

# INDIVIDUAL RIGHTS AS SOCIAL RIGHTS\*

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## 1.

Atria argues that the radical potential of social (or positive) rights is undermined when they are (mis)understood as differing from individual (or negative) rights only in their specific content and not in their basic character. Individual rights, he says, are essentially tied to a contractualist model of politics and society, according to which the purpose of legal and political institutions is to protect the interests that individuals already have, prior to such institutions. By contrast, social rights – when properly understood – presuppose social cooperation and the recognition of reciprocal duties by members of a political community who see each other as equals.

Liberal/neoliberal theorists insist that only individual rights should be constitutionally guaranteed or otherwise protected by the state, arguing that there are structural differences between these and (so-called) social rights. Their leftist/progressive critics deny there are any such structural differences, and argue for social rights being accorded a similar constitutional status. But this, argues Atria, is a serious theoretical and political mistake. Transformed into the justiciable rights of bourgeois law, social rights (to education and healthcare, for example) lose their oppositional character and take on that of individual rights.

Thus Atria wishes to protect social rights from their damaging assimilation to individual rights. But his argument depends on accepting the understanding of individual rights provided by their liberal/neoliberal proponents, when they are better understood, I shall suggest, in broadly the same terms that, according to Atria, social rights should be. So whereas Atria's aim is to rescue social rights from bourgeois law, I want to rescue individual rights from bourgeois thought. And by doing so, I shall suggest, the standard political debates about 'markets' and 'welfare' can be re-framed in such a way that markets can themselves be conceived as institutions of welfare states.<sup>1</sup>

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\*\*\*This is a revised version of a paper given at a 2013 seminar series on Social Rights and Markets organised by Emiliios Christodoulidis at the School of Law, Glasgow University. Responding to Fernando Atria's 'Social Rights, Social Contract, Socialism', it was published, along with Atria's paper and other responses to it, in *Social and Legal Studies*, 24/4, 2015, 618-621. Citations should be to the published version.

<sup>1</sup> I shall, however, leave aside Atria's claims about justiciability and bourgeois law, along with many others in this richly argued and illuminating paper.

In his discussion of social rights, Atria notes that they may be – or have been – understood in two very different ways. One of these, which Atria clearly prefers, he attributes to T H Marshall. According to this, social rights constitute the substance or content of citizenship, and presuppose ‘the bonds of citizenship’: the sense of mutual obligation and responsibility for one another’s well-being that is shared by members of a political community who recognise each other as equals. It is only because they ‘already have’ this bond that they can engage in constructing the social institutions needed to secure these rights. According to the second, by contrast, social rights are, like individual rights, understood as protecting the pre-political interests of individuals who are essentially indifferent to one another’s needs, but wish to protect themselves from disaster, including the social instability resulting from others’ poverty. Atria calls this the ‘contractualist’ understanding, indicating its conceptual affinity with what seems to be, in his view, the *only* possible understanding of individual rights.

I have no problems with Atria’s preference for the citizenship account of social rights over its contractualist alternative. I do, however, want to suggest that individual rights may likewise be open to two alternative accounts, so that there is (or can be) a ‘citizenship’ understanding of *these* rights, also. Individual rights, that is, need not be understood in contractualist terms. I shall consider this in the case of the rights (and duties) that are central to – indeed constitutive of – a *market economy*, especially those involved in the contractual exchange of property rights.<sup>2</sup>

An obvious theoretical resource here is Durkheim’s discussion of contract, including market exchange, in *The Division of Labour*, in which he challenged the ‘individualist’ (or as one might say, ‘contractualist’) account provided by Herbert Spencer. Famously, Durkheim declared that “not everything in a contract is contractual”, by which he meant, *inter alia*, that when ‘free and equal’ individuals enter into a contractual agreement, they inevitably find themselves bound, not only by what they have ‘willed’, as individuals, but also by the various social norms embedded in the legal rules governing such contractual exchanges, including requirements of fairness, criteria for the competence of parties, restrictions on what may be contracted, and so on.

For Durkheim, then, contractual exchange, is a socially dependent, legally articulated institution with a specific normative character. It is only because of this institution – which relies on the powers of the state for its existence and operation - that it is possible for individuals to exercise their wills in this specific manner, to make the choices and agreements involved in the conduct of

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<sup>2</sup> Atria does not provide an indicative list of individual rights, and uses only ‘the right to life’ as an example. But I assume that the rights involved in market exchange would normally be categorised as ‘individual’ rights; further, the main focus of debates about individual *versus* social rights has been on the relationship between markets and ‘welfare’ or ‘the welfare state’.

economic activities in a market economy. More generally, one might say, it is social institutions that make free agreements between individuals possible. And, in the particular case of market exchange, normatively constituted institutions are additionally involved in the specification of property rights, contrary to their naturalistic understanding in ‘bourgeois thought’.<sup>3</sup>

So although it may be true that in acts of market exchange, the parties are indifferent to one another’s well-being, the possibility of such exchange itself ‘presupposes social cooperation’. Further, this social cooperation can be understood in more directly *political* terms, by thinking of the creation of market institutions, and their associated rights and duties, as resulting from the decisions made by *citizens*, by members of a political community who regard each other as equals and recognise their reciprocal duties to support one another’s well-being. One might imagine, that is, citizens agreeing on the use of the state’s powers to create and maintain such institutions precisely in order to promote ‘the (material) well-being of all’. It is precisely for this purpose that they choose institutions in which individuals are expected to concern themselves only with their own well-being.

Of course, this talk of political ‘decisions’ and institutional ‘creation’ is not to be taken literally: such decisions are rarely if ever made, explicitly, nor institutions conjured into existence out of thin air. But what it nonetheless suggests is the possibility of understanding individual rights in a manner much closer to Atria’s preferred account of social rights, and of justifying market economies, *not* by recourse to the idea of natural property rights and the need for the state to protect them, but of socially instituted rights designed to serve a valued social purpose.<sup>4</sup> Further, this ‘social’ understanding of markets and their rationale brings with it a quite different way of understanding the relationship between ‘the market’ and ‘the welfare state’. If citizens establish market institutions (and individual rights) ‘for the benefit or welfare of all’, reflecting their reciprocal duties, they will also wish to secure such ‘welfare’ whenever the operations of the market fail to do so. They may therefore choose *also* to institute ‘a welfare state’ (in the normal sense of this phrase), to operate in tandem with the market, and to serve essentially the same, social purposes.

On this view, the rationale for ‘welfare provision’, as normally understood - and hence for departing from the market - are the same as those for market provision. The two are not in

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<sup>3</sup> The argument – or position – I have presented here is developed in more detail in Keat (2013).

<sup>4</sup> I would argue that this is the view taken by Smith in *The Wealth of Nations*, in emphasising the ‘universal opulence’ of commercial societies. Whether market economies *are* the most effective institutional devices for this purpose depends on empirical issues that cannot be addressed here.

conflict with one another, but different institutional means of achieving the same goals of social cooperation between equal citizens. Indeed, given the dependence of market institutions (and their associated rights) upon the state, one might even say that the market is best understood as one key element in ‘a welfare state’, more broadly conceived; another such element is ‘the welfare state’ (as normally, more narrowly conceived).

### 3.

I conclude with some comments designed to avoid some possible misunderstandings of what I have been arguing.

Although I have suggested that individual rights can be understood in broadly the same way that, in Atria’s view, social rights should be understood, I am not claiming that once individual rights are understood in this way, anyone who supports such rights must also support social rights. I am not, that is, arguing from ‘the social character of (even individual) rights’ to ‘socialism’. More generally, I do not believe that what are essentially theories about social ontology can, by themselves, have substantive political implications; they cannot replace (and should not be allowed to displace) specifically normative argumentation. Such theories may well, however, have implications for the ways in which normative or political positions can be intelligibly represented and justified. In particular, liberals and/or neoliberals can still reject social rights and support only individual rights, but they need to do so in terms of a properly ‘social’ understanding of the latter.

Similarly, although I have suggested that market institutions might be justified in a way that is quite consistent with state provision of welfare – the market operating as one arm of the welfare state, as it were – I am not claiming that, once it is recognised that they are social institutions that are possible objects of political choice by a citizenry, this is the only way in which they can be justified. Many liberal and/or neoliberal attempts to justify the market, in terms that imply the rejection of (any more than a minimal) welfare state, fail to recognise this. This failure should be criticised, but such criticism does not, by itself, settle the matter ‘in favour of welfare’, since there are possible justifications for the market that, whilst recognising its social character, have negative implications for the welfare state.

For example, what may attract members of a political community about market institutions is not only that they are effective (albeit imperfect) means of enhancing individual well-being, but that they do so in ways that are consistent with *other* principles that are also seen as valuable: for example, that material rewards are (broadly) conditional on contributions, or that the judgments of individuals about what is good for them are prioritised over the supposedly authoritative

judgments of others. To the extent that this is so, the specific institutional means for non-market welfare provision, where markets fail, may become problematic. In particular, 'the welfare state' (as normally conceived) might not be a normatively consistent complement to the market.

Thus substantive normative debate about markets and welfare, and about individual and social rights, is not foreclosed by the position I have defended here. It does, however, suggest the need for a significant shift in the terms of political discourse within which such debates are typically conducted.

### **References**

- Durkheim, E. (1984 [1893]) *The Division of Labour in Society*, trans. W. D. Halls, London: Macmillan.
- Keat, R. (2013) 'The ethical character of market institutions', in M. Del Mar and C. Michelon, eds, *The Anxiety of the Jurist*, Farnham: Ashgate, pp. 173-194.