Individual Rights, Economic Transactions, and Recognition: A Legal Approach to Social Economics

Chapter 3

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Although markets are based on legal foundations and judiciary problems often concern economic issues, the twentieth century saw a progressive methodological divide between legal and economic studies. In particular, economic theory stands on quite simplistic legal concepts that contribute to hide some important issues at stake. This divide has not been reduced much by the development of the field of law and economics, which simply applies the economics method to legal issues. A necessarily more fruitful field of interaction between these perspectives is promised by social economics, which, since its beginning, has adopted a more integrated and interdisciplinary approach, including the study of property rights and institutions. In particular, among the many issues debated in social economics, the theme of justice in economic exchanges over the course of history has stimulated much fruitful research that still deserves to be further developed. In this field of research, the study of the legal variables comes into direct interaction with economic reasoning. Consequently, categories used in the economic analysis should be harmonized with the legal framework. On the other hand, the choice of the legal theory on which we develop social economy studies is crucial in determining what can and what cannot be seen in terms of pathologies in human interaction.

Modernity brought the idea of individual property rights as a complex phenomenon. However, economics adopted a simplistic view of property as a fundamental institution, understating the complex interaction of different rights and obligations that frame the legal environment of economic processes with an insufficiently elaborated tool. Here, a more elaborate view of legal elements will be proposed

in order to analyze the interactions constituting exchanges. The legal perspective will be inspired by classical natural law, without necessarily following the Aristotelian or Thomistic frameworks. The classical idea of objective good and of moral law as inspiration to human interaction through practical reasonableness is here read through the lens of more contemporary philosophical work.[1] This allows us to use ideal principles as an ethical reference while adopting a practical approach to social-economic concrete action according to the typical ideal-realist perspective. This approach draws special attention to social law (in the sense of norms developed and accepted by a community) and opposes legal positivism. The organic view of society typical of classical natural law will be fitted to the contemporary idea of individual rights by simply accepting the latter as a partial analysis of legal relationships. On the other hand, the connection with social economics is made through the institutionalist framework, which maintains many aspects of the ancient organic view of the social fabric.[2] Therefore, concepts of the classical tradition, including the ideal-realist approach, are fitted into a transaction approach to be able to study the fairness of economic processes from a different perspective compared to the proceduralist one.

The starting point for my analysis is that "the members of a human society are bounded together by a network of rights and duties" determining a relational space.[3] In order to understand the role of the law in economic processes, a comparable relational approach to economic intercourses is needed. John Commons's concept of transactions is an appropriate framework by which we can study economic and legal elements in a unitary view of human action.[4] Commons's transaction approach is able to frame the often cited relationships of conflict, mutuality, and order, and it can also include law and rights as part of the interrelationship.

Property Rights and the Law

The idea of individual rights was not part of classical political philosophy and gradually emerged only from canonist studies in the late Middle Ages.[5] The individualism of modern political and economic thought isolated individuals from social relationships and endowed them with property rights, which were defined as "natural" in the sense of having priority over any other claim or law and thereby constituting a defensive sphere of private autonomy. In the classical world, we could find concepts such as the law, the just thing, the right order of society, and right behavior, but no notion pointing to a "defensive"

relationship of the individual to political authority based on an individual legal endowment.[6] Any right was defined to some obligation through a juridical relationship—which was part of a relational and organic view of the law.

The social philosophy of political liberalism shaped a political economy that incorporated the idea of individual right as individual endowment or a kind of stock. Property rights were conceived as a defensive principle to protect the individual sphere of liberty from the authority of the state. As a consequence, the relational principle that shaped ancient theories of the law and that led to the idea of *Ordo* was lost to the advantage of a claim of individual autonomy and freedom.[7] Unfortunately, after modern natural law achieved the acknowledgment of individual control over property (to defend the individual from the claims of the sovereign), this idea of individual rights evolved in a view of society where property rights came before any other duty and, above all, neglected any obligation that the individual has in relation to his community.

Moreover, property rights, which originally were intended to be an all-inclusive concept that in the view of Hobbes concerned our own life, body, family affections, and wealth, became a simple "stock-package" pointing to the specific relationship between the individual and the property.[8] It came to consist in a right of exclusion that had to be defended by the state, functional to a conflict-ridden view of society. This perspective is still dominant in both libertarian views of society as well as liberal-progressive conceptions of the economy. Even those who argue in favor of the extension of individual rights into social and economic rights often conceive them as an individual stock and not as an organic interdependence of claims in society.

An example of this fact is the definition of basic rights by Henry Shue as "the minimum reasonable demands that everyone can place on the rest of humanity."[9] Here the right is conceived as an open claim and not as a relationship between individuals.[10] The usual critique to this kind of conception is that, finding no specific obliged individual as a counterpart, it leaves to the state all charges of assuring its minimal fulfillment. Therefore, due to the way rights are conceived, they are not easily transformed in "justiciable rights" and therefore the government has to assume the costs of fostering them. That, in turn, makes society very vertical and bureaucratic because the interaction between the claimants and those who actually supply the service is mediated by the state through public administration.

The problem in contemporary economics is that property rights are simply taken as objects of transactions and seen as an invariant stock.

Exchanges are not shaping or affecting rights; instead, they are simply transferring their ownership to other individuals. This theorization is in many cases perfectly suited to economic studies. Therefore, these rights concern property and consist of a relationship between the individual A and the good G. That right-stock can be transferred from individual A to individual B and be subject to evaluation. The evaluation of a right-stock depends on subjective use value determining reservation prices and on the social evaluation given by relative scarcity determining the market price. But the nature and form of the right itself is not seen as changeable by economists. Moreover, individual or social rights or any moral obligations are presumed neutral to the process of market evaluation, and similarly, wealth effects and externalities are excluded or regarded as "incidental." Properties of the good as well as the good itself are therefore associated and seen as objective and simple in their unity, not affected by the context and by the personality of traders. The result is that we tend not to question the fairness of market prices.

This theoretical architecture may seem appropriate to describe exchanges involving relatively homogeneous commodities. But most transactions do not involve simple commodities but rather "services" of a heterogeneous nature. Most transactions in a service society involve the creation of value out of interpersonal relationships and activities in which the quality of the persons involved is crucial, such as labor relations or the consultancy of a tax advisor. In other cases, rights are sold that allow the access to some performance or information, such as getting on the train or reading an e-book. In all these cases the coincidence of the good G and the property right connecting A to G is a misleading way of explaining how transactions work.

The problems that a legal approach to social economics has to deal with are, first, the genesis and nature of individual property rights. Then, it has to deal with the relationship between property rights and other human and social rights as well as obligations and liberties. Finally, it must study the criterion to evaluate justice in exchanges—that is to say, criteria for fair evaluation in relation to the nature of legal relationships.

Contemporary Conceptions of Rights and Justice

The theory of justice proposed by John Rawls had a major impact on economics and has become an important reference for liberal thought.[11] It interprets justice as a distributive problem and it justifies government reallocation of resources by a procedural logic.

However, this theory does not question the outcome markets' outcome based on an intrinsically fair process, but looks at only the resulting distribution of income. It assumes that fostering free markets assures efficiency with a side effect of bad distribution of income. That implies an external ethical point of view that is theorized as the "original position." This theory totally neglects any problem connected to commutative justice and the genesis of rights. Its critics have pointed out its contradictory materialism, but this is not our concern here.[12]

The position of Ronald Dworkin's work is relevant here. He is not a positivist and therefore he acknowledges the fundamental role of moral obligations in line with the classical approach, but at the same time he adopts an individualist perspective.[13] The interesting aspect of Dworkin's approach is his idea of the *unity of value*, that is to say, unity of moral and ethical values.[14] He argues that a well-working theory of justice is based on morals: in this view the law is not competing with morals, but can be seen as a branch of political morals, which is a specific branch of the wider concept of personal morals. The latter, in turn, is a part of the conception of how to live well, or the ethics of dignity.

In this way, Dworkin interprets personal interest as framed by an ethical ideal. He admits that, today, the Greek view of unity of the two spheres of value (morals and interest) has survived in a degraded form. Greek ideals affirmed that the good life is something beyond the satisfaction of desires because it also involves caring for others. Modern political and economic philosophy abandoned the integrity of morals and ethics, instead conceiving interest and ethics as conflicting: morals in this case means subordination of personal interest to ethics. As a consequence, in Dworkin there is both a superior point of reference given by ethics and an ideal logic of derivation of law from morals.

Dworkin defines individual rights as something residual from collective ends of society related to ethics.[15] Individual rights are therefore subordinated to collective ends; the definition of individual legal positions is not derived directly from interindividual relationships, but it is mediated by general ethical and political principles. He distinguishes *background rights*, relative to society in general, from *institutional rights*, relative to the effect of specific institutions. Moreover, he also distinguishes between arguments of principles and policy: a policy standard is an objective to be reached, such as an economic improvement, whereas a principle is a standard to be observed as fundamental requisite of justice and equity. Principles are not hard and

fast rules, but a general orienting device affecting the culture of a community.

Dworkin's aim to rejoin rights with classic principles is partially successful because it allows us to interpret his theoretical work as a reinterpretation of the political community (*polis*) in present times. Nonetheless, it represents still an open-ended and vertical conception of rights as they are defined relative to the state, and they are not discussed in their genesis. Dworkin therefore bases his reasoning on a priority assigned to public law compared to private or social law. However, the idea of principles as field organizers and elements able to align behavior can have interesting application in a social-economic theory of economic transactions inspired to the classic tradition.

A Horizontal View of Rights: Recognition

The individualization and the verticalization of the idea of right, originating from a preferential relationship between the individual and the state, does not contribute much to the social-economic analysis.[16] In fact, since the beginning of social economics, a critique of this conceptual architecture was conducted by those who—from Sismondi to the Jesuits—focused on the problem of social justice. The emphasis on the social economy inspired by the classical approach privileges social law and concrete legal relationships. Therefore, rights are justified not by abstract philosophical principles but by their actual acceptance by the involved individuals. On the one hand, we need abstract ideas of the good and of genuine humanity, and on the other, rights are concrete positions in actual relationships.[17] The justification of rights requires understanding the logical thread that connects the juridical elements framing economic interactions.

There are many precedents for this line of thinking in modern philosophy. Thomas Scanlon expressed a similar concern, although from a contractualist perspective, pointing out the need of requirements of *justifiability* to others.[18] Oswald Hanfling similarly argues that rights belong to a language game that includes the exchange of reasons.[19] Contemporary contractualists as Alan Gewirth found justification of rights in purposeful human action, which is to say, in specific deliberations.[20] Historically, this has led to constitutionalism, but formal laws can be empty of practices; the problem is to explain actual rights operating in social relationships. Amartya Sen, from his applied perspective, affirmed that rights can be functional to positive freedoms.[21] But he could not explain the source of rights and, actually, rights and capabilities are two competing concepts in Sen's

"a-juridical" system, which is based on the pragmatic idea of assuring human capabilities in a nonrelational setting (a good theoretical system in itself but not related to our problem).[22]

The approach followed here is classical in the sense that priority is given to moral law guiding effective individual action, framed by social customs and institutions. The basic idea is that, in social economics, we should understand how actual, observed economic behavior is affected by the social fabric. Therefore, priority is given to rules and rights as effectively perceived by acting people and not from an abstract general theoretical perspective. On the other hand, human behavior has to be studied in its social dimension, that is to say, from a relational perspective.

A similar approach characterized the ethical thought of Edmund Burke: the true law comes from moral customs diffused in a community.[23] He argued that the rules more apt to foster the well-being of a society emerge from the experience of that community; therefore, rights derive from actual customs and precede formal law. The approach presented here does not take this view as normative but as an applied theorizing perspective. Justification for rights can be shaped inside a practical view of social-economic interactions.

More specifically, this chapter contributes to a rediscovery of Hegel's *Philosophy of Right* and Rosmini's ideas on the law for aspects affecting economics.[24] The main idea that these authors stressed is the fundamental act of *recognition* on which any community is based. Recognition is the cognitive act by which each person acknowledges his human identity of another person, and is also the ground of the respect due to the other's identity, including her specific living sphere ("property" in classical terms) that is at the ground of any juridical relationship. Rights are not valid by themselves or by metaphysical reasons, but because others have felt a natural obligation to recognize them. A right, according to Rosmini, is in itself a moral entity that emerges in the relationship between personal freedom and moral law.[25] Therefore, in this view, the idea of duty logically precedes that of right (while remaining independent).[26] The rights of others that we recognize are obviously obligations that we are, directly or indirectly, willing to fulfill.[27] This aspect makes the juridical relationship fundamentally reciprocal and grounded in history.[28]

In Hegel's thought, reciprocal recognition, mediated by ideal juridical forms, is the foundation of property rights.[29] Property is generated in exchange by reciprocal agreements which include the recognition of property. The foundation of individual autonomy is the intersubjective recognition that our needs, beliefs, and capabilities

deserve to be fulfilled. It is based on a common moral principle that becomes embedded in practices, beliefs, and institutions. Exchange therefore includes two lines of communication, one concerning the reciprocal recognition of rights and the other based on prices.

This perspective is at the same time cognitive and behavioral. It asserts that rights are what we recognize to each other, and this recognition has an ethical aspect because we attach a dimension of "ought to be" on what we recognize to each other. At the same time, however, we do not have an ideal result to achieve: morals are based on abstract principles that we have to adapt to actual situations and not on ideal states to reach. The content of a right includes what history presents as actualizations of these relationships as mediated by (perhaps imperfectly) shared ideal values. So, there is a realist dimension in this framework of analysis that allows to understand exactly what are effective rights and obligations, and there is a moral dimension concerning the rights that we ought recognize to others according to the ethical vision of the society that we would like to live in. This does not mean that we cannot define universal, natural, or fundamental rights, but this is an issue beyond this chapter.

Once we accept the factual-ethical dimension of rights, we can work out some specification on the exact architecture of juridical relationships involving individuals and the political authority. Here, many classifications of rights can be described, as that between positive rights (or entitlements) and negative rights (or freedoms), similar to Kantian perfect and imperfect duties.[30] In the case of positive rights, we should recognize (and be ready to pay for) the specific forms of collective action that are assigned to fulfill such rights.

Economic Transactions and the Legal Framework

According to Gianfranco Tusset, writing about Gustavo Del Vecchio (an Italian economist who developed a relational approach to economic exchanges), the relational approach to economic interactions can be traced back to the work of Friedrich von Hermann and to Henry Dunning Macleod.[31] Apparently, Hermann influenced the work of Eugen Böhm-Bawerk, which directly inspired John Commons's conception of transactions.[32] The characteristic of the relational approach to exchanges is that it fundamentally involves legal variables, that is to say, rights, obligations, and rules.

Starting with his first work, Commons attempted to systematically connect juridical elements with economics.[33] In his *Legal Foundations of Capitalism*, Commons elaborated a legal framework

to study transactions under the hypothesis that economic outcomes are fundamentally shaped by the institutional framework, and he adopted and slightly modified the legal theory of Wesley Hohfeld.[34] In this perspective, the allocation of goods takes place in a juridical environment, where individuals act in a space defined by rights, duties, and working rules. Hohfeld's framework is based on a three-term relation (two persons and an act-description) giving birth to the following rights:

Right of A, corresponding to *duty* of B
Privilege of A, corresponding to *no-right* of B
Power of A, corresponding to *liability* of B
Immunity of A, corresponding to *no-power* of B

This relational scheme of legal elements was modified by Commons to shape his model of transactions. Actually, in Commons's model, transactions always involve at least five actors: the two interacting individuals A and B, two nontransacting individuals C and D representing the opportunities not taken (or opportunity costs) and the administrative authority in charge of regulating economic processes.[35]

Commons did not use the notion of preferences but rather the simple classical difference between *use value* and *exchange value*, which determines the opportunities of a transaction. Compared to Hohfeld, Commons's aim was also to emphasize transactions taking place within organizations (managerial transactions) and the role of the political administrative authority in allocating resources (rationing transactions). His end was to describe property as a social creation, a legal construct that can be adapted and modified, so property is embedded in social and legal relations in which power and authority are also relevant. In this way, Commons includes some element of administrative control in his legal positions.[36] The resulting framework is basically conflict-ridden and based on imperfect opposites that never coincide perfectly, such as right-duty, exposure-liberty, power-liability, and immunity-disability.

To each legal attribute of A, some corresponding position of B determines a relationship of limits and reciprocation. To this reciprocal interaction, Commons adds the state and the two respective "opportunity costs" of supply and demand of respectively individual C and D (the next best alternatives to A and B). Therefore, a transaction is a multilateral form of relationship. It involves the decision to reciprocally modify rights, often compensated by money (which is itself a specific right on a symbolic accounting unit), and consists of

a consensual modification of the juridical spheres of the parts under the framework of customs, rules, and institutions.

Laws and working rules, constituted by practices and customs, integrate this framework. Actually, rules and institutions contribute to define the legal position and, at the same time, govern the dynamics of the transaction: rules affect rights. Therefore, rules and rights are complementary in defining the legal environment. Commons particularly focuses on institutions and laws that are under the control of the government because he is interested in how society is steered politically by modifying the legal positions of actors.[37] However, he includes working rules resulting from social interactions, such as customs and habits, among the institutions affecting exchange, leaving room for our analysis (specifically, Commons talks of legal, moral, and economic sanctions).

The transaction is also the framework in which the process of *evaluation* takes place, a process "oriented" by institutions, specifically the working rules defining the respective entitlements.[38] Institutionalism stresses the role of *social* evaluation instead of evaluation based on the simple market process of neoclassical economics. Social evaluation is affected by the complexity of relationships and by the specific arrangement of institutions and also underlines the role of individual positions, particularly wealth, in affecting outcomes. Therefore, this view supports our double channel including recognition of rights and prices.

Commons in this way reaffirms the distinction between *freedom* and *liberty*: the latter presupposes a legal framework and a legal capacity of the subject to be able to hold rights and duties. Therefore, liberty cannot be defined without considering the respect of each right.

Rights, the Law, and Evaluation: Giving Priority to Social Law

Commons's transaction framework can be expanded to highlight the development of effective rights through reciprocal recognition and their effect on the distributional outcome in exchanges. The specific act of reciprocal recognition among individuals is the fundamental and effective foundation of their interactions. Therefore, a right is an issue of reciprocal communication and agreement in a structured legal environment, and not a simple static tradable element. In this way, rights emerge and are defined in a transactional process and not a simple input to it. The element underlined here is that the cognitive

process of recognition underlies any economic and social interaction; it affects the legal positions of players and, as such, has an impact on the economic outcomes of the transaction.

On the other hand, there are different kinds of rights and rules that enter transactions. This perspective of the right as a moral power in a relationship implies a further theoretical aspect: it is not possible to sharply separate the property right from other kind of rights and liberties (as in the classical idea of property). This fact is evident in a service economy where the willingness to pay of buyers depends on a variety of qualitative factors. The literature normally distinguishes human rights from social rights and economic rights. Human rights tend to be generally acknowledged by international institutions, and many constitutions state a variety of social rights for their citizens. Economic rights are more controversial, with the notable exception of property.[39] However, the approach taken here is that constitutions and formal laws are relevant, but effective rights, obligations, and liberties depend on the specific recognition between individuals.

Property is (part of) the set of entitlements of a person. The fact that property is tradable does not make it completely autonomous from other obligations attached to it or to the whole personality of the holder. Property can be complex and involve specific duties (such as maintenance, safety, externalities, and common benefits). Therefore, the personality of a trader, the set of her entitlements, and even the quantity of her endowments, all affect the outcome of the evaluation process concerning the specific right traded (property of a good or the labor of the individual). It is not only relative scarcity that affects prices, but also the status of the interacting persons as well as specific context variables.

Economic rights are not limited to property, but involve all entitlements of the exchanging parties, including the effective competences of the individuals, their reputation, formal certification of competences, and so forth. They can involve immunities (such as from externalities), freedoms, powers, and responsibilities. There are also entitlements arising as an effect of the working rules, such as the way of granting the performance, incentives to comply with agreed performance, or the penalties applied in case of unsatisfactory performance—briefly, all points normally included in contracts.

What is relevant here is that social and human rights can also factor into the interaction, especially when engaging low-pay work. Human and social rights can interact with the economic, such as in the case of slavery, which reduces also the economic rights of the slaves. Ethnic minorities are discriminated against in many ways including the

economic point of view, and women often get wages or salaries that are significantly lower than that of men. This kind of interaction is often analyzed under the label of "discrimination." The fact is that very strong rights of one part opposed to the weakness of the other in a transaction can reinforce the former's power and create a sort of liability in the counterpart, making the transaction less "horizontal." That can have monetary implications, in particular when prejudices and the consequent distortion of recognition becomes shared in a community.

A specific problem that can be studied is how the insufficient recognition of the juridical position of the counterpart leads to downplay her assets in the process of evaluation. This means that the process of evaluation—fixing individual reservation prices—is affected by the underlying process of recognition of the counterpart. Buyers faced with weak counterparts tend to define lower reservation prices, and sellers, when they are not recognized for what they are and deserve, also tend to feel compelled to fix lower reservation prices. Independently of the relative scarcity on the market (if the market exists), the emerging price would be lower than that coming out a situation of equal partners. If we consider our partner an inferior being, our reservation price for anything she can sell us is lower than the standard; the opposite when we deal with somebody we consider a prestigious person.

This process can worsen into a backward feedback when the expected lack of recognition leads to expected low evaluation inducing individuals to adopt low-profile strategies. For example, people may not study because they expect that the eventual title would not assure them proportional recognition, which can entrap people in lower qualifications. The reverse can also take place: the act of evaluating a specific property in a transaction can indirectly affect the respect for other rights of the individual, including human rights. The typical example is that of a salary that is too low to ensure a decent life for the worker. Even if that kind of labor is abundant, the pay should not be so low as to harm the worker's human rights. From this perspective, low pay is equivalent to insulting the person. Therefore, recognition affects the distribution of income (and perhaps also redistribution through the political recognition of social groups).[40]

The consequence is that, in order to increase the fairness of exchanges, we need a policy able to foster the juridical position as well as the social position of people in weak positions or with weak entitlements. Moreover, some counterbalancing intervention can also help

in equalizing the situation. The most typical example is the diffusion of education and literacy at the end of the nineteenth century that had the effect of reducing poverty. Today, we can single out the problem of migrants, whose situation requires an active policy to ensure a balanced position in transactions.

Rights can be defined and enforced by the constitution and by formal laws, but their origin and their effective definition and respect are the result of social interaction. Classic natural law sees natural rights as the product of a universal moral law that induces individuals to respect other people's positions in a reciprocal dimension. But reality shows the existence of relevant discrimination, and as a consequence, universal moral law does not necessarily grant equality. It remains useful to analyze actual situations as well, because they can be a point of reference for government policies.

Commons shaped the concept of transactions to include state authority as an essential condition of exchanges. At this point, some insights supplied by Dworkin are particularly useful. The state and other institutions are responsible for defining background rights, which constitute the standard that should be respected and define the respect that individuals deserve and are obliged to observe. Such rights should be derived from an idea of progress and improvement of civil society guided by shared ideal principles that can also be derived from philosophy, ideology, or religion. Education is the main policy that can be enacted in this regard. As a consequence, the definition of rights is not given by a static reciprocity, but rather is part of an evolving juridical framework in which the law has both to acknowledge people's values and assure a shared direction. The state should therefore assume an ethical role because it assumes the task of impressing a direction to the juridical evolution through democratic processes.[41]

The second kind of intervention inspired by Dworkin is designed to balance specific institutional rights. Similarly to what nineteenth-century Jesuit Luigi Taparelli argued, there is some need to counterbalance the different weight of persons in order to obtain balanced transactions.[42] This intervention can be performed by institutions that, affecting transactions, are able to reinforce the rights of weak categories of people (such as workers, women, or migrants). This is the case in favor of labor legislation that helps reinforce the position of laborers relative to employers. Consequently, contrary to the liberal argument that liberalization increases efficiency, labor protection legislation can display positive results in economic systems suffering from insufficient respect of labor rights.

Conclusion: Commutative Justice in Economic Interactions

The problem of social justice cannot be fully adequately tackled by state-centered theories that frame this problem as a purely distributive problem. The consequence of such theoretical frame is to surrender to any commutative injustice in the name of presumed market efficiency and to charge the state and other institutions of solving the insurmountable problems of increasing inequality. This is the theoretical limit of the perspective of Léon Walras, John Stuart Mill, and, more recently, John Rawls. As argued by Axel Honneth, the procedural perspective cannot help much avoiding this underevaluation.[43] He therefore adds a "justice of needs" and a "justice of performance" (in connection with labor remuneration) to the "procedural" to achieve an effective social justice.

In this chapter, I have used the concept of recognition to argue that the problem of social injustice primarily arises in the market from some unavoidable processes of unfair evaluation in which weak people are progressively set apart. Therefore, there is a serious problem of social evaluation in the market that is not purely economic but that social economists cannot avoid analyzing. The spontaneous emergence of norms, habits, and opinions is a fundamental aspect of human interaction. It acquires an important role in economic interactions in which it represents the most effective legal element. However, it can also have shortcomings and some negative impact by preserving or increasing inequalities that certainly are not functional to a fair functioning of the market.

In this framework, we can see that the historical role of social and labor legislation was not to reduce inequalities by redistributing wealth (that was theorized mostly by the current liberal-progressive trend in economics). Rather, the primary role of this legislation was to reinforce the juridical position of contracting parties in the market, ensuring in this way a result closer to commutative justice. Contemporary reformers, busy in dismantling past institutions, apparently disregard this fundamental aspect.[44]

Notes

1. Practical here means "with a view to decision and action"; see Finnis, *Natural Law and Natural Rights*, 12.
2. The pragmatic background of institutionalism also shares some epistemological aspects of the classic practical approach.
3. Hanfling, "Rights and Human Rights," 63.

4. We refer in particular to John Commons's early study, *The Distribution of Wealth*, and to the paper "Institutional Economics."
5. See the studies of Tuck, *Natural Rights Theories*; Reid, "The Canonistic Contribution to the Western Rights Tradition"; and Tierney, *The Idea of Natural Rights*.
6. The *Magna Carta Libertatum* of 1215 had an explicit defensive character and in part some individualist dimension. It had an important impact on the conception of eventual theorization of law. In the feudal world, any autonomy in the use of property was achieved thanks to "privileges" assured by the emperor or king.
7. The idea of *Ordo* survived in the German economic studies up to *Ordo-Liberalism*.
8. See Schlatter, *Private Property*.
9. See Shue, *Basic Rights*.
10. This idea has also shaped the form of twentieth-century welfare states developed out of the universalist principles theorized in the Beveridge Report in 1942. Universalism is achieved by state's supply of adequate public services and, in particular, by the *decommodification* of some service. In fact, some social rights (such as the right to health) have found some implementation following the same path that property rights took for implementation: by letting the state provide a specific service or guarantee.
11. Here, I refer to Rawls's *Political Liberalism* that updates his book *A Theory of Justice*.
12. See, in particular, Habermas, "Politischer Liberalismus"; and Honneth, "Das Gewerbe der Gerechtigkeit."
13. Legal positivism presumes that the law is the result of explicit social practices and institutional decisions.
14. The *unity of value* argument is particularly developed in Dworkin, *Justice for Hedgehogs*. Dworkin defines "ethics" as the study of how to live well and "morals" as the study of how we should treat the others.
15. In *Taking Rights Seriously*, Dworkin discussed rights to equal consideration and respect and argued that there is no trade-off between liberty rights and equality rights; in other words, there is no general right to freedom.
16. Those who start the theorization of rights from the individual have difficulties proceeding to an operational political-economic theorization, and they tend to crowd out social law in favor of top-down reforms. Joseph Raz, in *The Morality of Freedom*, also tends to follow this direction.
17. Many scholars found the idea of rights in the principle of human dignity or human needs. The latter principles are certainly useful in theory but they remain vague in practice.
18. See Scanlon, *What We Owe to Each Other*.

19. Hanfling, "Rights and Human Rights," 62.
20. See Gewirth, "Human Dignity as the Basis of Rights" and *The Community of Rights.*
21. See Sen, "Elements of a Theory of Human Rights."
22. Sen affirms that while rights involve claims, freedoms are primarily descriptive characteristics of the conditions of persons (ibid., 328). Martha Nussbaum, in "Capabilities as Fundamental Entitlements," on the other hand, tends to see the freedom perspective as too vague. Moreover, some freedoms limit others. Therefore, she sees the capability perspective as complementing the approach based on rights.
23. On Burke's philosophy, see Harris, "Edmund Burke."
24. Concerning Hegel, we follow the path of Honneth in *The Struggle for Recognition* and *Suffering from Indeterminacy*, as well as the insights of Ver Eecke, *Ethical Dimensions of the Economy.* On Rosmini, see Hoevel, *The Economy of Recognition.* In the theory of Honneth, recognition is something we should struggle for; in Rosmini it is a natural attitude that does not lead to a transcendent "we" as in Hegel. In this way, to Rosmini, the right to property is at the same time personal, interpersonal, and social. (The first modern philosopher of recognition was Rousseau, but there is no specific revival of him; see Neuhouser, *Rousseau's Theory of Self-Love.*)
25. See Rosmini, *Principles of Ethics.*
26. See Hoevel, *The Economy of Recognition*, 103.
27. See Rosmini, *The Philosophy of Right* (both volumes).
28. We see this in the Kantian scheme as well; for instance, see White, *Kantian Ethics and Economics.*
29. See Hegel, *Philosophy of Right.*
30. Hertel and Minkler's edited volume *Economic Rights* provides various categories that can be used in the analysis.
31. See Tusset, *Money as Organisation*; refer also to Hermann, *Staatswirtschaftliche Untersuchungen*; and Macleod, *Principles of Economical Philosophy.* For the work of Del Vecchio, see *Ricchezze immateriali e capitali immateriali.*
32. See Böhm-Bawerk, *Rechte und Verhältnisse vom Standpunkte der volkswirthschaftlichen Güterlehre.* The influence of Böhm-Bawerk on Commons is presented in Fiorito, "John R. Commons, Wesley N. Hohfeld, and the Origins of Transactional Economics." It is not clear how much inspiration Commons received from the work of Macleod. Consequently, the idea of basing the study of economic processes on transactions owes to the German economy both the use of ideal-types and the relational approach.
33. See Commons, *The Distribution of Wealth.*
34. See Hohfeld, *Fundamental Legal Conceptions.*
35. In particular, see Commons, "Law and Economics." For what concerns the legal elements entering production, Commons (in

The Distribution of Wealth) singles out personal abilities, capital, monopoly privileges, and legal rights.

36. See Fiorito, "John R. Commons, Wesley N. Hohfeld, and the Origins of Transactional Economics."
37. See Commons, "Law and Economics" and "Institutional Economics."
38. On the process of social evaluation, see Tool, "A Social Value Theory in Neoinstitutional Economics."
39. See Hertel and Minkler, *Economic Rights*.
40. See the exchange between Honneth and Margalit in "Recognition."
41. The problem of stating what is the just thing in the classical tradition is solved by assuming an external point of view to be able to study the balance of positions.
42. His thought on the point is resumed in Mastromatteo and Solari, "Jesuits and Italian Unification."
43. See Honneth, "Das Gewerbe der Gerechtigkeit."
44. I am indebted to Daniel Finn, Kevin McCarron, and Robert E. Prasch for comments on the first draft of this work.

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