstitutional standards (and in some cases even constitutional) and made unavailable by the legislature (and even the body of constitutional reform)” BASTIDA (2009:116 ff.).

rights, unlike civil and political rights, inevitably require for their realization the disbursement of economic resources in large proportions.

The high cost of social rights intends to deny the normative character of social rights from two dimensions: as a reason to highlight the structural difference from the premise of the factual unconditional nature of civil and political rights against the factual conditionality of social rights, and as a paradoxical reason, to highlight the failure to achieve a reasonable degree of protection of social rights, because it depends on resources necessary for their satisfaction and availability in the State treasury.

In this regard, the first dimension implies that the right to a positive act *–facere–* in favor of the citizen stumbles with numerous constraints in the case of social rights, mainly from (factual) budget order, depriving the efficacy of the constitutional recognition of the right in a variable measure. This situation is known in German doctrine as “reserve of an impossible”, while the Spanish Constitutional Court has developed this concept from the reserve of the economically possible²⁰.

Among those who have defended the position and relationship between social rights and economic outlays²¹ claim that for the realization of social rights, the use of the financial means of considerable size is required, which makes them dependent, thereby generating a rights crisis, as economic costs will condition the guarantee of rights. This is especially noticeable in rights such as health, education, housing and food.

The second dimension is associated with the idea of the impossibility of achieving a reasonable degree of protection of social rights. Given the high cost that seeks to sustain this type of rights, these require a prior assessment and decision within the framework of the state budget policy and its fixations of priorities, which will affect the scope and intensity of specific legal claims (BÖCKENFÖRDE 1993: 65). This leads to inefficiency and offers an alternative nature of social rights, bringing as a consequence a non-suitable protection. The result will be the impossibility to support directly the claimable judicially claims, since it inherently does not pose an immediate right (for citizens).

²⁰ The Spanish Constitutional Court has held that “Article 41 of the Spanish Constitution [SC] establishes Social Security in a state role in which the remedy of situations of need occupies a decisive position, but such situations must be assessed and determined considering the general context in which they occur and about economic circumstances, availability of time and needs of various social groups”. STC: 213/2005, of 21 July, fj. 4. With respect to Article 27.9 SC, “the authorities will help schools that comply with requisites established by law (...) such assistance is made considering other principles, values or constitutional mandates (...) also such mandates the unavoidable limitation of available resources”. STC 77/1985 of 25 June, fj. 11.

²¹ Böckenförde argues “that of fundamental rights that claims to provide for its implementation require the use of financial means of considerable size (...) is also extracted. The concrete guarantee of fundamental rights becomes dependent on state funding available. The economic impossibility is presented as a limit - necessary - the (delivery) guarantee of fundamental rights. This means abandoning the unconditional support of the claims of fundamental rights” BÖCKENFÖRDE (1993: 65).

In conclusion, the factual conditionality of social rights, as indicated by a sector of the legal literature, notes subordination to economic cost, i.e. the will of economic funding that the State provides for their protection.

Thus, the criticism raised against this approach argues that such speculations have been used to structurally separate the civil and political rights from social rights. The argument largely becomes an excuse to leave out the constitutionalization of social rights or in any case their classification as a fundamental right, thus, the State would not be obliged to protect social rights as true fundamental rights, treating them as mere programmatic norms²² or as end-norms²³ or realistic mandates.

To use other examples different to the ones we use in criticism of indeterminacy of constitutional provisions on social rights, this time we will refer to the right to political participation –right to vote and to be elected– in the active facet of the right to vote –right to vote–. It is evident the State has to ensure the compliance of this political right through economic resources, what means that there must be a budget disbursed by the executive and approved by the legislature to ensure it. It makes understand that the State must have public resources to support electoral bodies responsible for carrying out the elections, which in turn depends on public resources.

Another example relates to access to justice, due process and effectiveness of judgments rights. This right has an obvious delivery dimension, which may be guaranteed by a constant economic cost required by justice system. A good justice service requires disbursing a budget, thus, these fundamental rights also become expensive. No judicial system can operate with a vacuum budget. No court can function without receiving regular injections of taxpayers' money to fund their efforts. Its operating expenses are paid with tax

²² “The conception that the iusfundamental delivery norms must be regarded as programmatic rules, deny the possibility that these may emanate binding rules for the legislator, not even prima facie, or legal positions of a triadic structure where the State is the passive subject, the object is a benefit and the rules are aimed at to satisfy the basic needs of the individual or to provide the essential conditions for the exercise of freedom (...) provision rights as programmatic norms deny any type of binding against the legislator. Correspondingly, it denies any expectation, advantage or attribute that could claim the individual and that could be considered enforceable by judicial process (...) [the rights] only play a political role to be a source of inspiration for the content of the laws” BERNAL (2007: 368)

²³ “The conception that defines benefit rights as end-norms of the State intends precisely to reconcile the legislative level of discretion with the binding nature of this type of iusfundamental precepts (...) The rules of final programming are characterized because (...) they prescribe the State the duty to pursue or achieve a particular purpose, but not the way or the means (...). The constitutions leave open the discussion about the most appropriate means and the opportunity required to obtain the objectives. This discussion should be conducted in the field of politics (...) this conception is separated from the thesis of programming norms for which, the fact that the legislature is not bound to the means implies that neither it is to the purposes. For the thesis of the end-norms of the State, however, the legislature is bound by an obligation to pursue the constitutionally established aim, although it has full freedom to decide on the means and opportunity to implement them” BERNAL (2007: 375).

revenues. As far as the defense of rights depends on judicial supervision, rights cost at least what it costs to recruit, train, match, pay and monitor the system (HOLMES y SUNSTEIN 2012: 65).

In that sense, S. Holmes and C. R. Sunstein stated in their widely-acknowledged book “The cost of rights”²⁴ that all rights cost money. Given its nature, it is impossible to protect or enforce them within funds and public support. This is true for old and new rights. Both welfare and the right to private property have public cost. The right to freedom of contract involves no less cost than medical care, the right to freedom of expression or decent housing. All rights receive some public treasury (HOLMES y SUNSTEIN 2012: 65).

The same statement may be referred about classical liberal rights such as the right to inherit or the right to property. The latter is protected by right to private property law, coercively excluding non-owners as well as the configuration of all registration structure that gives legal certainty in the transfer of movable or immovable property. A liberal legal system not only protects and defends the property; it defines, creates and maintains it. Without legislation and without judgment (judicial guarantees) there can be no property rights. The State identifies, for example, the obligation of property owners to keep and make repairs if needed, and this entails an economic cost, a positive action by the state, i.e., the need for government action²⁵ to collect taxes and fulfill this right.

So the financing of basic rights through tax revenues helps to see clearly that rights are public goods, these are social services funded by taxpayers and administered by the State to improve the collective and individual well-being. Therefore, all rights are positive rights to some extent²⁶.

²⁴ To HOLMES and Stephen R. Cass SUNSTEIN, the expression “cost of rights” is a richly ambiguous expression, because the two nouns up have multiple meanings and inevitably controversial. To keep the analysis focused on that dimension – and – the least controversial possible, “costs” mean here costs included in the budget, while “rights” are defined as important interests that can be reliably protected by individuals or groups using government instruments. HOLMES y SUNSTEIN (2012: 33).

²⁵ “The government should help to maintain owners’ control regarding the resources and punish the use of force, the fraud and other offenses in a predictable way (...). Good part of the Civil Code is dedicated to that in relation to property. And the criminal justice system channels a significant amount of public resources to prevent the commission of crimes against property (...) [these are] fronts that are publicly financed, against those who violate the rights of owners” HOLMES y SUNSTEIN (2012: 82).

²⁶ “Positive rights are those rights which promote public aid, demanding the government for its performance, driving equality have active intervention, reallocate the money raised are charitable and tax, grant services, which not only include the right to receive coupons to redeem food, subsidized housing and minimum welfare payments, education, health, environment, but also the rights referred to above, such as property, judicial protection effective, the right to political participation, the right to inheritance, among many civil and political rights called. This suggests to us that there is no such differentiation between social rights and civil and political rights” HOLMES y SUNSTEIN (2012: 60).

These freedoms are developed because such spaces of individual freedom are considered important by a sector through collective decision. As a result, the sector is concerned about the creation of an institutional framework which preserves and promotes the rights, and is born through a system of individual rights, which empower to oppose against undue interference of third parties or the State itself. This warranty is possible after the State has invested enough resources in creating the institutional structure that enables the regularity of those freedoms.

Social rights also depend on a collective decision in order to access basic and necessary goods. In some countries like England or Canada, these rights are developed with absolute regularity and guaranteed as subjective rights, while in other countries social rights are moving poorly and erratically and are set as subsidiary rights, commoditized, and deprived of an immediate effect. It reflects the absence of the state in public policies and social programs.

So, the argument of the cost of rights is not solid enough to affirm the distinction between social rights and civil and political rights and, therefore, these should not have a different legal effect, since all rights discussed above correspond to positive actions by the State, which obviously entails an economic cost, which is characteristic of all rights, without exclusion.

Social rights do not require an optimum degree of compliance, by reference to the economic and budgetary conditions available, even more when this occurs not only social, but also with civil and political rights, which presuppose an economic investment of huge amounts of money.

This idea is focused to criticize sectors who believe that social rights are limited in their expensive nature, since never a degree of appropriate and necessary protection of social rights will be achieved. If we accept this argument we are making ours the idea of scarcity, which can serve to conceal unjust decisions related to the allocation of resources for the satisfaction of social rights.

Governments generally justify the lack of public policies on social rights, precisely because of the limited availability of economic resources. This argument ignores both the amount of public resources available to the State, such as how to prioritize resources for each sector of rights are not set-in-stone situations, but these depend on many factors, including political will and the operational capacity of the State, or both, since the size of the budget can be increased according to tax collection. The amount of taxes, for example, is decided by the parliament and the executive, depending on economic variables, i.e. through contraction or expansion fiscal policies where taxes, spending and subsidies are

used. However, taxes “also hide value considerations on distributive justice: how much we contribute as a society and what are the basic needs that must be met for all citizens”²⁷.

However, if we use the theory of economic dependence that raises the scarcity of resources, it would become a partially legitimate reason for the government to reduce the budget. This statement should not only have implications for social rights but also on civil and political rights, which puts these in equal generation of rights, which largely implies that all rights depend on the collective contribution ultimately seen as selective investments of scarce resources (HOLMES y SUNSTEIN 2012: 154).

Resource scarcity may be reduced if society would be responsible enough when contributing taxes, and whether public servants were responsible enough to use the proceeds obtained for strictly public purposes and not to destine them to private enrichment (HOLMES y SUNSTEIN 2012: 178), so rights also depend on what will be called civic virtue (HOLMES y SUNSTEIN 2012: 172).

In conclusion, it is not true that social rights cannot achieve an adequate and sufficient level of protection; it can happen that this shortage reflects inadequate social cooperation scheme –tax collection injustice– or an unequal distribution of burdens – distributive injustice– product of an inadequate “prioritization” of State resources or a marked “inefficiency” in the execution of public spending.

The difficulty often does not lie in the low rates of gross domestic product (GDP) registered in a country, but in the will to change distributive situations and governmental “naturalized” practices which are highly damaging to the full satisfaction of social rights.

So our rights are still dependent, day after day, on how much the State is willing to spend and how; thus, rights must fight in the political arena and not only at the policy level. Finally, if the State makes good revenue through taxes, it will no longer have limited resources, and someone will be responsible for the task of deciding which functions privilege over others. It follows that discretionary spending implies discretion in the

²⁷ “The problem in contemporary democracies is that the issue of the distribution and allocation of resources, central to the life of our rights, has become more a technical than a political issue, handled more in the cabinet of the ministry of economy in instances of political deliberation. The Budget of the Republic in our country, for example, is made by the ministry of economy and proposed by the President to Congress who approves (Article 78 of the Peruvian Constitution of 1993). This system allows an orderly and responsible for State finances design, and makes the Parliament responsible for requesting and controlling the size of budget justifications and the distribution of resources (Article 80 of the Peruvian Constitution of 1993). However, parliaments today do not make a very strict budget control made in the technical bodies of the executive because of party discipline or disdain for control issues that are often very sophisticated, much less undergo allocative decisions therein contained through a broad public debate or the participation of civil society”. So, there are deficiencies in the legislative when exercising control over the executive regarding the guarantee of social rights through economic budget, generally because the political party that governs in the executive has the majority in parliament. LEÓN (2013: 93).

enjoyment of rights. If we are convinced, for example, about the priority of social rights, not to fight this battle would mean in practice to weaken the distributional and potentially emancipatory role of the State (HOLMES y SUNSTEIN 2012: 23), substantially affecting the value, scope and predictability of our social rights.

In this sense, there are more expensive rights than others, but it is inadmissible to cling on the idea of the existence of inexpensive and expensive rights, while all rights are necessarily expensive its cost stays through the time. It means that it must be organized an institutional and organizational framework to attend social rights' moral value, political significance and legal operation. Otherwise, social rights will remain mere rhetoric (ANSUATEGUI 2010: 62 ff.) or will be considered only paper-and-ink rights.

III.3. Social rights are not genuine subjective rights (not fundamental rights)

Among the authors holding social rights not configured as subjective rights is F. Atria (ATRIA 2004: 15-59 ff.). He understands that if the notion of right is understood as a subjective right in legal sense, the notion of social rights would become a contradiction between the terms. Therefore, it must be rescued an alternative way of understanding the political concept of rights in order to avoid this contradictory conclusion.

This situation leads to consider that a right cannot be understood as a social right to the extent that the former is understood as a subjective right (ATRIA 2004: 15-59 ff.) because by the very nature of the concept of rights and its enforceability, social rights cannot be conceived as individual rights and escape the justiciable form of protection typical of civil and political rights (ATRIA 2004: 15-59 ff.). Since enforceability is the main feature of subjective and fundamental rights, this quality would detract immediate legal effect, undermining the protection of social rights at the jurisdictional level. Finally, it would deny them the category of fundamental rights.

So if we consider that social rights have the character of subjective right, as F. Atria states, they would be simple aspirations, possibilities or idealities, whose satisfaction would not apply. In any case, "it would be about group rights or protecting rights of collective interests, while the expression 'individual rights' would only apply regarding civil and political rights.

The author also makes a characterization of civil and political rights referring that these have a subjective, individual and defense character. Also, its protection is against third parties and those are correlative to duties but prior to them. Likewise, civil and political rights are based on self-interest, unilateral and certain. *Contrario sensu*, social rights are not configured as individual rights because they seek a human way of life, in which everyone interconnects to others based on the principle of solidarity; these are secondary rights against their correlative duties, neither unilateral nor determinative.

On the other hand, R. García Manrique makes a deeper and more critical study about social rights as subjective rights, arguing that the substantial reason to not to set them as individual rights is its lesser ability. Social rights express ideal states of things far from reality in a greater extent than other rights. This greater and inherent alienation makes a difference with other rights, which derives certain legal and political consequences. (GARCÍA 2010: 73-105 ff.).

From this perspective, what characterizes social rights is that their deontic divergence is much greater than in liberal rights, so the difference between them and other rights is gradual²⁸ and conjunctural. In consequence, traditional social rights show a significantly lower degree of realization that the ideals expressed by liberal rights.

A further treatment of the defended position refers that the argument that denies social rights as subjective rights, is made from the content of social rights for two reasons: first, because social rights are goods to market service. The market solves in principle the satisfaction of goods and the State is alternatively responsible of such satisfaction. Thus, the content does not generate an equal division of property, which clearly prevents them to be accomplished as liberal rights. Thus, Garcia Manrique argues that the scope of social rights suffers from an uncertainty in the realization of the same regarding to maximum quotas of enjoyment.

In conclusion, the demands of social rights are far greater than liberal rights', because the assets associated therewith have not been completely decommodified, resulting in an unequal, minimum and alternative market sharing (GARCÍA 2010: 73-105 ff.).

In that sense, the author states that the difference between rights is gradual and conjunctural, which has evolved precise legal effects on the legal technique of the subjective right, which is precisely the technique chosen to put fundamental rights into practice, so liberal rights are better suited to it, while social rights have deficiencies.

For this author, to demonstrate how the technique of the subjective right affects more to social than liberal rights, the following reasons are necessary (GARCÍA 2010: 73-105 ff.): (i) if social rights can be configured as fundamental rights, (ii) then, the subjective right will be "a claim conferred to a subject (or another type of subjects) against another subject (or another type of subjects) to whom a duty or correlative 'obligation' is imposed. (iii) Given this previous concept, it is made a division between real rights²⁹ –whose content

²⁸ "The difference is gradual because reality can approach more or less to the ideal state of affairs expressed by a right and here it is only stated this distance is greater in the case of social rights, without the possibility to express how much is it, because this depends on the specific right and the political community concerned". In GARCÍA (2010: 73-105 ff.).

²⁹ True rights are characterized because they are susceptible of judicial protection, which in turn requires both the content of the right (the behavior or performance that can be demanded) and the subject to which the right is exercised to be equally precise.

and bound subject are precise– and fictitious rights³⁰ –whose content and bound subject are not precise–. (iv) The Constitution does not usually set the precise “content” of fundamental rights, so the accuracy of its contents may take place by legal or judicial processes. (v) Thus, many of the “measures” may take the form of a subjective right; this legal technique offers many possibilities. (vi) However, this technique is limited: not everything that can be done for an ideal can be done through the attribution of subjective rights to citizens³¹. Accordingly, an ideal setting as a subjective right always implies its restriction. (vii) In the case of social rights, whose claim must be restricted for judges to identify and satisfy it, it must be restricted in a greater degree than in the case of fundamental rights. (viii) Hence, a social right can be paradoxically configured as a subjective right. (ix) However, these political objectives (social rights) cannot be guaranteed only with the technique of the subjective right, since setting up a social right as a subjective right necessarily requires its restriction. Therefore, a subjective social right will always be a minimum social right or a right to a certain defined set of benefits (or abstentions) which alone cannot fully guarantee the desired objective, but only to some extent. (x) The author concludes that social rights will not only be minimal for its alternative nature –since they are commoditized– but also by its subjective right nature.

For this sector of the academy, which holds the minimum subjective nature of social rights, claim that although the restriction fits all fundamental rights, liberal rights have to tolerate less the restriction than the ideal of social rights, i.e., the price paid for the configuration of the political ideals as subjective rights is its minimization (BÖCKENFÖRDE 1993: 80), a price that is higher in the case of social rights than in the case of liberal rights because they have minimized in a greater extent.

The author concludes referring this community cannot be achieved with minimum social rights such as those guaranteed by liberal constitutional systems, which can alleviate poverty but not inequality. In that sense, there is a sociological difference between social rights and other fundamental rights –liberals– and their different degree of realization; also, two differences are reflected, on the one hand, legal will claim the worst adaptation of the former to the subjective rights, on the other hand, politics, which has decided that the former are minimum and the latter are not.

One of the alternatives proposed in relation to the negation of social rights as authentic subjective rights is determined by Böckenförde, who states that delivery rights provisions are specified normatively on objective legal mandates (BÖCKENFÖRDE 1993:

³⁰ Fictitious rights are those that do not meet any of these two conditions: their content or the obligated subject are not precise, so these are not susceptible to judicial protection.

³¹ According to the concept assumed, a subjective law requires judicial protection. Therefore, the correlative obligation must be precisely defined, so the judge can determine whether it has failed and order their execution. However, only a minimal content can be accurately defined because the maximum content of an ideal (a) has an aspirational nature that does not support precise definition, (b) it “moves steadily forward” and (c) it is a constant subject of political discussion. Therefore, it is not a strictly legal matter.

80) directed to the legislature and the public administration. Therefore, delivery rights cannot be concrete under legal triadic positions composed of an active subject, a subject or passive person and an object. The indeterminacy of the legal provisions and the necessity to respect the powers of parliament impose to leave aside the active subject, that is, not to attribute to the holder of a subjective right the possibility of requiring judges to carry out a specific law.

The thesis of the objective mandate makes separate from the fundamental nature of the subjective right –the ability to be enforceable by citizens–, a theory adopted in Spain with which the interpretation of social rights as apparent rights recognized in Chapter III of Title I SC.

Böckenförde accepts that determining the rules as legal objectives mandates do not follow that these are programmatic propositions, but they hold a binding force in three aspects: 1) a legal duty –objective mandate of completing the order set by the provision posed by the legislator, 2) it prohibits inactivity and rude neglect regarding the aim of the norm by the State and 3) it prohibits the definitive abolition of legislative measures, once they have been adopted or its reduction beyond the limits, able to neglect the aim of the norm. In this regard, Carlos Bernal Pulido argues that the bind that delivery rights generate on the legislature generates a subjective legal side³².

The reply to the approach of denial of the subjective nature of social rights, presupposes the contextualization of our time about the current constitutional State which has been presented as a subsequent step to the conception of the Rule of Law. Whether it suppose a substitution of terms, it should not be understood as overcoming the Rule of Law but must be understood as a higher stage, while the Constitutional State is characterized by the fact that the validity criteria established by the basic rule are in the Constitution (ANSUÁTEGUI 2013a: 271-272).

For other authors such as Gustavo Zagrebelski, the transit of the Rule of Law to the Constitutional State means a genetic change (ZAGREBELSKY 2003: 33), i.e., the existence of a break in continuity, so the Constitutional State is understood as the replacement of the Rule of Law. In short, either one or the other position, there are elements that characterize the new model constitutional state³³, either passing or genetic change.

³² “They give rise to claims of defense of the individuals concerned against inactivity, a gross neglect or definitive withdrawal of the measures taken in implementation of the constitutional mandate” BERNAL (2007: 382).

³³ Thus the Constitutional State, is the typical state of our time, which “(...) is characterized by human dignity as anthropological and cultural premise for popular sovereignty and the division of powers, fundamental rights and tolerance for the plurality of parties and the independence of the courts” HÄBERLE (2003b: 3) For Robert Alexy, “the Constitutional Democratic State is characterized by six fundamental principles (...) human

Also, as a new philosophy for the limitation of power neo-constitutionalism(s) was born³⁴, leaving behind the constitutionalism of the late eighteenth century. Thus, constitutionalism as a new paradigm of law lies historically at the point following the catastrophe of the Second World War and the defeat of Nazi-fascism (FERRAJOLI 2001: 70).

In the context of neoconstitutionalism or constitutionalism as a new paradigm of law³⁵ as Luigi Ferrajoli says, it is proposed a clearly formal and structural fundamental rights theoretical concept³⁶. This definition consist in fundamental rights as “all those subjective rights universal to all human beings as endowed with the status of persons, citizens or persons with capacity to act; subjective rights understood as any positive (benefits) or negative (no injury) expectations, attached to a subject by a rule of law; status understood as the condition of a subject, provided for a positive legal norm, as the foundation of its holder suitability of legal situations and/or author of the acts exercising these situations” (FERRAJOLI 2004: 50).

This definition proposed by L. Ferrajoli allows found four theses that help to conceive neo-constitutionalism because of a profound internal transformation of the paleo-positivist paradigm model. So, to argue that social rights are fundamental rights and therefore are understood as subjective rights, the study on three of them will be addressed:

dignity, freedom and equality as well as the principles relating to the structure and purpose of Democratic and Social Rule of Law” ALEXY (2003: 31).

³⁴ “It is only after the Second World War that constitutionalism would have changed their characteristics, to the point of setting up a new theory that the doctrine agrees call neoconstitutionalism(s)” ALTERIO (2014: 233 ff.). In this sense, we cannot fail to mention Riccardo Guastini who pointed out that the foundations of constitutionalism are nothing more than “a rigid Constitution, the judicial guarantee of the Constitution, the binding force of the Constitution, the over - interpretation of the Constitution, the direct application of the Constitution, the interpretation of the laws under the Constitution and the influence of the Constitution in political relations” GUASTINI (2003: 50-57 ff.).

³⁵ For Luigi Ferrajoli “(...) above all, the conditions of validity of laws are changing; are not dependent only in the form of production but also of the consistency of their content with the constitutional principles (...); changes (...) the epistemological status of legal science, which the possible divergence between Constitution and legislation confers not only exclusively explanatory role, but critical and projective its own object (...) that the legal science has a duty to prove in order to be eliminated or corrected; the role of jurisdiction is altered, which is to apply the law if it is constitutionally valid (...) and that the judge has a duty to censor the law by denouncing its unconstitutionality, as it is not possible to interpret its constitutional sense; finally, a transformation product paradigm of constitutionalism is equivalent to introducing a substantial dimension not only in the conditions of validity of the rules, but also in the nature of democracy” FERRAJOLI (2003: 18-19).

³⁶ A number of criticisms have been against this conceptualization of fundamental rights, mainly that the concept of fundamental rights proposed by Luigi Ferrajoli is characterized as “decontextualized” for not considering the historical experience and legal reality, and the neutral or formal concept construction is not caused by ignorance but by the lack of recognition of relevance of these assumptions. ANSUÁTEGUI (2013b: 42).

1) The difference between fundamental rights and economic rights; 2) Fundamental rights and their relation to real democracy; 3) The relationship between the rights and guarantees.

Regarding the first argument, the structural difference between fundamental rights – whose theoretical heritage is a product of natural law and contractual philosophy– and patrimonial rights³⁷ –whose ancestry is generated by civilian and Roman tradition– we find four differences: a) fundamental rights are universal rights –universal quantification of holder subjects– while patrimonial rights are singular –there is a unique determined holder–; b) fundamental rights are inclusive, while patrimonial rights are exclusive; c) fundamental rights are inalienable rights –subtracted both to policy decisions and market–, while patrimonial rights are rights available; d) patrimonial rights are horizontal –intersubjective civilian relationship–, while fundamental rights are vertical publicist rights, from the individual against the State (obligations and prohibitions) (FERRAJOLI 2004: 42)

This difference makes evident what underlies the technique of subjective right; the subjective right has its own structural particularity regarding patrimonial rights and subjective situations are heterogeneous and opposite each other in several respects concerning fundamental human rights.

The second thesis is concerned to the relationship between fundamental rights and real democracy, under the characters listed above on fundamental rights –universal, inclusive, inalienable and vertical rights–, these are configured as substantial links normatively imposed both majority decisions and free market, while no political majority may dispose and reduce freedoms and other fundamental rights to majority decisions³⁸, i.e., no contract may have life, cannot decide that a person is condemned without proof, hence the substantial connotation, printed by fundamental rights –both rights of freedom and social rights– towards the Constitutional State of Law and the Constitutional Democracy³⁹.

Finally, the third thesis is focused on the relationship between rights and guarantees, which rebuts the idea regarding social rights would not be right, because they lack adequate

³⁷ For the economic rights, the ascendancy was held from civilian and Roman law.

³⁸ “It is disproved the current conception of democracy as a political system based on a set of rules that ensure the omnipotence of the majority. If the rules on representation and on the principle of majority rules are formal to what is decidable by the majority, fundamental rights circumscribe what we can call the undecidable sphere”. FERRAJOLI (2004: 51)

³⁹ “The paradigm of constitutional democracy is the son of contract philosophy in two ways: In the sense that constitutions are social contracts written and positively, fundamental covenants of civil coexistence historically generated by the revolutionary movements with which sometimes they have been imposed on public authorities, other absolute way, as sources of legitimacy. And in the sense that the idea of the social contract is a metaphor for democracy: political democracy, since it refers to the consensus of the parties and, therefore, it is to establish, for the first time in history, a legitimization of political power from below; but it is also a metaphor from the substantial democracy, since this contract is not an empty agreement but whose clauses and also as precisely because the protection of fundamental rights whose violation by the sovereign legitimizes the breaking of the covenant and the exercise of the right of resistance” FERRAJOLI (2004: 53).

judicial guarantee or legal protection, which would lead to justify the denial of its subjective nature and the poor use of technique and, as a result, social rights would not be understood as fundamental rights.

Criticism is done on the concept of rights proposed at the time by H. Kelsen: “the essence of subjective right, when it is more than the mere reflection of a legal obligation, lies in the fact that a legal rule grants an individual the legal power to claim, in an action for breach of the obligation” (KELSEN 2005: 148). Against this Kelsen notion of subjective right, two reductions of subjective rights emerge: (i) as a primary guarantee –the right consists in negative or positive expectations with the corresponding obligations (of delivery) or prohibitions (of injury)–; (ii) as a second guarantee –as obligations to repair or judicially punish violations of the rights, i.e., violations of their primary collateral guarantees– (FERRAJOLI 2004: 41).

Ferrajoli argues these identifications are theoretical propositions that can be disproved by actual reality of law. Accordingly, there may be primary gaps by default of the stipulation of obligations and prohibitions that are primary guarantees of subjective law, and secondary lagoons as a lack by the obliged bodies to sanction or invalidate its violations, in order to apply secondary guarantees. If this possibility happens, the existence of subjective rights stipulated by a legal norm cannot be denied; the lagoon making it a right in a paper could be regretted afterwards, but next, affirming the obligation of the legislature to remedy the deficiency or lacuna (FERRAJOLI 2004: 61-62).

At this time, the difference setting fundamental rights and economic rights is in this regard that fundamental rights are immediately posed by abstract norms where the existence of guarantees –primary and secondary– it not is taken for granted, by relying on the express stipulation rules of positive law. It would be absurd to deny their existence and their guarantees only for such failure. However, the opposite happens with patrimonial rights, because such rights are not prepared but pre-arranged by hypothetical standards as contracts effects, which is the source of the obligation –primary guarantee– (FERRAJOLI 2004: 62).

Therefore, positive and norm-dynamic nature of modern law is the distinction between rights and guarantees, so that is the positive rule of the legislature which forces us to recognize that the rights and guarantees exist, and these apply both to freedom and social rights, as well as to the international level.

In this situation, it has been noticed in the constitutional enunciation of social rights, the absence in developing positive and adequate social guarantees –defense techniques and justiciability– comparable with liberal guarantees given in this scenario, resulting in lower degree of realization. This means a stark divergence between norm and reality, which must be filled or at least reduced.

Complementary to those stipulated by Luigi Ferrajoli is pertinent to bring up the statement made by Robert Alexy on the concept of subjective rights proposed by Hans Kelsen. Alexy maintains that it seems unnecessary to speak of a right only when there is the legal capacity of its imposition –legal power or competition–. For example, through the establishment of a lawsuit, certainly it is possible to define the concept of rights, but such definition does not reflect the existing use of language nor is fruitful for the understanding of the legal systems (ALEXY 2007: 181)

To analyze this precedent aspect Robert Alexy stressed that a structural theory what matters are the “analytical issues” of subjective rights, therefore, he argues that “rules, positions and relationships” must be differentiated, highlighting to conceive subjective rights as legal positions and relations. This situation will allow to distinguish between the reasons in favor of individual rights, the individual rights as legal positions and relations and how subjective rights can be protected and legally imposed (ALEXY 2007: 177-178).

Thus, the distinction between statements on reasons –in which “g” is a necessity–, statements about rights –in which “a” is entitled to “g”– and protection statements –in which “a” can claim the violation of his right to “g” through a lawsuit⁴⁰– will make one not to fall within the scope of the controversy about the concept of rights. Statements about reasons are obviously more differentiable against the rights statements while it is a foundation relationship, however, complications arise when statements about rights and protection statements concerned. In this case, protection statements –to claim the violation of a right– also express a “*legal position*” as statements about rights –in which somebody has a right to something–. In this regard, the relationship will be between two positions or rights (ALEXY 2007: 181)

It should be stressed that this situation will enable to understand the plurality of individual rights, which is the analysis and classification of those “legal positions”, which are called rights. We can find several authors who classify differently the legal positions, while the variety of what is called subjective right, creates a terminological problem. For R. Alexy “it is most important (...) the intellection of the structure of the different “*legal positions*”. It is advisable, therefore, to use the expression “legal right” following the existing use as a general concept for very different positions, and then, within the framework of this concept, drawing distinctions and carry out terminological characterizations (ALEXY 2007: 185).

⁴⁰ Robert Alexy believes that if the technical and organizational reasons linked the statement about rights is the central legal doctrine. In ALEXY (2007: 183) "Regarding the theory of law which would have to say is that there be neglected or the conceptual level about rights- - statements or the reasons -the justification for rights-. Integrate these two aspects is the challenge to build a non - reductionist theory of rights " PARCERO (1999:300)

Here, Robert Alexy understood that the positions are to be designated as rights, rights to something, freedoms and competencies. (ALEXY 2007: 186) Analyzing each of them stresses the “rights to something”, while it will be divided into two dimensions, on the one hand, the rights to negative actions and, secondly, the rights to positive actions. Within the latter, there are rights to positive actions, and underlying there are strictly speaking rights to benefits, what ultimately would become the fundamental social rights. This statement will allow understand social rights as fundamental rights and therefore as subjective rights.

In that vein, Robert Alexy understood fundamental rights as a whole; as a beam of iusfundamental positions. The assembling of a bundle of positions corresponds to an ascription of a beam of rules to a fundamental right norm. Thus, he holds the rules and positions can be divided according to three points of view: 1) According to the positions in question in the system of basic legal positions. 2) According to the degree of generality. 3) According to a rule and principle character, if they are definitive positions or *prima facie* (ALEXY 2007: 241-243).

In summary, to overcome these denying theses of the subjective nature of social rights (as fundamental rights), it is argued the following:

(i) The objections made by Fernando Atria and Ricardo García Manrique are thought from Private or Patrimonial Law in relation to subjective right structure, because they argue that a subjective right is “a claim conferred to a subject (or kind of subjects) against another subject (or kind of subjects) to whom a duty or correlative obligation is imposed”, where individual rights are conceived as natural rights, of defense and protection against attacks by third parties, but prior to them.

As Ferrajoli referred, the concept of subjective rights from the patrimonial perspective responds to predisposed rights by hypothetical norms as effects of contracts, with an exclusive, singular, available nature, which are born from a slope of civilian and Roman law traditions, with powers conferred under that condition.

It may be noted that this connotation is unmatched in terms of how individual rights are understood from the perspective of fundamental rights, which was born from the natural law and contractual philosophy in the eighteenth century, reflected in the 1789 Declaration of the Rights of Man and of the Citizen. It is only necessary to read Article 1 which states that “men remain free and equal in rights” to understand their universal and inclusive nature.

(ii) The possibility of considering that social rights are not enforceable rights is refused, a thesis formulated by Fernando Atria, while according to technical possibilities, it

has been developed a variety of social rights justiciability instruments⁴¹ of direct and indirect nature. Indirect instruments are related to formal and substantive equality principles, due process and effective judicial protection and civil and political rights (by connectedness). Also, by direct mechanisms consistent in the protection through the Rule of Law clause and the principles and values of the Constitution, progressivity, irreversibility, the core content of the right and the unconstitutionality by omission. Therefore, these formulas have become a way to shape social rights and lead its enforceability through subjective right nature.

Indirect enforceability of a social right is obtained from the invocation of a different right, forcing its consideration through the potential of justiciability and protection mechanisms provided by other rights (ABRAMOVICH 2002:132-168). Faced with these strategies, G. Pisarello postulated the interdependent judicial enforceability and politically aware nature of Economic, Social and Cultural Rights (hereinafter ESCR) stating that this intuition was already contained in the 1993 Vienna Declaration according to which all ESCR are independent, indivisible and actually susceptible rights. All rights, social or not, have any content, or imply any obligation enforceable at the court. Nothing prevents them from being thematized as constitutional judicial protection of social rights. In this regard, the Constitutional Tribunal protects against public and private powers, not directly, but by its connection with other fundamental rights or principles such as non-discrimination and human dignity (PISARELLO 2009: 162).

In short, Pisarello concludes that social rights: 1) are already justiciable in part, 2) nothing brings into question the separation of powers and the democratic principle, 3) existing mechanisms can be improved through regulatory, interpretive changes and through the design of existing institutions (PISARELLO 2009: 162). As in the case of Ecuador, Article 11 of 2009 Constitution has recognized rights are justiciable, as well as interdependent and indivisible.

In this regard, Professor Añón Roig argues that the consideration of the continuity and axiological structural interdependence of fundamental rights provides a more complex but plausible and fruitful perspective. In that sense, she talks about individual rights with a broad content and as a category comprising several protected legal positions or different relationships which may also have different degrees or levels of protection. So, the subjective right is thus a complex reality, a beam of positions, a set of relationships or rights which has operated a major transformation of the concept of law, which includes

⁴¹ “The enforcement refers to the power to request the immediate accomplishment of a fundamental right, while justiciability is understood related to that power, but in the limited scope of a judicial or quasi-judicial process. It can then understand that enforcement is the gender while the justiciability is the species” ABRAMOVICH (2002: 132-168) “As the authors define more specifically the justiciability as the possibility to complain to the judge or court on the compliance of at least some of the obligations under the law” ABRAMOVICH (2002:37).

both a more structural, formal and conceptual perspective, and substantial, normative, axiological dimensions, allowing to conceptualize the notion of fundamental rights (AÑÓN ROIG 2010: 26 ff.).

On the other hand, the direct enforceability refers to direct invocation of a social, economic or cultural right, so there is no theoretical impediment to consider that these rights are not directly enforceable before the Court, either through individual or collective claims (ABRAMOVICH 2002:132). Hence, Abramovich and Curtis said that every right implies different levels of obligations: to respect, to protect and to fulfill (ABRAMOVICH 2002:133), with an additional mediate and minimum duty and obligation of progressivity, according to ESCR Committee.

From this perspective, there are three examples, including the *Association Benghalensis Case*, in which the Argentine government and the Ministry of Health were condemned to comply the obligation to provide care, treatment and drug delivery on a regular, timely and continuous way to HIV / AIDS patients registered in the hospitals of the country. Consequently, State's omission determines the ability to act through the enforcement of the right. Also, in the case of the Peruvian pension system amendment, the Constitutional Court File No. 0050-2004-AI / TC, of July 3, 2005, held that the right to pension has a fundamental character, and determined its core content following the principle of proportionality consisting of: a) the right of access to a pension, b) the right not to arbitrarily deprive anyone to pension, c) the right to a minimum living amount. Finally, *The Bogovernment of the Republic of South Africa and other v. Grootboom, Irene and others Case*, although the court refused to define a minimum content on the right of access to housing, it decided to incorporate the test of reasonableness to analyze the measures or public policies, considering measures are reasonable if these care about those in need, those in a greater risk or those vulnerable in access to social rights. Thus, it seeks to provide citizens and permanent residents access to housing with certain comfort features (ABRAMOVICH 2002:132-168).

As can be seen, all doubts have been answered and the theses regarding social rights as not enforceable rights have been nullified, including F. Atria statement according to which "social rights would be mere aspirations, possibilities or idealities, whose satisfaction therefore not enforceable is distorted".

iii) Similarly, we do not share Ricardo García Manrique's thesis, who alleges a substantial reason not to set up social rights as subjective rights because of their lower capacity, i.e., its minimal grade of realization, as they represent *unreal states* in greater extent than other fundamental rights. Also, Ricardo García Manrique considers social rights as unequal distribution assets, subsidiaries and commodified. Finally, that social rights have a gradual and cyclical dimension that has performed in a lesser extent than liberal rights, so the subjective right is a limited, non-suitable technique for their protection which leads to

its restriction, regarded as a minimum social right not only for its alternative character but also by the technique of subjective right.

It is mandatory to deny these theses from a moral and ideological view, to the extent they have conceptual and technical deficiencies. Arguing that social rights should not be configured as individual rights because of their lack of realization, their gradual dimension or a supposed minimum social right nature, means to ignore social rights problems, not only in legal terms but especially in social, ethical, political and economic spheres.

Since the social dimension, needs of satisfaction and anthropologically basic needs are present in every society, and the State is responsible for making every effort to protect social rights, for which the constituent has assigned parameters to follow, which must be carried out through appropriate and necessary public policies to guarantee equal access to all citizens.

In economic and political levels, all social, civil and political rights have an economic cost, as stated above, and an ideal tax collection is mandatory to adequately redistribute budgetary resources to the enjoyment of liberal rights but also social rights, although the latter involve a higher cost. To the question about how we ensure these social needs, the answer is in the political role and its willingness to protect social rights. While political and ethical pluralism is inherent to every society –often with antagonistic conceptions about certain preferences–, the political scenario must be the main way to defend social rights.

Thus, one should not blame the technique of subjective rights because of its deficient protection of social rights, as some authors allege regarding social rights protection, but this goes beyond towards a social, economic, political and ethical approach.

Accordingly, the change of paradigm in which the Rule of Law is replaced by the Constitutional State, the rights have underlined their individual rights status reflected in several constitutional procedures to safeguard them against any involvement. Also, its scope and importance have been expanded to the extent they have been set as a limit and justification of the actions of any authority, including the legislature.

In this sense, fundamental rights have been understood as provisions with an open and indeterminate content, supervised by the formula of the core content⁴² and subjective rights have earned the necessary ductility. With great consistency Robert Alexy proposed that fundamental rights cease to be rule-norms, to become principle-norms (ALEXY 2007: 67), understood as mandates of optimization, according to the factual and legal

⁴² “This formula makes clear that the essential content of fundamental rights is not a measure to be inferred “itself” and regardless of the set of the Constitution and the legal assets recognized by such rights and essential content of a fundamental right and permissible limits are a unity” HÄBERLE (2003a: 59).

possibilities, and with the principle of proportionality as the great definer of the minimum content of social rights. Consequently, fundamental rights count as subjective rights, including social rights.

On the other hand, the justiciability of social rights has carried out an intense control of state obligations regarding social rights, juridifying different conditions which are essential to develop an adequate and reasonable policy to fulfill the basic needs. Thus, judicial review becomes involved with the “structural failures” that are preventing the enjoyment of rights on a collective level. Similarly, it engages with substantive or axiological issues contained in public policy, highlighting certain diminished prospects on the extent of the rights established by political bodies, but always within the framework of regulatory obligations contained in international agreements, constitutions and laws.

This type of judicial review does not determine completely the content of public policy to comply with social rights. The adoption of “specific measures” falls within the edge of the political bodies to whom the judgment forwards “modes” to overcome the deficits found in politics and low levels of enjoyment of rights.

IV. CONCLUSIONS

The alleged difference between the categories of rights (civil and political rights and social rights) carried out by a sector of legal literature is surrounded by a liberal ideological mantle, which has the purpose to support a dissimilar protection of social rights, based on a high indeterminacy, its costly character and the refusal to be considered as subjective rights. This situation conditions the projection of the legal theory of social rights as fundamental rights on both the constitutionalization of certain ethically justifiable demands and social rights (in its subjective and objective functions) as limits to power and effective irradiation in the legal system.

In relation to the delivery character of social rights, it has been argued by a certain sector of the legal literature that it is very easy to identify social rights only as benefits rights, those rights that instead of being satisfied by an abstention of the obligated person, require a positive action usually translated in the provision of some good or service. This understanding, which encompasses only one of the main dimensions of social rights, has also contributed to the alleged difference between the categories of rights (civil and political rights and social rights).

The supposed difference in the categories of rights based on the historical factor also leads to the same conclusion: the consolidation and deep penetration of this factor in the legal theory of social rights has led to propose a disparity between civil and political rights and social rights, confirming that such a difference has an ideological and a historical source.

However, the basis of the alleged difference is very weak, since both social and civil and political rights have a similar normative structure from a deontic point of view, i.e. all fundamental rights (civil, political and social ones) are characterized by their double dimension; a facet of benefit and one of abstention. In other words, they are rights with a character in positive and negative senses. Thus, the only difference, if one can be assigned, would be fixed by the gradual character of the rights; a difference depending on the greater weight assigned to either the defense obligations or the delivery obligations, or some rights require more funding than others, since all fundamental rights are costly and dependent on the economic capacity of the State.

The same is true on indeterminate character, since all fundamental rights have an open texture, some will be more indeterminate than others depending on their fundamentality, importance or their vagueness. In this sense, both civil and political rights and social rights are indeterminate. All rights have a *prima facie* character and are not definitive rights, therefore, the subjective nature of social rights will also be flexible according to each legal reality, whose performance expectations will be configured in a different way, which does not mean that its subjective character is denied.

It is pertinent to deny the thesis that social rights should not be defined as subjective rights due to their lack of realization or the gradual dimension they have, or because of a supposed minimum social right nature, a criterion of a certain sector of the literature with serious conceptual and technical deficiencies, since accepting this idea would be ignoring the legal, political, ethical, and economic problem that characterizes the rights.

These affirmations mentioned in favor of social rights lead us to revert the reductionist theses of exclusively liberal and reductionist roots, which seek solely the configuration of social rights as program norms, end-norms or realistic/objective mandates, which ultimately would result in the denial of the fundamental right character. In this way, our hypothesis has been demonstrated and tested, giving account of the defense of a legal theory of social rights as fundamental rights.

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