

Social Rights and Complex Freedom: A Comment on Fernando Atria

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At the start of his thought-provoking article, Fernando Atria poses the question:

Is the difference in the available institutional means of protection of rights to be explained by the different structure of social rights vis-à-vis individual rights, or is it a mark of the political devaluation of the former when compared to the latter?

By posing the question in this way, Atria presents it as an issue of the formal (equal) status of individuals as bearers of rights and substantive limits upon the expression of those rights. Individual rights are primary, whilst social rights appear as external. They are not regarded as integral to the realization of the individual and, therefore, are not perceived as a product of the same processes. Further, ‘institutions’, too, are posited as external, as a potential limit upon the individual and justified only to the extent that they allow the flourishing of an individual who is defined outside them. Insofar as the individual is understood in terms of capabilities (e.g. see Sen 2009), then it is the individual *capable of property* that is the focus of attention with contract thereby naturalized (and its social character veiled). Social struggles may have secured some justiciability of social rights, but, for Atria, this is always a weak foundation precisely because individual rights are differently enshrined, following from bourgeois law’s commitment to the maintenance of private property as their expression.

This ‘problematic’ of individual (negative) freedom and social (positive) freedom, which Atria is challenging, is, of course, long-standing in political philosophy and jurisprudence. A large part of the article is taken up in the demonstration of difficulties in its instantiation in the work of Höffe (1995, 2007). Whereas negative freedoms are held to be universal, positive freedoms, for Höffe, must always, be context specific in that they depend upon the availability of resources and differential cultural definitions (including, perhaps, those associated with the special subcultural values of elites, a topic to which I will return!). Atria powerfully develops the way in which social rights become neutralized to a ‘safety net’ formulation, where the cooperative understanding that properly should be regarded as integral to them is recast in contractarian terms and reduced instead to a form of self-interest.

The issue is, in part, the extent to which social rights complete, or make real, individual rights or the extent to which they must be subordinated to them. Atria makes a gesture

towards Marx to suggest that wherever there is a 'war' between social rights and 'individual rights' – to borrow from Marshall's (1992) framing of the relationship between citizenship and social class in the very moment of articulating the necessity of social rights – individual rights must win, unless one steps outside the domain of rights. I do not wish to say that Marx does not have powerful insights to offer on the topic. For example, Höffe's distinction depends upon private property being understood as arising as a consequence of (natural) scarcity, whilst Marx (1976) very powerfully demonstrates that scarcity is more properly understood as the product of private property, itself, since exchange is always dependent on the ability to exclude. It is precisely this inversion of the relation between private property and scarcity that enables a criticism of elite responses to social rights that they involve 'unaffordable' claims notwithstanding that they arise in the context of a general increase in resources that derives from the underlying cooperative character of expanded capitalist reproduction, despite the appropriation of those resources by the few.

For many, however, resort to Marx would be tantamount to giving up the 'reformist' ambition at the heart of social rights to which Atria is also sympathetic. However, it is not clear that Marshall's idea of social rights has sufficient conceptual elaboration to prevent their neutralization. In fact, what appears to be missing is the means of demonstrating a contradiction in the idea of self-interest and the establishment of social rights as the means of the realization of the individual. Atria looks to communitarian philosophy and, specifically, to Taylor's (2007) idea of 'slow pedagogy', where what we owe to others is 'learned by living political lives'. However, even here he faces the problem that it potentially appears to be 'utopian'. Ideally, we would 'flip' this construction, such that it was 'individual freedom' that appeared contradictory and utopian and social rights – or what, following Polanyi (1957), I would prefer to call 'complex freedom' – that appeared both realistic and necessary.

How might this be done? What I suggest might be a better grounding for social rights is to extend their sociological depth by locating Marshall's approach in a broader sociological tradition, one that includes Durkheim, North American pragmatists such as Mead (and, of course, his philosopher mentor, Dewey) and Karl Polanyi. Essentially, this tradition offers a critique of both the market as the expression of private property and of the individual as autonomous and self-sufficiently independent of social relations. I do not have the space to set the argument out in great detail (for further detail, see Holmwood, 2013), but I will associate it with Durkheim's ideas of 'moral individualism' (1958) and the 'non-contractual element in contract' (1964), the pragmatist idea of the 'social self' (Mead 1913), and Polanyi's (1957) ideas of 'complex freedom' and the 'antisocial' market. In each of the approaches, what is offered is a critique of liberal public reason as 'pathological' and self-defeating.

I will begin with the critique of the market in this sociological tradition and illustrate its features in the work of Polanyi. Essentially, Polanyi charts the emergence of liberal political reason as a form of political economy that is disruptive of the spontaneous moral economy that, prior to capitalist transformations of markets from the 18th century onwards, had governed just exchanges. This political economy was established on a theory (and policy) of a self-regulating circular flow of product and resource markets. Thus, not only are products commodified but also the three categories of resources – land,

labour and capital (or money). Now according to Polanyi, this model is a fiction because land, labour and money do not appear naturally as commodities and the attempt to constitute them is disruptive of social relations. This is evident in all sorts of resistances to commodification – the defence of collective rights in land, for example, and resistance of labour to the market determination of wages with its ‘blindness’ to concrete human need – which, from the perspective of market rationality appear as irrational. However, for Polanyi, the issue is not only that there are social resistances to commodification but also that complete commodification is self-contradictory, something most clearly indicated in the case of money (and also most recently articulated by Minsky, 1992).

Polanyi is not hostile to product markets, simply to the assumption of the self-regulated market, which he regards as a ‘fiction’, or ‘utopia’, precisely because it sacrifices human need to an unrealizable ideal. For this reason, regulation via political authorities is a necessary to realize the benefits of product markets without the deleterious effects of the commodification of everything. However, it is when the idea of the ‘social self’ is invoked alongside the critique of antisocial market fundamentalism that we begin to see more powerful critical possibilities. I suggest that Durkheim’s idea of moral individualism can be aligned with pragmatist criticisms of the ‘old individualism’ (Dewey, 1984), but I will develop the argument in the context of Mead and pragmatism.

According to the social self, the liberal idea of the self is a product of particular sociological conditions – essentially those of an emergent capitalism of petty producers – but it never properly captures those conditions or, indeed, the nature of subsequent developments. This idea of the self is constructed around the idea of an autonomous, calculating, self-sufficient individual. However, for pragmatists, the individual forms ‘associations’ and is, in turn, formed by association (and cannot be conceived outside them). The core of Mead’s argument is that in order to have a self-consciousness, the ‘I’ must be able to be a ‘me’ to itself; that is, to understand itself as object as well as subject. To be a *me* is to be able to see oneself as an other and, so, the self cannot exist without a consciousness of others and of itself in a world of others similarly constituted. According to Mead, to be a self is to be capable of taking the perspective of the other, registering our impact upon others and acting in preparation of that impact: ‘At the back of our heads’, he argues, ‘we are a large part of the time more or less clearly conscious of our own replies to the remarks made to others, of innervations which would lead to attitudes and gestures answering our gestures and attitudes towards others’. (1913: 376).

Markets are based on ‘self-directed’ actions, which are aggregated through an impersonal mechanism, but our actions have consequences that appear in the lives of others and therefore must always constitute the possibility of addressing that impact. It is here that pragmatists connect the social self and social reform. As Mead says:

In social reform, or the application of intelligence to the control of social conditions, we must make a like assumption, and this assumption takes the form of belief in the essentially social character of human impulse and endeavor. We cannot make persons social by legislative enactment, but we can allow the essentially social nature of their actions to come to expression under conditions which favor this. (Mead, 1899: 370).

Social reform, then, for Mead, is also the expression of democratic life and it contributes to the deepening of democracy engaged with practical problems:

A conception of a different world comes to us always as the result of some specific problem which involves readjustment of the world as it is, not to meet a detailed ideal of a perfect universe, but to obviate the present difficulty; and the test of the effort lies in the possibility of this readjustment fitting into the world as it is. (1899: 371)

In this way, the social self, social reform and complex freedom are intertwined. And the twin utopianism of Marxism and liberalism are subject to criticism and rejection.

But what of liberal public reason as pathological? Here we see that just insofar as ‘simple freedom’ is counterposed to ‘complex freedom’, the antisocial market necessarily undermines the social conditions of the individual, so the liberal construction of the individual is hostile to the very well-being of the individual which it purports to enshrine. On this ‘combined’ sociological perspective, individual rights are ‘anomic’, just insofar as their social character is denied. *Social*-ism, then is necessary to the full realization of the self, including the self’s understanding of its own individuality. But, of course, this merely socializes rights and doesn’t establish their form as social rights (i.e. the specific practices and claims that are recognized remain context specific as argued by Höffe), but rights are universalizable as ‘social’.

Paradoxically, there is an echo of this in Hayek, as Atria sets out. Hayek does not deny solidarities and obligations felt by an individual ‘towards the fellow members of the small group to which he belonged’ (1978: 88, cited by Atria) but argues that they are only applicable to small-scale societies and are not applicable in complex societies which must respect the rules that embed simple freedom. But complex societies do allow group solidarities, not least that of elites and the associations that they might form, such as that of the Mont Pelerin Society, which has advocated thin relationships for others. As Polanyi argued, it was precisely the advocacy of simple freedom in the face of the consequences of the Great Depression brought about by (neo-)liberal policies that gave rise to the atavistic solidarities of fascism. Perhaps the Tea Party movement and the growth of other far right responses following the Great Recession of 2008 is a reminder of the dangers in our own time against which institutionalized social rights are a protection.

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Individual Rights as Social Rights

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

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

Thus, Atria wishes to protect social rights from their damaging assimilation to individual rights. But his argument depends on accepting the understanding of individual rights provided by their liberal/neo-liberal proponents, when they are better understood,