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On Social Rights from an Analytical and Philosophical Perspective

The paper examines the concept of social rights from both the analytical and philosophical perspective. In the first part of the paper a distinction is made between social rights in the strict sense (called in the paper “Type 1 social rights”), which can be decomposed into the Hohfeldian incidents, and social rights which resemble norm-goals and therefore cannot be decomposed into the Hohfeldian incidents (these rights are called in the paper “Type 2 social rights”). It is argued that even though Type 1 social rights are rights in the strict sense, they exhibit certain idiosyncrasies distinguishing them from “classical” rights, among which the most striking idiosyncrasy is their double correlation to duties. The second, philosophical part presents various ways in which social rights can be justified. A special emphasis is laid on the justification appealing to the concept of autonomy. Some standard criticisms of social rights are also evaluated.

Keywords: social rights, Hohfeldian incidents, autonomy, paternalism, subsidiarity principle.

1. The ambiguity of the concept of social rights

In legal-philosophical discourse the term “social rights” is used to describe a set of rights such as, e.g., the right to social security, education, health, housing, which are to protect certain interests of agents that can be called “social”, or more precisely: “socio-economic”. This is the reason why the usage of the generic term “social rights” is not misplaced. But there is also a danger of misunderstanding in using this term, because particular “social rights” differ essentially in their structure, which justifies dividing this generic term into two more specific sub-terms, *viz.* “Type 1 social rights” and “Type 2 social rights”. The former can properly be called “rights”, since they can be easily decomposed into “Hohfeldian incidents”, whereas the latter cannot be thus decomposed: they resemble more the norm-goals than rights in the strict sense. However, this difference in structure is not correlated with a difference in their philosophical underpinnings, that is: one cannot say that the justification of Type 1 social rights is stronger than that of Type 2 social rights, or *vice versa*. The strength of justification must, in fact, be evaluated with respect to the content of a given right, not to its structure.

The layout of this paper is as follows. In section 2 I shall deal with the differences in structure between both types of social rights. In section 3 I tackle the problem of the justification of social rights; in that section I shall also introduce a distinction between conditional social rights and unconditional social rights.

2. Type 1 and Type 2 social rights: differences in their structure

2.1. Type 1 social rights

Type 1 social rights include, among others, some of workers' rights (to associate in trade unions,¹ to limited hours of work, to paid leave, to higher wages for extra work, to maternity leave, to minimum pay, to decent working conditions), the right to unemployment benefits, the right to free public primary education,² the right to basic healthcare, the right to the means of subsistence for the least advantaged, and the right to social security (including the rights to pension, disability, sickness, and survivors benefits). As mentioned, Type 1 social rights can be shown to be composed of "Hohfeldian incidents" – liberties, claim-rights, or immunities. As we shall see, however, some of these rights assume a different form from that taken by these "Hohfeldian incidents". *But this does not alter the fact that, like civil and political rights, Type 1 social rights of can be properly called "rights" and belong to the domain of the judiciary, i.e., they can be enforced by recourse to court procedures.*

Before moving on to the presentation of the main categories of Type 1 social rights let me first recall the definitions of 'Hohfeldian incidents':³

- (*Liberty*) An agent *A* has a liberty (privilege) to do *x* if and only if *A* has no duty to do *x* or non-*x*; *A*'s liberty is therefore correlated with "no-right" on the part of other persons, who have the duty of non-interference.
- (*Claim-right*) An agent *A* has a claim-right that *B* do *x* if and only if *B* has a duty to do *x*. Thus, every claim-right correlates to a duty on the part of one or more duty-bearers. *B*'s duty may consist either in performing some action or in refraining from performing some action; in the latter case the duty-bearers are all persons. Claim-rights are therefore of two types: *in personam* – correlated with specific duties of specific individuals, and *in rem* – held not against some specific nameable persons but against the world at large.
- (*Power*) An agent *A* has a power if and only if *A* has the ability within a set of rules to alter their own or another's normative situation.
- (*Immunity*) An agent *B* has an immunity if and only if *A* lacks the ability within a set of rules to alter *B*'s normative situation.

¹ From a strictly formal point of view this right should be numbered among civil/political rights, since it is regarded by the European Convention on Human Rights (article 11) as a component of the freedom of assembly and association. But given its purpose (the protection of workers' interests) and its history (it appeared as a result of the activity of movements aimed at protecting workers' interests), it can be more plausibly regarded as a social right.

² This right is often regarded as a cultural right. But the line between social rights and cultural rights is not always sharp; the right to free primary education is one of those rights which can plausibly be regarded as belonging to both categories: it protects our "cultural interest" in education (so it is a cultural right), but since primary education is a necessary condition for realizing our socio-economic interests it can also be viewed as a (at least derivatively) social right.

³ Cf. W. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, "Yale Law Journal" 1913/1, pp. 16–59.

Now, drawing on Hohfeld's distinctions, one can roughly divide Type 1 social rights into two categories: 1) liberties and 2) claim-rights.

- 1) Type 1 social rights may be typical liberties. An example is the right to form and join trade unions. As a liberty, it, of course, involves an immunity – from the state's actions aimed at curtailing this liberty. In other words, workers may but do not have to associate in trade unions and this right corresponds to an absence of power on the part of employers and the state to alter the right-holder's normative situation.
- 2) Most Type 1 social rights are claim-rights *in personam*, but they are quite peculiar claim-rights compared, e.g., with such "classical" claim-rights as the right of private ownership or rights generated by private contracts. The peculiarity common to all social rights (being claim-rights) is that *their addressee ("persona") is usually the state itself, or perhaps, on different interpretation, society acting through the medium of the state*. An additional peculiarity, typical for some Type 1 social rights, is that *they are derivative from a duty*. For instance, one cannot forgo one's right to basic healthcare by refusing to pay healthcare insurance or the right to pension benefits by refusing to pay pension premiums. One can therefore say that they are *doubly correlated* to duties (and not *singly correlated* to duties the way "classical" claim-rights are): their holder has a duty to take some actions that give rise to these rights, and the rights are (as all claim-rights are) correlated with a duty towards the right-holder. This "double correlation" is characteristic for what may be called "paternalistic" rights, i.e., rights granted to the agent as a result of the policy of hard paternalism (i.e., paternalism that allows for imposing certain duties on the agent with a view to promoting his or her well-being or to preventing his or her well-being from deteriorating). Paternalistic rights arise therefore as a result of mandatory contracts (social, health and pension insurance) enforced by the state.
- 3) Another peculiarity of some Type 1 social rights, e.g. the right to (primary) education, is that they are *primarily a duty rather than a right* (or, *simultaneously a duty and a right*). Paternalistic rights are similar to them in that they are correlated with their holder's duty, but dissimilar in that the duty's content is different from the right's content.

2.2. Type 2 social rights

Type 2 social rights do not fall under any of the "Hohfeldian incidents". I shall analyze at some length one of these rights – "the right to work". This right could, in theory, be interpreted as a liberty (privilege) or a claim-right, but these interpretations would be obviously inconsistent with the way it is understood by its adherents. If this right were merely a liberty, it would constitute only a protection for our liberty to choose an occupation, and thereby a protection against all attempts to impose on us, against our will, a given kind of work. It is clear that it is not a claim-right either: the holder of this right cannot require that the state grant him or her a job. This right is therefore what Joel Feinberg called a "manifesto right": it is an exhortation directed at the legislator to undertake action aiming at decreasing the rate of unemployment;⁴ the implementation

⁴ J. Feinberg, *Social Philosophy*, New York 1973, pp. 63–67.

of this kind of right will always be progressive and imperfect. Other rights of this type are, among others, the right to decent standards of living, the right to enjoy the benefits of scientific progress, the right to income equality, or the right to housing. Clearly, it would be odd to interpret, e.g., the right to housing as endowing the citizen with a claim to housing and thereby as imposing on the state the duty to guarantee housing to every citizen. But, of course, it would be equally odd to interpret it as imposing on the state and citizens the duty of non-interference with one's search for housing. Its only plausible interpretation is that it spells out an exhortation to the state to realize, by various means, a housing policy which would enhance the accessibility of housing to all citizens. These are therefore aspirational, regulative principles, not imposing any strict duties on the legislator that could be enforced by the judiciary.

Two additional points need to be stressed in the context of the discussion of Type 2 social rights. Firstly, the fact that Type 2 social rights are aspirational in nature rather than strict duties need not necessarily be treated as their disadvantage. As was aptly remarked by James Nickel:

Treating very demanding rights as goals has several advantages. One is that proposed goals that exceed one's abilities are not as farcical as proposed duties that exceed one's abilities. Creating grand lists of human rights that many countries cannot at present realize seems fraudulent to many people, and perhaps this fraudulence is reduced if we understand that these "rights" are really goals that countries should promote. Goals are inherently ability-calibrated. What you should do now about your goals depends on your abilities and other commitments. Goals coexist happily with low levels of ability to achieve them. Another advantage is that goals are flexible; addressees with different levels of ability can choose ways of pursuing the goals that suit their circumstances and means. Because of these attractions of goals, it will be worth exploring ways to transform very demanding human rights into goals. The transformation may be full or partial.⁵

Secondly, the difference between Type 1 and Type 2 social rights should not be conceived in absolute terms. The first reason for this is that some social rights may "pass" from one type to another. This is indeed often the case with the right to housing. In many legal systems the scope of the application of this right is narrowed down to the least advantaged persons, e.g., those living below the level of subsistence; as a result, the right to housing can be reasonably regarded as a claim-right (i.e., as a Type 1 social right). One can, of course, also imagine treating the right to work or the right to housing *for everyone* as a Type 1 social right, but in practice, for economic reasons, such a construal of these rights is not feasible and therefore would be, to use Nickel's term, "fraudulent". The second reason is more interesting because it is connected with the very structure of these two types of social rights, *viz.*: it may be possible to, so to speak, transform the structure of Type 2 social rights with a view to likening them, to a certain extent, to Type 1 social rights. The result of such a transformation could be called, following James Nickel, "right-goal mixtures". Nickel describes them in the following way:

Since even a goal that is supported by good reasons imposes no duties – that is, fails to be mandatory in character – we may think that such goals are poor substitutes for rights and should not be called "rights". But it is possible to create right-goal mixtures that contain some mandatory elements and that therefore seem more like real rights. A minimal right-goal mixture would

⁵ J. Nickel, *Human Rights*, in: E.N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy*, 2014, available online at: <http://plato.stanford.edu/archives/win2014/entries/rights-human/>.

include a duty to *try to realize the goal as quickly as possible* (...). The economic and social rights in the Social Covenant [i.e. the International Covenant on Economic, Social and Cultural Rights – W.Z.] seem to fit this model. The countries ratifying the Covenant agree to make it a matter of government duty to realize the list of rights as soon as possible. (...) Each of the Social Covenant's signatories has agreed to "take steps, individually and through international assistance and cooperation to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant." (...) A problem with such a right-goal mixture is that it allows the addressee great discretion concerning *when* to do something about the right and *how much* to do. A panel supervising compliance with a human rights treaty may wish to remove some of this discretion by requiring that the addressees at least take some significant and good faith steps immediately and regularly and that these steps be documented (...) Goals can be assigned addressees (the party who is to pursue the goal), beneficiaries, scopes that define the objective to be pursued, and a high level of priority. Strong reasons for the importance of these goals can be provided. And supervisory bodies can monitor levels of progress and pressure low-performing addressees to attend to and work on their goals.⁶

A similar system of monitoring (based on reports submitted by the states) is provided by the European Social Charter. It remains the fact, though, that even after an introduction of various mechanism of monitoring the implementation of social rights by the signatory states, the rights are still essentially different from Type 1 social rights. In other words, even after such a transformation they are at their core Type 2 social rights.

2.3. Type 1 and Type 2 social rights: (usually) positive rights

Social rights of both types can also be characterized by means of the distinction between positive and negative rights. The distinction has been described by Charles Fried in the following way:

A positive right is a claim to something – a share of material goods, or some particular good like the attention of a lawyer or a doctor or perhaps the claim to a result like health and enlightenment – while a negative right is a right that something not be done to one, that some particular imposition be withheld. Positive rights are inevitably asserted to scarce goods, and consequently scarcity implies a limit to the claim. Negative rights, however, the rights not to be interfered with in forbidden ways, do not appear to have such natural, such inevitable limitation. (...) It is logically possible to respect any number of negative rights without necessarily landing in an impossible and contradictory situation. (...) Positive rights, by contrast, cannot as a logical matter be treated as categorical entities, because of the scarcity limitation.⁷

As Cécile Fabre rightly notes, Fried's distinction between positive and negative rights embraces in fact two distinctions, *viz.* the basic one – the *duty distinction*: "some rights are negative in that they ground negative duties only, while other rights are positive in that they ground positive duties to help and resources", and the secondary one (derivative, according to Fried, from the duty distinction) – the *conflict distinction*: "since negative rights ground negative duties of non-interference, they are not assigned to scarce goods and therefore do not conflict with one another; by contrast, since positive rights ground positive duties to help and resources, they are assigned to scarce goods and therefore conflict with one another".⁸ Before moving on to characterizing social rights,

⁶ J. Nickel, *Human...*

⁷ Ch. Fried, *Right and Wrong*, Cambridge (Mass.)–London 1978, p. 110.

⁸ C. Fabre, *Constitutionalising Social Rights*, "The Journal of Political Philosophy" 1998/3, pp. 262–263.

it should be noted that the second distinction is not fully convincing,⁹ since one can easily imagine various instances of conflicts between negative rights, e.g., between the right to privacy and the right to free speech, or between the right to free movement and the right of assembly. One cannot even say that conflicts between negative rights are less frequent than those between positive rights; it is hard to imagine how a calculation of the quantity of various types of conflicts between rights could ever be carried out. But the first distinction (the duty distinction) is entirely clear – and crucial for distinguishing between negative and positive rights. It is true that this distinction is sometimes criticized on the ground that all rights require a certain action on the part of the state (e.g., rights traditionally regarded as “negative” – the right to vote, the right to a due process of law, or the right to conclude agreements – cannot be realized if certain steps are not taken by the state to make possible their implementation), but this objection is misleading; in the case of the abovementioned rights the actions of the state *do not belong to their content*, which is why these rights can aptly be called “negative”.

Now, social rights are usually positive, i.e., they are rights to the positive actions of the state (and sometimes, as in the case of workers’ rights, to the actions of particular individuals – the employers). Even though, as was mentioned before, the sense of the state’s duty is different for the two types of social rights. Type 1 social rights ground duties to take certain positive actions, whereas Type 2 social rights ground duties to strive to realize certain socially desirable goals. However, social rights can also be negative, i.e., they can be rights to other persons’ omissions or forbearances. For instance, the right to associate in trade unions is negative, since it is correlated with the negative duty of non-interference.¹⁰ By contrast, civil and political rights are usually negative (they ground a negative duty of non-interference) but they can also be positive (like the rights to seek redress through courts, to a due process of law¹¹). In general, one can say that social rights are usually positive and civil and political rights are usually negative.

Social rights can of course conflict with one another as well as with civil or political rights, e.g. the (social) right to welfare subsidies, which may require increasing taxes, can come into conflict with the (civil) right of private ownership. Let me devote a few words to the second type of conflicts. Arguably, one cannot decide *in abstracto* how they should be resolved; their resolution requires a thorough analysis of specific conflicts. General answers seem unsatisfactory and arbitrary; for instance, one might try to argue, in John Rawls’s spirit, that in burdened societies (i.e., poor and undeveloped) priority should be given to social rights, whereas in developed societies – to civil and political rights. But Rawls’s claim about the “lexical” priority of freedom over well-being is an expression of the dubious belief in the possibility of providing a neat hierarchy of various social values.¹² To support the claim that civil and political rights should have priority

⁹ It is also rejected by C. Fabre (C. Fabre, *Constitutionalising...*, p. 264).

¹⁰ It is worth adding that this negative social right is both *active* (a right to act or not act in a certain way) and *passive* (a right not to be done by others in a certain way). It should be noted that the distinction between active and passive rights concerns only negative rights; positive rights are neither passive or active. Accordingly, e.g., the social right to social security (implying certain transfers of goods from the state) is neither active nor passive, but the right to bodily security (e.g., freedom from assault, from arbitrary seizure) is a negative, passive right. More on passive and active rights can be found in J. Feinberg, *Social...*, pp. 59–63.

¹¹ Cf. C. Fabre, *Constitutionalising...*, p. 269.

¹² I have developed this critique in my article *Remarks on the Lexical Order of Rawls’s Two Principles of Justice*. W. Załuski, *Remarks on the Lexical Order of Rawls’s Two Principles of Justice*, in: A. Brożek, J. Jadacki, B. Żarniś (eds.), *Logic, Methodology and Philosophy of Science at Warsaw University. Theory of Imperatives from Different Points of View*, Warszawa 2013, pp. 158–166.

over social rights, an argument is sometimes put forward that social rights are stressed especially by authoritarian regimes. But this argument is altogether implausible: it can be easily neutralized by pointing out that social economic crises are likely to lead to the curtailments of civil and political liberties (e.g., in the 1930s).

3. Philosophical justification of social rights

One plausible conception of the justification of social rights appeals to the concept of fundamental interests and to the principle of subsidiarity. In this conception, a social right is justified if it can be shown, *first*, that it realizes our fundamental interests, and, *second*, that the realization of these fundamental interests cannot be achieved in a different way (e.g., through the common efforts of the local community to which a “person in need” belongs) than by protecting them as a “right” directed towards the state. As for the first condition, arguably the strongest philosophical justification for social rights appeals to the *fundamental interest in possessing autonomy*, i.e., the capacity to rationally form, choose and revise the conception of the good life.¹³ As Fabre wrote: “If we are hungry, thirsty, cold, ill and illiterate, if we constantly live under the threat of poverty, we cannot decide on a meaningful conception of the good life, we cannot make long-term plans, in short we have very little control over our existence.”¹⁴ It is worth noting that there seems to be an interesting difference between social rights on one hand, and civil and political rights on the other as far as their relation to autonomy is concerned. Arguably, *social rights seem to protect autonomy itself* (the capacity to rationally make choices between various options might not develop properly if the agent lacks education and material resources), while *civil and political rights seem to protect the practical import of autonomy*. If we had only a narrow sphere of negative and political liberty (i.e., two types of liberties defended, respectively, by civil and political rights), our autonomy (positive freedom) would not have many occasions to “externalize” – there would be few options among which we could autonomously choose. The second condition of justification appeals to the subsidiarity principle according to which social rights can be introduced only as a last resort, i.e., if the fundamental interests cannot be protected in some other way. It remains a moot question which of the standard social rights fulfil these two conditions. Some Type 1 social rights (e.g., workers’ rights, the right to primary education,¹⁵ or the right to basic subsistence in the case of illness and disability) and some Type 2 social rights (e.g., the right to work) satisfy both conditions of justification (thus, one cannot say, generally, that the philosophical justification for a given type of social rights is stronger than for the other). But not all social rights seem to satisfy these conditions. One may argue that, e.g., the right to pension benefits does not protect our fundamental interests and/or their goal could be achieved in some other way. Furthermore, “paternalistic social rights” are harder to justify than the non-paternalistic

¹³ This type of justification was developed by Alan Gewirth (A. Gewirth, *Human Rights: Essays on Justification and Applications*, Chicago 1982) and James Griffin (J. Griffin, *On Human Rights*, Oxford 2008). Gewirth argued that freedom and well-being (and the rights protecting them – respectively, civil/political and social) are necessary for realizing human agency (i.e. autonomy). In a similar vein, Griffin defended the claim that rights protect our “autonomy”, “personhood”, “normative agency”, i.e., the ability to form, revise and pursue a conception of worthwhile life.

¹⁴ C. Fabre, *Constitutionalising...*, p. 267.

¹⁵ As was noted by Avi Ben-Bassat, and Momi Dahan, “the right to education is the most widespread social right and displays the strongest constitutional commitment”. A. Ben-Bassat, M. Dahan, *Social Rights in the Constitution and in Practice*, “Journal of Comparative Economics” 2008/1, p. 118.

ones: their justification must be preceded by a notoriously difficult justification of hard paternalism. It needs to be added that there are many other conceptions of the justification of social rights than the one relying on the principles of autonomy and subsidiarity. One may, for instance, argue that social rights protect equality (of wealth or welfare), whereas civil and political rights protect liberty. Or, one can argue that social rights are expressive of the value of solidarity. One may also maintain that social rights are necessary for taking advantage of civil and political rights (which means that social rights can be justified by means of civil and political rights).

Analogously to the justification, the force of the critique of social rights will vary depending on which particular social rights are considered. The arguments most frequently raised against social rights are that:¹⁶ 1) they have a negative impact on economic efficiency; 2) they are too burdensome for taxpayers and, in consequence, undermine their motivation for entrepreneurship; 3) they lead to the overgrowth of the state and bureaucracy (since social rights are realized by the state);¹⁷ 4) they promote the attitude of passivity and laziness; 5) they do not defend really fundamental interests (and thereby do not have a sufficient “moral weight”); 6) some are unjust, violating the fair-play principle (e.g., a lazy person receiving unemployment benefits may be regarded as a free rider, who wants to take advantage of the “welfare pool” created by the society, even though his or her contribution to this pool is very small or zero); 7) they are destructive to social solidarity since they undermine informal social mechanisms based on the altruistic motivation of mutual help; 8) they are costly. Some of these arguments may indeed be apt with respect to some social rights. For instance, the right to unemployment benefit is really likely to promote the attitude of passivity and laziness. Furthermore, a number of social rights may indeed have a negative impact on economic efficiency and lead to the overgrowth of bureaucracy. But the fact that some of these arguments may be valid does not imply that they cannot be defeated by even stronger arguments in favour of these rights. As was argued earlier, some of these rights can be plausibly viewed as realizing our fundamental interests (which means that the objection 5) is flawed with respect to them), and this consideration seems to defeat the arguments appealing to economic efficiency or to the overgrowth of bureaucracy. But, as was mentioned earlier, before deciding to protect a given interest as a “social right”, one should reflect on whether this interest could not be realized in some other way. The objections 4) and 6) raised against social rights could be weakened by transforming those social rights which are targeted by these objections into *conditional* social rights, i.e., such rights whose enjoyment is contingent upon some previous activity of their holder.¹⁸ Thus, for instance, the enjoyment of the right to unemployment benefits could be conditioned by the previous activity of the unemployed person – e.g., his or her activity aimed at finding a job, or consisting in doing some *pro bono* work (such activity, in addition to satisfying the social sense of fair play, would probably boost the unemployed persons’ sense of self-respect). Arguably, few social rights can be transformed

¹⁶ Cf., e.g., D. Kelley, *A Life of One's Own: Individual Rights and the Welfare State*, Washington 1988; W.A. Niskanen, *Welfare and the Culture of Poverty*, “Cato Journal” 1996/1, pp. 45–71; R.A. Sirico, *Restoring Charity: Ethical Principles for a New Welfare Policy*, in: J.J. Sikkenga (ed.), *Transforming Welfare. The Revival of American Charity*, New York 1997, p. 34–56.

¹⁷ The problem of the justifiability of social rights is connected with the question about the desirable extent of the state's prerogatives. The adherents of the welfare state will be in favour of a broad set of social rights, while the adherents of the night-watchman state will want to reduce this set to minimum.

¹⁸ Cf. W. Osiatyński, *Prawa człowieka i ich granice* [Eng. *Human Rights and Their Limits*], Kraków 2011, pp. 214–217.

into conditional social rights; it is not easy to provide many more examples apart from the right to unemployment benefits (such an example could be perhaps welfare benefits for people with mild physical disability – benefits for the severely physically disabled should of course be unconditional). This understanding of the term “conditional social rights” should be distinguished from the understanding connected with the “double correlation” character of some of them. As mentioned in section 2.2, some of the social rights are in fact not “free-standing” rights, but arise out of a duty (e.g., to pay insurance premiums) binding upon their holder. One can therefore say that they are conditional on this duty.

At the end of this paper, I would like to note that the problem of the justifiability of social rights can also be discussed in a broader – philosophical-anthropological – context. This context is connected with two questions: the question of the responsibility of human beings for the course of their life (and therefore the question of the role of luck in our life), and the question of human rationality. The assumption that the role of luck in shaping our lives is substantial and/or that human beings are only boundedly rational provides a strong case for social rights. The assumption (made within classical liberalism) that the role of luck in shaping our lives is marginal and that humans are rational provides a strong case against social rights. A development of these issues, however, lies beyond the scope of this paper.

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