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AGAINST POSITIVE RIGHTS

ANTONIO CARLOS PEREIRA-MENAUT*

I. INTRODUCTION (THE *Airey Case*)

The Strasbourg European Court of Human Rights, which was created by the European Agreement for Human and Social Rights, delivered a judgment concerning Ireland in the 1979 *Airey Case*.¹ In effect, the court condemned the Irish State for not having reached a level of economic development which would allow every poor Irishman or Irishwoman to be provided with legal aid for complex lawsuits.

The petitioner, Mrs. Johanna Airey, was an Irishwoman married to Mr. Timothy Airey. Mrs. Airey alleged that her husband had subjected her to physical violence, had left home, and had failed to continue maintenance payments since losing his job. Mrs. Airey wished to obtain a judicial separation issued from the Irish High Court on the basis of cruelty, but lacked sufficient funds to pay a lawyer and feared that a *pro se* argument would be unsuccessful. Therefore, she brought suit against the Irish State before the Strasbourg Court and alleged a failure to make court access effective for poor litigants in her situation. The court held in favor of the petitioner on this point. Despite recognition that the realization of social and economic rights is largely dependent upon a nation's financial situation, the court

* Member of the Facultad de Derecho, Universidad de Navarra, Pamplona, Spain. I am indebted to many people for their help. Professor Stith read the rather unintelligible first draft, helped my poor English, and made thoughtful comments. I also thank other faculty members of the Valparaiso University School of Law; among them are Professors Albrecht, Blomquist, Brietzke, Brockington, Levinson, Meyer, and Yonover, all of whom made helpful comments and criticisms during the seminar that followed this lecture. Professor Crick (formerly of Birkbeck College, London) wasted a weekend reading the manuscript and drew my attention to such underlying problems as the nature of negative liberty and the relations between civil society and the state; Professor Marshall (Queen's College, Oxford) sent me a long, thoughtful letter pointing out the weaknesses of the distinction between the classical, absolute, negative liberties and the social, relative, positive rights. Fresh information on positive rights in Portugal was kindly given to me by Professor Bigotte-Chorão and Mr. De Almeida. Professor Cascajo (Salamanca) gave me a hand with the Spanish situation, while Professors Martínez Doral and D'Ors (University of Navarre) read and discussed the draft with me. If this article still contains failures after all this help, I am the only one to be blamed.

Editor's Note: this article is derived from a lecture given by Professor A.C. Pereira at the Valparaiso University School of Law, September, 1986. The original text and colloquial tone of the lecture have been preserved. Footnotes have been added.

1. *Airey Case*, Eur. Ct. H.R. (Ser. A No. 32) (1979).

found that Ireland had a legal duty to provide economic aid to Mrs. Airey in a matter as difficult as an attempt to prove marital cruelty as a basis for legal separation. Putting aside some technicalities with which we are not concerned in this present lecture, it seems reasonable to observe that the court went beyond its task of adjudicating conflicts between litigants and devoted itself to making value judgments concerning the results of the economic, social, and legal policies carried forward by the Irish State.

It is not surprising that several members of the judicial panel authored dissents — including Mr. Justice O'Donoghue (from Ireland) and Mr. Justice Vilhjalmsson (from Norway). Among other things, Mr. O'Donoghue said that lacking a device for getting money from an unemployed husband is not an offense: "I am not aware that in any country an effective or fruitful process has been devised to recover payments from a penniless defaulting husband." Mr. Vilhjalmsson objected that:

[I]t is not in dispute that the applicant has access to the High Court in the formal sense. . . . Thus, the difficulties which, according to the applicant, bar her from the remedy formally open to her under Irish law are factual in their nature. . . . An individual's ability or inability to claim his or her rights under the [European] Convention [of Human and Social Rights] may stem from several reasons, one of them being his or her financial position. It is . . . deplorable that this should be so. To correct this situation, the States . . . are taking countless measures . . . [but] the war on poverty cannot be won through broad [judicial] interpretation. . . . Where the Convention sees financial ability to avail oneself of a right . . . as so important that it must be considered an integral part of the right, this is so stated.

I find the *Airey Case* a paradigmatic example of the serious problems which affect the very idea, not to mention the further practice, of judicial enforcement of positive social and economic rights and liberties. At least three problems seem to arise in the *Airey Case* and elsewhere: First, under the words "positive" or "social and economic rights" the debated matter seems a choice among instrumental social policies rather than a matter of adjudicating relatively fixed law and rights. Second, these positive rights seem to belong more to the tradition of increasing the power of the state to promote more safety, health, or wealth than to the constitutional tradition of limiting power. The third problem is that the judicial enforcement of these "rights" would perhaps increase judicial activism and, in some cases, the politicalization of the courts. After some historical and sociological background and a few clarifications, I shall try to follow these three lines of reasoning. In my opinion, the most important aspect of the problem, which contains the other two aspects, is that positive rights belong more to the realm of the state than to the realm of the constitution.

II. WHAT ARE POSITIVE RIGHTS?

The term "social and economic rights" refers to the typical 20th century European constitutional rights and liberties of which we Europeans seem to be so very fond. These rights are intended to bring about *real* equality for the working classes which were not able to benefit from the merely formal liberty and equality recognized by the classical liberals. This deeper equality is the political value which seems to lie right at the heart of these rights. Another main feature of social and economic rights is the implication of some duty of positive action on the part of the state, instead of the mere refraining from acting which was formerly considered enough for the putting into practice of the liberal, rather negative, rights and liberties.

From the chronological point of view, positive rights seem to have a heterogeneous origin, for the most part in the 19th century. This origin includes the Marxist critique of merely formal liberties, the love for equality which began to spread all through Europe after the 1848 Revolutions and increased without stop until recently, and the benign social policy which the German autocrat Otto von Bismarck first put into practice at the same time that he severely repressed the German social-democrats. The *Kaiser*, in his 1881 speech before the *Reichstag*, said that the state under him was taking charge of the task of social support.² This, by the way, throws doubt upon the constitutionalist origin of the *Sozialstaat* (Social State). Social and economic rights began to be included in constitutions, mostly European ones, during the 20s and the 30s — the 1917 Mexican Constitution, the Weimar Constitution, the 1931 Spanish Constitution, and the 1937 Irish Constitution. Some of the post-1945 European constitutions, namely the Italian, the Portuguese, and the Spanish, probably serve as the best examples because they explicitly contain long, ambitious lists of such rights.³ Among all Western constitutions, the Portuguese is perhaps the most socialisticly spirited.

In West Germany, the Basic Law lacks an explicit proclamation similar to the three aforementioned constitutions, but the Constitutional Court has developed positive rights by looking to section 20.1 of the Basic Law, which calls Germany a "social and democratic *Rechtsstaat*," and by imbuing the classical rights and freedoms with the spirit of social and economic rights.⁴ The German case deserves a bit more attention because the Federal Republic is perhaps the country with the greatest experience in this matter.

2. P. ROSANVALLON, *LACRISE DE L'ETAT-PROVIDENCE* 152-53 (1981).

3. CONSTITUZIONE arts. 2, 3, para. 2, art. 4, para. 1, arts. 24, 29-47 (Ital.); CONSTITUCION arts. 1, 13, 17, 18, 20, 42, 43, 47, 48, para. 2, art. 50, para. 1, arts. 53, 79 (Port.); CONSTITUCION ESPAÑOLA arts. 9, para. 2, art. 20, para. 1(b), (c), arts. 30-53 (Spain).

4. E. FORSTHOFF, *EL ESTADO DE LA SOCIEDAD INDUSTRIAL* 252-56 (1975) (Spanish trans. of E. FORSTHOFF, *DER STAAT DER INDUSTRIEGESELLSCHAFT* (1971)).

Taking the old, negative rights in the spirit of social and economic rights meant transforming them into a set of positive values which no longer protect the individual against the state, but rather generate obligations vis-a-vis the state, civil society, and individuals. But insofar as these affirmative rights compel civil society and individual citizens, they strengthen the position of the state, which is the only body with sufficient power to protect men from the general condition of social life and from illness, misfortune, unemployment, and deep social inequalities. Thus, the classical liberties became positive goals to be sought by the whole fabric of society and state, and individual rights became exposed to such public interventions as the state thought reasonable in order to attain those general goals.⁵

From this chronological point of view, positive rights may be regarded as the last chapter in the history of rights and liberties which began in the 17th Century. For our present purpose, the salient features of this stage will be discussed. The liberal ideal of Rule of Law has given way to the ideal of the Social and Democratic *Rechtsstaat*. Great emphasis is placed on real and effective liberty and equality even if it implies losing formal liberty. The types and number of rights increase, now including a growing amount of state subsidies and supports. Most typical are social welfare rights, but there appear also to be new economic, cultural, and finally, ecological rights. Looking particularly at the Portuguese Constitution, which almost attains *delirium tremens* in this matter, we find rights for workers, for women, for the handicapped and disabled, for children, for parents, and for families and other groups. We also find rights to participate in sports, to have a healthy environment, and many other heterogeneous and peculiar rights and freedoms, some of them even amusing, such as the right to enjoy and produce cultural goods.⁶ Such an immodest proliferation seems a bit odd because if constitutional freedoms and rights are so numerous, it would be rare that all of them were really fundamental, not to mention the fact that most of them seem not likely to be enforced in a court of law. For example, article 18.1 of the Portuguese Constitution says that "constitutional rules concerning rights, freedoms, and guarantees are directly enforceable," but it says nothing about protecting the "Economic, Social, and Cultural Rights and Duties" referred to in articles 59 to 79.

As a result of this evolution, the old, venerable constitutional rights and liberties have become hardly recognizable. The Oxonian Professor G. Marshall has penned a good synthesis, not without humor:

Once upon a time, the term civil liberties had a fairly clear meaning. It included the major rights of the subject as against public authority: freedom from wrongful arrest and arbitrary

5. *Id.*

6. CONSTITUZIONE art. 78 (Ital.).

imprisonment, freedom of expression and freedom of assembly. But civil rights in the American sense have been added to civil liberties, in particular the right to equality or nondiscriminatory treatment, at least on grounds of race, sex and nationality, and (more controversially) on grounds of religion, language, age, size and previous condition of pulchritude. In addition, new types of social rights or claims have been discovered or asserted — for example rights of education, minimum wages, social security, privacy, public information and trade union membership, not to mention the inalienable rights of employees unilaterally to break the terms of their contracts of employment, to communicate information to their fellow workers and peacefully to persuade them to work or refrain from working.⁷

One wonders if this process of fragmentation which produces such a huge crowd of peculiar rights has come to an end. But some still claim that new rights should be adopted such as “youth rights, gay rights and the rights of mental patients, immigrants, part-time workers, and women (not yet known as gender rights — but wait).”⁸

The spirit of positive rights favors the poor and powerless by fighting the ill social and economic conditions which in practice prevent them from enjoying formally granted freedom and equality. Thus “Beyond Formal Equality!” could be the motto of these rights, and sections 3.2 and 9.2 of the Italian and Spanish Constitutions could be considered as perhaps the best constitutional expressions of the spirit of social and economic rights. Section 3.2 of the Italian Constitution reads as follows:

It is the duty of the Government to remove the obstacles of an economic and social kind which *de facto* limit the citizen's freedom and equality, thus preventing the individual from his full development as well as the real effective participation of all workers in the political, economic, and social organization of the Country.⁹

It may be useful to recall that this section was due to the prominent Italian socialist Lelio Basso. Like most socialists, he had confidence in power *qua* power and much concerned with equality understood after the socialist fashion. As for section 9.2 of the Spanish Constitution, it is not much more than a translation of the Italian except that it includes “groups” besides “individual citizens.”¹⁰

7. Marshall, 1984: *A Happy New Year for Civil Liberties*, 137 PARLIAMENTARY AFFAIRS 333, 333 (1984).

8. *Id.* at 334.

9. COSTITUZIONE art. 3, para. 2 (Ital.).

10. “It is the duty of the public powers to promote the conditions in order to make real

If taken quite seriously, both sections of these mentioned constitutions seem to aim at an ambitious goal placed beyond the reach of politics — perhaps even beyond the reach of mankind. As the British Professor Bernard Crick says, “no state has the capacity to ensure that men are happy, but all states have the capacity to ensure that men are unhappy.”¹¹ Let us substitute “equal” and “unequal” for “happy” and “unhappy” and the assertion would probably continue being true. Equality is something good in itself, but *absolute* equality cannot be achieved by political means — nor, perhaps, should one attempt to achieve it. To say it again with the common sense and political sense of Professor Crick, “[w]e live in a human condition, so we cannot through politics grasp for an absolute ideal” because “politics is simply not concerned, as politics, with absolute ends.”¹² I would dare say that we could equally write down “law” instead of “politics” in these two statements.

Basic, essential equality among all men is, in my view, an indisputable premise stemming from the very human nature, one and the same in all its basic features and shared by all men. Paradoxically, some of the same trends in legal and political philosophy which deny or neglect human nature and its essential equality seem to be rather worried about equality in the details of social and economic circumstances. Classical Liberalism relied upon basic equality and accepted the next step, equality of opportunities.¹³ Those favoring positive rights would take a third step by trying to go beyond formal equality. But others are afraid that full equality beyond formality, although praiseworthy in itself, if applied to social life could destroy politics, and if applied to law would bring about less justice than that modest amount of justice provided by the classical, rather formal Rule of Law, imperfect though the latter may be. For the same reasons, if full equality were applied to sporting events, competition would likely be destroyed, or at least the most able sportsmen would be discouraged from participating at all.

Let us take examples from the fields of education, law, and Formula I car racing. It cannot be denied that in spite of formal equality, the final results of educational curricula, lawsuits, and races are far from dependent

and effective the liberty and equality of the individual citizen and of the groups” CONSTITUCION ESPAÑOLA art. 9, para. 2 (Spain) (unofficial trans. by author).

11. B. CRICK, IN DEFENCE OF POLITICS 159 (1964).

12. *Id.* at 15, 154. Although I very much rely upon this little masterpiece, I am aware that Professor Crick does not share the negative vision of liberty that, on the whole, I favor. For his rather socialist view, see Crick, *Freedom as Politics*, in THE STUDY OF POLITICS 301 (P. King ed. 1977).

13. See J. MILL, PRINCIPLES OF POLITICAL ECONOMY 810-13 (1965); J. RAWLS, A THEORY OF JUSTICE 83-90 (1971); R. NOZICK, ANARCHY, STATE AND UTOPIA 235 (1974). Nozick mentions two ways to equality of opportunities: worsening the position of the favored, and improving the position of the ill-favored. Unlike me, he disregards the race example.

only on effort, or on having justice on one's side. As for the courts of law, let us remember the fact that many people simply do not or cannot think of trials as a means of solving their problems; they therefore seem to enjoy little equality of opportunity in comparison with those familiar with courts and lawyers. As a learned English judge said, "[t]he Courts are open to everyone, like the Ritz Hotel."¹⁴ If we make a serious attempt to discover the deep, unseen roots of the unequal results of school education, trials, and Formula I competitions, we probably will discover that the remote causes of the unequal results lie much before the studies, trials, or races begin. First of all, the lack of money disallows expensive books, expensive lawyers, and sophisticated racing cars. Such was the case with Mrs. Airey: she could defend herself freely before the Irish High Court, but she was afraid she would lose against well-paid professional lawyers.¹⁵

Second, at an even deeper level we find further causes of inequality which are much more difficult to overcome: Poor intellectual background in one's family, absence of opportunities to drive Formula I cars, and many other unfavourable circumstances associated with previous conditions such as family standard of living or parental occupation. These deep inequalities, of which Mrs. Airey also complained, are those *de facto* obstacles referred to in the Italian and Spanish *Magnae Cartae*.¹⁶ These obstacles are not affected by formal proclamations of equality, nor even by sincere efforts to realize equality of opportunity, because they are dispersed throughout the social circumstances, and they condition the effective enjoyment of equality and liberty. Thus social and economic rights are intended precisely to remedy these deep causes of inequality, uncared for by the classical negative rights and liberties.

As a general comment, it may be said that in order fairly to counteract this kind of deep inequality, two main courses of action may be taken. The first is to give the benefit of a subsidy or a handicap to the less favored before the race, the trial, or the school begins. The second takes effect after the race or the trial is already in progress. It consists of favoring the weak in various ways, as Spanish labor law does with its principle *in dubio pro operario*¹⁷ ("In doubt, for the worker"), or more radically, as sought by the Italian and Spanish School of the *Uso Alternativo del Derecho* of neo-Marxist origin, by way of having the judges clearly siding with the workers

14. I. JENNINGS, *THE QUEEN'S GOVERNMENT* 148 (1965).

15. How her unemployed, penniless husband was supposed to afford expensive lawyers is, to my mind, rather a mysterious question which the Strasbourg Court did not pay much attention to; yet it seems to be not entirely negligible because if Mr. Airey was penniless, his wife enjoyed equality of opportunity.

16. CONSTITUZIONE art. 3, para. 2 (Ital.); CONSTITUCION ESPAÑOLA art. 9, para. 2 (Spain).

17. See M. ALONZO-OLEA, *DERECHO DEL TRABAJO* 556-57 (7th ed. 1982).

and the poor. It was no accident that the aforementioned Lelio Basso shared the views of the *Giurisprudenza Alternativa*.

In the field of education, the reforms in several countries during the last two decades have indeed brought about lower requirements so that all students can attain them, but the reforms have also resulted in lower performance. In education the pessimistic prophesy which menaces extremist egalitarianism is most clearly fulfilled. Not being able to produce equality at a high level, equality is produced at a lower level. It seems impossible to ensure that all students understand Hegel, but it seems very possible, even easy, to make sure that no students understand him. By contrast, nobody seems to take the demands of radical egalitarianism very seriously in the field of sports.¹⁸

In principle, there is no objection to the laudable project of attacking inequalities and lack of real freedom in their deepest social, economic, and cultural roots. But restoring equality, especially if understood in a broad, socialistic manner, is a shoreless ocean. Important problems may arise when absolute suppression of inequalities is effectively attempted. Like all other absolute goals, it is a never-ending task,¹⁹ never to be accomplished by political or legal means because both politics and the law, as every politician or lawyer knows, share a limited character which falls short from infiniteness or absoluteness. It is plain that considerable progress is possible in such matters, but sooner or later (long before reaching the satisfactory, in any case) some point is reached beyond which every further step will incur a rather high cost in terms of freedom as well as government overload. If a powerful, modern government makes an effort to eliminate those ever deepening roots of inequality by using the utmost technical possibilities, in the end it would probably lead to genetic manipulation.²⁰ Something similar could be said about the other mentioned purpose of positive rights, i.e., get-

18. Incidentally, radicals in England have suggested that competitive sport should be discouraged in schools because it fosters elitism; one wonders if non-competitive sport would arouse much interest among schoolboys.

19. R. NOZICK, *ANARCHY, STATE AND UTOPIA* 243 (1974). Nozick continues:

It may well be that other dimensions [of inequality] would replace the ones eliminated with the same effects If, after downgrading or equalizing one dimension, say wealth, the society comes generally to agree that some *other* dimension is most important, for example, aesthetic appreciativeness, aesthetic attractiveness, intelligence, athletic prowess, physical grace, . . . then the phenomenon will repeat itself.

Id. Rosanvallon remarks, similarly, that liberating from want is never to be accomplished, because "wants" and "needs" are concepts changeable and cultural in nature. P. ROSANVALLON, *supra* note 2, at 102. My point now is that, even if there were only one dimension of inequality — say culture — the finding and eliminating of its ever deepening roots would also be a never ending task.

20. Perhaps this may seem a bit exaggerated, but as Nozick remarks, many writers have noticed that the very existence of the family makes full equality of opportunity impossible to attain. R. NOZICK, *supra* note 19, at 235.

ting rid of the adverse social and economic conditions which de facto obstruct the "real and effective" enjoyment of equality and liberty, as the Spanish Constitution reads.²¹

III. WHAT I AM NOT AGAINST²²

Before submitting to your patient consideration my three arguments against positive rights, let me make clear what I precisely object to. First, I do not object to social welfare policies as such. Not that I feel very enthusiastic about the social state of our times, but social policies are not something bad in themselves, and in any event, they are not the subject matter of this lecture.

Second, I am not attacking positive, community-shared values and goals. No human community, even with a good legal system, would be able

21. CONSTITUCION ESPAÑOLA art. 9, para. 2 (Spain).

22. Throughout this lecture, and especially in those parts which have become Parts III and IV, I distinguish between policies, goals, values, and rights. In one way or another this is not new. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977), which characterizes policies, principles, goals, and rights as distinct concepts: "A political *right* is an individuated political aim. . . . A *goal* is a nonindividuated political aim. . . . Collective goals [are intended] to produce some overall benefit for the community as a whole." *Id.* at 91 (Italics provided) (economic efficiency). "I call a 'policy' . . . [a] standard that sets out a goal, . . . generally an improvement . . . of the community I call a 'principle' a standard that is to be observed, . . . because it is a requirement of justice or fairness *Id.* at 22. "*Principles* are propositions that describe rights; *policies* are propositions that describe goals." *Id.* at 90 (Italics provided).

Within the field of rights I make a further distinction between two different categories. "Absolute" does not mean unlimited or exempt from all thinkable interferences. We may rightly say that a right to be alone in a piece of land, for example, can be considered absolute, (this cannot be said of positive rights); yet certain lawful intrusions will surely occur if a fire or a flood occurs near one's exclusive territory. I use that adjective only for the sake of clarity, because it is evident that the very classical rights, such as freedom of speech or assembly, are not absolute if understood literally. Yet, on the whole, it will probably be accepted that traditional rights are less relative than positive rights. Even if the right to be alone is not absolute, one must admit that the right to a healthy environment is far less absolute. Something similar could be said regarding the "positive-negative" distinction: for example, the right to nondiscrimination, although rather negative an idea, may call for government action when put into practice.

Other classical rights, like the due process right, are not entirely negative as ideas, and in practice imply positive duties on the part of officials. Any negative right may require positive governmental action if, when implemented in practice, it faces serious obstacles. Nevertheless, as in the "absolute-relative" distinction, generally speaking I suppose that classical rights fall more on the negative side, and social and economic rights fall rather on the positive side. Finally, a classical right may be construed with the spirit of the social and economic, and, if that right involves equality, like equal protection, once thusly interpreted it would be not much different than a positive right. In such a case, it would pose the same questions about the removal of all financial disparities and involve similar problems of weighing social policies, so that the mentioned "relatively fixed law" could fade or be concealed.

to survive for long without such common values, "[o]therwise even the most elaborate labyrinth of rules [would be] only a complicated game for . . . the furtherance of private interest," as Professor Stith thinks.²³ Yet, in order to attain a purpose of this kind, I would not rely on the state but rather on civil society itself,²⁴ because I do not think that the state may easily give society the communitarian attitudes that the latter actually lacks. The problem with many modern community-spirited trends is that, while trying to foster society, what they really do is strengthen the state because the state is the only body with power enough to enforce those ambitious goals embodied in social and economic rights. It is impossible in this lecture to say more on these grave questions concerning the state, the community and the individual; it must suffice for me to point out that I would favor rather individualistic law and politics, and rather communitarian morals and culture.

Third, I am not against having positive rights granted and regulated by ordinary statutory law insofar as the available legal techniques and financial resources would allow it. Perhaps one could reply that not much progress is made with this proposition since he who grants can take away as well; positive rights thus remain subject to the danger of being put out of force just as they were freely declared in force. For this reason the defenders of social and economic rights would claim that positive rights should enjoy the same absolute value and the same kind of constitutional warrants as the classic liberties.

Of course I am taking for granted a distinction between different kinds of rights. The classical rights do not derive their legitimacy from ordinary statutory law; contrarily, the economic and social rights do. The negative rights are absolute, and to say it in Professor Dworkin's terms:²⁵ to be taken quite seriously. The positive rights are rather relative and depend on social circumstances and public opinion trends. Obviously, the defenders of positive rights claim that the differences are not so clear and that the borderline suffers intrusions from both sides. As reasonable as this position is, let me say, in answer, that the common man, if asked, would probably feel that having a free pair of spectacles given by the National Health Service (which would be a concretization of the right to health) is less indispensable and more matter-of-choice than having one's home free from undue intru-

23. Stith, *New Constitutional and Penal Theory in Spanish Abortion Law*, 35 AM. J. COMP. L. 513, 537 (1987).

24. But, as Professor Crick has objected, what if civil society is not very active, as is often the case in modern times? I recognize that this objection affects the very basis of my position. I would therefore answer by begging a further question: is the state really the best sort of remedy for this disease? One would venture to say that relief should properly be expected to come from the deep, ethical and cultural resources of society.

25. R. DWORKIN, *supra* note 22, at 184, 204-05.

sions. The same man in the middle would not probably find having the right to a clean environment suppressed equally dangerous and anti-constitutional as having free speech suppressed and would feel that a legal document getting rid of the latter right only improperly could be called a real constitution.

Thus this line of reasoning suggests that if the legislature or the majority of the citizens would decide to undertake expensive measures for cleaning the environment or for giving legal aid to unwealthy litigants, it would be for them freely to make this decision, as well as to withdraw from such policies if funds began to run short or simply if new social and cultural views came into vogue. Contrariwise, notice that Mrs. Airey's right to not be convicted without a previous trial would remain unaffected even if, in an imaginary case, the Irish legislature or the majority of the citizens would vote to take this right away. These instances illustrate, I hope, the distinction between the civic liberties of old and the positive rights of our times: negative rights can be absolute, and surely should be so, while positive rights cannot be absolute unless unlimited resources are placed at the disposal of the government. The negative rights would seem less dependent on fashions, and the positive would seem to be rather matter-of-choice.

Besides taking from social and economic rights the feature of intrinsically absolute value, ascribing them to the infra-constitutional level of ordinary statutory law would have the advantage of turning them into a matter of social policy of the type mentioned before. A further advantage would be to have them written down in more concrete, specific terms, a situation which would lessen the risk of excessive judicial activism.

Some attention may be paid to the fact that supporters of positive rights are not usually content with having these rights recognized at a statutory level because this would imply leaving them to the free decision of the changing legislative majorities, which could choose to get rid of them, or to plainly ignore them. These supporters would rather have economic and social rights guaranteed at the same level as the ancient civic liberties. This was the case in *Airey*: the petitioner was capable of bringing her case before the Strasbourg Court which then reached a favorable judgment in spite of the fact that her alleged right to legal aid has no ground in Irish statutory law. Had the Strasbourg judges shared the idea that positive rights are the business of ordinary statutory law, they would have openly refused to consider Mrs. Airey's claim.

Now that I have said what I do not object to, let me agree with the idea that, doubtless, governments must take all due measures to ensure that effective rights and freedoms are not monopolized by a minority of *beati possidentes*, but not by strengthening power even more *en passant*, nor mixing such measures with rights in the proper meaning. Contrariwise, I would disagree with social policies and government services disguised as rights and

freedoms, with political, ideological goals enforced through courts of law, and I disagree with having duties in the guise of rights. All this would easily result in blurring the tenets of authentic rights, confusing them with social measures, and treating social and economic rights as equally important for constitutionalism as the negative rights; the likely consequence would be not only the increasing of power but also the anesthetizing of non-state social energies.

Yet the question still lingers whether positive rights are dangerous in themselves or only when placed in the hands of courts. If most of them were taken out of the legal realm, they should be valued, like the rest of the political goals and policies, according to commonsensical criteria of morality, realism, and helpfulness to the common good. From a moral point of view, it is plain that many positive rights deserve praise; but experience shows that to propose goals morally praiseworthy is not very difficult when one does not respect the borders of the kingdom of Utopia. Anyway, a single global judgment on these rights is difficult to give because of their variety: some are modest, harmless for other's freedom, and help to fulfill an old liberty, e.g., aid for poor litigants; others are morally commendable but unlikely to ever be fully implemented, e.g., everyone's right to a job, a goal which should always be attempted. Finally, others are openly unfeasible and perhaps not so commendable — for example, the curious and unsettling flavor of article 3, paragraph 2, and article 9, paragraph 2, of the Italian and Spanish Constitutions, respectively.

IV. ARGUMENTS AGAINST POSITIVE RIGHTS: ARE THEY TRULY RIGHTS?

Needless to say, there do exist many good reasons in favor of social and economic rights. In the face of strong injustices and inequalities, who has never felt the desirability of going beyond formal justice, equality, or liberty? For decades social and economic rights have enjoyed far wider acceptance than their contraries in European public opinion. Suffice it to recall that classical rights were far from being purely, utterly negative, and that they proved more or less effective when menaces to freedom came formally from public institutions, but not when they came from bad social circumstances and were not directed against the rights themselves as was the case in *Airey* and in many other instances.

Yet I would dare to say that positive rights are hardly rights at all. It may be very commendable to try to keep the environment clean, but it seems not to be a proper right. If a claim, reasonable though it may be, cannot be defined and enforced in a court of law, in which the *jurisprudentes* (those learned in law and justice) adjudicate in terms of right or wrong, then it is not a real right. A real right, in my view, cannot have such political, matter-of-choice, vague more-or-less quality which is characteris-

tic of such social policies. Beyond this, more reasons exist. Many of the modern European positive rights seem to be government services and subsidies, goals to be pursued through political means, or duties imposed upon citizens. The European constitutions mentioned have many examples of these.

First, concerning government services and financial supports proclaimed as rights, many instances can be shown, mostly in education, health, social insurances, and like fields, but also, on occasion, in such matters as leisure, sports, or high-level cultural goods: “[T]hey [the Government] shall facilitate adequate utilization of leisure.”²⁶ This could perhaps mean that the Government would have to order inquiries to see if people are bored or amused, and whether the amusements are or are not according to the constitution.

The Portuguese *Magna Carta*, in turn, states that “the Government should guarantee to all the citizens, according to everyone’s own abilities, access to the highest degrees of teaching, scientific research, and artistic creation.”²⁷ This section appears to place upon the Portuguese government the real duty of making such subsidies as may be needed to effectively give everyone his fair chance to become a Nobel Prize winner in biochemistry or literature.

Perhaps Mrs. Airey’s claim, seeking a right to financial aid for lawsuits, was of this kind. In my view, Mrs. Airey could have a real right to legal aid if other people in Ireland were enjoying this right already; but not if, for instance, Ireland were in an economic situation impeding the government from giving such aid to anyone, or not if the majority of the people simply would prefer not to have legal aid in order to keep taxes down. Thus, the right that she really seems to have had was the old right to equal treatment by the government and the courts.

Second, concerning political goals disguised as rights, something similar could be said. The civil liberties of old were rather modest, and they could be effectively respected with relative ease because they consisted mostly of negative liberties and rights to political participation. For their practical realization, it was enough that the government should refrain from interfering in people’s private lives and in the electoral process. So, “one’s home is inviolable”²⁸ is a short and clear phrase declaring a right which is easy to understand and inexpensive to fulfill. On the contrary, “[t]he Republic recognizes the right of all citizens to work and promotes such conditions as to make this right effective,”²⁹ rather looks like wishful thinking

26. CONSTITUCION ESPAÑOLA art. 43, para. 3 (Spain).

27. CONSTITUCION art. 74, para. 3(d) (Port.).

28. COSTITUZIONE art. 14 (Ital.); CONSTITUCION ESPAÑOLA art. 18, para. 2 (Spain).

29. COSTITUZIONE art. 4 (Ital.).

(especially in our day) expressing the praiseworthy goal of full employment while laying upon the government a heavy duty which is both expensive and unlikely to be achieved. Under cover of a right, there is really a goal which can never to be attained without much state activity. Therefore it can give an unemployed person no clear ground to lay a complaint before a court alleging that the government does not fight unemployment effectively or even increases joblessness indirectly because of the widespread neo-capitalist economic policies of our day. The Spanish case is similar since article 35 of the Constitution³⁰ emphatically proclaims everyone's right to a job, even in the worst periods of unemployment. In fact, unemployment largely increased under the socialist government in power since 1982 irrespective of the constitutional proclamation.

Thirdly, and what is worse, along with the lists of new rights, these constitutions include duties laid upon citizens. The preface of the French Constitution of 1946, now still in force, speaks of social and economic rights *and duties*. In the Italian, Portuguese, and Spanish Constitutions, employment is at the same time both a right and a duty. A further step is taken by article 53 of the Italian Constitution and article 31, paragraph 1 of the Spanish Constitution, both saying much the same: that we are all duty-bound to pay taxes.³¹

I hardly feel that the voracious modern state needs such stimuli. It seems to be somewhat of a mockery to set down such obligation in the very middle of a catalogue of rights and liberties, not to mention the fact that representative democracy was born primarily because people refused to pay taxes unless they were few, reasonable, had the prior consent of the citizens, and were collected only for specific needs. Contrary to the classical, such modern constitutions seem to take the principle for granted that sovereignty is not to be found in individuals but in the state or in, as the Spanish Constitution says, "the public powers" in their capacity as delegates of the people.³² So we find in the end that the old, venerable right to no taxation without representation, prior consent, and justification, has in fact become a

30. See, e.g., CONSTITUCION ESPAÑOLA art. 35, para. 1 (right to employment), art. 40, para. 1 (command for full employment-oriented policy).

31. It seems worthwhile to point out the contrast with the famous section 12 of the original *Magna Carta* which limited the government's taxing capacity: "No *scutage* or *aid* may be levied in our kingdom without general consent, unless it is for the ransom of our person, to make our eldest son a knight, and (once) to marry our eldest daughter. For these purposes only a reasonable *aid* may be levied." MAGNA CARTA § 12. Notice that those Italian and Spanish provisions are also very different from section 14 of the 1789 French Declaration of Rights: "All citizens have a right to verify on their own, or through their representatives, whether public taxation is necessary or not, to consent to it freely and to supervise its use." 1789 FRENCH DECLARATION OF RIGHTS § 14.

32. See, e.g., CONSTITUCION ESPAÑOLA art. 1, para. 2, arts. 9, 27, 39-51, 133, para. 1 (Spain).

duty to pay.

Obviously I do not object to the general idea that we citizens have duties to fulfill. What I seek is to recall the obvious fact that constitutionalism was not invented to have new burdens laid upon people. Experience shows that power is expansive in itself without need of any further fostering and tends to restrict rights and liberties and to increase taxes and duties. If all we want, or accept, is to have duties laid upon us, we do not have to enact constitutions. Instead, we can let things go as they are and then systematize in law the countless resulting duties as happens in administrative or criminal codes. This leads us to one of the keys to understanding positive rights: since the state produces security, duties, and taxes, whereas constitutions classically rather produced rights and liberties, these social rights could, in my view, be considered an aspect of Statism rather than an aspect of constitutionalism.

V. POSITIVE RIGHTS, THE STATE AND THE CONSTITUTION

I now come to the realm of abstract concepts of which we Europeans are so fond. Because of the differences between your political history and ours, it could be possible that Americans would find a conceptual discussion about "state" and "constitution," like most discussions about abstract words, to be but an academic entertainment or a waste of time, which is much the same. Yet "nothing is so practical as a good theory," and I would dare say that "state" and "constitution" are so different that the question whether positive rights belong to one or the other is far from superfluous.

It is not possible in this lecture to give a full description of the state.³³ Suffice it to say that the state belongs to the genealogy of Machiavelli and Hobbes, Hegel, and Kelsen, to the doctrines inspiring sovereignty and the *régime administratif*, as well as to absolute, ever increasing power. On the other hand, the constitution rather belongs to the genealogy of Coke and Locke, to the doctrines inspiring the Virginia and the 1789 Declarations, as well as to the Rule of Law and the limitation of power. The *étatiste* tradition may be well intentioned, but, as a saying quoted by Locke goes, "[t]he reigns of good princes have been always most dangerous to the liberties of their people."³⁴ So in my tale, the state is the wicked dragon, and the constitution is the beautiful damsel in distress.

Among European writers, some (for example the Spanish Professor Pé-

33. For an Anglo Saxon contrasting view of what the State really is see K. DYSON, *THE STATE TRADITION IN WESTERN EUROPE* (1980). For a continental contrasting view of how different the stateless societies are (or perhaps were) see G. LEIBHOLZ, *CONCEPTOS FUNDAMENTALES DE LA POLÍTICA Y DE TEORÍA DE LA CONSTITUCIÓN* 165-202 (1964).

34. 5 J. LOCKE, *TWO TREATISES OF GOVERNMENT* § 166 (London 1823).

rez-Luño) claim that positive rights are of the same kind as the classical rights and liberties,³⁵ and what is more, that they are the only real fulfillment of classical rights. To put it in other words, the Social and Democratic *Rechtsstaat* is the natural culmination of the old Rule of Law.

My view is different, and I think that language may help; it seems plain that "Rule of Law" is mainly a negative idea. Namely, the submission of all individuals and bodies, either private or public, to the only law existing in the country. No power but that of the law is implied in such idea. To the contrary, "Social and Democratic State" is a positive idea of never-ending activism of the state. In *Airey*, the Irish government was not convicted for overusing but for not using its power. For that reason, while the adjectives "Social and Democratic" may be added to the continental term *Rechtsstaat* without any important semantic problem,³⁶ "Social and Democratic Rule of Law" would result in a somewhat self-contradictory label, because "Rule of Law" means limiting, whereas "Social and Democratic" means subsidizing and taking the most active part in society so long as any wants and inequalities remain to be corrected.

Indeed, I wonder whether such state protective activism is really new. It has been so from the very beginning, because the State was born in the fevered European world of the 15th to 17th centuries to give the people security and protection — just think of Hobbes. The states of France or Spain, for example, were not prevented by their absolutism and anticonstitutionalism from protecting their people, but rather quite the contrary. The French writer Rosanvallon has brilliantly emphasized this aspect along with the role played, centuries after, by Bismarck and by that leading group of German teachers known as the "Socialists of the Chair," both sharing the *étatiste* frame of mind. So, Rosanvallon writes, the present-day *Etat-Providence* (State as Providence) "is but an extension and a prolongation of the classic protective State,"³⁷ instead of being the last stage in the development of Constitutionalism and the Rule of Law. The mentioned Pérez-Luño

35. Social rights, Pérez-Luño writes, are not a negation but a reshaping of liberties. Thus classical freedoms and modern social rights are not mutually exclusive. Pérez-Luño, *El Proceso de Positivación de los Derechos Fundamentales*, in J. CACAJO, LOS DERECHOS HUMANOS 173, 208 n.85, 216 (1979).

36. The Spanish Constitution defines the Spanish State as "Estado social y democrático de Derecho" — literally it renders "a social and democratic State of Law." CONSTITUCION ESPAÑOLA art. 1, para. 1 (Spain). See A. MORALES, EL ESTADO ESPAÑOL COMO ESTADO SOCIAL Y DEMOCRÁTICO DE DERECHO 27, 199, 212-16 (1984), the most authoritative account on the Spanish case. See also CONSTITUCION art. 2 (Port.) ("a democratic State of law based on popular sovereignty, respect and warranty of fundamental rights and liberties and in pluralism, . . . aiming to secure transition to socialism through . . . economic, social and cultural democracy . . .") (Italics provided). The Basic Law reads, on its turn: "The Federal Republic of Germany is a federal, democratic and social state."

37. P. ROSANVALLON, *supra* note 2, at 20-24, 149-53.

offers a rather *étatiste* definition of these rights: "The set of norms through which the state carries on its function of balancing and moderating social inequalities."³⁸ Notice that this description would equally fit any other instrument of state policy, e.g., taxation, while rights or freedoms cannot be found at all (at least if understood in the usual way) in such a definition. A state can perfectly be both totalitarian and seriously committed to radical equality and freedom from want, but no state can be at once totalitarian and constitutional. Bismarck, Mussolini, Salazar, Franco, and other leaders brought security and welfare to the middle and lower classes of their respective states. In order to achieve a protective, state one does not need constitutionalism.

A further reason for these rights being better understood if considered an aspect of the concept of the state, is that many of the rights cannot be enjoyed without the state's previous actions. One does not need much state action to enjoy the right not to have one's mail opened by the police. A great deal of previous state activism will be needed, however, if one is to enjoy only a small part of the rights to health, or to have the environment cared for, or to produce literary creations — to mention only a few examples from the three constitutions commented on before. The Portuguese Constitution deserves to be quoted again because it clearly speaks of this role of the state prior to the enjoyment of some of these rights:

1. All have a right, for themselves and for their families, to a dwelling of the proper size

2. In order to make sure that this right to a dwelling may be enjoyed the State has the duty: a) To program and execute a housing policy³⁹

What if, though, a nonaffluent state lacks any serious housing policy, as happens in Portugal?

If these rights cannot be implemented without the state, and are even harder to implement against the state, what are the consequences? If one effectively wants to enjoy his or her positive rights, what course of action must he or she follow: stopping the state or encouraging its action? Fighting against the powerful state, as was done in past centuries, seems to be more adequate for preventing state action than for having a house ready to live in. For this reason one would be tempted to say that (social and economic) rights are no longer subversive and libertarian. As clearly stated in a conference held in the Université de Saint Louis (Belgium) in 1983 by the

38. Pérez-Luño, *supra* note 35, at 209. It may be pointed out that this description is given from an *objective* point of view, while the definition given by the same author from the *subjective* viewpoint is more person oriented and is more legal in character.

39. Art. 65. *See also* arts. 59, para. 3, 60, para. 2, 63, para. 2, and 64, para. 3.

French Professor Danièle Loschak,

[T]he category of Human Rights not only lacks all conceptual unity and intellectual consistency whatsoever, but it turns out to be more misleading than ever, since claiming these rights, instead of weakening power and broadening the range of liberties . . . leads to the reinforcement of the one and to the retreat of the others. . . . The notion of the rights of man still has subversive potentialities in the face of totalitarian powers. But, within the framework of the Welfare State, it rather seems to be, from now on, anesthetizing.⁴⁰

Since these rights cannot be enjoyed without governmental intervention, it becomes clear that the very attempt to put them into practice calls for a proportional enlargement of the sphere of action of the state, which cannot but result in increasing governmental power and increasing duties and taxes on the people. To put it in the words of the well-known French Professor Rivero: "The more the state is asked to perform its welfare role, the more it has to do its police role."⁴¹ Many things have changed in law and in politics, yet this seems to me to remain basically untouched: that no state can perform new activities without enacting new regulations and levying new taxes. Simply, these are the ways in which states act, call them "externalities" or "bad side-effects" or whatever. Whether such an increase of power and taxes and the decline of liberty are costs that deserve to be paid is another matter.

To those who claim that the positive approach to rights is the only completion of classical liberties, my answer is: let it be so. But it would not be much use to deny that long before perfection and full equality are reached, even long before those aforementioned "de facto obstacles to freedom"⁴² are removed, the accumulation of such externalities, in the shape of power, bureaucracy, regulations, and duties could by itself arise as a new and perhaps not less formidable obstacle to freedom. Preferring positive rights to negative or vice versa, and accepting the consequences, is a matter of political choice, concerning which I have expressed my personal views. People should not be told, however, that they can have it both ways; at least beyond some specific point,⁴³ the negative and positive approaches to rights cease to coincide.

40. D. Loschak, *Mutation des droits de l'homme et mutation du Droit*, in REVUE INTERDISCIPLINAIRE D'ETUDES JURIDIQUES 49, 84-85 (Special ed. 1984) (original in Spanish).

41. See *id.* at 74.

42. See *supra* notes 9-21 and accompanying text.

43. The point at which the bases of the two classes of rights diverge cannot be determined from a theoretical or academic point of view, but rather must be left to political prudence and realism.

VI. POSITIVE RIGHTS AND THE COURTS

I have spoken before of *excessive* judicial activism because I do not feel every judicial instance of creativeness is necessarily excessive. As a Continental European I was brought up in the anti-judiciary frame of mind so common among Europeans since Montesquieu: The judges must restrict themselves only to civil law conflicts between private citizens and must play no active role at all, not even within the realm of law. To put it in Montesquieu's words, the judiciary must act as the *bouche qui prononce les paroles de la Loi, êtres inanimés*.⁴⁴ Time has proven this idea both impossible and, I would dare to add, undesirable. Personally I find nothing wrong in allowing the courts a role as sources of law along with the legislatures. In the province of law, why should judges be less trusted than legislators? Have members of parliaments, one wonders, more *prudentia iuris* (learning in law) than members of law courts? Still, beyond the borders of the legal world, I would not favor judicial activity.⁴⁵ This is the reason I argue against positive rights, namely, that positive rights often involve a discretion that seems to be political, social, or economic in nature, rather than legal. Needless to say, to argue that such a discretion should not be allowed to the courts is not to argue that positive freedom does not exist or that positive rights should not be granted at all. In the matter of "positive rights and the courts," I submit the following simple idea: since those rights seem not to be proper rights, but rather political or social things, they should not be enforced by courts of law. This proposition may be somewhat question-begging because I am taking for granted a certain vision of the role of law and courts in society. Many of the defenders of social and economic rights depart, to a greater or lesser measure, from the views of classical constitutionalism. The leading French author René David seems to think that law must transform society.⁴⁶ What, then, is the role reserved to politics? Cappelletti, in *Giudici Legislatori?*, encourages judicial activism in order to counter-

44. 11 MONTESQUIEU, DE L'ESPRIT DES LOIS ch. 6 (1977).

45. It is plain that these borders are not always clear enough. For a defense of judicial activism see Swygert, *In Defense of Judicial Activism*, 16 VAL. U.L. REV. 439 (1982). Judge Swygert has one point (among many others) which I find very remarkable from a practical point of view: that judicial activism is possible only if the public and the other branches of government consent to it. See *id.* at 458. Judicial activism is not very easily accomplished in very troubled societies.

46. DAVID, *Préface to ACCÈS A LA JUSTICE ET ETAT-PROVIDENCE* 3, 6 (1984). Professor David states that in a conference of French and Soviet lawyers, the contrast became apparent between the French lawyers' main concern with access to the courts and the Soviet lawyers' opposing perception of Administrative Law; the Soviet lawyers did not emphasize lawsuits, but emphasized "the more general problems of Administrative Science." *Id.* at 12. "The establishment and organization of a welfare State, he remarks, commit us to this second way," i.e., the Soviet lawyers' approach. *Id.* One would dare say that something seems to be wrong in a constitutional or legal theory which proposes such a model. Does such Administrative Science, one wonders, deserve to be called "legal"?

balance the outgrowth of the executive and legislative branches.⁴⁷ Cappelletti and Garth seem to think that the changing of society is the task of courts since the legislator cannot reasonably be expected to perform such a duty.⁴⁸ For my part, I prefer to hold to the classical approach, far from perfect though it is.

Not every social good, value, or goal is a right, and properly speaking, rights and courts are not the only means to have such things protected. Why should social values and welfare policies enter the legal world of rights and lawsuits? There may be other protective devices: political devices, or the protection stemming from public opinion. If social goods, values, and goals are really valuable and good, they should not be left without protection. It seems reasonable that things which are basically political or social in nature should rather enjoy protection of like nature, in the same way as, say, the political answerability of the executive in parliamentary forms of government is not exacted by judges but by the legislature and public opinion. It would be logical that social and political programs would find their own way of being guaranteed.

Yet it cannot be denied that political matters are sometimes made justiciable. The very negative rights, although much more related to natural and procedural justice, do not cease to be partially political in character. Other political issues, such as conflicts within federal systems and electoral inequalities, are also submitted to law courts in many countries. In such cases, unlike where positive rights are involved, notice that political arguments give way to common legal criteria: *pacta sunt servanda*, *audietur et altera pars*, other rules of fair procedure, equality under law, and so forth. No important problem will arise while political affairs can be translated into clauses of legal reasoning. It seems that in those cases the judicial duty may include adjudication of political issues without ceasing to be judicial.⁴⁹

47. M. CAPPELLETTI, GIUDICI LEGISLATORI? 22 (1984).

48. See generally Cappelletti & Garth, *Introduction*, in ACCÈS A LA JUSTICE ET ETAT-PROVIDENCE 15 (1984). They seem to share the view of promotion of social change, rather than *suum cuique tribuere*, as the proper role of law. See *id.* at 35-36.

49. I am not unaware of the difficulties inherent in the attempt to define the judicial task. The criteria ordinarily used do not afford an exact concept. Professor Marshall offers the characteristics of "independence of deciding officers, finality of the decision, and the respect for procedural principles of natural justice"; but "the important policy question remains: what issues . . . ought to be resolved by such adjudicative methods rather than by legislative determination or executive policy . . . ?" G. MARSHALL, CONSTITUTIONAL THEORY 120 (1971). I am assuming that, on the whole, political and legal reasoning can be easily differentiated, while the frontier areas are not so clear. For my present purpose, it would be enough to recognize, as a matter of fact, that when trying to find which of two political positions has more plausibility, convenience, and justice on its side, both legal reasoning and judicial adjudication fall very short. Another aspect that may be pointed out is that legal formalities and procedural rules, so important in law, fade when faced with "full equality beyond formalities" and other absolute, political goals. For the specific character of political affairs, see ARISTOTLE, THE

Law has something to say when any conflict comes to legal terms. If positive rights were so translated, they could then be adjudicated by the courts; the trouble is that such a translation may prove not an easy task.

Some precedents of the modern positive right to a clean environment were managed by the Romans in justiciable terms, as was the case of the smoke produced by the *taberna casiaria*.⁵⁰ Because Roman Law is very individualistic, this was possible only because there existed identifiable individual properties and rights; this is not the situation in many of the positive rights because the interests they protect are diffuse and general in character. Judicial enforcement of such rights would create problems because our law continues to be fairly individualistic, as the German experience shows in the field of environmental protection.⁵¹ Since many social and economic rights are shaped as commandments to the government, and the task commanded is sometimes not easy, it could happen that the public powers could be found at fault not for deeds but for omissions, as was the case in *Airey*. In *Airey*, the alleged omission was relatively clear and concrete, but it could be different if the commandments consist of carrying on ambitious social policies whose practical implementation will depend on many variable circumstances, most of them of a nonlegal nature which judges have no specific authority nor training to decide.⁵² The Portuguese Constitution, which aims at so deep a social transformation, takes a further step by giving the Constitutional Court the task of denouncing those things that the government fails to do in order to apply the constitutional norms.⁵³

NICOMACHEAN ETHICS (J. Thompson trans. 1953); J. LOCKE, *supra* note 34; CRICK, IN DEFENSE OF POLITICS (1962); Pereira-Menaut, *Doce Tesis Sobre la Política* in LLANO, ETICA Y POLITICA 127-65 (1980). For discussions of what makes legal work be legal and adjudication be judicial, see J. MARTINEZ DORAL, THE STRUCTURE OF JURIDICAL KNOWLEDGE *passim* (1963); DOMINGO, TEORIA DE LA "AUCTORITAS" 141-74 (1987). Domingo argues that the *iurisdictio* belongs to the *potestas* while the *indicatio* belongs to the *auctoritas*.

50. DIG. 8.5.8 (Ulpian, Ad Edictum 18). In these cases, rather than damages there were limitations of individual property, i.e., *immissiones* (by the smoke) in the properties of other people.

51. As for the problems inherent in judicial protection, see CACAJO, EL PROBLEMA DE LA PROTECCIÓN DE LOS DERECHOS HUMANOS (1979); J. CASTRO, LOS DERECHOS HUMANOS. SIGNIFICACIÓN, ESTATUTO JURÍDICO Y SISTEMA 261-99 (1979), which deal with protection of social rights. For German experiences of the clash between the individualistically crafted administrative law and the general character of the environmental interests, an excellent account (both theoretical and practical) was given in lecture by Gronemeyer, "En Cuanto al Derecho de cada uno a que se Proteja el Medio Ambiente," (University of Navarre School of Law, 1981). The serious problem of individualism in western law would be relatively easy to solve if it were only a matter of traditional inertia, but the question remains whether it is possible to arrange a quite nonindividualistic law worthy of being called "law."

52. "Nobody is very much of an expert in elaborating and applying the economic rights of man — judges less so than many." G. MARSHALL, *supra* note 49, at 134.

53. See CONSTITUCION art. 283, (Port.), regarding request of the Head of the State and certain other authorities. But notice that this is so only after the 1982 constitutional reform. Before 1982, this task was the duty of the Council of the Revolution (now abolished) to be

The difficulties inherent in court enforcement of social rights are clear. Some supporters recognize this fact. The aforementioned Professor Tunc writes that "there does certainly exist a 'right to the sun,'" and quotes another French author, De Malafosse, who speaks of a "right to Nature."⁵⁴ It is not strange, therefore, that Tunc admits that these rights cannot be enforced directly in courts.⁵⁵ Things could hardly go otherwise, one thinks, unless they would be translated into concrete, justiciable schemes.⁵⁶ As a person living under the Spanish Constitution, I am glad to notice that after an ambitious list of positive rights,⁵⁷ article 53, paragraph 3 puts things into order, stating that these rights will not actually be enforceable in court, although these rights "shall guide positive legislation, judicial practice, and actions by public authorities."⁵⁸ Even the Portuguese Constitution with all its socialistic verbiage has to accept that positive rights cannot be directly enforced in court, but need to be left to ordinary legislation.⁵⁹ Once this is conceded, frankly or not, there seems to be no use in emphatically proclaiming that they are real rights with true legal meaning — unless this be understood *lato sensu*.⁶⁰ Some may feel tempted to classify it as pulling the

done on its own initiative. See CONSTITUCION art. 283, (Port.) (repealed 1982). Still, the legal and political consequences of the "unconstitutionality due to omission" are worth a bit of our while: the Constitution simply says, "make it known to the legislative body," so that this paragraph lacks any specific legal effect. See CONSTITUCION art. 283, para. 2 (Port.); Miranda, *Inconstitucionalidade*, in 3 PÓLIS-ENCICLOPÉDIA VERBO DA SOCIEDADE E DO ESTADO 462 (1985).

54. See generally Tunc, *En quête de Justice*, in ACCÈS A LA JUSTICE ET ETAT-PROVIDENCE 320 (1984).

55. *Id.*

56. During the seminar that followed this lecture, Professor Blomquist pointed out that in certain crowded towns there exists a "right to the sun" to be enjoyed by people living in lower floors. I would suggest that such rights could perhaps belong to the civil law tradition, like the Roman neighborhood relations, rather than to the modern positive rights scheme. DIG. 8.2 (Ulpian, Ad Edictum 18).

57. CONSTITUCION ESPAÑOLA arts. 30-52 (Spain).

58. CONSTITUCION ESPAÑOLA art. 53, para. 3 (Spain). The status of the article 35 duty/right to work is unclear; it is not covered by article 53, paragraph 2 which indicates which rights may be claimed by citizens in court. At the same time, it is not among the rights listed in article 53, paragraph 3. Further information is given by the Constitutional Court, which said that article 53, paragraph 3 is a "constitutional provision binding the legislator" (Nov. 30, 1982 judgment), and that articles 14-38, among which is the duty/right to work, "bind all public powers" including judges since the very moment that the Constitution came into force and without any "need of intervention of the ordinary legislator" (Nov. 20, 1982 judgment). Yet, what are, one wonders, the practical consequences of these declarations?

59. CONSTITUCION arts. 18, 24-58, 59-79 (Port.).

60. Article 18 implies a distinction between "[r]ights, freedoms, and safeguards" and all other "rights or interests protected by the Constitution," depending on the clarity and workability of the constitutional provisions; many of articles 24-58 contain classical liberties clear enough and judicially enforceable even if no ordinary statute recognizes them, while articles 59-79 contain positive rights and duties to be made concrete through legislation. For instance, under article 58 of the Constitution, the civil servants can be on strike, notwithstanding that

citizens' legs, but it may be wise policy as well. It is no different than making "a distinction in any Bill of Rights between civil and economic protections,"⁶¹ nor is it different than "the insertion in some constitutions of 'Directive Principles of State Policy' alongside judicially enforceable guarantees of citizens' rights."⁶² If social and economic rights are not proper rights, but as social goals, they still deserve protection, then a certain distinction between the different kinds of rights, and between the consequent protections granted to them, seems logical.

Apart from the fact that judicial enforcement seems difficult, I wonder if it is even desirable because it could lead the courts into greater judicial activism, and perhaps politicalization. This begs another question since some writers claim that even in ordinary lawsuits politicalization is possible because judges have unconscious preconceptions and biases.⁶³ I agree that a quite strict legal reasoning, without the slightest shadow of political or social meaning, is surely impossible to achieve even if every step is taken to avoid it. Recognizing the existence in every judgment of this undesired minimum of politicalization as a matter of fact should not, however, lead us to open the door to a maximum. Political reasoning and decisions typically exist (preferring one political value to another, weighing social and economic risks or circumstances or public opinion attitudes, evaluating the adequacy of means to political goals, and the like) which judges can hardly refrain from when they adjudicate conflicts stemming from positive rights.

Another problem emerges from the fact that in the realm of politics there is the possibility of encountering several opposing views, all claiming to be the most commendable from the point of view of particular supporters. A salient feature of many positive rights is that these rights are related to socialist or social-democratic ideologies. It seems plain that a change in circumstances may discourage social welfare policies and commend neo-capitalist policies without ceasing to look for justice and happiness for the people. One must concede that liberals, social-democrats and conservatives all aim honestly at what they think best, but the law affords no gauge to measure such political preferences; so it was in *Airey*, where the Court indirectly condemned certain Irish policies.

As for Germany, whose Constitutional Court is often regarded in the south of Europe as a model, it may be said that since the details of the new

the act regulating strike refers only to workers of private enterprises. According to Professor Vieira de Andrade, those social rights are not "true subjective rights," a fact which curiously does not mean that they "are not true fundamental rights." See Andrade, *Direitos Fundamentais*, in 2 PÓLIS-ENCICLOPÉDIA VERBO DA SOCIEDADE E DO ESTADO 602 (1984).

61. G. MARSHALL, *supra* note 49, at 134.

62. G. MARSHALL, *supra* note 49, at 109-110.

63. G. MARSHALL, *supra* note 49, at 82-83 (discussing LASKI, THE STATE IN THEORY AND PRACTICE 175 (1934); 2 HOLMES-LASKI LETTERS 1372 (M. Howe ed. 1953)).

“social” view of the old liberties and rights had to be carried forward by judges (especially by those sitting in the said Court), judicial activism became unavoidable. I say “unavoidable” because no one can easily interpret political values with only the tools of strict legal reasoning.⁶⁴

Finally, to sum up the problems concerning judicial enforcement of positive rights, let me borrow Professor Richard Stith’s words:

As long as a high court can play only a negative role, it must at least work very hard to achieve institutional dominance. But when judicial review is combined with the vague values and affirmative duties of the Social State, then the power of judges may be overextended. . . . The whole problem, in my view, lies in the word “effective”. . . . In order for values to be “effectively” promoted, empirical results rather than only rules must be scrutinized. Rules at the constitutional and at the legislative levels have to be changed whenever necessary in order to achieve results, even *ex post facto* in particular cases. . . . It may even be unconstitutional *not* to change the rules whenever they produce results contrary to basic values. . . . Judicial review and the Social State should not be combined. . . . [The former] should not extend to the positive and programmatic social duties stated or implied in a constitution.⁶⁵

If this is true about courts in general, just think what should be said about a continental Constitutional Court like the Spanish one, politicized from its beginning and under overt pressure from the government.

VII. CONCLUSION

Let me come to a close by recalling a simple matter of fact. Politics and law are matters of common sense and prudence rather than theoretical affairs. If we were in Dickens’ times, I think that I would in fact favor State protective activism. In 1986, on the contrary, I wish that all the pub-

64. Stith, *supra* note 23, at 537-38. “The German dissent [in the abortion judgment] well recognizes the difficulties inherent in court enforcement of constitutional values.” *Id.* Stith, quoting the dissent states:

it is regularly a most complex question, how a value decision is to be realized through affirmative measures of the legislature. . . . Based upon the determination of the actual circumstances, of the concrete setting of goals and their priority and of the suitability of conceivable means and ways, very different solutions are possible.

Id.

65. Stith, *supra* note 23, at 539-40.

lic powers on Earth would stay at home and let us live in a sort of a peaceful anarchy like Tolkien's hobbits lived in their shire.⁶⁶

66. See J. TOLKIEN, *THE HOBBIT* ch. 1 (1981), and J. TOLKIEN, *THE LORD OF THE RINGS* prologue, ch. 1 (1981). I sympathize with these examples because the hobbits really had a stateless society but did not lack solidarity, real rules, or common values. Yet the Shire was a particular case because the hobbits had no internal problems, no unemployment, no poverty. Finally, they suffered war, needed foreign help, and Frodo was wounded.

