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TOWARDS A RADICAL THEORY OF SOCIAL RIGHTS

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Ph.D

2016

To my mother

DECLARATION

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Abstract

This thesis intends to demonstrate the radical potential of rights. I argue that rights are capable, on the one hand, of challenging capitalist social relations and the liberal legal order which sustains those relations, and, on the other hand, of constituting a new political system. I argue that without reconceptualising rights in this manner, we are unable to comprehend certain social movements which employ the language of rights for challenging the existing systems and for articulating transformative visions of a new world.

This thesis suggests that we need to rethink rights as political alliances and agreements and rights-claims as political proposals between co-citizens. Here, the content of rights is formulated through a political action of the rights-holders themselves, as opposed to being derived from the pre-political sphere. Furthermore, I argue that our understanding of the scope of these political proposals and, hence, our understanding of the nature of the new order that rights can potentially constitute, depends on the way we conceptualise the conflictual dimension of rights-claims. It is the notion of a rights-claim as a challenge to the constituted order, as opposed to a petition to be included within that order, which captures how rights inaugurate a radical discursive space where potentially transformative political proposals regarding the matters of collective life can be made.

Throughout this thesis I refer to a transnational movement of peasants, *La Via Campesina*, which fights for a new socio-political arrangement where 'feeding the world' is the end in itself rather than a dictate of the capitalist market. Crucially, this movement makes extensive use of the language of rights and of 'the right to food' in particular. I argue that it is only the radical theory of social rights constructed in this thesis that allows us to analyse the transformative core of the movements like this one.

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Table of Contents

Introduction 13

Chapter One: Two Marxist Critiques of Rights 27

1. INTRODUCING MARX'S VIEWS ON RIGHTS 30
2. THE EGOISM OF RIGHTS 34
3. MARX'S THEORY OF NEEDS 40
4. THE LEGALITY CRITIQUE 43
5. THE DEPOLITICISATION CRITIQUE 53

5.1 WENDY BROWN AND THE DEPOLITICISATION CRITIQUE 58

Conclusion 63

Chapter Two: The Politics of Radical Needs 65

1. RADICAL NEED 66
2. THE POLITICS OF RADICAL NEEDS 68
3. *LA VIA CAMPESINA* 71
4. TOWARDS A RADICAL THEORY OF SOCIAL RIGHTS 77

Chapter Three: The Juridical Model of Rights 79

1. THE ORTHODOX CONCEPTION 80
2. THE FUNCTIONALIST CONCEPTION 84
3. JOSHUA COHEN'S FUNCTIONALISM 88

Conclusion 92

Chapter Four: Hannah Arendt and The Political Model of Rights 95

1. ARENDT'S CONCEPT OF LAW 98

1.1 ARENDTIAN POLITICS: EXTRAORDINARY OR STRUCTURED? 100

1.2 THE TRADITION 105

1.3 ANOTHER TRADITION 109

1.4 *LEX* AND RIGHTS 117

2. ARENDT AND HUMAN RIGHTS 120

2.1 THE RIGHT TO HAVE RIGHTS 123

Chapter Five: The Politics of Social Rights 133

1. THE SOCIAL AND THE POLITICAL 135

2. NANCY FRASER AND THE POLITICS OF NEEDS-INTERPRETATION 145
3. SOCIAL RIGHTS AND THE POLITICS OF NEEDS 148
Chapter Six: Rights as Demands 153
1. THE DISCOURSE-THEORETICAL CONCEPTION 157
2. THE AGONISTIC CONCEPTION 163
2.1 LEFORT AND THE SYMBOLIC DIMENSION OF RIGHTS 163
2.2 RANCIERE AND THE POLITICS OF THE EXCLUDED 168
3. PERFORMATIVITY OF RIGHTS-CLAIMS 171
Chapter Seven: Rights as Challenges 179
1. RIGHTS AS DECLARATIONS 181
1.1 AUGMENTATION OR REVOLUTION? 188
2. RIGHTS AS CHALLANGES 190
Conclusion 194
Chapter Eight: Adjudicating (the Politics of) Social Rights 197
1. BRAZILIAN COURTS AND COMMAND-RIGHTS 202
2. ADJUDICATING DEMAND-RIGHTS 205
2.1 DEFERENTIAL REVIEW 207
2.2 A DIALOGICAL MODEL 210
Conclusion 215
CONCLUSION 217
BIBLIOGRAPHY 221

Introduction

The present work is motivated by the desire to remedy a certain miscommunication. I believe that the existing conceptualisations of rights are inapt to register and transmit all the important instances of rights-talk in contemporary political struggles. I argue that there is a gap between the leading theoretical frameworks on rights and the practice of radical social movements; a gap which precludes us from properly interpreting potentially transformative political visions. The aim of this thesis, then, is to readjust and enrich the concept of rights in order to avoid future miscommunications.

Transformative political action, as Drucilla Cornell explains, seeks to "so dramatically restructure any system – political, legal, or social – that the 'identity' of the system is itself altered".[1] In the words of Nancy Fraser, transformative strategies are about correcting "unjust outcomes precisely by restructuring the underlying generative framework."[2] In the context of the anti-capitalist struggles with which this thesis is concerned, transformative politics challenges capitalist social relations and seeks to transcend them.

The transnational agrarian movement of peasants, *La Via Campesina*, will be referred to throughout this thesis as an example of a transformative movement in the above

[1] Drucilla Cornell, *Transformations: Recollective Imagination and Sexual Difference* (Routledge 1993) 1

[2] Nancy Fraser 'Social justice in the age of identity politics: redistribution, recognition and participation' in Nancy Fraser and Axel Honneth *Redistribution or recognition? A political-philosophical exchange* (Verso 2003) 74

sense. This movement fights against what it sees as the encroachment of capitalism in agriculture.[3] While the demands and objectives of *La Via Campesina* are multifaceted, I believe there is a radical dimension to its call for *food sovereignty*. To bring out this dimension, I will thematise the struggles of this movement in terms of the politics of radical needs.

According to Karl Marx, a radical need is one which is produced within a given system, but which cannot be satisfied within that system.[4] Using Jacques Rancière's theoretical framework, I conceptualise the politics of radical needs as consisting in contextual, bottom-up, ruptural, open-ended and potentially transcendent demands.[5] Demands for the satisfaction of radical needs are *contextual*, in that such needs are not natural, but arise within particular institutional arrangements. Such demands are *bottom-up*, as they are articulated against the authoritative interpretations of needs. These demands give rise to a *ruptural* politics, as by pointing to the immanent contradictions of the capitalist order a certain rupture is brought about within that order. This politics is *open-ended* and *potentially transcendent* in that it can imagine a new socio-political system of need-satisfaction that transcends capitalist social relations rather than aiming to be incorporated within the *status quo*. It is the rupture in the capitalist order brought about by radical needs-claims that creates a political space in which potentially transformative deliberation and contestation over the nature, sources and model of realisation of the needs in question can take place.

As I shall argue, *La Via Campesina's* fight for 'food sovereignty' should be seen in such terms, that is, as an attempt to articulate a radical need. The movement does not demand an 'individual access to food', as featured in the official formulations of the right to food. The radicalism of *La Via Campesina* lies not in its demand for the means of consumption, but in its call for the transformation of the systems of the production and distribution of food. This is a struggle against the commodification of food and

[3] See the discussion on pages 72-77

[4] See the discussion on pages 67-69

[5] See the discussion on pages 69-72

for the capacity to 'feed the world', where feeding is an end in itself rather than a dictate of the capitalist market. In this sense, *La Via Campesina* fights for a new, transformed world, beyond capitalist social relations.

Crucially, *La Via Campesina* makes extensive use of the discourse of social rights, and the 'right to food' in particular. What I would like to suggest is that the existing accounts of rights are not capable of capturing the transformative core of the movements like *La Via Campesina*. This incapacity is not without political significance: it results in the curtailment of subversive political imaginaries and the co-option of potentially radical discourse into a paradigm which depoliticises, and thus legitimates, the prevailing order. The question is, then, whether movements like *La Via Campesina* are making a category mistake in attempting to frame their transformative projects in the language of rights.

This work believes in the radical potential of rights. In particular, insofar as *social* rights directly invoke the matters of resource-distribution, as opposed to the formal equality before the law espoused by civil and political rights, I argue that they are better placed to challenge the material relations of capital.

It should be noted at this point that I do not think that rights-talk is the only medium for channelling transformative political projects. Yet it offers a vocabulary that is familiar both to our friends and ideological enemies.[6] It is a *lingua franca* of contemporary political life,[7] widely used by political movements and official institutions alike. To demonstrate their transformative potential would be to discover a discursive field where radical ideas can be formulated and communicated. This work, then, is motivated by a belief that such a discursive field is possible through rights.

[6] Jeremy Waldron, 'The Role of Rights in Practical Reasoning: "Rights" versus "Needs"' (2000) 4(1/2) The Journal of Ethics 115, 134

[7] Costas Douzinas, 'The End(s) of Human Rights' (2002) 26 Melbourne University Law Review 445, 453

THE LIMITS AND THE DANGERS OF THE POLITICS OF SOCIAL RIGHTS

I start with sceptics. Chapter One outlines a Marxist take on the subject. The aim of the exposition of Marxist views will not be to condemn rights. Nor do I plan to rebut these critiques. Rather, I propose to take heed of the valid points about the limits of liberal legalism and start reimagining rights from there.

The Marxist critiques demonstrate the limited nature of social change. Following the *legality* critique, which I develop with the help of Evgeny Pashukanis, *legal* rights cannot be either a means or a goal of a transformative movement. Insofar as the objective of political action is to win legal rights, such action necessarily remains within the realm of possibilities internal to capitalism. This is because it is not merely the *content* of legal rights under capitalism that is problematic, as if legal rights could be reformulated in a hypothetical communist society. Rather, the *form of law itself* should be understood as something emerging with and constituting capitalist relations.[8] By conferring formal equality and freedom on individuals, law constitutes them as bearers of rights and duties and, hence, makes commodity exchange – the fundamental capitalist relation – possible. Crucially, it the presumption of a possible *conflict* of private interests spawned by capitalist social relations that, according to Pashukanis, necessitates law. Furthermore, social and political rights are mere appendages to possessive rights, remedying and containing the externalities produced by the latter, while simultaneously leaving capitalist social relations untouched.

If the legality critique is about the problematic nature of legalisation as a means and an end of rights-talk, the second Marxist critique is concerned with the depoliticisation of the *need* for legal rights which is produced by the historically contingent social relations, the relations that rights themselves naturalise and reproduce. While the formal equality and freedom that law confers is not a mere

[8] See the discussion on pages 44-54

ideological mystification, but a reality with material consequences, law also depoliticises and perpetuates the socio-economic situation of actual human beings who, in contrast with their legal representations, do suffer inequality and lack of freedom.[9]

After merging the two critiques it becomes evident that not only is legalisation-oriented rights-talk incapable of articulating transformative political projects, but it further actively depoliticises what is a historically conditioned configuration of powers. These critiques point to the limits and dangers of understanding rights as parasitic on law - *limits* in terms of the transformative potential of rights and *dangers* in terms of naturalising those limits. The discourse of social rights, in particular, operates within the possibilities of the extant order, further depoliticising the implication of that order in the production of the needs in question. How is it possible, then, to rethink the discourse of rights beyond the confines of liberal legalism? What does it mean for social rights to articulate radical needs?

SKETCHING A RADICAL THEORY OF SOCIAL RIGHTS

I argue that social rights should be understood to be formulated contextually through a bottom-up political action against the existing formulations of rights, as opposed to being derived from a pre-political source and enacted in a top-down fashion. Importantly, it is this account of the process of formulating rights in terms of a contextual and bottom-up practice that marks a distinction between the two models of the relationship between rights and politics around which I organise my discussion in this thesis. The *political model* differs from the *juridical model* precisely in that the former adopts the above understanding of rights. It is on the basis of the political model that we can further clarify the main features of the radical theory of social

[9] See discussion on pages 54-63

rights proposed here. I argue that the practice of claiming social rights should be rethought of as an open-ended and potentially transcendent practice which, instead of aiming to realise some pre-political human needs, is capable of questioning the underlying frameworks that might be responsible for the production of those needs, as well as configuring new socio-economic arrangements for their satisfaction. Finally, taking my cue from the Marxist critiques above, I argue that insofar as we continue to think of rights as not-yet-institutionalised individual claims we will not be able to capture their transcendent potential. To articulate a radical need, a social rights-claim should be understood in terms of a speech act of challenge which aims to rupture the extant order by demonstrating the latter's immanent contradictions.

It is this rupture that initiates a potentially transcendent process of deliberation and contestation on the nature, the sources and the means of realisation of the needs in question.

I construct this theory by exploring the leading theories of rights, which I organise into two models: the 'juridical' and the 'political'. This survey of the existing field will be as much about highlighting the ways in which this literature is blind to certain important uses of rights-talk as about searching for relevant ideas for the purposes of constructing a radical theory. As we will see, ultimately all the leading accounts present reductionist readings of the politics of rights, which are unable to capture the transformative potential thereof.

THE JURIDICAL MODEL

Chapter Three examines two broadly liberal theories – the 'orthodox' and the 'functionalist' – which together comprise the juridical model. The juridical model posits a certain conceptual priority between rights and politics, with the former preceding (and legitimising) the latter. Juridical theories are the least accommodating

of the radical conception of rights, since they purport to provide clear, pre-political criteria for identifying genuine human rights. It is the philosopher who, by looking at human nature or global public reason, arrives at a list of rights, which then structures and regulates the political sphere. Bottom-up political action by rights-claimants themselves in no way defines or alters the content of rights. What this hierarchy of rights over politics amounts to, in the context of social rights, is that the socio-political arrangement which might be responsible for the production of the needs in question, as well as the institutional model through which those needs are to be satisfied, is beyond the purview of rights-talk. These matters are assigned to the field of 'ordinary politics' created and legitimised by already established rights. The inquiry here is into the content of needs, into *what* individuals need as opposed to *why* they need what they need, i.e. whether there are structural determinants of those needs. With this, the need for rights itself is depoliticised and the radical potential of social rights in challenging the sources of that need is disguised. To salvage this potential, we need to free rights from the shackles of pre-political ideals. This requires nothing less than a fundamental rethinking of the relationship between politics and rights. Contrary to the juridical model, we need to think of rights not as pre-conditions and constraints on political action, but as constitutive thereof.

THE POLITICAL MODEL: RIGHTS AS PROPOSALS

Chapter Four introduces an alternative, political model of rights. It is on the basis of this model, I argue, that we need to construct the radical conception of social rights. If the juridical model assigns rights to the pre-political sphere, the political model dispenses with this problematic temporality. On the political model, *politics happens through rights-claims*. Against the orthodox and functionalist theories, the political model takes the content of rights to be formulated by the claimants themselves in

the course of political action. I shall argue that this alternative model allows us to reconceptualise rights as open-ended claims that potentially configure new political realities, rather than aspiring to the realisation of pre-political entitlements.

Hannah Arendt provides a helpful exposition of the main ideas behind this model. It is by exploring her rich work that I will extrapolate certain important features of the radical theory. While Arendt is often criticised for her alleged rejection of human rights and for her attempt to 'purify' politics from 'the social question',[10] I argue in Chapters Four and Five that her theory of law as *lex*, as well as her notions of 'the right to have rights' and of 'the social' can be reconstructed in such a way as to arrive at the following formula for a politics of social rights: the right to have social rights is a right to be included in the open-ended political processes of deliberation and contestation on the issues of the sources, the character and the ways of realisation of the human needs in question. This is a conception of rights as political alliances and agreements and of rights-claims as political proposals that, instead of invoking pre-political entitlements, initiate an open-ended political process around the issues of collective interest which were hitherto expelled from the public sphere. Crucially, the purpose of the politics of rights understood in this sense is not, necessarily, to create and maintain *liberal legal* rights. Rather, it is possible to recast it as a politics of rights, which goes against, and potentially transcends, the bourgeois law. While Arendt herself did not consider such a non-liberal politics of rights, I would like to salvage this radical promise of her framework. To do this, we need to go beyond her.

Insofar as Arendt's ideal of politics remains that of concerted action by equal citizens, her notion of rights as proposals neglects the distinct challenge facing the excluded, that of accessing the political space where their claims could be counted as political proposals in the first place. I suggest that there are at least three possible extensions of the political model towards a more conflictual account of social rights. The first

[10] Jürgen Habermas, 'Hannah Arendt: On the Concept of Power' in Jürgen Habermas, Philosophical-Political Profiles (London, Heinemman, 1983); Sheldon Wolin, 'Hannah Arendt: Democracy and the Political', in Reuben Garner (ed.) The Realm of Humanitas: Responses to the Writings of Hannah Arendt (New York: Peter Lang, 1990); Richard J. Bernstein, 'Rethinking the Social and the Political' (1986) 11(1) Graduate Faculty Philosophy Journal 111.

two are offered by discourse and agonistic theories respectively, and the third one will be developed in terms of the notion of a challenge-right. Depending on which of these three conceptions we adopt the potential scope of the politics of needs changes and the possibility of articulating radical needs is furthered or undermined. In other words, the scope of the political space that conflictual rights-claims create and the potential reach of the political proposals made in that space depends on how we understand the nature and the structure of a rights-claim.

RIGHTS AS DIRECTIVES

Chapter Six will introduce the first two accounts of the conflictual character of rights: the discourse-theoretical and the agonistic. Both of these theories adopt the political model outlined above and largely incorporate the idea of rights as political proposals. What they add to the Arendtian framework is the acknowledgment of the initial task of establishing a political space where political proposals can be made.

I start with discourse theory. On the one hand, according to this approach, the content of rights is not determined as a matter of a philosophical enquiry, but contextually, as a result of political action. In this, discourse theory belongs to the political model. But, on the other hand, in order to conceptualise a politics of rights which challenges the authoritative formulations thereof, this approach falls back on the problematic premises of the juridical model. Discourse theory ultimately subordinates the function of rights to a pre-political consideration: the discourse principle. This is a principle according to which "only those norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity as participants in a practical discourse."[11] Human rights stipulate the conditions of possibility of communicative freedom without which there can be no meaningful

[11] Jürgen Habermas, *Moral Consciousness and Communicative Ethics* (MIT Press 1986) 93

participation, and hence no legitimate norms. Rights-claims, thus, have a pre-given objective of creating a free communicative space in this sense. It is this context-transcending discourse principle that gives rights their 'veto power' against the existing articulations of rights, fuels the conflictual politics of rights and circumscribes the scope of political proposals. Rights are conflictual, but only to the extent that is necessary for implementing the discourse principle. For this reason, discourse theory represents a setback from a radical promise of the political model. It cannot conceptualise an open-ended politics of rights as challenging the socio-economic arrangements which might be culpable in creating the need for rights in the first place and configuring new political systems. These issues are left to 'ordinary politics' which takes place within the space established and regulated by rights.

The agonistic theories of Claude Lefort and Jacques Rancière offer both a sharper focus on the efficacy of rights-talk for the struggles of the excluded and an understanding of radical politics as an open-ended practice. For agonists, rights become the *principle* of democratic politics. Here, because of what Lefort calls their 'symbolic efficacy',[12] rights are an always available resource for political action. The inevitable *excess* of meaning that any act of institutionalisation leaves allows rights to provide an access to politics for the excluded and against the systems of exclusion. Politics takes place precisely through the process of contesting particular instantiations of rights, through the process of questioning their authoritative interpretations. Rights-claims are not bound by pre-political normative structures but are constitutive of open-ended political action. But how open-ended can political action be on this conception?

While agonists provide a useful conceptual apparatus for thinking about the conflictual nature of rights, they fail to account for the transcendent potential of rights-claims by reducing the latter to not-yet-enforced individual claims. In other words, as in liberal and discourse theories, rights are seen as parasitic on law.

[12] See the discussion on page: 178

The last section of Chapter Six will employ the framework of speech act theory in order to clarify the nature of this limitation of both the discourse-theoretical and the agonistic conceptions. This framework will further help us to capture the affinity of these theories with the juridical model and distinguish all of them from the conception of *rights as challenges* developed in Chapter Seven. In particular, I suggest that we can classify different theories of rights in terms of the assumptions that they make as to the performative character of a rights-claim. I argue that each of the theories mentioned above understand a rights-claim as a *directive*: 'an attempt to make the hearer to do something.'[13] Despite their differences, all three theories assume that a rights-claim acts as a directive aiming at making the addressee institutional order recognise/enforce the claimed right. The difference is that if for liberal theories the content of a directive is derived extra-politically (I call this command-conception), for discourse and agonistic theories it is articulated contextually, through a political action (demand-conception).

Crucially, every directive speech act requires that the hearer is *capable* of performing the propositional content of the speech act and that the speaker believes in the hearer's capacity.[14] This clarifies the problem with the construction of rights as directives. If we adopt the latter conception, it follows that the claimant of a right presupposes that the addressee extant order is a legitimate duty-bearer who, within its own resources, is capable of enforcing the right. In short, directive-rights invoke the possibilities provided by the *status quo* and assume that the propositional content of these speech acts can be realised within those possibilities.

Rights-claims understood in this manner cannot articulate radical needs, i.e. the needs that are produced by the extant order but whose satisfaction exceeds the possibilities of that order. As a result, rights-claims cannot inaugurate a radical discourse of rights. If we are to capture the ruptural potential of rights we have to go beyond the directive-structure of a rights-claim.

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[13] John Searle, 'A Classification of Illocutionary Acts' (1976) 5 Language in Society 1, 11

[14] John Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge University 1969) 66

THE RADICAL CONCEPTION: RIGHTS AS CHALLENGES

To complete the theory of the radical politics of social rights, Chapter Seven argues that, instead of directives or mere proposals, rights should be thought of as *challenges*. Only this conception can express and channel the ruptural, transformative force of rights-claims. Referring to speech act theory again, I conceptualise a radical rights-claim as the performance of an act of challenge.

Unlike directive speech acts, challenges do not presuppose the capacity of the hearer to perform the action in question. On the contrary, the type of a challenge that I have in mind aims precisely at demonstrating the inability of the hearer to perform the content of the challenge.

An example from everyday life is the situation when in the course of a conversation the speaker tells the hearer 'prove it', with a reference to some prior proposition and with the belief that the hearer will be incapable of doing so. Speaker's intention is to establish the falsity of some prior proposition. This is a speech act with a history to it.

What the issuer of a challenge expects from the hearer is either the latter's capitulation or an endeavour to justify the proposition; something the challenger believes is destined for failure. To challenge, then, is *to urge someone to prove a proposition that the hearer wants to be generally believed to be true*.

In the same manner, a radical rights-claim challenges the proposition according to which the extant order is capable of enforcing *all the rights that ought to be recognised and enforced*. This is a proposition based on which the extant order legitimises itself and the challenge is precisely to that legitimacy. Furthermore, the claimant of a challenge-right operates with an intention to demonstrate the addressee's inability to perform the demanded action. This is an act of provocation that questions and politicises the fundamentals of the existing system, ruptures the latter and, thereby, establishes a political space where radical alternatives

formulations of rights can be deliberated and contested. *La Via Campesina*'s call for food sovereignty is precisely such a challenge. It is neither a directive awaiting for a top-down enforcement, nor merely a proposal to fellow citizens to deliberate on the issue. It is a political *act in itself*; a political act of challenge.

THE POLITICS OF SOCIAL RIGHTS AND JUDICIAL REVIEW

In the last chapter, I will look at social rights adjudication in order, firstly, to clarify the depoliticising consequences of understanding rights as demands and commands, and, secondly, to test the appositeness of courts in terms of channelling the radical politics of social rights. I argue that the framework of the three conceptions of rights-claims developed in this thesis offers a good perspective on how courts depoliticise needs in different ways by treating rights-claims as commands and demands. Furthermore, against certain optimism about the transformative potential of courts, I argue that the manner in which existing forms of social rights adjudication frame rights-claims disallows the possibility of registering rights as challenges. As a result, courts are not capable of creating a political space where transformative formulations of rights can be deliberated and contested. While recourse to the judiciary might have other strategic benefits for radical movements – whether it is raising public awareness or achieving short-term gains (e.g. poverty alleviation) – courts' direct role in radical social change, at least considering the available models of adjudication discussed in current academic debates and adopted by the courts worldwide, seems limited.

Chapter One

Two Marxist Critiques of Rights

The aim of this thesis is to construct a theory of the transformative politics of social rights, i.e. the politics which challenges the fundamental social relations under capitalism and aims to transcend them. The present chapter will address the scepticism regarding the possibility of such a politics. In particular, I will distil and clarify two critiques of rights found in Karl Marx, and further elaborated by Evgeny Pashukanis and Wendy Brown respectively, which offer important insights into the limitations of legal rights and into the pitfalls of using the language of rights in articulating transformative demands. The main lesson that we learn from these critiques, is that as long as rights are parasitic on a liberal legal order - in other words, as long as rights are understood as individual claims, in principle enforceable by a bourgeoisie state - they are not capable of transcending that order, and cannot therefore inform transformative politics.

It is true that Marx was no theorist of rights. His views on the topic are scarce, scattered across several works and at times conflicting[15]. It seems indisputable, though, that Marx did not have a high opinion of rights. At worst, he saw them as

[15] See Jeremy Waldron and Amy Bartholomew both noting ambiguity in Marx's description of rights: Amy Bartholomew, 'Should a Marxist Believe in Marx on Rights?' (1990) 26 The Socialist Register 244, 237; Jeremy Waldron, 'Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man' (Routledge 1987) 135; See also: Richard Nordahl, 'A Marxian Approach to Human Rights', in Abdullahi Ahmed An-Na'im (ed) *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press 1995)

being complicit in capitalist exploitation and alienation, and at best, he considered their utility to be limited for the purposes of revolutionary struggles. I look at three authoritative, and, as we shall see, ultimately reductionist or simplistic, interpretations of Marx's views. According to the first, rights encourage a culture of egoism and adversity.[16] This view is said to be further mired in ideological assumptions according to which individuals are by nature self-interested, and that there can be no harmonious society free of conflicts. My contention is that this interpretation misses the crucial aspect of Marx's critique. As a consequence, the commentators either dismiss the whole critique too quickly - as we will see in the case of Claude Lefort - or transpose it into a different type of debate where the main concerns that motivated Marx are obscured - as will be evidenced by Jeremy Waldron's conflation of Marx with Communitarians. The problem for Marx, however, is not rights *per se*, but those *conditions* that require rights. Looking at Marx's theory of needs will help us to see that egoism, in this context, does not refer to an autonomous choice of an individual to promote one's particular interests which is then given its full scope through rights. Rather, selfishness is already constitutive of civil society because of the capitalist social relations which force us to satisfy our natural and human needs in an egoistic manner, by treating each other as a means to our private ends. What, then, is the role of rights in reproducing the capitalist system?

Drawing on Pashukanis' theory of law, I argue that *legal* rights, especially possessive rights, are integral to the system of egoistic needs. The formal equality and freedom of human beings that rights guarantee is not an ideological mystification, but a reality with material consequences. It is through abstracting individuals from their actual social contexts and transforming them into legal subjects, into bearers of rights and duties, that commodity exchange, the fundamental capitalist relation, is effectuated. Furthermore, political and social rights cannot but be appendages to private law,

[16] Waldron, 'Nonsense Upon Stilts', 253

thrown up by the latter and incapable of challenging the fundamental pillars of capitalism. I call this *the legality critique*.

The other two (reductionist) interpretations of Marx's views deal directly with the ideological function of rights, firstly, in presenting individuals as self-sufficient atoms and therefore expressing individualistic bias at the expense of communitarian values,[17] and secondly in obscuring actual material inequalities and social divisions through the *formal* equality that they espouse.[18] In terms of the former, I show how

Marx's target was not individualism *per se*, but a particular, bourgeois form of individualism. More importantly, and this applies to the second interpretation as well, it will be argued that the ideological effect of rights should be found not primarily in the way they obscure real inequalities, or in the sense that they wrongly present human beings as egoistic and their condition as alienated or atomised, but in that they wrongly present atomising and alienating powers as natural. I brand this *the depoliticisation critique*.

As was already noted, the purpose of this exposition and defence of Marx's views is not to reject rights. In fact, my intention in the upcoming chapters is to affirm their radical potential. I endeavour to do this by reference to their symbolic efficacy, which was theorised by Claude Lefort, and for the neglect of which he justly chastised Marx. Yet, in order to be able to see how this symbolic dimension might channel transformative demands, as opposed to being co-opted for the continual reproduction of the *status quo*, we have to pay closer attention to some of the lessons of the Marxist critique which are often trivialised or misunderstood (not least by Lefort himself). The lesson of the legality critique is that the radical transformative character of rights cannot be realised through law. As long as rights are parasitic on the bourgeois law, they cannot but leave capitalist social relations intact. As for the critique of depoliticisation, it demonstrates how the rights discourse risks naturalising

[17] Examples of such an interpretation can be found in ibid 183-190; Staughton Lynd, 'Communal Rights' (1984) 62 Texas Law Review 1417; Steven Lukes, *Marxism And Morality* (Clarendon Press 1985)
[18] Allen E Buchanan, *Marx and Justice* (Rowman and Littlefield 1982) 67

the *need* for rights, rendering the oppressive social relations which produce such a need politically irrelevant.

In the light of these considerations, in order to develop a theory of the transformative politics of rights, we need to start exploring the ways in which the rights discourse can escape the association with liberal legality and the reproduction of oppressive needs. The next chapter will argue that while the depoliticisation critique seems to question the possibility of politicising the needs which are created within the extant order in such a way as to challenge that order, the transformative politics of needs is indeed possible. The remainder of the thesis will be about constructing a theory of social rights capable of channelling such a politics.

1. INTRODUCING MARX'S VIEWS ON RIGHTS

Karl Marx locates his critique of rights within the context of his interpretation of the bourgeois revolutions of the 18th century.[19] In terms of his account, under *anciene regime*, man's material life was indistinguishable from his political and religious lives. Serfs were bound to their land and the land-owners to the hierarchical structures of privileges. This political bondage, together with the institutionalised religion, contained and stabilised the economic and political life, social divisions and private conflicts.

With the political revolution this bondage breaks down. The social whole gets split into the public sphere of the state and the private sphere of economic relations. Man is liberated both as a citizen – who now freely participates in the business of the state, - and as a private individual – who is free to operate as an economic being in a newly formed civil society. The material and spiritual elements of life, such as property and

[19] Karl Marx, 'On the Jewish Question' in Karl Marx and Frederick Engels, *Collected Works, Volume 3* (New York: International Publishers 1975)

religion, kept stable under feudalism, become unrestrained, no longer bound to privileges, no longer directly political: property ceases to be relevant for political participation and the *state* church is abolished. Yet, to "this proclamation of their civil death corresponds their most vigorous life, which henceforth obeys its own laws undisturbed and develops to its full scope".[20] The egoistic spirit is unleashed in the civil society, now a sphere where in the place of feudal bonds "[t]he sole bond holding [people] together is natural necessity, need and private interest, the preservation of their property and their egoistic selves."[21]

What is more, the political, communal life is subordinated to the private sphere of predominantly economic activities. It is the protection of the latter that is proclaimed as the ultimate goal of the former. Marx finds the expression of this paradox in the history of the French Revolution, where a people who are just beginning to tear down all social hierarchies and free themselves:

> "should solemnly proclaim the justification of egoistic man separated from his fellow men and the community… So even in the moments of youthful freshness and enthusiasm raised to fever pitch by the pressure of circumstances, political life is declared to be a mere means whose end is the life of civil society."[22] In short, the citizen is put to the service of an egoistic man.

This is the context against which Marx interprets the emergence of the 'so-called rights of man'. He offers a critique of rights in the famous, *On the Jewish Question*.[23]
The article was written as a response to Bruno Bauer who claimed in the context of

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[20]Elsewhere Marx notes: "As industrial activity is not abolished by the abolition of the privileges of the trades, guilds, and corporations, but, on the contrary, real industry begins only after the abolition of these privileges; as ownership of the land is not abolished when privileges of land ownership are abolished, but, on the contrary, begins its universal movement with the abolition of privileges and the free division and free alienation of land; as trade is not abolished by the abolition of trade privileges but finds its true materialization in free trade; so religion [and we could add private property] develops
in its practical universality only where there is no privileged religion [or private property]." Karl Marx, *Selected Writings* (David McLellan ed, 2nd edn, Oxford University Press 2000) 156

[21] Marx, 'On the Jewish Question', 164

[22] Marx, *Selected Writings* (McLellan ed) 62.

[23] Marx, 'On the Jewish Question'

the 'Christian State' of Prussia that in order for Jews (as well as Christians) to be emancipated politically, that is, acquire civil and political rights, they had first to throw off the burden of their religion.[24] Using Bauer as a foe to elaborate his own theory, Marx proceeds to argue that Bauer failed to grasp that political emancipation is perfectly compatible with private religiosity. Indeed it is precisely the fact that Jews can be emancipated politically without emancipating themselves from Judaism first, that proves that political emancipation falls short of true human emancipation.[25] The very fact that different religions not only continued to exist but even thrived in the politically developed secular states of the time, like the United States, provided direct evidence that full citizenship was limited and still harboured the systems of non-freedom. For Marx, full human emancipation cannot take place within the confines of the bourgeois state at all, since the state itself only exists insofar as it presupposes its opposite, the civil society, where the oppressive social powers persist. The state secularises itself by relegating religion to the private domain of civil society. Therefore, the modern secular state comes about by guaranteeing private religiosity; by granting the right to freedom of religion to its subjects and pushing the latter into civil society. Private property is a similar story: the state declared privileges based on property to be politically irrelevant, i.e. no longer relevant for the purposes of equal participation in the state, but did this *not* by abolishing property-based differences, but by relegating them to the private domain. Thus, instead of eradicating the differences produced by spiritual and material elements of life, the state "only exists on the presupposition of their existence; it feels itself to be a political state and asserts its universality only in opposition to these elements of its being."[26]

So, even though political emancipation is a step forward, "the final form of human emancipation within the hitherto existing world order" and "real, practical

[24] For some context to both Marx's and Bauer's articles see Yoav Peled, 'From Theology to Sociology: Bruno Bauer and Karl Marx on the Question of Jewish Emancipation', (1992) 12(3) *History of Political Thought* 463; also see Charles Barbour, 'Acts of Emancipation: Marx, Bauer, and "The Jewish Question"', in A. Yeatman and P. Birmingham (eds) *The Aporia of Rights: Explorations in Citizenship in the era of Human Rights* (Bloomsbury 2014)

[25] Marx, 'On the Jewish Question', 160

[26] *Ibid.* 153

emancipation",[27] the acquisition of civil and political rights fails to help individuals in throwing off the yoke of religion or of private property. The bourgeois revolution introduced merely an intermediary stage towards a real emancipation to be achieved through the abolition of the public/private divide.

Marx's most critical and controversial comments are directed towards the rights of man, or personal rights - property, liberty, security and equality. For him they "are nothing but the rights of a *member of civil society* – *i.e.*, the rights of egoistic man, of man separated from other men and from the community."[28] They are the rights of this separation, belonging to "an individual withdrawn into himself, into the confines of his private interests and private caprice".[29] On the other hand, he seems to be more generous to the category of political rights, noting that they "can only be exercised in community with others. Their content is participation in the community, and specifically in the political community, in the life of the state."[30] Political rights create a political community where a human being counts as a 'species-being' and is valued as a 'moral person'. Such rights are signs of historical progress, announcing the abolition of feudal privileges and the enforcement of equal participation in citizenship. But political rights are also signs of incomplete emancipation. (Generally, it is not quite clear what the object of Marx's criticism is when it comes to political rights, i.e. whether the problem that he sees in these rights is that they are just a sham, concealing and perpetuating class domination, or that they are limited in their reach and, if used at all in revolutionary struggles, should never be ends in themselves.)

Finally, Marx's views on social rights can be partly inferred from his critique of the welfare state in his later work, *The Critique of the Gotha Program.* [31] In this article Marx chastises the role of the concepts of rights and of distributive justice in the revolutionary struggles of the workers. His point is that the state-sponsored welfare

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[27] *Ibid.* 155
[28] *Ibid.* 162
[29] *Ibid.* 164
[30] *Ibid.* 160-161
[31] Karl Marx, 'Critique of the Gotha Programme' in Marx, *Selected Writings* (McLellan ed)

systems themselves have to be fed through the exploitative social and economic structures. The aim of the proletariat should be the means of production rather than the means of consumption. It is in this work that Marx dismisses rights as "obsolete verbal rubbish", "ideological nonsense", "trash", etc.[32]

So, how do we understand the above criticisms of rights? What does Marx mean by the egoism of the rights of man and how does this affect the other categories of rights? Below I will refer to several authoritative interpretations and show why they simplify, and are ultimately reductionist readings of, Marx's views. I will also offer what I see as two valuable critiques of rights discernible in Marx: the critiques of legality and of depoliticisation.

2. THE EGOISM OF RIGHTS

Under Claude Lefort's interpretation, "Marx's critique of the rights of man is guided by the idea of a decomposition of society into individuals, a decomposition which seems to be the result of the unleashing of private interests, of the dissolution of

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[32] *Ibid.* 615. Following this hostile attitude, many authors have questioned whether or not Marx repudiated the very idea of rights. The stakes are high here, since, depending on the answer and on one's theoretical preferences, either rights or the Marxist tradition itself might be branded as indefensible. According to some prominent commentators like Allen Buchanan, Steven Lukes, Samuel Bowles and Herbert Gintis, Marx did reject the very idea of rights. See: Buchanan, *Marx and Justice*; Steven Lukes, 'Can a Marxist Believe in Rights?' (1982) 1 Praxis International 334; Samuel Bowles ad Herbert Gintis, *Democracy and Capitalism: Property, Community and the Contradictions of Modern Social Thought* (New York: Basic Books 1986). There are also those, like Jeremy Waldron, who leave the question open, or like Amy Bartholomew for whom rights definitely have a place in Marx. See:

Bartholomew, 'Should a Marxist'. Irrespective of Marx's personal views on the matter, a further inquiry is sometimes launched to ascertain whether a Marxist, i.e. someone who buys into Marx's main postulates about the capitalist mode of production, on the risk of betraying the Marxist tradition, can or should believe in rights. For the debate on these matters see: Jay Bernstein, 'Right, Revolution and Community: Marx's On the Jewish Question' in Peter Osborne (ed) Socialism and the Limits of

Liberalism (Verso 1991) 91-119., Drucilla Cornell, 'Should a Marxist Believe in Rights?' (1984) 4 Praxis International 45; William McBride, 'Rights and the Marxian Tradition,' (1984) 4 Praxis International 57;
Christopher Boyd, 'Can a Marxist Believe in Human Rights?' (2009) 37(4) Critique: Journal of Socialist Theory 579

bonds of dependence which were economic, social and political and which formed quasi-organic wholes".[33] The emergence of rights in the 18th century "served only to provide a cover for the dissociation of individuals in society and a separation between this atomised society and the political community."[34] The role of rights, then, is to maintain the illusion of the independence of particular elements of civil society.

As we saw, liberal ideology, according to Marx, presents the modern split between public and private spheres as a final emancipation. But Marx has his own theory of emancipation from the perspective of which the liberal version is seen as a mere illusion. The problem with Marx, for Lefort, is that he is not capable of dissociating political emancipation from political illusion. Both the sphere of politics presented as the sphere of the universal and the sphere of society "reduced to a combination of particular interests and individual existences, broken down into its component parts"[35] are seen as "the two poles of the same illusion"[36].

Referring to the experience of the 20th century totalitarian state which was specifically built upon the ruins of human rights, on the abolition of the division between politics and civil society, Lefort demonstrates that rights do not merely sustain an illusion of emancipation but represent a crucial buffer zone between civil society and state power. [37]

Furthermore, for Lefort, the public/private split does not have to result in an egoistic society and rights need not promote egoism. This is an image which might be discernible in the revolutionary declarations, but are part of an ideology that has to be overcome. Lefort seems to suggest that Marx's critique of rights is a critique of a certain *culture* that rights create. This is a culture of egoism, where individuals are "turned into"[38] isolated monads and separated from each other. But even if the texts of the revolutionary declarations support this view, this is merely one, ideological

[33] Claude Lefort, *The Political Forms of Modern Society* (Polity 1986) 253
[34] *Ibid.* 245
[35] *Ibid.* 247
[36] *Ibid.*
[37] *Ibid.* 246-248
[38] *Ibid.* 248

version of what rights do: "Marx falls into and draws us into a trap... of ideology. He allows himself to become the prisoner of the ideological version of rights, without examining what they mean in practice, what profound changes they bring to social life."[39] Far from being a mere veil, rights represent a "new mode of access to the public sphere."[40] They "testify to the existence of a new network of human relations and bring it into existence."[41] The problem then is not what Marx sees but what he cannot find in rights.[42]

As I will argue later, Lefort's account of what Marx neglected is largely correct and is a crucial starting point for rethinking the importance of rights. His interpretation of what Marx actually said is not quite accurate however. Without considering the problematic aspects of rights, the Lefortian project itself loses much of its appeal.

This inaccuracy stems from Lefort's misconstruction of Marx's critical analysis of civil society. The collapse of feudalism did not produce mere individualism as Lefort seems to suggest, but, in Wendy Brown's words, "anxious, defended, self-absorbed, and alienated Hobbesian subjects who are driven to accumulate, diffident toward others, obligated to none, made impossibly accountable for themselves, and subjected by the very powers their sovereignty is supposed to claim."[43] Additionally, this is not an ideological picture, but a fact for Marx. Hence, rights do not find individuals in their innocent state only to bring out their egoistic and confrontational nature. It is the material conditions of life, rather than legal and philosophical concepts, that produce this type of human beings and their relationships in the economic sphere. Jeremy Waldron's similarly wrongheaded interpretation will further clarify where commentators on Marx usually err.

Arguing against Allen Buchanan's translation of Marx's description of rights as egoistic into a proposition that rights are 'valuable *only* for egoistic man', Waldron

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[39] *Ibid.* 249

[40] *Ibid.*

[41] Claude Lefort, *Democracy and Political Theory* (David Macey trans., U of Minnesota P, 1988) 32

[42] Lefort, *The Political Forms,* 248

[43] Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton University Press, 1995), 113

understands Marx to be making "a stronger point" that "the concerns articulated by [the rights of man] are constitutive of the *mentality* of the member of capitalist civil society."[44] If Buchanan's point is that rights are necessitated by the conflicts between individuals, produced, in turn, by the material conditions of civil society, Waldron seems to discard or minimise the relevance of *the material* prerequisites for egoism and locates the prerequisites, at least partly, in the *mentality* of individuals.

For Waldron, Marx's views on rights are "bound up with his general view of man in capitalist society. Such a society fosters an illusion of self-sufficient atomism – of individuals free of any essential dependence on others."[45] But since, as Marx himself argues, man is a *zoon politikon* - a social animal who develops only in society - it remains a mere illusion. This illusion is, however, embedded in the culture and consciousness of civil society and produces man who "regards other men as a means, degrades himself into a means, and becomes the plaything of alien powers."[46] The egoism of rights symbolises this construction of the individual in bourgeois society. It follows, then, that on this interpretation what requires to be done is a lifting of the veil which clouds the existing intrinsic connectedness of human beings.

Waldron goes so far as to directly conflate Marx with a type of criticism espoused by communitarian authors.[47] The latter charge rights, among other things, with forfeiting communitarian values because of their individualistic and adversarial character.

The most famous of all communitarians, Charles Taylor, in his famous essay

'Atomism', criticises liberalism for its emphasis on individual rights.[48] The liberalism of social contract theory, on this account, posits "a vision of society as in some sense

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[44] Waldron, 'Nonsense Upon Stilts', 127 [emphasis added]

[45] *Ibid.* 28

[46] Karl Marx, *Early Writings* (David McLellan's ed., Basil Blackwell 1972) 140 (as cited in Waldron, 'Nonsense Upon Stilts', 129)

[47] Waldron suggests that Marx's concerns with rights were taken up by what he calls "new communitarianism". Waldron, *Nonsense Upon Stilts*, 166; For Communitarian critiques of rights see: Michael Sandel, *Liberalism and its Critics* (Oxford, Basil Blackwell, 1984)

[48] Charles Taylor, *Philosophy and the Human Sciences, Philosophical Papers Vol. 2* (Cambridge University Press 1985) 187-211

constituted by individuals for the fulfilment of ends which were primarily individual."[49] Such a vision "asserts priority of the individual and his rights over society."[50] The overemphasis on the individual results in neglecting the responsibilities to further the interests of a particular community which gives us our identity.[51] Such a view is made possible by an atomistic conception of human nature and the human condition, which affirms the self-sufficiency of the individual.[52] Taylor then proceeds to demonstrate the contrary, namely, that human beings are social animals and that the doctrine of the primacy of rights neglects this. Michael Sandel also attacks a particular liberal *vision* which is "embodied in the practices and institutions most central to our public life." [53] This vision understands the justness of a society not in terms of its *telos* but in terms of how it respects the *teloi* of atomistic individuals, or, in Sandel's vocabulary, of "unencumbered selves".[54] The result is the prioritisation of rights over common good. Marry Ann Glendon takes issue with the adversarial nature of rights-talk which undermines communitarian values.[55]

The point I am trying to make with this brief overview of the communitarian critics of rights, is that they all locate the problem with rights in the domain of ideas. They all chastise certain visions and cultures that rights entrench and either suggest abandoning the language of rights as such[56] or propose a better balancing of rights with communitarian values.[57]

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[49] *Ibid.* 187

[50] *Ibid.*

[51] *Ibid.* 188

[52] *Ibid.*

[53] Michael Sandel, 'The Procedural Republic and the Unencumbered Self', (1984) 12 Political Theory 81, 82

[54] *Ibid.*

[55] Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press 1991)

[56] For instance, Mark Tushnet proposes a substitution of the language of rights with that of *needs*. Mark Tushnet, 'An Essay on Rights' (1984) 62 *Texas Law Review* 1363. Michael Sandel also argues for abandoning "the politics of rights" and for substituting it with a "politics of common good" - Michael Sandel, 'Morality and the Liberal Ideal' (The New Republic, May 7, I984)

[57] Amitai Etzioni, *The New Golden Rule: Community and Morality in a Democratic Society* (Basic Books 1997)

Incidentally, the idealism of Bauer was the main object of Marx's attack in *On the Jewish Question* as well. Bauer had argued previously[58] that religious consciousness was a defect but a *private one* to be rectified by the practitioners themselves. Only by overcoming this narrowness could the Jews become politically emancipated, i.e. acquire civil and political rights, provided the state, in turn, gave up its religiosity. But

Marx turned around Bauer's argument. He transformed, what he called, Bauer's theological criticism into a political one. Religious narrowness for Marx is now the manifestation of secular narrowness, i.e. the lack of "real freedom and equality", not its basis.[59] Rather than being a private matter, religious narrowness has a political source. It is a symptom of a social pathology sustained by social and political powers not a 'disease' itself. As he notoriously notes elsewhere: religion is "the opium of the people"[60] sedating the (socially produced) hardships of this world. Therefore, it could not be 'cast off as a snake's skin'.[61]

I argue that the same line of criticism applies to rights. The problem is not rights *per se*, but rather the social relations that necessitate them. When Marx talks about egoism he is not referring to a moral choice of an individual to behave in a selfish manner, which is then given its full scope through rights. Rather, selfishness is already constitutive of civil society because of the relations of capitalist production and exchange which force us to satisfy our natural and human needs in an egoistic manner, by treating each other as a means to our private ends. Therefore, paraphrasing Marx, the demand to give up rights should be understood as the demand to give up the existing state of affairs that necessitates them.[62] In order to explain how egoism is produced by capitalist social relations, I now turn to Marx's

[58] Bruno Bauer, 'The Jewish Question' in L. S. Stepelevich (ed.), *The Young Hegelians: An Anthology* (Cambridge 1983)

[59] Marx, 'On the Jewish Question', 151

[60] Karl Marx, 'Contribution to the Critique of Hegel's Philosophy of Law. Introduction' in Karl Marx and Frederick Engels, *Collected Works, Volume 3* (New York: International Publishers 1975) 175

[61] Marx, *Selected Writings* (McLellan ed) 48

[62] Marx, 'Contribution to the Critique', 176

theory of needs.[63] I will then explore the role of rights in enabling and perpetuating the capitalist system of needs.

3. MARX'S THEORY OF NEEDS

Marx distinguishes between egoistic and human needs. Crucially, this is not a distinction between different lists of needs but a distinction of form, what Andrew Chitty calls a distinction of 'ways of needing.'[64] Individuals have natural needs whose satisfaction is necessary for their survival and reproduction. But under capitalism the labourer is separated from the means of production and the objects that would meet his natural needs are not directly available to him. They have to be earned through a capitalist exchange. Chitty explains the nature of a capitalist exchange by contrasting it with "social interchange".[65] The former is a conditional one: an individual gives the other something only on condition that he will receive some other thing in return. For instance, a cobbler satisfies the needs of others, by producing shoes, in order to meet his own natural needs. His attitude towards the needs of others is *self-interested*, *egoistic*. He treats other human beings as a means towards his private ends. It is in this sense that within capitalist social relations natural needs take the form of egoistic needs. In a capitalist society "every individual is a totality of needs and only exists for the other person, as the other exists for him, in so far as each becomes a means for the other".[66]

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[63] Cheah Pheng suggests that Marx's critique of rights is better understood precisely in the context of his theory of needs. Cheah Pheng, 'Second Generation Rights as Biopolitical Rights' in Costas Douzinas and Conor Gearty (eds), *The Meanings of Rights: The Philosophy and Social Theory of Human Rights* (Cambridge University Press 2014)

[64] Andrew Chitty, *The Early Marx on Needs* (1993) 64 Radical Philosophy 23, 23

[65] *Ibid.* 29

[66] Karl Marx, 'Economic and Philosophic Manuscripts of 1844' in Karl Marx and Frederick Engels, *Collected Works, Volume 3* (New York: International Publishers 1975) 317.

This does not, however, mean that production for one's individual subsistence carried out in isolation, i.e. unmediated by economic relations, would amount to the satisfaction of a truly *human* need. Human needs arise once individuals go beyond mere natural needs. The content of human needs is the satisfaction of the needs of others. It is here that the idea of the *interchange* of the products of labour as a truly human activity comes in. It is in this way, by producing for other human beings, that man achieves the realisation of his essence and the satisfaction of his true human need: the need for *the other*. Paradoxically, the conditions under which meeting natural needs is no longer the sole aim of human labour are created precisely with the emergence of capitalism.[67] Capitalist development produces what Marx calls 'a man rich in needs'. Over time, human needs become more diverse and refined. The realisation of an ever growing number of needs increasingly requires the involvement of other human beings, resulting in human beings needing each other, which potentially leads to a truly human existence based on the social interchange of productive activities and products.

Yet, even though capitalism develops vast quantities of new needs, the individual is impoverished by having his needs reduced to greed. Even though the cobbler in the above example produces with the needs of others in mind, he does it out of self-interest, in an alienated way, through a conditional exchange, treating others as a means to his private ends.

> "As soon as exchange occurs, there is an overproduction beyond the immediate boundary of ownership. But this overproduction does not exceed selfish need. Rather it is only an indirect way of satisfying a need which finds its objectification in the production of another person. . . .I have produced for myself and not for you, just as you have produced for yourself and not for you, just as you have produced for yourself and not for me… No one is gratified by the product of another. Our mutual production means nothing for us as

[67] Agnes Heller, *The Theory of Need in Marx* (London: Allison and Busby 1976) 32

> human beings. . . .Human nature is not the bond of our production for each other… Each of us sees in his product only his own objectified self-interest and in the product of another person, another self-interest which is independent, alien, and objectified. As a human being, however, you do have a human relation to my product; you want my product. It is the object of your desire and your will. But your want, desire, and will for my product are not impotent. My social relationship with you and my labour for your want is just plain deception. . . .Mutual pillaging is at its base."[68]

In sum, to respond to the above interpretations of Marx, it is the capitalist social relations, not the culture and consciousness embedded in rights, which *produce* selfish behaviour. The response to the egoism of civil society is not to change *ideas*, not to transform an ideological image, but to eliminate those powers that are responsible for this situation. The "illusion" in Marx is the *naturalness* of those powers that produce egoism *not* the egoism that *ideally* exists in the mentality of the members of civil society. But to say that rights do not create oppressive social relations is not to say that they have no role in sustaining and perpetuating such relations. I suggest that analysing Marx's views on rights in terms of the twin critiques of *legality* and of *depoliticisation* will demonstrate how rights are implicated in the reproduction of the capitalist system. The next section will take up the task of explicating *the legality critique* which consists in the argument that the legal *form* is essential to capitalist relations. While commodity exchange necessitates possessive rights - so that the participants in the capitalist market are constituted in terms of potential bearers of contractual rights and duties - social rights are thrown up by these economic relations to remedy their inevitable externalities. The section below will be followed by a discussion of how the rights discourse further depoliticises and perpetuates the capitalist system of needs which requires rights in the first place.

[68] Karl Marx, 'Excerpt-Notes of 1844' in Marx, *Selected Writings* (McLellan ed) 50-51

4. THE LEGALITY CRITIQUE

How do legal rights perpetuate capitalist relations? Is it that the formal and abstract nature of legal rights obscures the real inequalities and the asymmetries of power created by the capitalist economy? Or is it that legally guaranteed rights – especially, the right to private property - are mere coercive instruments used by the dominant classes to maintain their economic power? A prominent Marxist legal theorist, Evgeny Pashukanis, had to respond to the Marxist schools of law of his time, which gave positive answers to the above questions.[69] Without denying the importance of the ideological or coercive elements intrinsic to bourgeois legal concepts, Pashukanis maintained, and rightly so, that such a focus said little about the actually existing and working law, and about the legal *form* itself.

His argument is similar to Marx's point about the ideological nature of the concepts of commodity, exchange value and value. What Marx calls 'commodity fetishism', is a belief that goods possess value as an innate quality; a belief that neglects and mystifies the social relations of production as the defining factor of the exchange-value of goods. Marx is, however, fully aware that commodity exchange is not just an idea. If anything, it does have a *material* existence in being a driving force of capitalist production. Similarly, Pashukanis observes that

> "[h]aving established the ideological nature of particular concepts in no way exempts us from the obligation of seeking their objective reality, in other words the reality which exists in the outside world, that is, external, and not merely subjective reality… The ideological nature of the concept does not obliterate the reality and the material nature of the relations which it expresses."[70]

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[69] Evgeny Pashukanis, *Law and Marxism: A General Theory* (Barbara Einhorn trans., Chris Arthur ed., InkLinks 1978)
[70] *Ibid.* 74-75

Pashukanis' aim is precisely to extrapolate the reality and the objective role of legal concepts in capitalist relations. It is from Pashukanis' commodity-form theory of law that I distil the legality critique of rights.

In *The General Theory of Law and Marxism* Pashukanis offers a socio-historical interpretation of the legal form.[71] Law for him is a historical phenomenon, and should be studied in that way. Arguing against his contemporary Hans Kelsen, Pashukanis notes that the positivist way of arriving at the definition of law through formal logic renders socio-economic and historical factors irrelevant to legal science: "[s]uch a general theory explains nothing and turns its back from the outset on the facts of reality, that is of social life, busying itself with norms without being in the least interested in their origin (a meta-juridical question!), or in their relationship to any material matters"[72] In other words, *Grundnorm* - or a command of a sovereign,[73] or 'the rule of recognition'[74] for that matter - cannot capture the distinctiveness of the legal form. A Marxist theory of law, according to Pashukanis, should concern itself with those material conditions which in a certain historical context necessitated that the regulation of social relations assume a *legal* character. It is the material relationships of capital, not legal norms authoritatively enacted by a sovereign, that provide content for the legal relationship.

The point Pashukanis is making here is not reducible to a proposition that economic processes call for particular laws which end up serving the interests of the capitalist class. While Pashukanis did not deny the possibility of direct manipulation through concrete laws, for him, a specifically jurisprudential question was why certain social relations need to be regulated through the *legal form* in the first place. In this way, he turns around the jurisprudential inquiry and instead of deriving the legal relation from the legal norm, as positivists do, Pashukanis suggests that the opposite is the

[71] *Ibid.* 107.

[72] *Ibid.* 52. For Kelsen's criticism of Pashukanis see: Hans Kelsen, *The Communist Theory of Law* (Praeger 1955). On the relationship between Pashukanis' theory with liberal jurisprudence see: Nigel Simmonds, 'Pashukanis and Liberal Jurisprudence' (1985) 12(2) Journal of Law and Society 135.

[73] John Austin, *The Province of Jurisprudence Determined* (Wilfrid Rumble ed, Cambridge University Press 1995).

[74] H L A Hart, *The Concept Of Law* (Clarendon Press 1961).

case. He sees the legal relation as being both historically and logically prior to the legal norm: "Of course one cannot assert that the relation between creditor and debtor is generated by the system of compulsory debt collection operating in the state in question. The objective existence of this system certainly guarantees and safeguards the relation, but it in no way creates it."[75] Pashukanis further refers to international law as an example of how legal relationships can be established and maintained without the need for a norm-imposing and norm-enforcing authority.[76]

Furthermore, not only do legal relations precede the legal norm, but these relations themselves derive their content from the material relations of production. In particular, Pashukanis proceeds to link the emergence of law to the emergence of capitalist society and to the requirements of commodity exchange.

We already know from Marx that a commodity is the basic element of a capitalist economy, distinguishing the latter from other historical forms of economic organisation. Commodities are produced for the sole purpose of being exchanged on the market. But because they vary in terms of material qualities, in terms of their use-values, in order for them to be exchangeable on the market, they need to be somehow equated through a common denominator. The *value* of commodities is, then, an abstraction that makes commodities commensurable. Such value is external to commodities and to their material qualities, and is determined not by the private wills of their owners, but through a market mechanism.

More importantly, as Marx explains:

> "Commodities cannot themselves go to market and perform exchanges in their own right. We must, therefore, have recourse to their guardians, who are the possessors of commodities. Commodities are things, and therefore lack the power to resist man. . . . In order that these objects may enter into relation with each other as commodities, their guardians must place themselves

[75] Pashukanis, *Law and Marxism*, 89

[76] *Ibid.*

> in relation to one another as persons whose will resides in those objects, and must behave in such a way that each does not appropriate the commodity of the other, and alienate his own, except through an act to which both parties consent. The guardians must therefore recognize each other as owners of private property. This juridical relation, whose form is the contract, whether as part of a developed legal system or not, is a relation between two wills which mirrors the economic relation. The content of this juridical relation . . . is itself determined by the economic relation."[77]

This passage from *Das Kapital* serves as a blueprint for Pashukanis. He picks up where Marx left off and develops a general theory of law according to which the legal form correlates with the essential qualities of commodity exchange.[78]

In contrast to feudal societies, where rights accrued alongside privileges, and where the economy was a relationship of specific individuals in specific social spheres, capitalism brought about the consolidation, generalisation and legalisation of all economic relations. The distinctiveness of capitalist relations, with generalised commodity production and exchange at their foundation, necessitated an abstract bearer of rights who could freely and wilfully participate in the market. Therefore, while a legal subject as a bearer of rights is entitled to more than just a capacity to alienate property, it is precisely for the facilitation of the circulation of goods that such a subject first emerges historically.

Pashukanis follows Marx in arguing that for a product to act as a commodity, it has to relate to other commodities in terms of exchange-value, which, in turn, is determined by the market mechanism and not by the will of a commodity-owner or by any other external reason. It follows then that, "for the products of human labour

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[77] Marx, *Selected Writings* (Lawrence ed) 244

[78] For a good overview of Pashukanis' work see: China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Leiden: Brill 2005); Piers Beirne and Robert Sharlet, 'Introduction' in Piers Beirne and Robert Sharlet (eds.) *Pashukanis: Selected Writings on Marxism and Law* (Academic Press 1980);
Chris Arthur, 'Introduction' in Evgeny Pashukanis, *Law and Marxism: A General Theory* (Barbara Einhorn trans., Chris Arthur ed., London: InkLinks 1978)

to be able to relate to each other as values, it is necessary for people to relate to each other as autonomous and equal personalities."[79] What law does is to guarantee this autonomy and equality and therefore an 'uncoerced harmonious process' of exchange. In a nutshell, legal subjects, in their capacities as property owners, wilfully enter into a relationship with other property-owners through an institution of contract, keeping the capitalist system going. Crucially, the formal equality and freedom of legal subjects is not an ideological mystification, but a reality with material consequences.

At the same time, of course, actual human beings, as opposed to their legal representations, are not equal. For instance, in the situation where a labourer, because of the lack of the means of production, has to sell her labour power to a capitalist, law is there to present this relationship as one between two equal entities with a free will to contract. This is an *actual* equality, but only within the legal discourse, where the parties to a contract are abstracted from actual social situations and transformed into abstract bearers of rights and duties. In this way, legal fetishism complements commodity fetishism.[80]

While the relations based on property are the source of the legal relation, Marx observes that the two are so intertwined that it becomes very difficult to distinguish them. Pashukanis takes this observation seriously and argues that it is in regulating the *conflict* of private interests that law distinguishes itself from the relations of production and exchange:

> "[a] basic prerequisite for legal regulation is the conflict of interests. This is both the logical premise of the legal form and the actual origin of the development of the legal superstructure. Human conduct can be regulated by the most complex regulations, but the

[79] Pashukanis, *Law and Marxism,* 109

[80] *Ibid.* 117

> juridical element in the regulation of human conduct enters where the isolation and opposition of interests begins."[81]

Thus, the *differentia specifica* of legal regulation is a presumption of a private conflict, of "contestation – two sides defending their rights."[82]

After proclaiming contract, property and private conflict as quintessential elements of law, it is no surprise that Pashukanis takes private law to be the "fundamental, primary level of law".[83] Echoing Marx's analysis in *On the Jewish Question*, he considers public law to be "continually repulsed by private law, so much that it attempts to define itself as the antithesis of private law, to which it returns, however, as to its centre of gravity."[84] In other words, public law is derived from private conflicts. As Bob Jessop explains:

> "The legal form of the Rechtstaat (or constitutional state based on the rule of law) characteristic of bourgeois societies is required by the nature of market relations among free, equal individuals. These must be mediated, supervised and guaranteed by an abstract collective subject endowed with the authority to enforce rights in the interests of all parties to legal transactions."[85]

"Every legal relation", claims Pashukanis, "is a relation between subjects".[86] Private law is the essence of law, with public law being a derivative phenomenon.[87]

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[81] Arthur, 'Introduction', 13

[82] Arthur, 'Introduction', 15; This can be observed in the comparison between legal regulation and technical regulation. For illustration, Pashukanis invokes a distinction between train timetables that regulate rail traffic and the norms that deal with the liability of the railways towards the consigners of freight. The former is an example of technical regulation. It is characterised by singleness of purpose and directs a collective towards shared goals (e.g. the proper functioning of the railway system). Technical regulation, or administration of things, can be effectuated through different normative frameworks. In the latter, however, we are dealing with a legal phenomenon, because the norms in question are concerned with the rights and obligations arising between different interest-groups, and therefore presuppose a potential clash between private claims.

[83] Pashukanis, *Law and Marxism,* 103

[84] *Ibid.* 106

[85] Bob Jessop, *State Theory* (Pennsylvania State University Press 1990) 53

[86] Pashukanis, *Law and Marxism,* 109

[87] Paul Hirst, 'Law, Socialism and Rights' in Pat Carlen and Mike Collison (eds) *Radical Issues in Criminology* (Rowman & Littlefield Publishers 1980) 97

Now, some critics have noted how Pashukanis' framework cannot account for many developments in the 20th century, especially the advent of the welfare state which demonstrated how the interventions of the state into the economy conflict with the interests of particular capitalists.[88] From taxation to affirmative action and beyond, legal instruments have been used to curtail the often destructive *laissez-faire* economy prevalent among 19th century societies. Yet, China Miéville convincingly argues that Pashukanis' point is not that the legal form necessarily benefits the capitalist class at the expense of the rest of society; rather, we need to realise how legal interventions, however damaging they might be to particular business interests, cannot but serve the interests of the capitalist *project* as a whole.[89]

All legal interventions, as Miéville shows,[90] deal with particular problems that the on-going class conflict creates, by simultaneously guaranteeing the fundamental process of the system: commodity exchange. Law cannot but leave the process of commodity exchange untouched. Concrete problems, for instance in the case of gender or racial inequality in labour relations, are dealt with by abstracting a disadvantaged party to the level at which she can operate as a free and formally equal commodity owner ready to fully participate in commodity exchange. Commodity exchange is the essence and the limit of the legal form.

This helps us clarify a Marxist critique of welfare state and social rights. The implementation of the principles embodied in social rights is carried out through the same logic: the problems that these rights are to remedy are abstracted within the legal form "thus inevitably leaving particular lacunae or creating new problems that cannot be solved by those moments of abstraction to be dealt with by the next wave of administration, in response to class conflict."[91] Social rights, like political rights, are

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[88] Susan Von Arx, 'An Examination of E.B. Pashukanis's, General Theory of Law and Marxism' (PhD thesis, SUNY 1997) 203

[89] China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Leiden: Brill 2005) 108

[90] *Ibid.* 104 ff

[91] *Ibid.* 112

thrown up as a consequence of the operation of possessive rights. Claus Offe's observations can further clarify this gap-filling nature of social rights.

Offe proposes to analyse social rights as an instrument whereby the state transforms non-wage-labourers into wage-labourers.[92] According to his Marxist model of analysis, the dispossession of the labour power of the means of subsistence by factors ranging from the destruction of traditional agrarian labour to cyclical economic crises, from technological advancements to the global expansion of markets, does not directly translate into its (re)incorporation into wage-labour relationships. In order for dispossessed potential workers to form an active proletariat, social policy and welfare rights have to be in place.

Offe identifies three main problems that social rights are there to tackle. Firstly, this process of the commodification of labour power requires motivating the dispossessed class to enter the labour market. This is effected through procuring certain sets of values or criminalising non-market based forms of subsistence, for instance, begging. As Offe quoting Marx argues, this function of social rights guarantees the situation in which "the working class by education, tradition, and habit looks upon the requirements of that mode of production as self-evident natural laws."[93] Secondly, social policy provides those socio-structural preconditions like health, education, care for the elderly etc. that have to be secured for the continual reproduction of labour power. Thirdly, in order to stabilise labour power as a commodity the social institutions of the state have to strike a fine quantitative balance between the wage-labourers and the workers who cannot, at any given time, be absorbed by the labour market due to lack of demand. In sum, social rights operate to enable capitalist production by regulating the process of proletarianization; "social policy is not some sort of state 'reaction' to the 'problem' of the working class; rather, it ineluctably contributes to the constitution of the working class."[94]

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[92] Claus Offe, *Contradictions of the Welfare State* (John Keane ed., MIT Press 1984) 92
[93] *Ibid.* 96
[94] *Ibid.* 98

To recap at this point: we saw that the existence of an abstract bearer of rights and duties - of a formally equal and free subject who can wilfully enter into a contract - is essential for individuals to interact in a capitalist market. Bourgeois law which creates such subjects thus enables commodity exchange. Furthermore, if private law is the foundation of bourgeois law, political and social rights are appendages to possessive rights, filling the gaps that the latter's operation leaves behind. In other words, it is the capitalist system of needs sustained and enabled by possessive legal rights that necessitates political and social legal rights. The legality critique of rights consists, then, precisely in the understanding that law cannot be neutral; that because of its form, and irrespective of its content, law is unavoidably a *class* law. The legality critique posits that legal rights are integral, and necessarily so, to capitalist social relations.

There is one further ground for scepticism about Pashukanis' theory though. Addressing it will lead us to the second critique explored in the next section. Bill Bowring notes that even though Miéville has read Bob Fine's criticism of Pashukanis, he nevertheless entirely neglects Fine's point.[95] Fine argued that Pashukanis is wrong to base his theory only on commodity exchange without taking heed of the processes of production.[96] If Pashukanis claims that his is a *Marxist* theory of law, then he loses sight of the fact that for Marx, it is the extraction of surplus from the labourer by the propertied class at the level of commodity production that is essential in understanding capitalism.

Firstly, neither Bowring nor Fine offer any explanation as to how the focus on commodity production would alter Pashukanis' theory. Secondly, Bowring's criticism is odd because Miéville *does* engage with this point and with none other than Fine himself.[97] Thirdly, as Chris Arthur made clear long before Miéville, the charge against

[95] Bill Bowring, 'Positivism versus self-determination: the contradictions of Soviet international law' in Susan Marks (ed) *International Law on the Left: Re-examining Marxist Legacies* (Cambridge University Press 2008) 150-151

[96] Bob Fine, *Democracy and the Rule of Law. Marx's Critique of the Legal Form* (Blackburn Press 2002) 157; for a similar criticism of Pashukanis see Alan Hunt, 'Marxist Theory of Law', in Dennis Patterson (ed) *A Companion to Philosophy of Law and Legal Theory* (Blackwell Publishing 1996) 360

[97] Miéville, *Between Equal Rights,* 91

Pashukanis that he errs in not deriving law from the relations of production can hardly be sustained. This is because:

> "it is precisely one of the interesting features of bourgeois exploitation that it inheres in economic relations that *do not* achieve formal expression. Formally speaking, Pashukanis is *correct* to refer law only to social relationships based on commodity exchange… The monopolisation of the means of production by the capitalist class is an extra-legal fact (quite unlike the political domination of the feudal lord). The bourgeois legal order contents itself with safeguarding the right of a property owner to do as he wishes with his property – whether it be the right of a worker to sell his labour power because that is all he owns, or that of the capitalist to purchase it and retain the product."[98]

Arthur goes on to say that "Pashukanis should perhaps have laid greater stress on the need to criticise law not only on the basis of what it shows (the fetishisation of relationships of commodity exchangers) but on what it does not, and cannot, show, and, indeed, ideologically cloaks."[99] In the next section I intend to stress the role of rights in such an ideological cloaking of oppressive social relations. I argue that the ideological role of rights is not contained merely in their legal form. The *discourse* of rights should also be questioned for naturalising the need for rights which in turn is produced by material conditions of life, the conditions that themselves become depoliticised and perpetuated by the naturalisation of such a need. But before extrapolating these ideological effects of rights, we need to deal with two other (mis)interpretations, or rather reductions, of Marx's views also based on the critique of ideology.

[98] Arthur, 'Introduction', 30

[99] *Ibid.*

5. THE DEPOLITICISATION CRITIQUE

According to one interpretation, Marx railed against rights because of their individualistic form. Waldron explains the individualistic form of rights in terms of the "claims that individuals make one-by-one, each on his own account. Together a set of individual rights (to free speech, to vote, etc.) may help constitute a form of community, but the idea still evinces a reductionist and atomistic approach to human practice."[100] On this view, Marx saw rights as standing for a particular, problematic, type of justification of social organisation – an individualistic one. The frame of reference of rights is always the individual, which leads the critics to claim that this clouds the other possible justifications, not least a justification to community.[101] What this amounts to is the predominance of individual interests over communal interests.[102]

But this interpretation neglects the fact that Marx was not against individualism *per se*, but against a particular, bourgeois form of individualism. To begin with, Marx's sympathetic description of political rights as being about participation in the community, - even though, as Waldron reminds us, such a participation is made possible through the rights which are already framed individualistically[103] – suggests

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[100] Waldron, 'Nonsense Upon Stilts', 127. Waldron goes on to argue that - even if they necessarily express individual interests, even if certain communal goods cannot be expressed through them, and even if there are situations where standing up for one's right would cause an unnecessary conflict (e.g. in marital relationships), - rights represent an important background defensive structure in case of a dissolution of communal ties. To criticise rights for their individualistic form then means to assume the possibility of a perpetually harmonious society. Furthermore, even if the starting point of rights is individualistic, they protect important individual interests the securing of which is necessary for any meaningful participation in the community. ibid 183-190

[101] Examples of such an interpretation can be found in Waldron, 'Nonsense Upon Stilts', 183-190; Lynd, 'Communal Rights'; Lukes, *Marx and Morality*.

[102] This critique of rights informs Critical Legal Studies Movements. See: Duncan Kennedy, 'The Critique of Rights in Critical Legal Studies', in Wendy Brown and Janet Halley (eds), *Left Legalism/Left Critique* (Duke University Press, 2002). For an interesting overview and critique of CLS's critique of rights see: Amy Bartholomew and Alan Hunt, 'What's Wrong with Rights', (1990) 9 Law and Inequality 1

[103] Waldron, 'Nonsense Upon Stilts', 184-185

that the individualistic point of reference as such was not Marx's concern.[104] Amy Bartholomew further presents a convincing textual basis for the support of Marx's commitment to 'rich individuality' and self-development. Bartholomew rightly argues that "[t]here is in Marx not only a language of, but an abiding commitment to, the individual, to self-guided, self-development and freedom which is strong and rich."[105]

We can see this in his theory of needs discussed above. All needs are individual needs for Marx, whether egoistic or human. As Agnes Heller makes clear, he explicitly rejects the notion of social needs as just another category of alienated needs.[106] A communist society for Marx is not a society where an imposed capitalist (egoistic) system of needs is replaced by an imposed communist (communitarian) system of needs. Instead, it is a system where Marx's ideal of 'the man rich in needs' is realised and where "the free development of each is the condition for the free development of all." [107]

As for the second interpretation of Marx's critique of ideology, it concerns the mystification of real inequalities by the formal nature of rights. A good starting point for understanding how this interpretation unduly simplifies Marx's valid point is a distinction between his internal and external critiques. Allen Buchanan explains this distinction thus: the radical, external critique of rights is advanced from the perspective of a future communist society where the conflicts of bourgeois society which necessitate rights will disappear.[108] For instance, the point against the individualistic frame of reference of rights cannot be an internal critique because rights could be defended on the ground that they do not promise that for the non-delivery of which they are chastised. This critique is advanced from the perspective of an alternative vision of community. Similarly, a claim that rights reflect and enforce egoistic behaviour is mostly understood to originate from the same external

[104] Bartholomew 'Should a Marxist', 244

[105] Bartholomew 'Should a Marxist', 254-255

[106] Heller, *The Theory of Need,* ch. 3

[107] Karl Marx and Frederick Engels, 'Manifesto of the Communist Party' in Robert C. Tucker (ed.) *The Marx-Engels Reader* (New York: W.W. Norton 1972) 353 (as cited in Bartholomew 'Should a Marxist', 254)

[108] Buchanan, *Marx and Justice*, 67

perspective of a future communist society, where the preconditions of egoism are eradicated and rights are no longer required.

A less radical, internal critique is launched from within the conception of rights under attack. For Buchanan, the reference to a hypocrisy of rights - in not delivering the equality they promise - is an example of the internal critique. Discussing political rights, Buchanan notes that, on the one hand, they promise to eliminate the relevance of social differences for legal and political systems, whereas, on the other hand, the inequalities in property, education, birth etc., by being relegated, as opposed to being abolished, to civil society "continue to exert a pernicious influence through both legal and illegal channels."[109] It follows then that if it can be shown to Buchanan that the public sphere is free of corruption, "the role of wealth in election campaigns"[110] is minimised and a robust welfare system is in place to enfranchise citizens in substance rather than merely in form, then Marx's internal critique could to a large extent be discharged. But Marx's concern is not with participation in the public sphere *per se*, or with distributive justice for that matter, but with exploitation in civil society, with alienation of man from his labour and from society, and the role that rights play in entrenching all of this.[111] Moreover, as we saw with Pashukanis, rights do uphold equality and freedom even if only within the legal discourse; the fact that has real effects on social relations. The argument that this is merely an illusion misses the point.

Interestingly, earlier in the book, talking about the internal critique of *justice* in Marx, Buchanan includes in the latter category a critique of ideology and false consciousness which wrongly presents certain empirical facts, upon which the theory of justice is then built, as true.[112] Surprisingly though, he does not look at how rights

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[109] *Ibid.*

[110] *Ibid.* 64

[111] Waldron challenges Buchanan precisely on this point, noting that Marx's argument goes deeper than a charge of a corrupted politics - "He is alluding to the idea that religion and private property are both alienated forms of life, and that their removal from the political sphere does not remove – indeed it may enhance – their expression of man's basic self-alienation. It does not prevent them from acting as obstacles to genuine social understanding." Waldron, 'Nonsense Upon Stilts', 130

[112] He brings an example of false representation of slaves as inferior beings under the system of slavery in Ancient Greece and the American South. Buchanan, *Marx and Justice*, 55-56

ideologically entrench as natural what in reality is a historical product, namely, the oppressive social relations of capital.

The internal criticism of rights in Marx, I argue, is not merely about the way they enable and mask undue influence in the public sphere, or the way they obscure material inequalities. Instead, what is valuable in Marx's critique is the observation that the recognition of rights is the "recognition of an unrestrained movement of spiritual and material elements which form the content of his life."[113] By considering the social determinants of individuals to be politically insignificant, rights naturalise them. By conferring rights, *the individual* who has to fight for survival in a capitalist economy is proclaimed to be a natural hypostasis of a human being. The state proclaims civil society as its natural basis whose protection becomes its sole aim. Crucially, in the same move, it depoliticises oppressive social relations participation in which is now a natural right of every individual and the obligation of the state to guarantee. This leaves such relations beyond political criticism, and, with this, obscures their problematic character. The right to own private property, for instance, - "the right of selfishness" for Marx, a man's "right to enjoy his possessions and dispose of the same arbitrarily, without regard for other men, independently from society",[114] - naturalises man's 'desire' and need for property; instead of freeing him

"from the filth of gain" it gives him "*freedom of gainful occupation*."[115] Similarly, if a desire for religion is, for Marx, a political symptom of the unemancipated conditions of life,[116] rights which constitute the individual as a sovereign being, fully in charge of his life, render these conditions influencing him politically irrelevant, a natural part of life. As Brown notes:

> "Marx's characterisation of rights as egoistic rests on a reading of the ways in which the historical emergence of the 'rights of man' naturalises and thus entrenches historically specific, unavowed

[113] Marx, 'On the Jewish Question', 167.

[114] Karl Marx, *Early Writings* (David McLellan's ed., Basil Blackwell 1972) 53 (as cited in Buchanan, *Marx and Justice*, 62)

[115] *Ibid.* 162

[116] Brown, *States of Injury',* 104

> social powers that set us against each other, preoccupy us with property, security, and freedom of movement, and economically and socially stratify us."[117]

Thus, the ideological critique of rights concerns the way the 'egoism of civil society' produces the need for rights, while at the same time being itself obscured by the latter. To put it another way, it is about the way rights perpetuate by depoliticising the oppressive social powers which create the need for rights to begin with.

Overall, it is true that Marx did not spend much time analysing rights. He believed that they would disappear with the advent of communism. As a result, those authors who aim at establishing that he rejected the very idea of rights do not sufficiently analyse the critiques themselves. Marx believed that the ideological construction of the subject of rights constrained the unemancipated individual. It obscured the historical contingency of material inequality and oppression. But rights were not a fatal constraint. The universal agent – the proletariat - fuelled by progressive historical forces, would come to realise the historical contingency of capitalism; would grasp the gap and exploit the contradiction between real and actual freedom sustained by the bourgeois state and rights, and overthrow the dominant class to bring about a classless society. In this revolutionary struggle rights might not be entirely useless if employed strategically but they are not that helpful either. If Marxist teleology is no longer convincing, however, the role of rights in sustaining oppressive powers needs to be re-assessed.

[117] *Ibid.* 113

5.1 WENDY BROWN AND THE DEPOLITICISATION CRITIQUE

Wendy Brown takes up this challenge.[118] She dispenses with the progressive historiography while retaining the gist of Marx's critique. If emancipation is no longer guaranteed by historical forces, rights cease to be marking a mere stage towards an inevitable 'real' emancipation. Instead, they constitute a "discursive regime", a "political culture that daily recapitulates its value in anointing and protecting personhood and daily reiterates the egoism out of which rights emerge."[119] Rights now "appear as political ends rather than historical or political instruments."[120]

Brown further complicates Marx's analysis of the depoliticising effects of rights with Michel Foucault's thought.[121] Foucault famously differentiated the juridical notion of power from the disciplinary one. Under the juridical model, power is conceived as a commodity which can be possessed and exercised. Freedom exists only in opposition to power. The subjects are formed outside of power. Power functions negatively, through prohibitions and repression. Foucault's notion of power is different.

According to him, it is everywhere. The sovereign does not have an exclusive hold on power. It exists wherever human relations exist. It operates through normalising techniques that become internalised by the subject. The standard liberal view of rights presupposes the juridical notion of power and understands rights as circumscribing the space of freedom outside the power, guarding the former from the latter. But for Brown, who follows Foucault on this, rights are themselves disciplinary techniques for producing and regulating the subject.

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[118] *Ibid.*

[119] *Ibid.* 116

[120] *Ibid.*

[121] On Foucault and rights see: Duncan Ivison, *Rights* (Acumen Publishing Limited 2008) ch. 7; Ben Golder, 'Foucault, Rights and Freedom' (2013) 26:5 Int. J. Semiot. Law 21; Ben Golder, 'Foucault's Critical (Yet Ambivalent) Affirmation: Three Figures of Rights,' (2011) 20(3) Social & Legal Studies 283; Ben Golder, 'Foucault and the Unfinished Human of Rights' (2010) 6(3) Law, Culture and the Humanities 354; Paul Patton, 'Foucault, Critique and Rights', (2005) 6:1 *Critical Horizons* 266

Since an individual is an effect of power rather than its addressee, the problem arises when the subjects produced by disciplinary power claim *rights*, the concept that presupposes a juridical form of power.[122] This, for Brown, leads to the re-inscription of the very injuries that rights are supposed to remedy: "Rights pervasively configure a political culture (rather than merely occupying a niche within it) and discursively produce the political subject (rather than serving as the instrument of such a subject)."[123]

Armed with this Marxist-Foucauldian framework, Brown sets out in *States of Injury* to "examine ostensibly emancipatory or democratic political projects for the ways they problematically mirror the mechanisms and configurations of power of which they are an effect and which they purport to oppose".[124]

Kenneth Baynes questions what he sees as Brown's rejection of rights. Invoking Lefort, he charges Brown with not seeing how rights are intrinsically linked to democracy and provide a basis for challenging the legitimacy of the extant order. Further, as soon as rights are institutionalised they become open to contestation and reformulation and thus "a basis for the introduction of new rights."[125] Finally, Baynes argues in the words of Lefort that:

> "[Rights] are constantly aroused by the need for the aspirations of minorities or particular sections of the population to be socially recognised. *These minorities, it should be said, may be the product of circumstances* [my emphasis]; whether they are made up of workers made redundant in a firm, inhabitants of a region threatened with the loss of their main sources of subsistence through the disappearance of an industry, farmers struck by a disastrous harvest or fishermen and shopkeepers affected by an oil

[122] Samuel A. Chambers, 'Giving Up (On) Rights? The Future Of Rights And The Project Of Radical Democracy' (2004) 48 American Journal of Political Science 185, 189

[123] Brown, *States of Injury,* 120

[124] *Ibid.* 3

[125] Kenneth Baynes, 'Rights as Critique and the Critique of Rights: Karl Marx, Wendy Brown, and the Social Function of Rights,' (2000) 28 Political Theory 444, 458

> slick: these minorities and categories may discover their own identity, whether it is of an ethnic order or based on a cultural affinity or a similarity of situation, or they may group together around some project of general importance (consumer protection, defence of the environment etc.). So varied are their motives and modes of formation that at first sight one would think they had nothing in common."[126]

Now, Brown is concerned precisely with those 'circumstances' that Lefort and Baynes mention in passing:[127] subject-producing circumstances which might themselves be obscured and, hence, perpetuated, through rights. Elsewhere, discussing gender identities, Brown makes a distinction between formulations of rights for women which "enable the escape of the subordinated from the site of that violation", and the formulations which "build a fence around us at that site, regulating rather than challenging the conditions within".[128] Thus, if Baynes points to how democracy and rights constitute each other in an on-going democratic process of questioning established rights, Brown is worried as to the extent that this process of formulation and reformulation is itself a co-opted process, a normalising discourse, depoliticising rather than challenging oppressive powers.[129]

Interestingly, Baynes engages with Brown's account of the depoliticising function of rights. Depoliticisation for Baynes stands for how "[r]ights generally operate in a way that removes issues from the immediate political (especially legislative) agenda."[130]
But this is not a necessary consequence, and even if rights do not become a part of

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[126] Lefort, *The Political Forms,* 264 (as cited in Baynes, 'Rights as Critique', 459)

[127] Wendy Brown, 'Revaluing Critique: A Response to Kenneth Baynes' (2000) 28 *Political Theory* 469, 478

[128] Wendy Brown, 'Suffering the Paradoxes of Rights', in Wendy Brown and Janet Halley (eds), *Left Legalism/Left Critique* (Duke University Press, 2002) 422

[129] *Ibid.*471-472; For a similar critique see generally: Alain Badiou, Ethics: An Essay on the Understanding of Evil (Verso 2001) Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishing, 2000); Slavoj Žižek, 'Against Human Rights', (2005) 34 New Left Review 115

[130] Baynes, 'Rights as Critique', 464

the legislative agenda, it does not follow that they will be depoliticised "in a broader sense".[131]

He gives the example of the right to abortion whose inclusion within a generally recognised constitutional right to privacy, according to Baynes, contributed to the politicisation of the whole issue of abortion.[132] Now, Brown asks whether or not debating the issue of abortion in terms of privacy neglects "women's subordination through the historical and contemporary sexual division of labour and organisation of reproductive work."[133] Without going into the details of this debate, it is important to emphasise Brown's point that politicisation is not reducible to making certain issues publicly debated. There is a more relevant question to ask – what kind of issues become public and how putting those issues on the political agenda contributes to the obfuscation of a wider picture, such as women's economic and social subordination. This example with privacy and abortion, for Brown, illustrates perfectly what Marx means by depoliticisation: "grant women formal legal equality, and grant them limited abortion rights on the basis of privacy, and watch the analytic disappearance of the social powers constitutive of women's unfree and unequal condition as reproductive workers. Instead, watch the public debate for decades whether or not a fetus is a person".[134]

Similarly, we can apply this critique in the context of *La Via Campesina's* struggles mentioned in the introduction of this thesis. We can argue that by treating food as a problem of individual access rather than that of controlling the systems of production and consumption, or by presenting the bearer of the right to food as a vulnerable human being whose natural need for nutrition should be satisfied through international and local institutions in a top-down manner, what dominant discourses do is to naturalise those social relations that treat food as a commodity and which

[131] *Ibid.*
[132] *Ibid.*
[133] Brown, 'Revaluing Critique', 476
[134] *Ibid.*

might be responsible for the current food crisis in the first place; these relations are removed from the concern of politics.[135]

In short, for Brown, rights often produce a certain type of political culture and political subjects that actively depoliticise oppressive social relations that constitute them. Crucially, this is not to condemn rights, but "to refuse them any predetermined place in an emancipatory politics and to insist instead upon the importance of incessantly querying that place."[136]

Brown's, then, is a cautious approach to rights which neither fully rejects the discourse of rights nor accepts it without serious reservations. For her, "rights have no inherent political semiotic, no innate capacity either to advance or impede radical democratic ideals", therefore they are "always historically and culturally circumscribed."[137] If rights can be and have been used to secure and naturalise dominant social powers as well as to emancipate from the arbitrary use of sovereign and social power, it is important to examine *concrete* articulations of rights in contemporary context.

But once the depoliticisation critique is merged with the legality critique the former is further radicalised. Our focus shifts from examining the emancipatory potential of rights-discourse to the latter's necessarily limited nature. We can argue that insofar as the discourse of rights is oriented towards legalisation it will inevitably remain within capitalist social relations, further depoliticising and perpetuating those relations.

[135] See the discussion in Chapter Two

[136] Brown, *States of Injury,* 121

[137] *Ibid.* 97

Conclusion

To conclude: we explored how the abstract equality and freedom espoused by legal rights is indispensable for the capitalist relations of exchange and that rights cannot but leave these relations undisturbed. We also mentioned how rights, at the same time, mystify the exploitative relations of capitalist production by presenting commodity-owners as free and equal. But the problem does not end with *legalised rights*. It extends to the *discourse* of rights-claiming. Such a discourse naturalises the desire for rights which is produced by the historical conditions of production and exchange, the conditions that rights themselves naturalise and depoliticise.

After merging the two critiques it becomes evident that not only is the rights-talk, which is oriented towards legalisation, incapable of articulating transformative political projects, but it further actively depoliticises what is a historically conditioned configuration of powers. These critiques point to the limits and dangers of understanding rights as parasitic on law - *limits* in terms of the transformative potential of rights and *dangers* in terms of naturalising those limits.

How is it possible then to rethink the discourse of rights beyond the confines of liberal legalism? What does it mean for rights-claims to transcend the prevailing system? To answer these questions, we need to first explain what sort of a claim is capable of exceeding the possibilities of liberal constitutional order? What is this transformative demand that we are asking rights to channel? More specifically, what can escape co-option and accommodation by the capitalist system? Now, even though the depoliticisation critique might seem to suggest otherwise,[138] not every demand for the satisfaction of needs addressed to the system which is responsible for those needs is necessarily internal to the system. To demonstrate the possibility of transformative demands for need-satisfaction, I will turn to Marx's concept of radical

[138] See Chambers, 'Giving Up (On) Rights?'

need as elaborated by Agnes Heller. I will argue that it is only by articulating radical needs that rights can avoid the two critiques outlined here. The question, then, with which the next chapter ends, and which falls to the remainder of the thesis to answer, is: *how is it possible for rights to articulate radical needs?*

Chapter Two

The Politics of Radical Needs

This chapter proceeds in the following manner: Section One will outline Karl Marx's notion of radical need, i.e. the need which is produced by the existing system but the realisation of which exceeds the possibilities of that system. Section Two will use

Jacques Ranciere's theoretical apparatus to thematise the demands for the satisfaction of radical needs in terms of bottom-up, ruptural and potentially transcendent politics of the excluded. In Section Three I will discuss the transnational movement of peasants, *La Via Campesina,* and use this movement as an example of the politics of radical needs in practice. While *La Via Campesina* makes it clear that their struggle is not a struggle 'to be fed', and while there are suggestions that the movement's call for food sovereignty should be understood as an alternative demand

'to be able to feed oneself', with the help of Marx's and Rancière's analytical frameworks I argue that a truly transformative dimension of the movement can be expressed only through a radical need to *be able to feed everyone who needs to be fed as an end in itself*.

Crucially for our purposes, *La Via Campesina* frames this demand for radical needs in terms of rights. But does it err in doing so? Should this movement abandon rights-talk entirely, or is it, after all, possible for rights to channel radical needs and, if yes, how? To start answering these question, the final section will offer a sketch of a radical theory of social rights which will be developed in the chapters to come.

1. RADICAL NEED

What does it mean to challenge the capitalist system of needs which reduces need to greed, as discussed in the previous chapter? Let us start with how it *cannot* be challenged. According to Agnes Heller, this cannot happen through the concept of *interest*, either private, general or class interest.[139] Private interest is an expression of the reduction of need to greed, of human needs to egoistic needs. General interest itself is, however, only the obverse side of private interest. The two determine each other. The former is made up of the latter: "the general interest is precisely the generality of self-seeking interests".[140] This duality reproduces the familiar split between the private individual and the citizen in the bourgeois society, which Marx explores in *On the Jewish Question*.[141] The citizen in a capitalist society always presupposes the existence of a self-interested man of civil society. Likewise, "'[g]eneral interests assert themselves behind the backs of men who have already been reduced to selfishness".[142] Both the man of civil society and the citizen, like their respective private and public interests, are embedded in capitalism and cannot transcend it.

The same goes for class interest. The struggle for wages is one example of the action motivated by it. But it is a struggle which only makes sense within the relations of capital; it exists within the possibilities of capitalism. Class interest naturalises wage-labour and demands its reform rather than its abolition. Thus, the struggle of the proletariat motivated by the general or class interest would only reproduce the existing division of labour, affirming oppressive social roles and positions. How then

[139]For an interesting article on Heller's theory of radical needs see: John Grumley, 'A Utopian Dialectic of Needs? Heller's Theory of Radical Needs' (1999) 59 (1) Thesis Eleven 53

[140]Heller, *The Theory of Need,* 64

[141] Karl Marx, 'On the Jewish Question' in Karl Marx and Frederick Engels, *Collected Works, Volume 3* (New York: International Publishers 1975)

[142]Heller, *The Theory of Need,* 64

do we conceptualise a transformative politics of needs? For this purpose, Marx introduces the concept of radical needs.

Radical needs refer to those human needs that are created under capitalism but that cannot be realised within it; radical needs are those produced by, but at the same time exceeding the possibilities of, the extant order. According to Heller, radical needs "arise within a society based on relationships of subordination and superordination", but their satisfaction requires transcendence of such a society. [143] As Ian Fraser explains, radical needs are a form of human needs.[144] But if human need, i.e. a need for other human beings, is mediated under capitalism through alienating relations, thus transforming it into egoistic need, radical needs are an expression of human needs that challenges this reduction.

Radical needs go beyond interest. They are not motivations for increased individual wealth in terms of wages or in terms of a heightened standard of living. They articulate not the consciousness of misery or of poverty narrowly understood, but the consciousness of alienation under capitalism: the gap between the need for self-realisation through a non-alienated social interchange and the contingency of the subordination of the individual to the alienating division of labour. The idea of radical needs offers an alternative to Marx's other problematic theory of contradiction according to which capitalism will be transcended because of the inherent natural laws of economy. Instead, radical needs represent a "collective Ought" that motivates the proletariat against prevailing oppressive social relations.[145] They are the permanently available source of transformative politics. The bearer of radical needs, for Marx, is the proletariat, "a class with radical chains, a class in civil society that is not of civil society… a sphere of society having a universal character because of its universal suffering and claiming no particular right because no particular wrong but *unqualified wrong* is perpetrated on it."[146]

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[143] Agnes Heller, *A Radical Philosophy* (James Wickham trans., Oxford: Basil Blackwell 1978) 138

[144] Ian Fraser, *Hegel and Marx: The Concept of Need* (Edinburgh University Press 1998) 154-159

[145] Heller, *Radical Philosophy*, 74

[146] Karl Marx, *Critique of Hegel's Philosophy of Right* (Cambridge University Press 1970) 137 (as cited in Heller, *The Theory of Need,* 89)

Without doubt, the proletariat has particular interests. We already discussed the interest in higher wages which can be realised under the capitalist system. But the proletariat is also characterised by the *unrealised need* to abolish the wage system as such, to abolish the alienating powers of capital and the system of egoistic needs that they produce. In other words, the proletariat is defined by radical needs. These needs are present in the capitalist society but their satisfaction requires the latter to be superseded. For instance, if workers' struggle for wages reflects particular interests of the proletariat which are imbedded in capitalist social relations, their struggle for free time is something that potentially transcends the wage system in its entirety. For sure, struggles for free time can, to some extent, exist without exceeding capitalist society. Nevertheless, at a certain point, free time becomes impossible to reconcile with the logic of capitalist accumulation. At that moment free time becomes a radical need that necessitates transcendence of the order. Similarly, I will argue in Section 3 that the struggle of *La Via Campesina* for food sovereignty is about specifically articulating such a radical need that points towards a new, transformed world. Before that, it is important to conceptualise what a *politics* of radical needs would look like. For this purpose, I turn to Jacques Rancière.

2. THE POLITICS OF RADICAL NEEDS

The capitalist system of needs can be thematised as, what Jacques Rancière calls, the *police*. The police is "a symbolic constitution of the social", which assigns particular roles, positions and identities in the social hierarchy, and demands conformity to them.[147] The police order 'counts' parts of society and claims that there are no parts left 'uncounted'. It establishes and polices the identities of the rulers and the ruled; the legitimate and illegitimate objects of politics; things that are politically possible and those that are impossible; groups which are eligible for politics and those

[147] Jacques Rancière, *Ten Theses on Politics* (2001) 5(3) Theory and Event 12

disqualified from it. What in common language goes under the name of *politics* – the processes within political and legal institutions, the exercise of political powers, governance etc. – is now renamed into 'police'.[148]

Even though the police sustains an appearance that no one of any significance has been excluded from the political decision-making process, and that the social hierarchies and positions are without alternative, Rancière insists that every order is contingent.[149] Things can always be otherwise. Politics is precisely the act of demonstration of "the sheer contingency of the order" which always insists on its naturalness.[150] It is a challenge to the claim of the police order that the structure and the parts of the society are already known and 'counted'. It is a challenge undertaken by the excluded, by the 'uncounted'.[151] Following Aristotle, Rancière uses the term
'the part of no part' to describe the group who is without a share in the community (*les sans part*).[152] *Les sans-part* are denied a voice in the political realm while being included in the social order through an identity that that order bestows upon them. They are counted, but counted by the police on its own terms. Examples of the *sans-part* he gives range from slaves in Athens to plebs in Rome, from the Third Estate in pre-revolutionary France to the proletariat in Tsarist Russia.[153] Politics is the process of the emergence of this no-part into the public realm destabilising the latter. The subject of the political action is born through an assertion of a concrete political wrong, of a concrete 'miscount' upon which the social order is built.[154]

Furthermore, the process of political subjectivization also necessitates *dis-identification*. Political subjectivization necessarily transforms existing identities, i.e.

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[148] Jacques Rancière, *Disagreement: Politics and Philosophy* (Julie Rose trans., University of Minnesota Press, 1999) 28: 'Politics is generally seen as the set of procedures whereby the aggregation and
consent of collectivities is achieved, the organization of powers, the distribution of places and roles, and the systems for legitimizing this distribution. I propose to give this system of distribution and legitimization another name. I propose to call it the police.' See also: Rancière, *Ten Theses*.

[149] Rancière, *Disagreement,* 29

[150] *Ibid.* 3

[151] Jacques Rancière, *Dix Thèses Sur La Politique,* in *Aux bords du politique* (Paris: Gallimard 1998) 233–
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[152] Rancière, *Disagreement,* 21

[153] *Ibid.* 9

[154] Oliver Davis, *Jacques Rancière* (Polity Press, 2010) 84-90

the identities that are assigned to subjects by the police order.[155] The political subject does not exist in the *social* prior to politics, for it does not have an identity; it is not part of the official count, but is born through political action, through making itself visible.[156] Crucially, this subject cannot be incorporated in the extant order without reconfiguring or even transcending it entirely.

The capitalist system of needs is a police order in the above sense. It distributes and oversees *who* needs *what* and *when*. For the police order, claims to need-satisfaction cannot be but demands by an interest group for a share of common resources. There can be no *radical* needs in the police universe. Such needs are unintelligible. It is this point of unintelligibility that marks the boundaries of the system. Claims to radical needs are inevitably translated into particularistic ones. Now, the demonstration of the need which is produced by the police order, but whose realisation marks the limits of that order allows the dis-identification of the bearer of such needs from pre-given social roles. This act of demonstrating the existence of needs, upon the exclusion of which the police order is established, introduces the possibility of an alternative system.[157] The bearer of such needs is constituted as a political subject who ruptures the official distribution of needs and subject-positions within the police order.

Thus, merging Marx's notion of radical needs with Rancière's account of politics, I suggest conceptualising the *politics* of radical needs as consisting in contextual, bottom-up, ruptural and potentially transcendent demands for the satisfaction of the needs in question. These demands are *contextual* in that radical needs are not natural, but arise within particular institutional arrangements. They are *bottom-up* insofar as they are articulated by the excluded against the official interpretations of needs. Furthermore, the politics of radical needs is *ruptural* in the sense that by

[155] Rancière, *Disagreement,* 36

[156] Jacques Rancière, 'Introducing Disagreement' (2004) **9** (3) Angelaki: Journal of the Theoretical Humanities 3, 7

[157] Mark Wenman, *Agonistic Democracy: Constituent Power In The Era Of Globalisation* (Cambridge University Press 2013) 90; Gianpaolo Baiocchi and Brian T Connor, 'Politics as interruption: Rancière's community of equals and governmentality' (2013) 117(1) Thesis Eleven 89

pointing to the immanent contradictions of the capitalist order the latter's claim to 'naturalness' is interrupted. It is through this rupture that the political subject is constituted and the political space is established where the formulations of rights that *transcend* the prevailing social relations can be deliberated and contested.

I argue that a transnational movement of peasants, *La Via Campesina,* is involved in the politics of radical needs understood in the above sense. This movement - which fights against "the encroachment of capitalism in agriculture"[158] and for the decommodification of food, and which rejects the model whereby alien powers put in motion the social relations which commodify food and cause havoc to the world food system - invokes the needs that exceed the possibilities of the prevailing order and, thereby, constitutes itself as a political subject. With its demand for food sovereignty, *La Via Campesina* identifies the point of rupture of the process of valorisation of capital and initiates a political process that is capable of transcending capitalism in agriculture.

In the next section I will look at a history of *La Via Campesina* and will use the above discussion of the politics of radical needs as an analytical framework for capturing the radical dimension of the movement. The reasons why I am focusing on *La Via Campesina* is that it makes extensive use of the discourse of rights. I would like to argue in the following chapters that the transformative demands of this movement can be channelled through rights-claims. But, in order to explain this theoretically, we need to radically rethink the nature of rights.

3. LA VIA CAMPESINA

To locate *La Via Campesina* in today's socio-political landscape it is helpful to start from the idea of *food regime*. Harriet Friedman takes a food regime to be "a rule-

[158] La Via Campesina's official website: http://viacampesina.org/en/index.php/main-issues-mainmenu-27/women-mainmenu-39/1191-la-via-campesina-and-the-international-womens-day (accessed 23 January 2016)

governed structure of production and consumption of food on a world scale."[159] Another leading scholar in the field, Philip McMichael, understands 'food regime' to refer "to stable periods of capital accumulation associated with particular configurations of geopolitical power, conditioned by forms of agricultural production and consumption relations within and across national spaces."[160] Both Friedman and McMichael characterise the current food regime as neoliberal, or corporate. This regime is said to have been around for more than three decades and has been brought about by, and still feeds on, the processes of trade liberalisation, privatisation, de-regulation, the rise of transnational organisations etc. [161]

Holt-Gimenez and Schattuck adopt the food regime theses and distinguish between four types of political and social trends that exist within or against the current food regime.[162] These are neoliberal, reformist, progressive and radical trends. The neoliberal trend is driven by the ideology of *laissez-faire* economy and advocates the marketization of the food sector and the commodification of food. As for the reformist trend, it intends to remedy the externalities of neoliberalism and is effectively serving the same purpose as the latter: the reproduction of the corporate food regime. The current official UN framework for the top-down realisation of the right to food - *Food Security* - is a good example of the reformist direction in tackling the global food crisis.[163] Food Security is defined by The Food and Agriculture

[159] Harriet Friedmann, 'The political economy of food: a global crisis' (1993) 197(1) New Left Review 29, 30-31

[160] Philip McMichael 'A Food Regime Genealogy' (2009) 36(1) Journal of Peasant Studies 139

[161] See *ibid*.; Philip McMichael, 'Food Security and Social Reproduction: Issues and Contradictions' in Isabella Bakker and Stephen Gill (eds), Power, Production and Social Reproduction (Palgrave Macmillan 2003); Harriet Friedmann and Philip McMichael, "Agriculture and the State System: The Rise and Decline of National Agricultures, 1870 to the Present." (1989) 29 (2) *Sociologia Ruralis* 93; Authors distinguish between three food regimes: they locate the first one in the colonial context. It existed between 1870 and 1914 and was organised around the imports of wheat and meat from settler states to Europe in exchange for manufactured goods, labour and capital. The second food-regime existed during the cold-war from 1950s to 1970s when the US was sending food to poorer countries to curb the expansion of communism. The corporate food regime is the third and current regime. See also: Hannah Wittman, 'Food Sovereignty: A New Rights Framework for Food and Nature?' (2011) 2 Environment and Society: Advances in Research 87

[162] Eric Holt-Giménez and Annie Shattuck, 'Food Crises, food Regimes and Food Movements: Rumblings of Reform or Tides of Transformation?' (2011) 38 (1) Journal of Peasant Studies 109

[163] For a general overview of the concept see: William S. Schanbacher, The *Politics of Food: The Global Conflict between Food Security and Food Sovereignty* (Praeger 2010)

Organization as an ideal to be achieved and is understood to refer to a situation when "all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life."[164] This objective is generally compatible with the neoliberal trend and it is no surprise that the path for achieving global food security is increasingly seen as lying precisely through market mechanisms guaranteed by the legal framework of the state.[165]

The other two trends – progressive and radical – are conceptualised by Holt-Gimenez and Schattuk as being opposed to the neoliberal dominance in agriculture.[166] The progressive grassroots movements call for *food justice* for the ethnically, racially or socio-economically marginalised groups. But while this trend tries to bring about alternative, community-based food systems at the local level, and largely within the existing food regime, the *radical* movements aim to transcend the corporate food regime altogether. The authors include *La Via Campesina* in this latter, radical trend.

La Via Campesina was founded in 1993 as a response to what it sees as "corporate driven agriculture and transnational companies that are destroying people and nature".[167] Today, the movement "brings together millions of peasants, small and medium-size farmers, landless people, women farmers, indigenous people, migrants and agricultural workers from around the world."[168] It consists of 164 organisations stretching over 73 countries from the Americas, Europe, Asia and Africa, representing around 200 million people in total.

Crucially for our purposes, towards its proclaimed goal of stopping destructive neoliberal globalisation, *La Via Campesina* makes extensive use of the language of rights, and in particular, that of 'the right to food sovereignty'.[169] Instead of the top-

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[164] Food and Agriculture Organization of the United Nations, http://www.fao.org/post-2015-mdg/14-themes/food-security-and-the-right-to-food/en/ (accessed 18 March 2016)

[165] Philip McMichael, 'Food Security and Social Reproduction'

[166] Holt-Giménez and Shattuck, 'Food Crises, food Regimes', 115

[167] http://viacampesina.org/en/index.php/organisation-mainmenu-44 accessed 17 March 2016

[168] *Ibid.*

[169] See Noha Shawki, 'New Rights Advocacy and the Human Rights of Peasants: La Via Campesina and the Evolution of New Human Rights Norms' (2014) 6(2) Journal of Human Rights Practice 306, 314;

down, reformist paradigm of Food Security, which emphasises *access* to food, *Food Sovereignty* stresses *the control over the production and consumption* of food. This is an alternative, bottom-up framework for the realisation of the right to food. In 2007, an international forum on Food Sovereignty defined the concept, and it is worthwhile to cite it in full:

> ”The right of peoples to healthy and culturally appropriate food produced through ecologically sound and sustainable methods, and their right to define their own food and agriculture systems. It puts the aspirations and needs of those who produce, distribute and consume food at the heart of food systems and policies rather than the demands of markets and corporations. It defends the interests and inclusion of the next generation. It offers a strategy to resist and dismantle the current corporate trade and food regime, and directions for food, farming, pastoral and fisheries systems determined by local producers and users. Food sovereignty prioritizes local and national economies and markets and empowers peasant and family farmer-driven agriculture, artisanal fishing, pastoralist-led grazing, and food production, distribution and consumption based on environmental, social and economic sustainability. Food sovereignty promotes transparent trade that guarantees just incomes to all peoples as well as the rights of consumers to control their food and nutrition. It ensures that the rights to use and manage lands, territories, waters, seeds, livestock and biodiversity are in the hands of those of us who produce food. Food sovereignty implies new social relations free of oppression and inequality between men and women, peoples, racial groups, social and economic classes and generations.”[170]

Priscila Claeys, ‘The Creation of New Rights by the Food Sovereignty Movement: The Challenge of Institutionalizing Subversion. 2012. Sociology 46(5): 844, 849-850

[170] Nyéléni Forum for Food Sovereignty (2007), available at http://nyeleni.org/spip.php?article290 (accessed 5 February 2016). See three special issues recently published on various topics concerning

This definition gives the sense of the scale of the aims and objectives that *La Via Campesina* aspires to achieve. Yet, certain confusion as to what is exactly transformative about this movement remains. It is clear that *La Via Campesina* fights against the corporate food regime which the former see as culpable in the current food crisis. This movement opposes the neoliberal system of needs which reduces the need for food to 'the need to be fed'. Instead, it has been suggested that the movements' demands be framed in terms of "a right to feed oneself",[171] or "a right to produce",[172] supposedly capturing better the meaning of food sovereignty. But at times, *La Via Campesina* seems to be concerned solely with the interests of the class of peasants, risking to fall prey to the interest-group politics with all the ensuing dangers.[173] So, it is important to ask as to what makes this movement radical as opposed to being another potential corporate player in agriculture, for instance in the form of a cooperative of peasants, national or global, dictating food prices to the rest of the world so as to ensure 'just incomes' for peasants.

I would like to suggest that *La Via Campesina*'s criticism of the neoliberal system of needs is not merely about the latter's complicity in the global food crisis. The point is not merely to provide food efficiently but to provide it in a human way, beyond 'the demands of markets and corporations'. The radical dimension of *La Via Campesina* resides in its fight for the means of agricultural production to not only give sovereignty to the farmer over her nutritional requirements, or to guarantee her general well-being, but, as it has been stated in the movement's Nyeleni Declaration "most of us [the peasants] are food producers and are ready, able and willing *to feed all the world's peoples*."[174] In other words, the aim is to 'feed the world,' to feed those

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food sovereignty: Journal of Peasant Studies, 41, no. 6 (2014); Globalizations (summer 2015); Third World Quarterly, 2015 Vol. 36, No. 3

[171] United Nations Human Rights. The Right to Adequate Food (Office of the United Nations High Commission for Human Rights 2010), available at http://www.ohchr.org/Documents/Publications/FactSheet34en.pdf (accessed 24 March 2016)

[172] Philip McMichael, 'A Comment on Henry Bernstein's way with Peasants, and Food Sovereignty', (2015) 42(1) The Journal of Peasant Studies 193, 194

[173] Raj Patel, 'Transgressing rights: La Via Campesina's call for Food Sovereignty' (2007) 13(1) Feminist Economics 87

[174] Nyeleni Declaration, 2007 http://nyeleni.org/DOWNLOADS/Nyelni_EN.pdf (accessed 5 February 2016) [Emphasis added]

in need not through a market mechanism and a commodity exchange but as an end in itself.

My suggestion is to take the complex concept of food sovereignty as articulating a radical need. The transformative potential of the movement lies not in an egoistic right to feed oneself but in *a right to feed everyone who needs to be fed as an end itself*. This is a radical core of the movement's demands which points towards a new, transformed world.

This demand for radical needs at the same time constitutes the movement as a political subject. One can say that the peasantry did not exist politically prior to the struggles of *La Via Campesina*. There were peasants with particular interests, but no distinct subject - *the peasantry* - that could name the political wrong done to it, and demonstrate the extent to which the dominant order naturalises this wrong. Crucially, the peasantry is not merely an interest group, seeking incorporation within the dominant order through the redistribution of resources. Rather it articulates an

'impossible' demand for the satisfaction of the radical need of an individual to meet the needs of others as an end in itself, and for this very reason challenges the fundamentals of the system.

But even if we agree on the above interpretation of *La Via Campesina* as fighting for the realisation of radical needs, the question that animates this thesis still remains: can such radical transformative demands be expressed through rights? I argued in the previous chapter that, for Marx, rights enable and naturalise the capitalist system of needs. The demands that rights articulate, according to this view, cannot challenge the fundamentals of capitalism because they are internal to capitalist society insofar as the need for rights is produced by the same system. Yet, as we saw in this chapter, Marx opens a door for a transformative politics of needs by introducing a concept of radical needs. These are needs which are produced *by* but cannot be accommodated *within* the existing system. Only a politics of radical needs can potentially transcend capitalism. But can such a politics be represented in terms of rights? To put it another way, can rights articulate radical needs? In the remainder of this chapter, I would like

to sketch a radical theory of social rights which is capable of channelling transformative politics.

4. TOWARDS A RADICAL THEORY OF SOCIAL RIGHTS

The theory of the radical politics of social rights, which I am proposing in this dissertation, offers an account of the politics of radical needs expressed through the language of rights. This theory can be summarised here in the following way. I argue that in order to channel transformative politics, social rights themselves should be understood to be formulated contextually through a bottom-up political action against the existing formulations of rights, as opposed to being derived from a pre-political source and enacted in a top-down fashion. I argue that the practice of claiming social rights should be rethought in terms of the open-ended and potentially transcendent practice which, instead of aiming to realise some pre-political human needs, is capable of questioning the underlying frameworks that might be responsible for the production of those needs, as well as, configuring new socio-economic arrangements for their satisfaction. Finally, building on the Marxist critiques outlined in the previous chapter, I argue that insofar as we continue to think of rights in terms of not-yet-institutionalised individual claims we will not be able to capture their transcendent potential. To channel the politics of radical needs, a social rights-claim should be understood in terms of a speech act of challenge which aims to rupture the extant order by demonstrating the latter's immanent contradictions. It is this rupture that initiates a potentially transcendent process of deliberation and contestation over the nature, sources and ways of realisation of the needs in question.

To see what is at stake in each of the above characteristics, I will look at the leading theories of rights, which I organise into two models: the 'juridical' and the 'political'. This survey of the existing field will be as much about highlighting the ways in which this literature is blind to certain important uses of rights-talk as about searching for relevant ideas for the purposes of constructing a radical theory. As we will see,

ultimately all the leading accounts present reductionist readings of the politics of rights, which are unable to capture the transformative potential thereof.

Chapter Three

The Juridical Model of Rights

I concluded the last chapter by arguing that in order to conceptualise a radical politics of rights, i.e. the politics which challenges prevailing social relations by articulating radical needs, we have to understand rights as being formulated contextually through a bottom-up, ruptural and potentially transcendent practice.

Now, the idea that rights-claims can channel radical political demands is a far cry from the mainstream theories of human rights. This chapter will examine two such mainstream, broadly liberal, theories which espouse, what I label as, the *juridical model* of the relationship between rights and politics, where the former is understood to precede and legitimise the latter.[175] The rivalling 'orthodox' and 'functionalist' approaches discussed below are least accommodating of the radical conception.[176] They provide clear criteria for identifying genuine human rights. It is the philosopher who, by looking at human nature or global public reason

[175]Bernard Williams, 'Realism and Moralism in Political Theory' in Bernard Williams, *In the Beginning was the Deed* (Geoffrey Hawthorn ed., Princeton University Press 2005)

[176] For a juxtaposition between the orthodox and the political conceptions see: Pablo Gilabert, Humanist and Political Perspectives on Human Rights, Political Theory 39(4) (2011), 439–467; Jean L. Cohen, *Globalization and Sovereignty*, ch. 3; Laura Valentini, 'In What Sense Are Human Rights Political?', *Political Studies*, 60 (1) (2012), 180-94; Adam Etinson and S. Matthew Liao, "Political and Naturalistic Conceptions of Human Rights: A False Polemic?", *Journal of Moral Philosophy*, 2012 Vol. 9, No. 3; Violetta Igneski, "A Sufficiently Political Orthodox Conception of Human Rights", 2014, Journal of Global Ethics, 10:2, 167-182; John Tasioulas, (2009) "Are Human Rights Essentially Triggers for Intervention?" *Philosophy Compass* 4(6): 938-950; Andrea Sangiovanni, 'Justice and the Priority of Politics to Morality,' (2008) 16 (2) Journal of Political Philosophy 137

respectively, arrives at a list of rights which then structures the political sphere. Bottom-up political action by rights-claimants themselves in no way defines or alters the content of rights.

The problematic nature of the juridical approach comes to the fore when we focus specifically on social rights. Insofar as social rights are seen as pre-political entitlements to the satisfaction of needs, the issues connected with the political system which might be structurally implicated in the production of those needs as well as the socio-political arrangement through which the needs have to be satisfied cannot be the objects of rights-claims. As a result, the discourse of rights depoliticises and perpetuates the structural determinants of the needs in question.

1. THE ORTHODOX CONCEPTION

On the orthodox conception,[177] individuals possess rights in virtue of their *humanity;* human rights are universal and timeless norms discoverable through philosophical inquiry into essential human features. They are understood as pre-social, pre-political norms with reference to which we can assess and transform existing legal systems. The validity of these moral rights and their binding force does not depend on legal recognition.

Here, human rights are discovered, or constructed, by the best moral theory in advance of political and social processes. Philosophers provide a determinate list of authoritative norms – *genuine* human rights – and proclaim it to be beyond political contestation. [178] Rights are said to protect most valuable interests that humans *qua*

[177] Also referred to as 'ethical', 'naturalistic', 'traditional' approach. See: James Griffin, On Human Rights (Oxford University Press, 2008); Alan Gewirth, Human Rights (University of Chicago Press, 1982); Jack Donnelly, Universal Human Rights (Ithaca, NY: Cornell University Press, 2003)

[178] For Joseph Raz, the traditional approach is characterised by four features:

> "First, it aims 'to derive' human rights from basic features of human beings which are both valuable, and in some way essential to all which is valuable in human life. Second, human rights are basic, perhaps the most basic and the most

humans have. The exact formulations of these interests, however, vary from one author to another. [179] The most influential theory is that of James Griffin.

In his recent book, *On Human Rights*,[180] Griffin articulates an urgency of completing the Enlightenment project, which gave up teleological and theological justifications of *natural* rights without offering any substantive alternatives, resulting in a worrisome indeterminacy of the concept both in theory and in practice. Criticising various authors (among them Feinberg, Dworkin, Nozick, Rawls and Beitz) for lacking ethical commitments in their accounts of human rights, Griffin sets to give a substantive interpretation of the 'vague' notion of dignity – found in the phrase: "dignity of the human person" - which grounds the Universal Declaration.[181]

For Griffin the essence of human rights is that they protect a quintessential human capacity for "deliberating, assessing, choosing, and acting to make what we see as a good life for ourselves".[182] He calls this capacity 'normative agency' or 'personhood' and defines it thus:

> "To be an agent, in the fullest sense of which we are capable, one must (first) choose one's own path through life—that is, not be dominated or controlled by someone or something else (call it

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> important, moral rights. Third, scant attention is paid to the difference between something being valuable, and having a right to it. Fourth, the rights tend to be individualistic in being rights to what each person can enjoy on his or her own: such as freedom from coercive interference by others, rather than to aspects of life which are essentially social, such as being a member of a cultural group."

Joseph Raz, "Human Rights Without Foundations," in Samantha Besson and John Tasioulas, *The Philosophy Of International Law* (Oxford University Press 2010) 323

[179] For different justifications see: *Agency* - Griffin, *On Human Rights*; Gewirth, *Human Rights*; *Basic Interest* - John Finnis, *Natural Law and Natural Rights* (Clarendon Press 1980); Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1988); *Natural Rights* - A. J. Simmons, 'Human Rights and World Citizenship: The Universality of Human Rights in Kant and Locke,' in A. J. Simmons, *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge University Press, 2000); *Capabilities* - Martha

Nussbaum, 'Human Rights Theory: Capabilities and Human Rights,' Fordham Law Review, 66 (1997); Martha Nussbaum, "Capabilities and Human Rights," in P. De Greiff and C. P. Cronin (eds.), *Global Justice and Transnational Politics* (MIT Press, 2002); and Amartya Sen, 'Elements of a Theory of Human Rights,' Philosophy and Public Affairs, 32 (2004). *Dignity* - Rainer Forst, 'The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach' (2010) 120 *Ethics* 711

[180] Griffin, *On Human Rights.*

[181] *Ibid*. 3

[182] *Ibid*. 32

> 'autonomy'). And (second) one's choice must be real; one must have at least a certain minimum education and information. And having chosen, one must then be able to act; that is, one must have at least the minimum provision of resources and capabilities that it takes (call all of this 'minimum provision'). And none of this is any good if someone then blocks one; so (third) others must also not forcibly stop one from pursuing what one sees as a worthwhile life (call this 'liberty')."[183]

From the requirements of normative agency, Griffin then derives a list of human rights, which include: a right to life, to security of person, to political participation, to free speech and assembly, to a free press, to freedom of conscious, freedom from torture, as well as social rights to education and to minimum subsistence.[184]

John Tasioulas, another leading proponent of the orthodox approach, challenges Griffin on two main points: the grounds of justification and the timelessness of human rights. [185] Tasioulas argues that we should take into account a larger number of interests in grounding human rights than Griffin's notion of personhood suggests.

This pluralistic approach brings into the picture the interests that human beings might have beyond liberty and autonomy in "leaving harmoniously with others (including other species), avoiding the infliction of pain and suffering, cultivating highly refined aesthetic and religious sensibilities and so on."[186] With this, Tasioulas allows certain cultural variations with respect to the grounds for human rights. He further claims, against Griffin, that rights are not timeless and should be understood within the context of modernity. By this he means that a list of human rights might change over time as can be seen on the example of the recent recognition of rights for sexual and

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[183]However, if the concept of personhood helps us identify human rights in general terms by looking at the importance of securing human agency, it does not provide clear answers as to the content and the scope of such rights. Here Griffin supplements his theory with the concept of 'practicalities', i.e. practical considerations relating to the nature of human beings as well as of human society whereby we can circumscribe human rights so that they serve as determinate guides to behaviour. *Ibid*. 33

[184]*Ibid*. 37-39

[185]John Tasioulas, 'Human Rights, Universality and the Values of Personhood: Retracing Griffin's Steps,' (2002) 10(1) *European Journal of Philosophy* 88

[186]*Ibid*. 88

racial minorities. However, he makes it sure that this does not translate into a proposition that the existence of human rights is contingent on particular institutional arrangements. [187] Tasioulas seems to be in accord with Griffin on central points, such as the idea that "human right is one we possess simply by virtue of being human",[188] and that human rights should be grounded in basic human interests, whether it is agency or a wider range of interests, established through reason. Furthermore, both Griffin and Tasioulas aim at providing definite criteria for identifying genuine rights.[189]

There are many problems with the orthodox account. Because of the focus on pre-social, pre-political justificatory grounds, the orthodox approach ends up with a too restrictive list of rights. Especially those social rights mentioned in the UDHR which presuppose institutional frameworks become unintelligible as human rights.[190]

Furthermore, as the functionalist theorists that we are going to discuss below argue, this approach does not describe human rights practice. The reasons why different communities uphold human rights do vary. The question is why we need to devise complicated theories grounding human rights that, as Joseph Raz put it, are "so remote from the practice of human rights as to be irrelevant to it."[191]

But for our purposes, the main difficulty with the orthodox approach is that as a result of deriving human rights from a pre-political domain, it unduly limits the acceptable

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[187] John Tasioulas, The Moral Reality of Human Rights, in Thomas Pogge, *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (Oxford University Press 2007) 77; John Tasioulas, 'Taking Rights out of Human Rights' (2010) 120 (4) Ethics 647, 671-672

[188] John Tasioulas, 'Human Rights, Universality and the Values of Personhood', 89; John Simmons is another theorist from this tradition. According to him: "Human rights are rights possessed by all human beings (at all times and in all places), simply in virtue of their humanity… Human rights… have the properties of universality, independence (from social and legal recognition), naturalness, inalienability, non-forfeitability, and imprescriptibility. Only so understood will an account of human rights capture the central idea of rights that can always be claimed by any human being." John

Simmons, *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge: Cambridge University Press, 2001) 185

[189] William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press 2009) 517

[190] See: Joshua Cohen, 'Is There a Human Right to Democracy?' in C. Sypnowich (ed) *The Egalitarian Conscience* (Oxford University Press 2006) 232; Beitz refers to Cranston's dismissal of social rights, see: Charles Beitz, Charles Beitz, 'Human Rights and the Law of Peoples' In Deen Chatterjee (ed) *The Ethics of Assistance: Morality and the Distant Needy* (Cambridge University Press 2004) 198

[191] Raz, 'Human Rights Without Foundations', 323

uses of the rights-talk. It circumscribes the scope of a rights-claim by establishing its potential itinerary in advance and by establishing a threshold beyond which we are no longer dealing with a human-rights-issue. Human rights are considered to be assessable in terms of their truth-value and their existence does not depend on political processes**.** The social and the political context wherein human rights operate is, in a significant sense, disregarded having no influence on their content. This does not allow us to conceptualise the ways in which social movements construct human rights in their particular struggles as challenges to concrete oppressive political and economic orders. Every new rights-claim becomes translatable into the existing categories of rights, resulting in the curtailment of its radical potential.

2. THE FUNCTIONALIST CONCEPTION

The functionalist conception discussed in this section recognises the *contextual* nature of rights. To grasp the meaning of human rights, claims Charles Beitz, we should not lose time on exploring a domain of morality, a deeper order of values which exists independently of institutional doctrine and practice.[192] Instead, on the functionalist view, individuals possess human rights not in virtue of their humanity, but due to certain institutional arrangements.[193]

Thus, the content of human rights is determined not through philosophical reasoning about the nature of human beings, but through the analysis of the role that human

[192] Beitz does not deny the existence of such values. see: Beitz, 'Human Rights and the Law of Peoples' 197. See also: Raz, 'Human Rights Without Foundations', 334–337

[193] For functionalists, the orthodox approach neglects how human rights are used in practice not as truth-claims but as political instruments. They are used as protections from particular dangers to human well-being that arise from contingent circumstances. In Joshua Cohen's words, "[h]uman rights are not rights that people are endowed with independent of the conditions of social and political life, but rights that are owed by all political societies in light of basic human interests and the characteristic threats and opportunities that political societies present to those interests." Cohen, 'Is There a Human Right to Democracy?', 232. For Beitz as well human rights protect individuals "against the threats to their most important interests arising from the acts and omissions of their governments" - Charles Beitz, *The Idea of Human Rights* (Oxford University Press, 2009) 197

rights play in contemporary international life.[194] The idea is to look at the existing international norms and at the practice that is formed around those norms in order to identify a distinct *function* of rights. It is from analysing the function that rights have, or are supposed to have, in international politics that we should construct their nature and content.[195] What is the function of human rights then?

In answering this question the theorists of the political conception largely follow John Rawls' account in *The Law of Peoples*.[196] For Rawls, human rights have a special function in formulating the conditions of membership of the states in international community. Rawls' aim is to expand the scope of international cooperation and not limit it to liberal-democratic states. He advocates tolerance of a reasonably pluralistic world where liberal societies co-exist with non-liberal but 'decent societies'.[197] For this purpose, Rawls grounds human rights in such a way as to discard the charge of western parochialism and harness support of various non-liberal but decent cultures. From this perspective, metaphysical justifications of human rights are unpractical insofar as "many decent hierarchical peoples might reject [them] as liberal or democratic, or as in some way distinctive of Western political tradition and prejudicial to other cultures".[198] Instead, human rights are principles that all decent societies would support, be it on liberal or on non-liberal grounds.

In this way, human rights are linked to state sovereignty. Insofar as states act within their sovereign right, they can, as Raz puts it, "say to outsiders: whether or not I (the state) am guilty of wrongful action is none of your business".[199] However, the violation of human rights strips states of a right to such a response. Thus, human rights put constraints on state sovereignty, 'on a regime's internal autonomy', and

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[194] *Ibid*. 10

[195] *Ibid*. 102

[196] John Rawls, *The Law of Peoples* (Harvard University Press 1999)

[197] What Rawls calls "decent hierarchical peoples" are not liberal-democratic, i.e. organised around the ideas of pluralism and equal participation of all in political life; they might privilege comprehensive religious or political doctrines without guaranteeing everyone's equal participation. Nevertheless, such societies still meet certain criteria which render them legitimate and which include: being non-aggressive, upholding the system of justice which expresses some notion of common good, purporting to represent everyone's interests, and respecting human rights.

[198] Rawls, *The Law of Peoples,* 68.

[199] Joseph Raz, 'Human Rights Without Foundations', 328

legitimise international action against the states that are non-democratic in an 'indecent way'.[200] It follows then that we are not dealing with a human right unless its violation justifies international action against the wrongdoer state.

When Rawls talks about international action he has coercive measures in mind, such as economic or diplomatic sanctions, or even, as a last resort, military intervention.[201] Beitz disagrees with the view that human rights should be explained *solely* in terms of their justificatory function with regard to *coercive* interference into sovereign affairs. Instead of 'international intervention', Beitz uses the term 'international concern'.[202] He refers, for instance, to international non-governmental organisations who are engaged in reform-oriented projects in response to human rights violations and whose activity can hardly be classified as intervention.[203]

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[200] As a result of taking into account the 'urgency' of human rights, combined with the need for universal acceptance by all decent peoples, as well as a concern with the risk of unjustified interventionist practices, Rawls arrives at a list of human rights that falls short of the one found in the UDHR. This list is also not identical to the one necessitated by his own liberal conception of justice that should govern a society of free and equal individuals. See John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1999). Human rights, for the reasons mentioned above, represent a more modest set of principles that Rawls takes to be 'a proper subset' of rights required by justice. This modest list looks like this: "the right to life (to the means of subsistence and security); to liberty

(to freedom from slavery, serfdom, and forced occupation, and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought); to property (personal property); and to formal equality as expressed by the rules of natural justice (that is, that similar cases be treated similarly)." Rawls, *The Law of Peoples,* 65. However, James Nickel argues that "[w]e can accommodate Rawls's underlying idea without paying that price. To accept the idea that countries engaging in massive violations of the most important human rights are not to be tolerated we do not need to follow Rawls in equating international human rights with a heavily-pruned list. Instead we can work up a view— which is needed for other purposes anyway—of which human rights are the weightiest and then assign the intervention-permitting role to this subset. See: James Nickel, *Making Sense of Human Rights* (2nd edn., Blackwell Publishing 2007) 98–103. Another prominent theorist in this approach, Joseph Raz, in contrast to Rawls, does not offer a determinate list of rights. For Raz, in order to justify foreign intervention, the urgency of rights-violations is not enough. We have also to look at the current international political environment, i.e. on the extent to which intervention might be used as an excuse for ulterior, such as imperialistic, purposes. The sort of claims that we have depends "on the contingencies of the current system of international relations." In this way, depending on any given international situation the list of human rights may expand or subtract. See Raz, 'Human Rights without Foundations', 336; Similarly, Beitz and Cohen refuse to give a "canonical list". Even though Beitz does not give a substantive list of human rights, because of his broader approach to the latter's public role his will end up being more comprehensive a list than that of Rawls.

[201] Rawls, *The Law of Peoples*, 36

[202] Beitz, *The Idea of Human Rights*, ch. 6

[203] Charles Beitz, 'Human Rights and the Law of Peoples' in Deen Chatterjee (ed) *The Ethics of Assistance: Morality and the Distant Needy* (Cambridge University Press 2004) 203

But this focus on international action, weather coercive or not, in defining the concept of human rights is problematic. Firstly, on this view, the starting point is always the *status quo* in the image of which the function of human rights, and hence their content, is tailored.[204] For instance, Raz explicitly says that the existence of human rights depends on "the contingencies of the *current* system of international relations".[205] The second problem with intervention-oriented accounts is that the perspective on the international role of human rights neglects the latter's *intra*national function of legitimising and criticising political systems.[206] Reiner Forst rightly argues that human rights do not, primarily, give reasons for external intervention but "provide reasons for arranging a basic social and political structure in the right way."[207] The role of human rights is to ground internal legitimacy instead of limiting internal autonomy.[208]

The function of human rights cannot be reduced to giving reasons for foreign interference. They also, or primarily, give reasons for organising a political system. Violations of a human right might end up in justifying external intervention, but the claims to human rights play a critical role within political community in a political process of challenging and transforming extant orders. Human rights is a language whereby the power is challenged by the rights-holders themselves. This is why

"[w]hen we think about human rights, the proper perspective is the one in tune with that of the participants in social struggles".[209] This perspective, the perspective of social movements struggling against perceived injustice, exclusion and oppression, is neglected by the interventionist focus. Human rights are not merely tools for the

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[204] Seyla Benhabib, 'Reason-Giving and Rights-Bearing: Constructing the Subject of Rights' (2013) 20 (1) Constellations Volume 38, 45

[205] Joseph Raz, 'Human Rights without Foundations', 336 [my emphasis]; Laura Valentini calls this 'a narrow version of the political conception' and distinguishes it from a broader, non-state-centric account of the political conception by Thomas Pogge. See: Laura Valentini, 'In what Sense Are Human Rights Political?', (2012) 60 (1) *Political Studies* 180

[206] Jean L. Cohen, *Globalization and Sovereignty. Rethinking Legality, Legitimacy and Constitutionalism* (Cambridge University Press 2012) 194; Forst, 'The Justification of Human Rights' 726-730

[207] *Ibid.* 727

[208] *Ibid.*

[209] *Ibid.* 729

powerful to protect the disadvantaged – though they can well be - but also, or primarily, tools for the disadvantaged to challenge the powerful.

Joshua Cohen seems, at first glance, to respond to above criticisms. However, as we will see, Cohen's sophisticated functionalist conception with an internal perspective is also limited due to the requirements of tolerance that Cohen inherits from Rawls.

3. JOSHUA COHEN'S FUNCTIONALISM

Following Rawls, Joshua Cohen is guided by the idea of global public reason.[210] His theory understands the reality of ethical pluralism and of the need for toleration. Furthermore, for Cohen as well, the practical role or function of human rights consists in providing global standards for assessing the legitimacy of political societies. The requirement to meet these standards sets limits on the internal autonomy of states.

But Cohen deems important to provide an account of why certain rights and not others are suited for the role. Insofar as the aim of this conception of human rights is to harness global support, the aim informed with the notions of ethical pluralism and toleration, the rationale behind human rights should be formulated so as to be sharable by everyone.

It is here that Cohen introduces his notion of *membership* or *inclusion* in an organised political society as a moral principle which requires from all political societies to devise their institutions in such a way as to give due consideration to a good of every individual both in the process of decision-making and in the content of those decisions.[211] The question of what human rights are is no longer left to the inter-state relations but is based on a normative principle. In other words, human rights are not

[210] Joshua Cohen, 'Minimalism about Human Rights: The Most We Can Hope For?' (2004) 12 The Journal of Political Philosophy 190

[211] Cohen, 'Is There a Human Right to Democracy?', 238

determined by looking at the reasons to intervention but by considering what is required for inclusion in a political society. Human rights specify the basic conditions that every state should meet in order to guarantee inclusion of its members and, in turn, to be accepted as a legitimate member of the international community. The violation of this principle might end up in coercive or non-coercive external interventions.[212]

Cohen's conception does not provide a substantive list of rights, but through the principle of membership offers a space for *political* disagreements (as opposed to the disagreements about the truth-value) about what is required for membership, i.e. "what consideration is due to each person in a political society".[213]

Crucially, the understanding of human rights in terms of basic conditions for membership gives us an internal perspective which was absent from the accounts discussed above. Claiming a human right means demanding inclusion in the political system. It means criticising and challenging the terms of membership from the perspective of the excluded and not as a matter of foreign policy.

The principle of membership is a consequence of taking the idea of self-determination seriously. It is this idea that forces us to be tolerant towards other ethical views around which societies build their communal lives. However, the result of self-determination does not have to be a democratic system, for Cohen. To do otherwise would be too paternalistic and demanding for those cultures that do not uphold liberal-democratic values. As a consequence, Cohen sacrifices full democratic

[212] Cohen, 'Minimalism about Human Rights' 194

[213] *Ibid.* 197. Cohen rightly criticises, what he calls, *substantive minimalism* advocated by Michael Ignatieff in Michael Ignatieff, Human Rights as Politics and as Idolatry (Princeton, NJ: Princeton University Press, 2001). See also: Thomas Nagel, 'The Problem of Global Justice', (2005) 33 Philosophy and Public Affairs 113; See also Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (University of Notre Dame Press 1994). Walzer looks for points of convergence between different cultures to identify "the core of a universal thin morality" and derive human rights from there. Substantive minimalism looks for an actual overlap of comprehensive views in order to derive a set of human rights. Cohen's *justificatory* minimalism, in contrast, allows societies to ground human rights on their own distinct comprehensive values. In this way, Cohen hopes that a more robust list of human rights might be established.

rights to participation and denies them the status of human rights.[214] But as Forst argues, the idea of self-determination on which Cohen basis his principle of membership already implies the recognition of each other's equal worth, i.e. membership necessarily implicates a substantive moral notion of equality. Only by participating in deliberation can one ascertain whether a person's interests are taken into account or not. Self-determination according to Forst "is a recursive principle, with a built-in dynamic of justification that favours those who criticise exclusions and asymmetries".[215]

Cohen becomes a hostage to the requirement of global acceptability of human rights and neglects different uses of human rights in struggles against the status-quo. The problem is that in seeking an overlapping consensus, one might end up neglecting a type of dissent that points beyond existing frameworks.[216] It is true, Cohen does acknowledge the fact that ethical societies are not fixed and given, that they are constituted by dissenting voices, by competing formulations of good.[217] But at the same time he denies the language of human rights to those who might be included according to some universally accepted standards but further demand full equality and freedom.

Seyla Benhabib develops this line of critique. On the one hand she applauds Cohen's endorsement of an "overlapping consensus" which does not depend on any comprehensive world-view and notes that this is a welcomed move in today's world where human rights are too often misused by international powers.[218] However, the same concern about overlapping consensus and toleration could also slip into 'liberal indifference' in accepting legitimacy of minimally inclusionary but still repressive

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[214] For opposite views see: Carol Gould, *Globalizing Democracy and Human Rights* (Cambridge University Press 2004); Pablo Gilabert, 'Is There A Human Right to Democracy? A Response to Joshua Cohen' (2012) Latin American Journal of Political Philosophy 1.2: 1-37; Seyla Benhabib, 'Is There a Human Right to Democracy?' in Dignity in Adversity: Human Rights in Troubled Times (London: Polity, 2011); Rainer Forst, 'The Justification of Human Rights', 711;

[215] Forst, 'The Justification of Human Rights', 730

[216] Jeffrey Flynn, *Reframing the Intercultural Dialogue on Human Rights: A Philosophical Approach* (Routledge 2013); Jean L. Cohen, *Globalization and Sovereignty;*

[217] Cohen, 'Minimalism about Human Rights' 200

[218] Seyla Benhabib, 'The Legitimacy of Human Rights' (2008) 137(3) Deadalus 94, 98

regimes.[219] Benhabib, similar to Forst, does not see how starting from the idea of self-government Cohen can restrict his list of human rights so as to exclude democratic rights to participation. [220] Chapter Six will discuss Benhabib's discourse-theoretical approach were she takes a different perspective on human rights avoiding Cohen's pitfalls. [221]

To recap, for all the authors discussed in this section, attendance to the requirements of global public reason results in defining political communities in terms of a homogenous whole, thereby ignoring complexities and ongoing debates within cultures.[222] What happens when in a society described as decent, i.e. in a society based on some common good notion of justice and characterised by a "decent consultation hierarchy", there are dissenting voices employing the language of human rights? Are these dissidents making a category mistake in invoking human rights? The focus on overlapping consensus as a guiding consideration in identifying human rights prompts us to answer positively to the last question. It is true that the theorists of the functionalist approach usually (a notable exception is Rawls) refuse to give a determinate set of human rights. But the procedures offered for arriving at such a set are already constrained by the requirements of (global) public reason in such a way as to necessarily limit the scope of the available use of the language. This picture neglects the multiple ways in which human rights are used within and/or outside states to challenge national and/or international institutional orders and deprives social movements a powerful vocabulary in their struggles.[223]

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[219] *Ibid.* 98

[220] Seyla Benhabib, 'Defending a Cosmopolitanism without Illusions. Reply to My Critics', (2014) 17 Critical Review of International Social and Political Philosophy 697, 704

[221] For a comparison between discourse-theoretical and functionalist approaches see Kenneth Baynes, "Discourse Ethics and the Political Conception of Human Rights," *Ethics & Global Politics*, 2 (2009), 1-22.

[222] Benhabib, 'The Legitimacy of Human Rights', 102

[223] This is not to reject the contribution of the political approach to the theory of human rights especially with respect to curbing unwarranted foreign intervention. Jean L. Cohen suggests to separate human rights from humanitarianism in distinguishing the politics of humanitarianism from the politics of human rights. See: Jean L. Cohen, *Globalization and Sovereignty*, ch.3

Conclusion

To sum up this chapter, if orthodox theories limit the use of rights-talk to the claims to individual well-being in order to achieve the *universality* of human interests, the functionalist conception similarly dismisses the articulation of political projects through human rights, but now due to the requirements of the universal *acceptability* of human rights norms.

It is true, the functionalist conception does represent a step forward from the orthodox approach towards linking human rights to particular institutional realities. My argument for the radical politics of human rights similarly confronts the discrepancy between the pre-political accounts of human rights and their context-specific political function. Yet, functionalists' understanding of what is political about rights differs from mine. For functionalists what makes human rights political is not the fact that they are articulated contextually through bottom-up political action, but the lack of substantive agreement on their justification. The distinctive feature of this approach is that instead of inquiring into the truth behind human rights, it focuses on the ways of guaranteeing these universal norms that are already established by attending to global public reason. As in the orthodox approach, here rights are seen as limits on and preconditions for politics, rather than constitutive parts of the latter.

Thus, in a relevant sense rights come before politics. If human rights protect a normative principle formulated independently of political action - whether it is agency (the orthodox conception), or the requirements of global public reason (the political conception) - they cannot invoke a political imaginary that goes beyond these predetermined itineraries. Here, rights-claims can only demand a return to some pre-existing stage of justice.[224]

[224] Fernando Atria, 'Social Rights, Social Contract, Socialism' (2015) 24(4) Social Legal Studies December 598, 607

The problematic nature of the juridical approach becomes more salient when we focus on social rights. If it is in the space made possible by rights that the issues connected with particular socio-political arrangements within the polity can be negotiated, then by limiting rights-talk to pre-political interests, the criticism of the structural problems responsible for the production of the needs in question become discursively barred from the reach of rights-claims. As long as rights are possessions which make politics possible, the social order which might be responsible for the needs that underlie social rights, as well as the institutional model through which those needs are to be satisfied, cannot themselves be objects of rights-claims. Here, the risk is that the systemic production of needs by existing socio-economic relations will be disguised, legitimised and, hence, perpetuated by addressing only the
'symptoms' of the problem rather than the 'disease' itself.

I would like to suggest that this hierarchy of rights over politics depoliticises the need for rights itself as well as disguises the radical potential of social rights. In order to salvage this potential, first we need to free rights from the shackles of pre-political ideals. This requires nothing less than a radical rethinking of the relationship between politics and rights. Contrary to the juridical model, we need to think of rights not as pre-conditions and constraints on political action but as constitutive thereof.

In the following chapters, I will distinguish the juridical from the political model. If the juridical model establishes the distributive criteria for rights prior to the outcomes of politics, the political model dispenses with this conceptual priority of rights over politics; rights become constitutive of political action, formulated contextually by political actors themselves. I would like to locate the radical conception of social rights within the political model and distinguish the former, on the one hand, from the juridical model, and on the other hand from those versions of the political model which fail to fully capture the transformative potential of social rights.

Chapter Four

Hannah Arendt and the Political Model of Rights

This chapter will introduce the *political* model of rights. It is on the basis of this model that we need to construct the radical conception of social rights. What unites different theories adopting this model is the understanding of rights as constitutive of politics. In contrast to the orthodox and functionalist theories, the political model understands the content of rights to be formulated by the claimants themselves in the course of bottom-up political action against the authoritative formulations thereof.

Hannah Arendt provides a helpful exposition of the main ideas behind this model. It is by exploring her rich work that I am going to extrapolate certain important features of the radical conception of social rights. Through a reconstruction of her dispersed arguments, I arrive at the following conception: *to claim social rights in a political manner is to make a proposal which initiates an open-ended political process of deliberation and debate on the issues of the sources, character and ways of realisation of the needs that those rights invoke.* This is a conception of rights as *alliances and agreements* and of rights-claims as *political proposals*.

It is true, Arendt never paid much attention to social rights *per se*. However, her strong views on its two component elements - human rights and social justice – are

well known, and it is precisely because of these views that Arendt seems to be an unlikely author to solicit on a radical political dimension of social rights-claims. After all, she is widely criticised for chastising the idea of human rights outside institutional frameworks. She is said to argue that rights are socio-legal preconditions for authentic politics and should be interpreted as demands for the implementation of these preconditions rather than as political claims in themselves. With respect to social justice, she is criticised for insisting on the purification of politics from 'the social question', relegating all social and economic matters to the non-political domain.[225]

However, I would like to discern an alternative line of thought in Arendt. I am going to argue that she can be read as suggesting an alternative, anti-'traditional', *political* conception of social rights which potentially transcends liberal legalism. This will be accomplished in the following way: by reconstructing Arendt's views on the relationship between law and politics; by clarifying her recasting of human rights in terms of the right to have rights, and by revising her (in)famous social/political distinction.

I begin by arguing that Arendt's notion of 'self-contained' politics,[226] i.e. politics unrestricted by external normative frameworks, on the one hand, and her emphasis on the importance of law for the preservation of the political sphere where freedom can appear, on the other, provides an interesting avenue for rethinking the relationship between politics and rights. On this account, rights are not institutional guarantees of pre-political interests limiting political action, and enforced by the sovereign, but mutual agreements constituting political sphere and existing as long as they are upheld by covenanting parties. Rights articulate and preserve public sphere rather than limiting and regulating it. What they protect and express is not primarily individual interests taken separately, but a political interest of the community to organise collective life in a particular way. This image of rights allows us to see how rights-claims do not invoke extra-political principles to be enacted in a

[225] See the discussion of these criticisms below

[226] Dana Villa, *Arendt and Heidegger* (Princeton University Press 1996) 36-42

top-down fashion, but are political proposals directed towards co-citizens, inviting them to deliberate on the terms of co-existence. To claim a right is not to bypass the political arena, but to open a political process around the formulation of the collective good that rights-claims refer to.

But, there is a question of who is included in the politics of rights. This question is all the more pressing in light of Arendt's dismissal of a transcendent grounding for rights as well as her understanding of politics as taking place between equals. I argue against the critics that instead of renouncing them *tout court*, Arendt recasts human rights in terms of *the right to have rights* which in turn is grounded not in a transcendent principle but in *praxis*, and exists as long as it is enacted. Rights-claims, however, are not completely arbitrary. They are guided and animated by the principle that becomes manifest in the practice of claiming itself. Connecting back to Arendt's conception of law and rights as political agreements and alliances, I present the right to have rights as a right not to some set of pre-political entitlements, but to the inclusion in the bottom-up and open-ended political process of production and maintenance of rights.[227] Crucially, there is nothing in Arendt that would lead us to think that this political process has to result in the creation of individual possessive rights or other types of rights which are derivative from the former. This process might as well go beyond the bourgeois law and constitute a new order. In short, even if against Arendt's own best intentions, there is a radical promise in her theory which the upcoming chapters seek to salvage.

[227] This understanding of the right to have rights in terms of a right to participate in the creation and maintenance of rights has been defended recently by James Ingram. See: James Ingram, 'What Is a 'Right to Have Rights'? Three Images of the Politics of Human Rights' (2008) 102 American Political Science Review 401; James Ingram, *Radical Cosmopolitics: The Ethics and Politics of Democratic Universalism* (Columbia University Press 2013) 246-259

1. ARENDT'S CONCEPT OF LAW

According to the conceptions which adhere to the juridical model, there are certain individual interests that should be protected from the dangers associated with politics. This model presupposes a particular conception of politics which is always already circumscribed by rights. It is believed that unleashing politics from normative constraints would pave the way for domination and oppression.[228]

In contrast, Arendt is an author who most forcefully attacked, what she saw as, the constant endeavour of the whole western philosophical tradition to put limits on political freedom and with it "[e]scape from the frailty of human affairs into the solidity of quiet and order".[229] For her, freedom can be expressed only through a politics which is unbound by transcendent principles. Therefore, freeing political action from preconceived structures (e.g. from pre-political rights) amounts to salvaging freedom as such. But does this mean that we end up allowing unrestricted politics with all the risks associated with it? In order to answer this question we need to delve deeper in Arendtian concepts of freedom and action.

Freedom for her is not a possession that an individual can enjoy in isolation, in a dialogue with herself.[230] It is not, as liberals have it, a capacity manifested in an unrestricted choice between alternatives. For the latter, Arendt reserves the term 'liberties'.[231] It is by equating freedom with liberties that politics and freedom are dissociated. She notes with frustration that "it has become almost axiomatic even in political theory to understand by political freedom not a political phenomenon, but on the contrary, the more or less free range of non-political activities which a given body politic will permit and guarantee to those who constitute it."[232] Instead,

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[228] For the criticism of such an understanding of the relationship between politics and morality see: Bernard Williams, 'Realism and Moralism in Political Theory' in Bernard Williams, *In the Beginning was the Deed* (Geoffrey Hawthorn ed., Princeton University Press 2005)

[229] Hannah Arendt, *The Human Condition* (2nd edn, University of Chicago Press 1998) 222

[230] Hannah Arendt, *Between Past and Future* (New York: Penguin Books, 1968) 145

[231] For a distinction between the two terms see: Hanna Fenichel Pitkin, 'Are Freedom and Liberty Twins?' (1988) 16(4) Political Theory 523

[232] Hannah Arendt, *On Revolution* (Penguin Books 1990) 30

freedom as 'a political phenomenon', as 'the raison d'etre of politics'[233] is a positive notion, but one that has no counterpart in negative freedom *a la* Isaiah Berlin.[234] Rather, the only freedom is the positive one, the one that exists as long as men act

"neither before nor after; for to be free and to act are the same."[235] Freedom thus is directly connected with action, where action should be understood in the specifically Arendtian sense.

In *The Human Condition*,[236] she divides human activities into labour, work and action. We labour to cater for our biological needs, to survive. We work to fabricate an artificial world to live in. Labour is reproductive, leaving nothing behind; work – productive, but inextricably linked with violence that it does to nature. Work expresses the means-ends logic, capable of reducing the whole world to its means. We share the capacity to labour with animals and the capacity to work with Gods. Only action is purely human. Action is free from the necessities of life, from violence and from being subordinated to external ends. It is about "startling unexpectedness",[237] about new beginnings and initiatives. It is about disclosing one's unique personality to *others* through speech and deed and about constituting a *common world* by acting in concert. That is why, action is the only human activity requiring "the constant presence of others",[238] requiring a public. The emergence of *polis* signals the birth of political life distinct from the life led in the home and the family. On the Greek model, the private life and the political life constituted the two orders of the existence of every citizen, the two were directly opposed to each other, guided by different, irreconcilable principles. The private sphere was a sphere of mere life (*zoe*) where violence and command was the order of the day, a sphere of

"wants and needs", of hierarchy and inequality.[239] The political life, in contrast, was a *good life*, one "from which everything merely necessary or useful is strictly

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[233] Arendt, *Between Past and Future,* 151

[234] Isaiah Berlin, 'Two Concepts of Liberty', in Isaiah Berlin, *Four Essays on Liberty*, (Oxford University Press 1969)

[235] Hannah Arendt, *Between Past and Future* (New York: Penguin Books, 1968) 153

[236] Arendt, *The Human Condition*

[237] *Ibid.* 178

[238] *Ibid.* 23

[239] *Ibid.* 30

excluded";[240] a life lived through language and deed among equals, where decisions are made through persuasion instead of violence and sheer force, and where the individuality and the reality of the world is disclosed. To be free meant to be free from the necessities of life and from the commands of others.

This is why the ancient Greeks located freedom exclusively in the political sphere.[241] Only those unburdened by private concerns were capable of entering the world of action and demonstrating to their peers their capacity to initiate something new, and their unique identities, i.e. - "who" as opposed to "what" they were.[242] This is the idea of freedom that Arendt appeals to, something that can be said to exist only in public. Without such appearance in the political space, freedom is just an unrealised potential. It is in this sense that "[f]reedom as a demonstrable fact and politics coincide and are related to each other like two sides of the same matter."[243]

What sort of politics emerge with Arendt's above conceptualisation of political freedom? Is it a politics of the *extraordinary*, paradigmatically represented by revolution, or is it a politics that necessitates certain background structures that have to be in place for action in concert to be possible? Or is there a third way of understanding Arendtian constitutional politics? These questions need to be taken up in order to grasp Arendt's views on the hierarchy, or its absence, between politics and rights.

1.1 ARENDTIAN POLITICS: EXTRAORDINARY OR STRUCTURED?

With her focus on revolutions and uprisings, as well as with her references to the agonistic spirit of competition and distinction in the public realm,[244] Arendt often

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[240] *Ibid.* 25
[241] *Ibid.*31
[242] *Ibid.* 178-179
[243] Arendt, *Between Past and Future,* 149
[244] Bonnie Honig, *Political Theory and the Displacement of Politics* (Cornell University Press, 1993) 76ff

leaves an impression that authentic politics is all about disruptive constitutional moments. Only by interrupting normal institutional politics, it seems, the unexpected and the initiatory character of action can be demonstrated and freedom realised.

So Georg Kateb is lead to argue that "Arendt's talents are best engaged by what is extraordinary, not by the normal."[245] On this interpretation:

> "[For Arendt] politics is all the more authentic when it is eruptive rather than when it is a regular and already institutionalised practice, no matter how much initiative such a practice accommodates. The reason is that eruptive politics is more clearly a politics of beginning and hence a manifestation of the peculiar human capacity to be free or spontaneous, to start something new and unexpected, to break with seemingly automatic or fated processes or continuities; in a word, to be creative."[246]

Margaret Canovan finds it "unfortunate that the same concern for rare events that gave her the unparalleled insight into *extraordinary politics* should have led her to overlook *normal politics* altogether."[247] Similarly Bonnie Honig argues that politics for Arendt is "a disruptive practice".[248]

Jeremy Waldron takes issue with this line of thought. For him, on the contrary, Arendtian politics are 'structured politics'.[249] Heroic deeds and agonistic competition for distinction, on the one hand, and interruption of existing rules and practices through civil disobedience and councils, on the other, should not be seen as "alternatives to responsible modes of constitutional politics. Instead they are presented by Arendt as, in the one case, an archaic precursor to politics in the most

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[245] George Kateb, 'Political Action: Its Nature and Advantages' in Dana Villa (ed) *The Cambridge Companion to Arendt* (Cambridge University Press 2001) 135

[246] *Ibid.* 134-5

[247] Margaret Canovan, 'The Contradictions Of Hannah Arendt's Political Thought' (1978) 6 Political Theory 21

[248] Honig, *Political Theory,* 112–113; See also: Andreas Kalyvas, *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt, and Hannah Arendt* (Cambridge University Press 2008) 277ff

[249] Jeremy Waldron, 'Arendt's Constitutional Politics' in Dana Villa (ed) *The Cambridge Companion to Arendt* (Cambridge University Press 2001) 203

fully structured sense, and, in the other, a despairing echo of constitutional politics – 'strange and sad' – accompanying its lamentable decline."[250]

Now Waldron is definitely right when he argues that Arendt did not praise 'founding moments', in her famous accounts of the eighteenth century revolutions, for the sake of those moments alone. But instead criticised modern revolutions for their inability to live up to their promises and constitute freedom, (even if the American Revolution, as we will see, was more successful for Arendt in this respect than its French counterpart). The eighteenth century revolutions were a breakthrough according to Arendt, bringing to light the force of new beginnings. People emerged as authors of their own laws, of their own future; the authors of history "that suddenly [began] anew".[251] But it is equally true that, for Arendt, this (re)-discovered joy of concerted action needed preservation and nourishment, because political freedom is fleeting and episodic unless it constitutes itself into something durable, into a public space where a plurality of acting men can be re-created on a perpetual basis. In reminiscence of Marx's famous passage quoted in the first chapter, Arendt notes frustrated how the French Revolution traded the freedom of collective action for the security of ancient liberties.[252]

Waldron understands Arendt's frustration with revolutionary experiences in terms of the latter's failure to establish enduring *structures* where freedom could *dwell*. For him it is Arendt's metaphor of constructing a 'house' and 'furniture' that corresponds to the framing of a constitution: "[l]ike a table or a seating plan, a constitution separates and relates us by putting us in different seats in one another's presence."[253]

While furniture realises its function of separating and relating through physical objects, a constitution operates through rules and practices. Constitutions set boundaries between nations, and between public and private realms. Furthermore,

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[250] *Ibid.* 203

[251] Arendt, *On Revolution*, 28

[252] On Arendt's critique of Marx see: Bhikhu Parekh, 'Hannah Arendt's critique of Marx' in Melvyn Hill (ed), *Hannah Arendt: The Recovery of the Public World* (New York, St Martin's Press, 1979); Christopher Holman, 'Dialectics And Distinction: Reconsidering Hannah Arendt's Critique Of Marx' (2011) 10 Contemporary Political Theory 332

[253] Waldron, 'Arendt's Constitutional Politics', 204.

they set boundaries between individuals in the form of guaranteed civil liberties that provide much needed legal assurances against oppression.[254] It is only after giving each other these types of assurances that constitutions proceed not to limit power but to establish a viable structure where political freedom can be realised.[255] To this end, constitutions establish equality, a condition of possibility of a public realm for Arendt. This "involves structures that enable us to treat one another as equals, and structures that enable each person's opinion to be exchanged with the opinions of others, in a way that is capable of yielding a decision."[256] Furthermore, such a structure enables individuals to participate in debates, creates institutions where people can come together to deliberate on public matters and, overall, makes action in concert possible.

Arendt certainly puts as much emphasis on preservation as on new beginnings in her accounts of the modern revolutions. But, looking at her broader argument, it seems to me, that Waldron errs in supposing that the role of maintaining a space of freedom can be delegated to the law, the latter understood in terms of the metaphor of housing and furniture. As Arendt points out: "Political institutions, no matter how well or how badly designed, depend for continued existence upon acting men; their conservation is achieved by the same means that brought them into being."[257] It is only through politics itself that one can test whether freedom still dwells in the
'house', through politics that would construct and reconstruct that house on a permanent basis.[258] As Christian Volk points out, Waldron implicitly adopts a negative/positive freedom paradigm and thus misunderstands Arendt. For Arendt, the decline of the public sphere of politics results in the decline of freedom in general,

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[254] *Ibid.* 207

[255] Elsewhere Waldron argues that rights represent a background structure which provides "security in case other constitutive elements of a social relationship ever come apart." See: Jeremy Waldron, 'When Justice Replaces Affection: The Need for Rights' (1988) 11 Harvard Journal of Law and Public
Policy 625, 629

[256] Waldron, 'Arendt's Constitutional Politics', 209

[257] Arendt, *Between Past and Future,* 153

[258] Michael Wilkinson, 'Between Freedom and Law: Hannah Arendt on the Promise of Modern Revolution and the Burden of the Tradition' in Marco Goldoni and Christopher McCorkindale (eds.) *Hannah Arendt And The Law* (Hart 2012) 57

insofar as “rights and institutions which should enable political action become foreign to the citizens and are perceived as having grown apart from them”.[259]

To be sure, Waldron, in contrast to the orthodox conception of human rights, does not justify rights in terms of transcendent principles. On the contrary, he is a famous critic of removing rights from, what he calls, ‘the circumstances of politics’.[260] He takes rights to be conventional, subject to political interpretation. Thus, he acknowledges that the ‘house’, or constitutional structures, can and will change. Even more so, he sees Arendtian constitutions as a work in progress, as an unfinished project.[261] But the problem with his account, and this is indicative of the pitfalls of the juridical model in general, is that it retains an understanding of the role of rights in terms of pre-political guarantees. It is true that Arendt is not a theorist of mere disruptive politics. She is keenly aware of the dangers of unrestrained politics and is interested in preserving the space where freedom can appear on a regular basis.[262]

However, it is equally true that, for her, political freedom cannot be guaranteed by pre-political structures. By relying on such structures, Waldron comes too close to the ‘Great Tradition’ against whose anti-political tendencies Arendt so forcefully fights. But is it possible to think about politics and law without privileging either of them? Is it possible to conceptualise *maintenance* of the public sphere in political terms? In other words, how can we think of law and rights as a political phenomenon as opposed to a pre-political framework? This is the question to which I turn now by revisiting Arendt’s criticism of the traditional, anti-political conception of law as *command,* and reconstructing her scattered views on the alternative, Roman idea of law as *lex*.

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[259] Christian Volk, 'Hannah Arendt and the Constitutional Theorem of De-Hierarchization. Origins, Consequences, Meaning' (2015) 22 Constellations 175, 182

[260] Jeremy Waldron, *Law and Disagreement* (Clarendon Press 1999).

[261] Waldron, ‘Arendt’s Constitutional, 213

[262] Hauke Brunkhorst, 'Reluctant Democratic Egalitarianism' (2008) 15 Ethical Perspectives 149, 158

1.2 THE TRADITION

Action, as we saw above, is 'boundless' and 'unpredictable' because it is about acting in novel ways that breaks with the natural cycle of life and takes place in the situation of human plurality where no single individual, no sovereign, can control the processes that are set in motion by human interactions.[263] This web of human relationships that is forged and constantly transformed by plural action, the outcome of which cannot be known in advance, argues Arendt, has been an anathema for those who craved certainty in political affairs.

If what makes action so unpredictable is the situation of plurality, the certainty had to be won by abolishing it, which in turn amounts to the abolition of the public realm the condition *sine qua non* of which is plurality. For Arendt, it was Plato who, concerned with securing the realm of human interactions from the unpredictability of action, privileged *vita contemplativa* over *vita activa*. With the idea of a philosopher-king he introduced the concept of *rule* as an organising principle of community. This is a principle which supposes "that men can lawfully and politically live together only when some are entitled to command and the others forced to obey."[264] Plurality is abolished with the imposition of a one-man-rule as in monarchy or tyranny, or of the rule by the many who presents itself as 'one' as in democracy.

The ruler becomes the architect of political life, the one who is entrusted with devising workable plans for the well-being of the community.[265] As a result, politics, once indistinguishable from action, gets associated with fabrication and degrades

"into a means to obtain allegedly 'higher end'".[266] Politics becomes a vocation of experts rather than that of 'political animals'.

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[263] Arendt, *The Human Condition*, 190-191

[264] *Ibid.* 222

[265] "Within this frame of reference, the emergence of a utopian political system which could be construed in accordance with a model by somebody who mastered the techniques of human affairs becomes almost a matter of course". *Ibid.* 227

[266] *Ibid.* 229

This ancient substitution of *poiesis* for *praxis* was 'confirmed and fortified' by the 'imperative conception of law' of the Hebrew-Christian tradition.[267] Here, the legal phenomenon, in analogy with the Divine Commandments, is seen entirely in terms of a command/obedience relationship, the model which remained unchanged when in Modernity the Divinity was replaced by Natural Law. This conception of law further enshrines the ruler/ruled structure of political organisation. Crucially, the law construed in the image of a Commandment necessitates an *absolute*, a transcendent authority that stands beyond and above law and gives law its legitimacy.[268] It is this need for a sovereign legislator in the form of a king, a nation, or a sacred document, that continues to haunt our juridical imagination.[269]

This confrontational dynamic between, on the one hand, the idea of political freedom which is realised through common action and, on the other hand, the constant endeavour to disengage freedom from the public realm and subject politics to transcendent authority at the expense of plurality is most starkly manifested, for Arendt, in the eighteenth century revolutions and their aftermath. During those revolutionary moments political freedom was revealed with all its force through collective action in the public sphere against the tradition which would try to convince us that "one may be a slave in the world and still be free".[270] Yet, the revolutions could not escape the pitfalls of traditional thinking.

The grip of the Tradition was most evident in the example of the French Revolution. Instead of securing and perpetuating the space for political freedom, the result of the French Revolution was to collapse the newly discovered power of the people into the abstract idea of the 'sovereign nation' which in practice meant the rule of a few over the many.

Here we encounter, what Arendt calls, 'the problem of an absolute'.[271] It is through modern revolutions that we come to realise most forcefully the function and the

[267] Hannah Arendt, *On Violence* (Harcourt, Brace, Jovanovich 1970) 39
[268] Arendt, *On Revolution*, 189
[269] Wilkinson, 'Between Freedom and Law', 49
[270] Arendt, *Between Past and Future,* 146
[271] Arendt, *On Revolution*, 158

recurrence of absolutes throughout the history. There is something inherent in revolutionary beginnings that, argues Arendt, pushes towards anchoring them in transcendent authority.[272]

This problem arises in response to two difficulties that every new political beginning faces: the legitimacy of a newly formed power and the legality of its laws. In the French context Sieyes found the solution in his notion of 'constituent power', in the idea of a sovereign French nation existing outside of and legitimising the constituted, institutionalised power.[273] But since the national will changes constantly, "a structure built on it as its foundation is built on quicksand" and the only way to maintain the visibility of a unanimous nation is through manipulation of its will.[274]

This development was partly conditioned by the fact that the French Revolution differed from the American counterpart in that it was preceded by the absolutism of monarchy. Hence they were concerned with *liberation*, with seizing hold of individual liberties rather than with a constitution of a new political space.[275] It was then only natural, for Arendt, that the sovereignty of the nation inaugurated by the revolution substituted the sovereignty of a monarch. The nation instead of a king was now placed above the law and represented both "the locus of all power [and] the origin of all laws."[276]

In contrast, the pre-revolutionary American states were already organised in self-governing bodies under a 'limited monarchy'. The mandate of the framers was not to delegate state powers to a sovereign. But to create from existing constituted entities

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[272] *Ibid.* 149

[273] *Ibid.* 154

[274] *Ibid.* 154

[275] It is true, argues Arendt, liberation is necessary to act freely but "the status of freedom did not follow automatically upon the act of liberation. Freedom needed, in addition to mere liberation, the company of other men who were in the same state, and it needed a common public space to meet them a politically organized world, in other words, into which each of the free men could insert himself by word and deed." ibid 148. Elsewhere she notes that "there is nothing more futile than rebellion and liberation unless they are followed by the constitution of the newly won freedom", *ibid.* 133

[276] *Ibid.* 148

a greater political power in the form of a new federal government. The delegates were representing individual state powers,

> "they received their authority from below, and when they held fast to the Roman principle that the seat of power lay in the people, they did not think in terms of a fiction and an absolute, the nation above all authority and absolved from all laws, but in terms of a working reality, the organised multitude whose power was exerted in accordance with laws and limited by them."[277]

No need for an abstract idea of a sovereign nation allowed the framers to escape the trap of constituent/constituted power. This is why "perhaps the greatest American innovation in politics as such was the consistent abolition of sovereignty within the body politic of the republic, the insight that in the realm of human affairs sovereignty and tyranny are the same".[278]

But the problem of an absolute persisted. To be sure the Americans never made 'a fateful blunder of the men of the French Revolution' of identifying the locus of power with that of law.[279] Instead, they located the former in the people and the source of the latter in the constitution. But even though the legitimacy of a new order was never questioned,[280] to ensure the legality of new laws they fell prey to the temptation of invoking an absolute. In this case, the latter role was assumed by the Constitution "which was to incorporate for future generations the 'higher law' that bestows validity on all man-made laws".[281] It is this 'tradition' within which the

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[277] *Ibid.* 157. For a criticism of Arendt's idealised image of the American revolution see: William Scheuerman, 'Revolutions and Constitutions: Hannah Arendt's Challenge to Carl Schmitt,' in David Dyzenhaus (ed) *Law as Politics: Carl Schmitt's Critique of Liberalism* (Durham, NC: Duke University Press, 1998); Jason Frank, *Constituent Moments: Enacting the People in Post-revolutionary America* (Duke University Press Books 2010)

[278] Arendt, *On Revolution*, 144; Arendt's point about the abolition of sovereignty is explored in Arato, Andrew and Jean Cohen, 'Banishing the Sovereign? Internal and External Sovereignty in Arendt' (2009) 16(2) Constellations 307

[279] Arendt, *On Revolution*, 165

[280] However, see Keith Breen, 'Law Beyond Command?: An Evaluation of Arendt's Understanding of Law' in Marco Goldoni and Christopher McCorkindale (eds.) *Hannah Arendt And The Law* (Hart 2012) 29

[281] Arendt, *On Revolution*, 162

juridical model of rights operates and which subordinates politics to pre-established rights. Looking at the alternative tradition that Arendt finds in the Ancient world will help us to start rethinking the relationship between rights and politics.

1.3 ANOTHER TRADITION

Arendt goes on to claim that there was an alternative tradition which, while acknowledging self-destructive tendencies of political action, nevertheless managed to avoid collapsing power into rule, or law into command.[282] As Arendt argues: "[t]he common dilemma - either the law is absolutely valid and therefore needs for its legitimacy an immortal, divine legislator, or the law is simply a command with nothing behind it but the state's monopoly of violence - is a delusion."[283] Both the Ancient Greeks and Romans proved this dilemma to be false. Both of these societies viewed law entirely in terms of a man-made, conventional phenomenon. Neither of them saw divinity as a source of law, nor did any of them assume any divine-like, transcendent authority that stands outside and above the law, whether in the guise of some sort of a General Will or self-evident truths. As Keith Breen puts it:

> "[this alternative tradition contests] hubristic belief that human beings can create their world in common simply through imposing their will. It shows that the ideal of sovereignty, at least as traditionally conceived in the sense of having just one source and being the attribute of one agent, is a dangerous chimera, more a despairing retreat from genuine freedom than its realisation".[284]

It is true, for the Greeks legislation was a pre-political activity. A lawgiver could have been a foreigner, a stranger who would have been employed as an architect to design

[282] Wilkinson, 'Between Freedom and Law', 53-54
[283] Arendt, *On Violence*, 97
[284] Breen, 'Law Beyond Command?', 25

laws for the *polis*. But he in no way stood beyond and above his own creation. Rather, this meant that the Greek notion of law as *nomos* was prior to the existence of the political realm "just as building the walls around the city was prior to the coming into existence of the city itself".[285] Law as *nomos* was a precondition for entering the political realm.

But even though the need for a divine legislator was absent in Ancient Greece, the conception of *nomos* does not seem to escape the image of law as *command*.[286] Arendt herself indicates this when she notes that because law-making was a pre-political activity, it was about fabrication not action and, as all fabrication, was connected with violence.[287] She does not elaborate on this point but the violence of *nomos* can be discerned in its exclusionary nature. *Nomos*, as the Greek solution to the frailty and irreversibility of political action, was about erecting, as it were, 'walls' and 'hedges' around the political realm.[288] It would draw boundaries both externally between citizens and foreigners and internally between public and private realms. To maintain these divisions and separations one needs an enforcer that stands outside the *polis*. The borders have to be guarded both against external intruders as well as against internally excluded groups (e.g. slaves). This leads her account if not to

"embrace a Schmittian ideal of sovereignty", at least to concede that "there must be some effective sanction, some temporally located absolute, that counters violations and transgressions."[289]

As I will argue later, some authors implicitly or explicitly attribute to Arendt a sympathy towards the Greek model leading them to misinterpret her call for the right to have rights. It will suffice to say here that because of her eagerness to imagine law and 'body politic' without a sovereign, the idea of law as *nomos*, - which, like a general theory of law, Arendt never actually fully elaborated - could not have been her preference. Instead, I argue, she supported the 'political concept of law' exemplified

[285] Arendt, *On Revolution*, 186

[286] Wilkinson, 'Between Freedom and Law', 27

[287] Hannah Arendt, *The Promise Of Politics* (Schocken Books 2005) 181

[288] Arendt, *The Human Condition*, 63

[289] Breen, 'Law Beyond Command?', 27

in the Roman notion of *lex*, for it is more in tune with her conception of political action and freedom.[290]

Now, if the limiting nature of law as *nomos* did not allow the Greek *polis* to forge ties with foreign cities and expand, the Roman Empire was made possible precisely through a relation-establishing idea of *lex*.[291] 'The political genius of Rome was to turn the Greek concept of law as borders and walls into a contract between co-citizens and between nations.[292] Rome's approach was not to impose laws on newly conquered territories. Instead of 'an Imperium Romanum' Rome sought for 'a societas Romana': "an infinitely expandable system of alliances… in which peoples and lands were not only bound to Rome by temporary and renewable treaties, but also became Rome's eternal allies".[293] Rome itself was founded through an agreement between patricians and plebeians, preceded by a mythical alliance between the Trojans and the Latins. The idea was not to crush enemies but to forge treaties with them, not just for the sake of peace or out of compassion, but for the purpose of establishing 'a lasting tie' and thereby increasing Rome's power by merger with the powers of its new allies.

Before we go any further, we need to note that it is the discovery - or re-discovery - of this "interconnected principle of mutual promise and common deliberation",[294] this principle of non-sovereign power, of a power that is created, as it were, horizontally rather than vertically, that Arendt hails the American Revolution for.

"[T]he main question for [the framers]" argues Arendt, "certainly was not how to limit power but how to establish it, not how to limit government but how to found a new one."[295] Their task was to 'create more power', to erect "a system of powers that

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[290] Peg Birmingham, 'On Action: The Appearance and the Law' in Anna Yeatman and others (eds) *Action and Appearance: Ethics and the Politics of Writing in Hannah Arendt* (London: Continuum 2011)

[291] Arendt, *The Promise Of Politics*, 182

[292] Arendt, *The Human Condition*, 195

[293] Arendt, *The Promise Of Politics*, 186

[294] Arendt, *On Revolution*, 214

[295] *Ibid.* 133

would check and balance in such a way that the power neither of the union nor of it part, the duly constituted states, would decrease or destroy one another."[296]

An extra-political notion of an absolute and the notion of law as command gets in the way of the constitution of political power by thwarting plurality. Our inability to think about power other than as something that man has over other man, as something connected with oppression and violence, bears witness to the extent to which the western tradition has been predominated by the image of the rulers and the ruled, of the command and obedience, of the sovereign and the subjects, as the organising ideas of the political community.

Power, explains Arendt, should be distinguished both from individual strength and from collective violence. It is "the human ability not just to act but to act in concert".[297] It exists while action lasts. The rise and fall of this power is determined by the rules of *grammar or syntax* of political acting.[298]

The importance of Roman *lex* then lies precisely in bringing "together the isolated strengths of the allied partners and [in binding] them into a new power structure by virtue of free and sincere promise".[299] Law understood as *lex*, allows and enables the establishment and the maintenance of the political power through which political freedom can be realised.[300] As Volk explains: "the purpose and rationality of the legal system… is to preserve the syntax and grammar of democratic political acting and to maintain the rules of an active public-political sphere".[301] In this manner, the boundlessness and unpredictability of action is (partly) remedied - and, thus, politics saved from self-destruction - not by confining political action to institutional structures in the Traditional manner, but by formalising the relationships between

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[296] *Ibid.*143

[297] Arendt, *On Violence*, 44

[298] Arendt, *On Revolution*, 173

[299] *Ibid.* 170

[300] Arendt refers approvingly to Montesquieu and argues that he "had maintained that power and freedom belonged together; that, conceptually speaking, political freedom did not reside in the I-will but in the I-can, and that therefore the political realm must be construed and constituted in a way in which power and freedom would be combined" ibid 141

[301] Christian Volk, 'From Nomos To Lex: Hannah Arendt On Law, Politics, And Order' (2010) 23 Leiden Journal of International Law 769, 771

citizens on the power of promise.[302] Politics then is about, among other things, creating and preserving these formal relationships in the public sphere, creating and preserving rights.

Lex is antithetical to the view of law as command which even *nomos*, as we saw, could not escape. It is not about limiting and regulating, but about creating "a new political arena",[303] about making human interactions and political power possible. It is a formal bond, a 'lasting tie' that links and relates human beings and that comes into existence through mutual agreements and alliances, through "the back-and-forth exchange of words and action".[304]

> "[L]aw is something that establishes new relationships between men, and if it links human beings to one another, it does so not in the sense of natural law, in which all people recognise the same things as good and evil on the basis of a voice of conscience implanted, as it were, by nature, or as commandments handed down from above and promulgated for all people, but in the sense of an agreement between contractual partners. And just as such an agreement can come about only when the interests of both sides are recognised, this basic Roman law is likewise a matter of "creating a common law that takes both parties into account".[305]

Lex is grounded not in a command/obedience relationship, not in a sovereign decision guaranteeing some pre-political good, "but rather [in] reciprocal persuasion and speech, [in] *praxis* in the true sense of the term".[306] It is grounded in a collective political practice.[307] We have to understand law in terms of 'directives' rather than 'imperatives': "they direct human intercourse as the rules direct the game. And the

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[302] Arendt, *The Human Condition*, 63, n62; Jacques Taminiaux, 'Athens and Rome' in Dana Villa (ed) The Cambridge Companion to Arendt (Cambridge University Press 2001) 172

[303] Arendt, *The Promise Of Politics*, 178

[304] *Ibid.* 180

[305] *Ibid.* 180

[306] Breen, 'Law Beyond Command?' (57) 23; see also Massimo La Torre, 'Hannah Arendt and the Concept of Law' (2013) 99 Archiv für Rechts- und Sozialphilosophie 400

[307] Birmingham, 'On Action', 114

ultimate guarantee of their validity is contained in the old Roman maxim *Pacta sunt servanda*".[308] These directives serve as a 'syntax and grammar' of political action. Waldron explains this point well:

> "Rules of grammar are not constructed up front; they are not distinct from usage; and certainly they are not established by individual grammarians. They present themselves instead as something implicit in on-going activity, regulating usage nonetheless and making possible certain forms of life that would be unthinkable without them".[309]

As Michael Wilkinson puts it:

> "Constitutionalism as *political grammar* represents the idea that even our most fundamental law is *relational and dynamic*, developing symbiotically with politics and the exercise of political freedom rather than being fabricated or constructed 'up front' as a timeless container for the vicissitudes of political action."[310]

Now, according to Breen, Greek *nomos* as well, like Roman *lex,* cannot escape borders and limits, nor the 'command model' through which these borders and limits are enforced.[311] Breen starts by arguing that in her paradigmatic examples of new beginnings, Arendt downplays the extent to which both the American Revolution and the formation of Rome entailed a series of exclusions. For instance, in the context of the American Revolution, Arendt imagines an *entire* people coming together to found a new world and, with this image, glosses over the exclusions which historically accompanied that event (e.g. those of Native Americans).

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[308] Arendt, *On Violence*, 97-98; See also Massimo La Torre, 'Hannah Arendt and the Concept of Law' (2013) 99 Archiv für Rechts- und Sozialphilosophie 400, drawing an analogy with John Searle's notion of 'constitutive rules'

[309] Waldron, 'Arendt's Constitutional Politics', 204

[310] Michael Wilkinson, 'Between Freedom and Law: Hannah Arendt on the Promise of Modern Revolution and the Burden of the Tradition' in Marco Goldoni and Christopher McCorkindale (eds.) *Hannah Arendt And The Law* (Hart 2012) 61

[311] Breen, 'Law Beyond Command?', 17

It is hard to disagree with Breen that Arendt idealises founding moments and hence risks prohibiting "further inquiry into the origins of the system".[312] But he is not convincing when it comes to Arendt's alleged *failure* to see that *every* founding moment and hence *every* law (whether *nomos* or *lex*) is 'inevitably' exclusionary and necessitates absolutes.[313] It seems to me that even if Arendt conceded a misinterpretation of some historical facts on her part, she could still insist on the *possibility* of an all-inclusive foundation, where all concerned, through 'mutual promise and common deliberation', would reach consensus on 'an agreed purpose' of their co-existence.

Breen then turns to Arendt's idea of *constitutional promising as constitutive of lex* and argues that because "every promise is a particular promise that brings into being specific and determinate relationships", it also excludes the possibilities of alternative relationships.[314] In other words, instead of certain social groups, as in the case of founding moments, what get excluded are *alternative* courses of action. *Lex*, then, limits "permitted modes of intersubjectivity".[315]

Yet, it is not quite clear what Breen is concerned about here. After all, when we talk about constitutional promising, what matters is not a loss of alternative 'futures' in themselves, but the decision on the part of the community to pursue one particular future; not a loss of the possibility of relating in indeterminate number of ways, but a decision to relate in *certain* ways. Alternative futures and the alternative modes of interaction that are not covered by existing agreements can always be invoked through new agreements. It is not that Arendt ever sought to abolish a conceptual distinction between law and acting, between law and politics. On the contrary, law operates to render a community stable and in the image of *lex* it carries out this function through mutual agreements, instead of top-down imperatives.

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[312] *Ibid.* 30
[313] *Ibid.* 31
[314] *Ibid.*
[315] Breen, 'Law Beyond Command?', 30

At some point, Breen reveals that he is concerned about the situation of disagreement - when certain groups and ideas are left outside the law – inevitably leading to law's imperative character. Since "a promise is worthy of the name only when there is the will and the means to carry it through,"[316] they have to be kept. Therefore, we end up with at least "some temporally located absolute" who enforces the terms of co-existence.[317] But this argument, too, fails to pose any conceptual challenge to Arendt. First of all, in principle, disagreements could be dealt through the same "mutual promise and common deliberation", reconfiguring or annulling existing alliances and/or introducing new ones. Of course, in practice law will often be and is used imperatively to exclude. But this is not part of the concept of *lex*.

More importantly though, what Breen fails to grasp is that law as *lex* is characterised not by 'obedience' on the part of citizens but by their 'pro-active support',[318] or as Massimo La Torre puts it, law is grounded by "the sheer fact of someone acting according to a scheme that could not be available, were certain rules not used, that is, abided by. Support of such rules here is only implicitly given through the acting according to the rules".[319]

Furthermore, law as *lex,* because it does not require absolutes, is better-positioned to allow challenges to exclusions. This means that citizens can withdraw their pro-active support and challenge established alliances through the same political action. "If law is understood as alliance" argues Peg Birmingham "then the notion of civil disobedience is built into the law".[320]

Lex also enables us to conceptualise civil disobedience as taking place horizontally, by appealing to co-citizens, inviting them to deliberate on the collective matters and 'initiating change' from below rather than asking for a sovereign to deliver such a

[316] *Ibid.* 31; Waldron makes the same point Waldron, 'Arendt's Constitutional Politics', 212

[317] Breen, 'Law Beyond Command?', 27

[318] Birmingham, 'On Action', 114, Massimo La Torre, 'Hannah Arendt and the Concept of Law' (2013) 99 Archiv für Rechts- und Sozialphilosophie 400

[319] *Ibid.*

[320] Birmingham, 'On Action', 114

change.[321] To insist on the existing agreement by coercively enforcing the law will then be to thwart plurality and political action, it would be an anti-political act incongruent with the political concept of law as *lex*.[322]

1.4 *LEX* AND RIGHTS

This conception of law alters our perspective on the nature of rights. In one of her distinctions Arendt juxtaposes a revolutionary constitution to constitutionalism, or political power to the 'bill of rights" which, she says, are "negative on power".[323] By rights Arendt means individual entitlements that limit politics. But in my view rights can be rethought precisely in terms of the Roman *lex*. They can be seen as constituting political power rather than limiting it. Here, rights *relate* people and therefore are by definition relative.[324] They do not articulate eternal truths but assume their shape and content through human interactions. As Isaac notes: "How human rights-claims are articulated and mobilised can and will vary from case to case and from time to time, as political identities are transformed and new alliances are forged".[325] Rights present themselves as claims with undetermined itineraries. In contrast to the juridical model, where rights have pre-established missions, here the practice of claiming is open-ended because:

> "[b]y linking men of action together, each relationship established by action ends up in a web of ties and relationships in which it triggers new links, changes the constellation of existing

[321] On the Arendtian take on civil disobedience see: William Smith, 'A Constitutional Niche for Civil Disobedience? Reflections on Arendt', in Marco Goldoni and Christopher McCorkindale (eds.) *Hannah Arendt and the Law* (Hart 2012

[322] But it is important not to attribute to Arendt a Lefortian view. See: Birmingham, 'On Action', 115

[323] Hannah Arendt, *On Revolution* (Penguin Books 1990) 148

[324] *Ibid.* 53

[325] Jeffrey Isaac 'A New Guarantee on Earth: Hannah Arendt on Human Dignity and the Politics of Human Rights' (1996) 90 American Political Science Review 61, 71

> relationships, and thus always reaches out ever further, setting much more into interconnected motion than the man who initiates action ever could have foreseen."[326]

The image of law as *lex* transforms our notion of rights-claims from the demands for pre-political entitlements to *political proposals*. According to Arendt, "the formulation of law, of this lasting tie that follows the violence of war, is itself tied to proposals and counterproposals, that is, to speech, which in the view of both the Greeks and the Romans was central to all politics."[327] In the context of our discussion this means that to claim a right is either to initiate a new agreement or to demand reconfiguration or compliance with the existing one. This account shifts our focus from the question of how to protect individual interests to the question of how to organise and maintain a political sphere. Rights-claims are not seen as invoking extra-political entitlements to be enforced by a sovereign, but are instead directed towards co-citizens, inviting them to deliberate and contest the terms of co-existence. To claim a right is not to bypass the political arena as in the juridical model, but to participate in a decision-making process on the issues that rights-claims articulate.

I take Richard Bellamy to defend a somewhat similar conception of rights in his recent article, *Rights as Democracy.*[328] Bellamy, too, offers a critique of the juridical model where rights are prior to and above politics. It is a two-term construction of a normative relationship entailed in a right, where x has a right to some y that, according to Bellamy, gives a peremptory character to rights. Instead, Bellamy takes rights to be:

> "a three-term relation, whereby x asks some z to recognise and respect his or her claim to y, with attendant costs and benefits to z who will wish x to likewise recognise either his or her similar claim to y, or to some other good such as v…. Therefore, x and z need to

[326] Arendt, *The Promise Of Politics*, 186-7

[327] *Ibid.* 179

[328] Richard Bellamy, 'Rights as Democracy' (2012) 15 (4) *Critical Review of International Social and Political Philosophy* 449

> agree on right and their respective correlative duties, or lack of them, in given situation. It is this need for a collective agreement on which rights we possess, when and where, what their implications may be in a given case, how they interact with other rights, and which policies and procedures might be most suited to realising them, that places rights within… the 'circumstances of politics'"[329]

In other words, it is through a political process that we determine which rights are out there and how are they supposed to be secured. Thus, on Bellamy's account as well "a right is not claimed solely for the individual in question but as a right that can be held and upheld equally by all other individuals".[330] Here too rights are political proposals about the issues of collective interest.[331] But I would like to suggest that while Bellamy assumes that the rights created through a political process become part of the liberal legal order, Arendt's framework does not have to lead to this conclusion. Rights as proposals are potentially transcendent; they are capable of configuring new political systems beyond the liberal constitutional order. I will discuss the possibility of salvaging this radical promise of Arendt's theory in Chapter Seven.

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[329] *Ibid.* 452

[330] *Ibid.* 454

[331] James Tully also distinguishes two traditions of thought on human rights which roughly correspond to the two models discussed here. On Tully's description of the political model, as well, "human rights are *proposals*. They need to be *proposed* to fellow humans by fellow humans, rather than declared by an authority. The reason for this is that human rights are not self-evident: They are always open to question and critical examination by the humans who are subject to them. They gain their normative force by being reflexively tested, interpreted and negotiated en passant." James Tully, 'Two Traditions of Human Rights' in Matthias Lutz-Bachmann and Amos Nascimento (eds) *Human Rights, Human Dignity and Cosmopolitan Ideals* (London: Ashgate 2014) 140. Elsewhere he talks about how human rights are "proposed as tools for cooperating together and for contesting and changing unjust forms and means of cooperation. No human rights are self-evident. As proposals, they are always questioned by those to whom they are proposed and the proposer has the responsibility to give reasons for them. Dialogue, negotiation, interpretation, contestation and revision emerge around human rights and continue forever. Human rights exist and have their meaning and normative force, not in striking us as self-evident, but, rather, in being proposed and used, and simultaneously, being open to continuous questioning, interpretation and negotiation by the persons and peoples who use them or are entertaining the possibility of using them. Human rights gain their authority from being open to the reflective critical enquiry and testing of the persons and peoples who hold them." James Tully, 'Rethinking Human Rights and Enlightenment' in Kate Tunstall (ed) *Self-evident Truths? Human Rights and the Enlightenment: The Oxford Amnesty Lectures of 2010* (Bloomsbury 2012) 20

Meanwhile, there is one crucial question that remains unanswered: if politics is about collective action in the public sphere, and if rights have no transcendent grounding but are political agreements among equal co-citizens, how can someone excluded from the political community, someone who is denied equality and rights, claim a right, i.e. make a political proposal? If, as the political model promises, the rights are authored by the claimants themselves, how can those who are subject to law but not admitted to the public sphere, participate in the creation of rights?

It is here that Arendt's notion of the right to have rights (one that Bellamy also invokes[332]), i.e. a right to be included in the political community, comes in. The remainder of this chapter is dedicated to the explication of this complex idea.

2. ARENDT AND HUMAN RIGHTS

Arendt introduces her concept of the right to have rights in the context of the discussion of the plight of stateless people.[333] In light of this problem, her bitter conclusion is that human rights are *alienable* rights. Or, rather, what we take to be human rights – e.g. according to the Universal Declaration of Human Rights – are in reality citizenship rights, and, hence, alienable as soon as the protection of civic government is withdrawn.

According to Arendt, the French Declaration proclaimed Man to be the source of Law in substitution for God and Custom. Rights were deemed inalienable since no government could abolish them. Insofar as national sovereignty was also proclaimed in the name of Man, the former naturally assumed the role of a guarantor of the rights of man. The intrinsic connection between the rights of man and of the citizen
– the shallowness of the former without the latter – was thus disguised from the start.

[332] Bellamy, 'Rights as Democracy', 455

[333] Hannah Arendt, *The Origins of Totalitarianism* (2nd ed., New York: Meridian Books 1951) ch. 9

It transpired only with the emergence of the new global political order and with the millions of stateless people who found themselves outside an organised community.

We were faced with the reality that "the moment human beings lacked their own government and had to fall back upon their minimum rights, no authority was left to protect them and no institution was willing to guarantee them."[334]

The statelessness, for Arendt, means 'absolute rightlessness'.[335] This is more than an infringement of citizenship rights. Jurists, obsessed as they are with the image of law as punishment, cannot see that, apart from the positive action on the part of a sovereign to curtail civic rights, there is a situation where without such action, without taking away rights as such, people can find themselves in a state of rightlessness.[336] Civil rights might be curtailed in different ways, whether through criminal law or under a tyrannical rule. Invoking an analogy with slavery, Arendt notes that the stateless where deprived not of liberty - something that can happen in other, less alarming ways – but of "the possibility of fighting for freedom – a fight possible under tyranny, and even under the desperate conditions of modern terror."[337] As she puts it:

> "The Calamity of the rightless is not that they are deprived of life, liberty, and the pursuit of happiness, or of equality before the law and freedom of opinion – formulas which were designed to solve problems within given communities – but that they no longer belong to any community whatsoever. Their plight is not that they are not equal before the law, but that no law exists for them; not that they are oppressed but that nobody wants even to oppress them".[338]

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[334] *Ibid.* 292

[335] *Ibid.* 295

[336] For a radicalisation of this critique of rights see: Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press 1998)

[337] *Ibid.* 297

[338] *Ibid.* 295-296. As Arendt observes, even the Jews in Buchenwald enjoyed some sort of freedom of thought and discussion unavailable for the actual citizens of Nazi Germany. This is how unique the situation of the stateless is. "[N]either physical safety – being fed by some state or private welfare

"Something more fundamental" than mere lack of freedoms enumerated in human rights declarations is disclosed to us here – the importance of a *place* where freedom assumes its meaning and significance, "a place in the world which makes opinions significant and actions effective".[339] (In *The Human Condition*, Arendt will refer to this *place* as 'a space of appearance' which arises among equal citizens in the political community[340]).

Ironically, human rights - presented by the 18th century revolutionary declarations as natural rights - as rights possessed by humans *qua* humans irrespective of any government - should have been activated precisely in the situation when individuals found themselves outside of the protection of any institutional order. But "[t]he world found nothing sacred in abstract nakedness of being human".[341] The subject of human rights – i.e. "a human being in general",[342] an abstract individual who exists irrespective of any political organisation – is in reality a rightless person whose action has no effect and whose "freedom of opinion is a fool's freedom, for nothing [he] think[s] matters anyhow".[343] It is here that we become "aware of the existence of a right to have rights (and that means to live in a framework where one is judged by one's actions and opinions) and a right to belong to some kind of organised community".[344] Only the fundamental *human right to have rights* corresponds to the fundamental deprivation that the stateless suffer. But do recent developments in international law render Arendt's more than half-a-century old observations obsolete?

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agency – nor freedom of opinion changes in the least their fundamental situation of rightlessness. The prolongation of their lives is due to charity and not to right, for no law exists which could force the nations to feed them; their freedom of movement, if they have it at all, gives them no right to residence, which even the jailed criminal enjoys as a matter of course; and their freedom of opinion is a fool's freedom, for nothing they think matters anyhow." *Ibid.* 296

[339] *Ibid.* 296

[340] Arendt, *The Human Condition*, 207-212

[341] Arendt, *Totalitarianism*, 299

[342] *Ibid.* 302

[343] *Ibid.* 296

[344] *Ibid.* 297

It has been argued that the proliferation of international treaties and of enforcement mechanisms on the global level represent a solution to Arendt's concerns.[345] Seyla Benhabib also points to the expansion of cosmopolitan norms and their enforcement as a hope for an adequate guarantee of human rights.[346] However, identification of the problem as one of enforcement betrays the reliance of this account on the juridical model of human rights. Rights here remain the instruments in the hands of the powerful to provide help to the powerless. The right to have rights is reduced to another pre-political entitlement that needs to be enacted in a top-down manner, leaving the possibility that the conditions responsible for the rightlessness will be reproduced.

In contrast, by connecting the idea of the right to have rights with my reconstruction of the Arendtian views on law and politics presented above, I propose to understand this right not as a right to a set of pre-given citizenship rights but as a *claim to be included in the political process of creating and maintaining rights*.

2.1 THE RIGHT TO HAVE RIGHTS

So, how is the right to have rights grounded and what is it a right to? In terms of foundations there are no straightforward answers in Arendt, but she provides a number of hints. It seems obvious that Arendt does not ground the right to have

[345] Jean Cohen, 'Rights, Citizenship, and the Social: Dilemmas of Arendtian Republicanism' (1996) 3/2 Constellations 164, 177; for the relevance of the concept to international legal scholarship see: Alison Kesby, *The Right to Have Rights* (Oxford University Press 2012). See also Samantha Besson, 'The Right to Have Rights: From Human Rights to Citizens' Rights and Back', in Marco Goldoni and Christopher McCorkindale (eds) *Hannah Arendt and the Law* (Hart 2012) 335-355. Besson claims that "If there is one idea in Arendt's political theory that cannot be regarded as obsolete whatever changes have occurred in international law since 1949, it is her idea of a 'right to have rights'." *Ibid.* 353. She goes on to point out that "developments of European and international human rights law and practice have proved her right". *Ibid.* 354

[346] Seyla Benhabib, *Another Cosmopolitanism* (Robert Post ed., Oxford University Press 2006); For current problems with refugees and undocumented migrants along the lines of Arendtian criticism see Monika Krause, 'Undocumented Migrants: An Arendtian Perspective' (2008) 7 *European Journal of Political Theory* 331

rights in human nature. This is because such a right would merely amount to another 'human right' and, therefore, be meaningless without institutional backing, impossible to demand from anyone. It would be susceptible to misappropriations by others while rights-holders remain passive subjects in the need of help from capable outsiders. In short, this right would leave the 'calamity' of the rightless unsolved.

At the same time, apart from couple of sympathetic references, Arendt wants to go beyond Edmund Burke.[347] She does not reduce the right to have rights to mere historical convention. Human rights do not exist only insofar as they are endorsed by some political community and only within it. If this was the case, her claim that the stateless are entitled to the right to have rights would lose all significance.[348] On the contrary, even though she rejects both 'nature' and 'history' as foundations, Arendt wishes to retain the normative force of human rights even in the absence of enforcement.[349] But how? Seyla Benhabib does not find any answers in Arendt. As she notes with bitterness, Arendt's

> "formula the 'right to have rights' is frustratingly ambiguous: if we have a right to have rights, who could have removed it from us? If we do not already all have such a right, how can we acquire it? Furthermore, what is meant by "a right" in this formula: a legally recognized and guaranteed claim by the lawgiver? Or a moral claim that we, qua members of a human group, address to our fellow human beings, to be recognized as their equals? Clearly, it is the

[347] Arendt notes that the problem of the stateless:

> "offer what seems an ironical, bitter, and belated confirmation of the famous arguments with which Edmund Burke opposed the French Revolution's Declaration of the Rights of Man. They appear to buttress his assertion that human rights were an "abstraction," that it was much wiser to rely on an "entailed inheritance" of rights which one transmits to one's children like life itself, and to claim one's rights to be the "rights of an Englishman" rather than the inalienable rights of man."

Hannah Arendt, *Totalitarianism*, 299

[348] Jeffrey Isaac 'A New Guarantee on Earth', 64

[349] Frank I. Michelman, 'Parsing 'a Right to Have Rights'' (1996) 3 Constellations 200, 204

second, moral, meaning of the term *rights* that Arendt has in mind. But she is not concerned to offer a justification here."[350]

But if we follow Benhabib in understanding the *right* to have rights to be "a moral imperative", "a moral claim to membership",[351] we risk rendering rights-holders passive subjects in need of recognition. This would be "a very un-Arendtian"[352] move, neglecting her resilience towards extra-political foundations and her insistence on the importance of action discussed throughout this chapter. After all, when Arendt talks about the situation of rightlessness she makes it clear that the stateless "are deprived not of the right to freedom, but of the right to action; not of the right to think whatever they please, but of the right to opinion."[353]

Instead, as several authors suggest, we would do better if we directly face the "groundlessness" of rights.[354] As Michelman puts it, normativity or "oughtness in right is empirically dependent, arising out of practice and action… [A] person's having any rights at all depends… on that person's having individually participated, by 'action', in the social production of moral consciousness."[355] It is not that the individuals 'deserve' rights in virtue of their innate qualities. But, rather, rights exist only if we participate in their creation and maintenance.[356] The right to have rights then is grounded in the action of the rights-holders themselves and exists insofar as it is enacted and only while it is enacted.[357] With this, according to Michelman, Arendt "is pointing to an irreparable groundlessness of rights, affirming our own precarious,

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[350] Seyla Benhabib, *The Reluctant Modernism of Hannah Arendt* (Sage Publications 1996) 185

[351] Seyla Benhabib, *The Rights Of Others* (Cambridge University Press 2004) 56

[352] Sofia Näsström, 'The Right To Have Rights: Democratic, Not Political' (2014) 42 Political Theory 543, 551

[353] Arendt, *Totalitarianism*, 296

[354] Ayten Gündoğdu, 'A Revolution in Rights: Reflections on the Democratic Invention of the Rights of Man,' (2014) 10 *Law, Culture and the Humanities* 367; Frank I. Michelman, 'Parsing 'a Right to Have Rights'' (1996) 3 Constellations 200; Cristina Beltrán, 'Going Public: Hannah Arendt, Immigrant Action, and the Space of Appearance' (2009) 37 *Political Theory* 595; Charles Barbour, 'Between Politics and Law: Hannah Arendt and the Subject of Rights', in Marco Goldoni and Christopher McCorkindale (eds) *Hannah Arendt and the Law* (Hart, 2012) 315; Näsström, 'The Right To Have Rights'; Näsström observes that "[t]he insight that our rights depend on nothing but our own action is disquieting, but this is the point. It *is* unbearable, a burden too heavy for humans to shoulder." ibid 9

[355] Michelman, 'Parsing', 204

[356] *Ibid.*

[357] Näsström, 'The Right To Have Rights', 550

existential, collective self-care when it comes to creating and maintaining in this world the conditions of civility and humanity for any or for all."[358]

But if the foundationalist reading of the right to have rights proposed by Benhabib would render rights-holders into passive subjects,[359] the 'political' (anti-foundationalist) approach just discussed, which emphasises the normative groundlessness of this right and the need for its actualisation through politics, leaves it unclear how we are to explain why political exclusion is *wrong* to begin with.[360]

In response to this, recently, some authors further developed the political approach by linking the right to have rights with Arendt's invocation of Montesquieu's notion of *principle*.[361] Now, Arendt mentions the idea of 'principle' with respect to political action. As we already saw, politics cannot be regulated through transcendent norms for Arendt. But this does not mean that political freedom is completely arbitrary. Politics, explains Arendt, is saved from its arbitrariness by the principle which becomes manifest through the action itself. [362] Such principle animates and guides politics.[363] However, she does not explicitly tie this notion to human rights. Only by the end of 'Perplexities' does Arendt claim that "human dignity needs a new guarantee which can be found only in *a new political principle*".[364] Yet, Nasstrom and Ingram take this to be a reference to Montesquieuan principle. With this move, continues Nasstrom, Arendt can thematise a claim to the right to have rights as "contingent without being arbitrary" and "as normative without being regulative."[365]

In addition to the principles such as 'mutual promise and common deliberation' and 'political freedom' that I already mentioned in this chapter, Arendt further refers to

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[358] Michelman, 'Parsing', 207

[359] See also: Peg Birmingham, 'On Action: The Appearance and the Law' in Anna Yeatman and others (eds) *Action and Appearance: Ethics and the Politics of Writing in Hannah Arendt* (London: Continuum 2011)

[360] Näsström, 'The Right To Have Rights', 550

[361] Ayten Gündoğdu, Rightlessness in an Age of Rights: Hannah Arendt and the Contemporary Struggles of Migrants (Oxford University Press, 2015) ch. 5; Sofia Näsström, 'The Right To Have Rights: Democratic, Not Political' (2014) 42 Political Theory 543, Ingram, 'What is a 'Right to Have Rights''

[362] Arendt, *Between Past and Future*, 152

[363] *Ibid.*

[364] Arendt, *Totalitarianism*, ix

[365] Näsström, 'The Right To Have Rights', 552

others: fear, distrust, virtue, love of equality and so on. For some, Arendt intentionally avoids reducing action to a *single* guiding principle, leaving it up to political action to manifest one.[366] Others, like Nasstrom and Gündoğdu are not content with this conclusion. They identify a normative gap in Arendt's conceptualisation of the right to have rights and propose 'responsibility' and Étienne Balibar's concept of 'equaliberty'[367] respectively as candidates for bridging that gap. These principles, for those authors, are manifested in modern revolutions and are reactivated and augmented through the practices of claiming rights.

But if we take the right to have rights to be grounded in *praxis*, animated and guided by some principle of action, how can the rightless, who, according to Arendt, lost the possibility of meaningful action and speech, demand it politically. For some, this is a paradox that '*The Perplexities of Human Rights*' introduces without solving it.

So Jacques Rancière denounces the paradox, charging Arendt for depriving the excluded of a possibility of action, for rendering human rights into depoliticised rights, into the "rights of the private, poor, unpoliticised individual".[368] The rights-bearers, on this account, are stripped of political subjectivity and are presented as mere victims who cannot enact their own rights. As a consequence, human rights become humanitarian rights, 'the rights of others' to assist.

Andrew Schaap, in his recent article, further unpacks Rancière's critique.[369] To begin with, Schaap follows Frank Michelman in rejecting the idea that the right to have rights should be parsed as 'a moral right to legal rights' and, instead, grounds it in action. The right to have rights, on this view, is a fundamental presupposition that every human being is capable of political action. At the same time, Schaap takes Arendt to be saying that rights are socio-legal preconditions of political action. To

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[366] Lucy Cane, 'Hannah Arendt on the Principles of Political Action', (2015) 14(1) European Journal of Political 55

[367] Étienne Balibar, *Equaliberty: Political Essays* (James Ingram trans., Duke University Press 2013)

[368] Jacques Rancière 'Who is the Subject of the Rights of Man?', (2004) 103 South Atlantic Quarterly 297, 298

[369] Andrew Schaap, 'Enacting the Right to Have Rights: Jacques Rancière's Critique of Hannah Arendt,' (2011) 10 *European Journal of Political Theory* 22

prove this point, he refers to her understanding of the relation between rights and equality. As Arendt believes, "[w]e are not born equal; we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights."[370] Now, Schaap understands this sentence to suggest that *legal* rights are the condition of possibility of politics and that they "institutionalise an artificial equality that is constitutive of the public sphere."[371] It follows then for Schaap and Rancière that if the right to have rights is a right of *everyone* to lead a political life, by 'everyone' we should understand everyone who is already enjoying rights, i.e. who is already included. That is why Arendtian human rights are depoliticised rights. They are the rights of those who cannot demand them due to the impossibility of appearing in the public sphere. Rancière explains this paradox thus:

> "either the rights of the citizen are the rights of man—but the rights of man are the rights of the unpoliticized person; they are the rights of those who have no rights, which amounts to nothing—or the rights of man are the rights of the citizen, the rights attached to the fact of being a citizen of such or such constitutional state. This means that they are the rights of those who have rights, which amounts to a tautology. Either the rights of those who have no rights or the rights of those who have rights. Either a void or a tautology, and, in both cases, a deceptive trick, such is the lock that she builds."[372]

Schaap further observes that because of this theoretical 'lock', the demand for the right to have rights can only be a demand to liberation, to civil rights which would then enable authentic politics. Such a struggle cannot be political in itself.[373]

It seems to me, however, that both Rancière and Schaap misinterpret Arendt by suggesting that rights are possessions that serve as *prerequisites* for politics; that they

[370] Arendt, Totalitarianism, 301
[371] Schaap, 'Enacting', 23
[372] Rancière, 'Who is the Subject', 302
[373] Schaap, 'Enacting', 24

are like 'the walls of the city' inside which one has to be already in order to participate in the political life. This criticism is similar to one mounted by Emilios Christodoulidis and Andrew Schaap in the context of the politicisation of social issues that we will discuss in the next chapter.[374] If in the latter case, as we will see, it is doubted that Arendt can accommodate an antagonistic politics of the excluded against the conditions of their exclusion, in the former case this charge becomes more specified in terms of rights as guarantees of equality.

The source of the misunderstanding on the part of Arendt's critics, in my opinion, comes from attributing to her a sympathy for the Greek *polis* and its corresponding concept of law as *nomos* - a pre-political notion of law which, like hedges and walls, demarcates the public sphere and enables political life. I argue instead that we need to take seriously Arendt's insistence that politics does not need any preconditions except those of a concerted action.

Roy Tsao convincingly argues that in *The Human Condition* Arendt makes a subtle distinction between two ideas of *polis*. [375] The first is a Greek model where *polis* is understood as 'physically secured by the wall around the city and phisiognomically guaranteed by its laws'.[376] Yet, by the end of the section on the Greek solution, one can discern an alternative, 'proper' understanding of *polis* that she endorses:

> "The polis, properly speaking, is not the city-state in its physical location; it is the organisation of the people as it arises out of acting and speaking together, and its true space lies between people living together for this purpose, no matter where they happen to be.
>
> 'Wherever you go, you will be a polis': these watchwords of Greek colonization express the conviction that action and speech create a

[374] Emilios Christodoulidis and Andrew Schaap, 'Arendt's Constitutional Question' in Marco Goldoni and Christopher McCorkindale (eds.) *Hannah Arendt and The Law* (Hart 2012)

[375] Roy T. Tsao, 'Arendt against Athens' (2002) 30 Political Theory 97

[376] Arendt, *The Human Condition*, 198

> space between the participants, which can find its proper location almost at anytime and anywhere."[377]

Tsao is right when he notes that Arendt invokes the notion of 'the space of appearance' precisely in connection with this conception of *polis*, equating the two for the first time in the book.[378] For Arendt, the space of appearance "comes into being wherever men are together in the manner of speech and action, and therefore predates and precedes all formal constitution of the public realm and the various forms of government." [379] This is a space which is created through action and where unique individual identities are disclosed, the reality of the common world is affirmed and freedom and equality realised. By equating the two, she suggests that it is not that the *polis* has to be established to secure a space of appearance. The space of appearance is itself the *polis* which exists through a concerted action,[380]and this lasts while men act politically and vanishes once they disperse.[381] Political community and citizenship should not be understood narrowly as a territorially circumscribed nation-state, but as any space where individuals recognise each other as equals.[382] This notion of a "portable *polis*",[383] of a *polis* which does not require either physical or phisiognomical walls, is at odds with Schaap's and Rancière's, as well as
Christodoulidis', rendering of Arendt as an institutionalist.

If the existence of the *polis*, of the political space of freedom and equality, requires constant action, the law as *nomos* alone cannot secure it. If action 'is the one activity which constitutes' the political space, this role cannot be delegated to *nomos*. If

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[377] *Ibid.*

[378] Tsao, 'Arendt against Athens', 115

[379] Arendt, *The Human Condition*, 199

[380] Charles Barbour, 'Between Politics and Law: Hannah Arendt and the Subject of Rights', in Marco Goldoni and Christopher McCorkindale (eds) *Hannah Arendt and the Law* (Hart 2012) 315

[381] Arendt, *The Human Condition*, 200

[382] Justine Lacroix, 'The 'Right to Have Rights' in French Political Philosophy: Conceptualising a Cosmopolitan Citizenship with Arendt', (2015) 22 Constellations 79, 83

[383] On Arendt's notion of 'portable *polis*' see: Jennifer Ring, 'The Pariah as Hero: Hannah Arendt's Political Actor' (1991) 19 *Political Theory* 433; Krause, 'Undocumented Migrants'; Tsao, 'Arendt against Athens'

equality, a condition of possibility of politics, can only exist through politics itself, then institutions as such cannot enact it.

What does Arendt mean, then, when she argues that "we become equal as members of a group on the strength of our decision to guarantee ourselves mutually *equal rights*"?[384] We find the answer in the above discussion of the Roman *lex*. It is an idea of rights as political agreements and alliances, and of law as a grammar and syntax of political action, that explains how equality is created and re-created through an on-going practice of articulating and re-articulating what it is to enjoy equal rights.

At some point in his discussion Schaap states that the Arendtian notion of "the right to have rights amounts to the right to politics".[385] I agree with this proposition, but whereas by this Schaap, following Rancière, means 'the right to the *preconditions* of politics', the realisation of which might or might not result in political action, I take it to be the right to participate in the *creation* and *preservation* of rights. 'Having' in the formula of the right *to have* rights does not refer to the possession of entitlements. Rights, as we saw, are not entitlements which can be established extra-politically, designed in advance of political action for the purpose of guaranteeing the latter. It refers to a potential 'have', to a *process of articulating rights* which is the content of politics. In other words, the right to politics is not a right to the *possibility* of politics, but to *actual* politics of (creating and maintaining) rights.[386] This is a right to make political proposals. With respect to social rights in particular, as we will see below, this is a right to politicise needs and to participate in the formulation of social rights.

To recap: rights do not have to be reduced to pre-political entitlements which are formulated without the involvement of potential rights-holders; they do not have to precede and regulate the political life; Instead, the political life can be understood to be, partly, constituted by rights-claims. To claim a right is to initiate an open-ended political process of deliberation and contestation over public issues. The open-

[384] Arendt, *Totalitarianism*, 301 (emphasis added)

[385] Schaap, 'Enacting', 23

[386] I believe this point is similar to what Étienne Balibar means with his notion of 'the right to politics'.
See Étienne Balibar, *Masses, Classes, Ideas* (Routledge 1994) 212; see Ingram making this connection: Ingram, 'What is a 'Right to Have Rights'', 410

endedness of this process stems from the fact that rights are not confined to pre-established functions and instead are capable of challenging extant and constituting new political systems. Here, rights-claims are political proposals about a collective agreement on what it means to enjoy equal rights. Yet, if rights are formulated with the participation of the claimants themselves as the political model teaches us, and if rights are political agreements between equal citizens, rather than pre-political entitlements, the question arose as to how we can conceptualise rights-claims by those excluded from the political sphere. Using Arendt's idea of the right to have rights, I argued that human rights should be rethought in terms of a right to be included in the politics of creating and maintaining rights.

Now, *social* rights might not qualify as political claims if I am to adopt Arendtian framework. This is because of her strict conceptual separation of the social from the political, for the purposes of securing 'purity' of the latter. Yet, I will argue that instead of completely discarding social matters from the public sphere, she can be taken to suggest a possibility of *politicising* them, when the political character of what has been wrongly relegated to the social realm is demonstrated. Even though her views on the *necessarily* social (as opposed to political) character of certain issues, as we will see, seem to be indefensible, her close attention to the things politically pernicious enables a subtle analysis of the depoliticising effects of the politics of pre-established human needs. The practice of claiming social rights becomes anti-political when it bypasses the sphere of political argumentation and contestation and invokes the pre-political category of necessity to justify their enforcement.

However, as I will suggest, while important for understanding the essence of the political model and for distinguishing it from the juridical one, the conception of rights as proposals fails to account for the distinctive role that rights have in the situations when they are denied. In the context where rights are denied, only a conflictual rights-claim is capable of creating a space where political proposals can be made and contested. I will develop this conflictual character of rights in Chapters Six and Seven.

Chapter Five

The Politics of Social Rights

My contention is that the right to have rights discussed in the previous chapter does not need to be a right to the politics of not-yet-institutionalised individual rights, i.e. the purpose of the politics of rights is not, necessarily, to create and maintain *liberal* rights. Rather, it is possible to recast it as a right to a radical politics of rights, which goes against, and potentially beyond, the bourgeois law. I am not, of course, suggesting that Hannah Arendt assumed a possibility, let alone advocated, such a non-liberal politics of rights. But I would like to argue that Arendt's framework provides a fertile ground for developing an idea of the politics of rights which challenges and transcends the bourgeois law.

Now, I argue that there are two ways of developing the Arendtian conception of rights as proposals: the one which collapses the right to have rights into the right to reform the liberal constitutional order, and the other one which allows for the articulation of a radical need transcending that order. I call the former the *demand-conception* of rights and the latter - the *challenge-conception*. These two conceptions, together with the command-conception belonging to the juridical model, will be compared and contrasted in Chapters Six and Seven. We will see how the demand-conception, as in the command-conception, evinces a directive structure of rights-claims and cannot but operate within the orbit of liberal constitutionalism.

Directives, by definition, are not capable of radically transforming the addressee insofar as they implicitly recognise the latter's legitimacy. It is only the challenge-conception which is apt for the radical theory of social rights.

But before we move to discuss the distinctions between demand-rights and challenge-rights, it is important to analyse the politics of needs that these two different extensions of the conception of proposal-rights purport to channel. The task of this chapter will be to explore different modes of politicisation and depoliticisation of needs. The aim is to prepare the ground for analysing how the scope of the politics of needs changes depending on the conception of social rights around which such a politics is organised.

Once again, it is Arendt who, through her attention to the politically pernicious activities, enables a subtle analysis of the moments of (de)politicisation of needs. Arendt is often criticised for her alleged ontological argument about the necessarily a-political nature of social issues. Her concern is said to be the reverse of *depoliticisation* - understood as a relegation of political matters to the non-political ones - what she calls 'the rise of the social' which threatens genuine politics by littering public sphere with the issues which do not belong there. My aim is to show that Arendt can be read as suggesting that the danger of the social is not only that it presents non-political issues as political, but also it's opposite: the social stands for the issues that should be dealt politically but are left to 'administration'. In other words, Arendt can be read as a theorist of depoliticisation. Even though her ontological conception of social needs, as we will see, is untenable, she can be interpreted as arguing that social issues can be, in principle, politicised once their public importance is demonstrated. I will further present Nancy Fraser's idea of the politics of needs-interpretation as an extension of Arendt's argument. Linking the theory of needs with social rights, I argue that to claim a social right is to invoke a right to have social rights, i.e. to demand inclusion in the interpretation of needs and the formulation of social rights.[387] I will finish by suggesting that the question of

[387] This would be an argument against Serena Parekh's recent interpretation of Arendt's views on social rights according to which the protection of human needs through such rights is a prerequisite

whether social rights can articulate radical needs depends on the way we conceptualise the structure of a rights-claim.

1. THE SOCIAL AND THE POLITICAL

It is often argued that Arendt's harsh criticism of the blurring of the private/public division makes it impossible for her to conceptualise the moments of politicisation of needs which so often make up political struggles.[388] However, I believe that Arendt does provide crucial theoretical resources for thinking how needs are (de)politicised.

In order to prove this point we need to go back to and start with Arendt's 'pure' concept of politics.

George Kateb explains Arendtian notion of politics in comparison with that of Max Weber. While for Weber politics stands for practices of ruling - "what some do to others" - Arendt takes it to be "what all do together".[389] Neither is Arendtian politics similar to that of Carl Schmitt's, who understands politics in terms of a friend/enemy opposition. Against both of them, Arendt stresses that political action happens neither *against* nor *for* others but *with* others, "that is in sheer human togetherness".[390]

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for the enjoyment of civil and political rights. Serena Parekh, *Hannah Arendt and the Challenge of Modernity* (Routledge 2008). In Parekh's words: "To be sure, understanding the human condition the way Arendt does supposes that social and economic rights, the rights that relate to the life process, are of primary and fundamental importance since they are the preconditions of life in the public realm". ibid 98-102. This would bring us back to the juridical model, and the idea of rights as preceding and legitimating politics. Contrary to Parekh, however, I would like to suggest that social rights cannot be reduced to 'life process' and to the pre-political domain. Instead, we can find resources in Arendt to argue for the political nature of social rights-claims.

[388] I agree with Christodoulidis that if the social question cannot be saved than her 'deeper insights' lose much of their value. See: Emilios Christodoulidis, 'Depoliticising poverty: Arendt in South Africa' (2011) 22(3) Stellenbosch Law Review 501.

[389] George Kateb, 'Political Action: Its Nature and Advantages' in Dana Villa (ed) *The Cambridge Companion to Arendt* (Cambridge University Press 2001) 130, 132

[390] Arendt, *The Human Condition*, 181 (as cited in Kateb, 'Political Action' 133)

With this, Arendt presents an image of authentic politics which is neither about top-down rule nor about exclusion and opposition. It is an image of action in concert, where participants are neither rulers nor ruled, neither enemies nor family members. It is an activity among equal and unique individuals and consists in political practices of persuasion, contestation and deliberation around the matters that concern the life of the collective. Politics creates a public sphere, a sphere where human beings act freely and, thereby, disclose their unique identities, and publicise, i.e. grant reality, to the matters that "lead an uncertain, shadowy kind of existence unless and until they are transformed, deprivitized, and deindividualised, as it were, into a shape to fit them for public appearance".[391] This political sphere - 'a space of appearance' where the reality of our existence and the reality of the world we share in common are affirmed - exists while politics lasts. It "relies on the simultaneous presence of innumerable perspectives"[392] and is destroyed with the eradication of the reality-constituting plural views, of multiple perspectives revealed through argumentation and reflection.

As we saw, for Ancient Greeks the life process - i.e. the activities determined by biological necessities and connected with the processes of 'mere survival' and reproduction - belonged to the private sphere. They used to be issues of individual concern, the liberation from which was a precondition for the access to the public sphere. Political action was unthinkable before the necessities of life were satisfied.

What Arendt calls 'the rise of the social', transforms these formerly private matters into the matters of public concern, thus, blurring the private/public distinction. This weakening of the boundaries threatens authentic politics, because in contrast to the truly political space where individuals distinguish themselves through their deeds, society - with its mechanisms of normalisation - forces everyone to conform to existing social standards, to behave according to social positions, to "act as though they were members of one enormous family which has only one opinion and one

[391] *Ibid.* 50
[392] *Ibid.* 57

interest."[393] Society promotes order and unanimity at the expense of freedom and plurality of a truly political life. The social prism does not allow multiple perspectives.

It is occupied only with the life process and its rise is tantamount to "the admission of household and housekeeping activities to the public realm".[394] The social presents itself as a hybrid of the private and the public realms, taking the *occupation with human needs* from the former and *the scope* from the latter. To put it in other words, it is a "realm where private interests assume public significance".[395]

With this rigid distinction of what belongs to the public and what to the private, Arendt casts social matters as something natural, given, unquestionable, equating them with biological necessities. Biological processes by definition cannot be an object of public reflection and debate, an object of authentic politics. So when, with modernity, society assumes the role of satisfying human needs, and starts exercising, what is effectively, "a gigantic, nation-wide administration of housekeeping,"[396] public deliberation and what is specifically political about politics is in danger of disappearance. An activity of 'administration of things', as a form of dealing with public affairs, conquers the public realm, the proper realm for action. If action is about creating and maintaining a space for contestation and deliberation on public matters based on the plurality of worldviews, administration concerns matters that are, in principle, beyond debate. The object of bureaucratic administration is identified in advance and allows only one unquestionable perspective. It is then a matter of finding proper means for realising pre-established ends, something requiring expert opinion rather than public reflection.

This instrumental character of administration is antithetical to the political which is beyond the means/ends logic, insofar as the realisation of the political principles of freedom and equality is intrinsic to political life, the end-in-itself of political action.[397]

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[393] *Ibid.* 39

[394] *Ibid.* 45

[395] *Ibid.* 35

[396] *Ibid.* 28

[397] For a critical analyses of the extent to which Arendtian political action is non-instrumental see: Maurizio Passerin d'Entrèves, *The Political Philosophy of Hannah Arendt* (Routledge 1994) 85-90

In other words, politics is about maintaining the space where freedom and equality can be actualised, while administration has a higher end to pursue and can sacrifice everything, including the political sphere, for attaining that end.

The French Revolution is an example of precisely such a destruction of the political realm by, what Arendt calls, "the social question". [398] Instead of creating a political space for debate and contestation, argues Arendt, the Revolution succumbed to the dictates of human needs. Politics became the instrument for fighting poverty and, in the processs, sacrificed authentic political action and paved the way for violence which, as we saw, always accompanies the processes of reproduction and fabrication.

Now, Arendt's above conceptual distinction between the social and the political has been characterised as 'futile and intangible'[399], as 'untenable'[400]. It has been widely criticised both for its practical and theoretical implications. The concept of politics that Arendt promotes is said to be elitist, excluding certain category of people (e.g. the poor) from the privilege of participating in the public realm in a meaningful way.[401] Moreover, because political action requires from the potential agent to free herself from the necessities of life, politics becomes possible *only* at the expense of the oppressed and the excluded.[402] It is also hard to imagine what the content of political action could actually be once we jettison all social and economic issues from the concern of politics.[403] It becomes impossible to theorise the moments of

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[398] Arendt, *On Revolution*, ch. 2

[399] Seyla Benhabib, *The Reluctant Modernism of Hannah Arendt* (Sage Publications 1996) 158

[400] Richard Bernstein, *Philosophical Profiles: Essays in a Pragmatic Mode* (Polity 1986) 246

[401] Jean-Paul Deranty and Emmanuel Renault, 'Democratic Agon: Striving for Distinction or Struggle against Domination and Injustice?' in Andrew Schaap (ed), *Law and Agonistic Politics* (Farnham, Ashgate, 2009)

[402] *Ibid.*; Robert Bernasconi, 'The Double Face of the Political and the Social: Hannah Arendt and America's Racial Divisions' (1996) 26 Research in Phenomenology 3, 6; Jacques Rancière, 'Who is the Subject of the Rights of Man?' (2004) 103(2) *South Atlantic Quarterly* 197; Hanna Fenichel Pitkin, 'Justice: On Relating Private and Public' (1981) 9 *Political Theory* 327; Emilios Christodoulidis and Andrew Schaap, 'Arendt's Constitutional Question' In Marco Goldoni and Christopher McCorkindale (eds) *Hannah Arendt and the Law* (Hart 2012)

[403] This question was raised by Mary McCarthy directly to Arendt at the conference dedicated to the latter's work: "I have always asked myself: What is somebody supposed to do on the public state, in the public space, if he does not concern himself with the social? That is, what's left?" It seem to me that if you once have a constitution, and you've had the foundation, and you have a framework of law, the scene is there for political action. And the only thing that is left for the political man to do is what the Greeks did: make war! Now this cannot be right! On the other hand, if all questions of economic,

politicisation, while in fact, as Deranty puts it, "[m]uch of what politics is about is best defined through the lens of politicisation: the factors that prevent it (affiliations, exclusions, work, social status, and so on); the vectors of collective action (bodily dispositions, social groups, institutional opportunities); and the concrete objects of political reflexivity (needs, domination, inequalities)".[404] Arendt's framework is said to be neglecting the systems of oppression and domination, which exist in the private realm and which get depoliticised by being proclaimed as "private matters".[405]
Instead, as Seyla Benhabib explains:

> "[t]he realm of necessity [i.e. the private realm in Arendt's understanding] is permeated through and through by power relations: power over the distribution of labour, of resources, over authority, and so on. There is no neutral and non-political organisation of the economic; all economy is political economy. Even household labour is permeated by gender-based power relations and the sexual division of labour in the family."[406]

Insofar as Arendt is understood as suggesting that all human needs are ontologically given and beyond debate, her position seems really untenable. Unfortunately, her work gives many reasons for making such a conclusion. Nevertheless, on several occasions she seems to point towards an alternative vision which looks promising.

During a conference dedicated to her work, Albrecht Wellmer challenged Arendt to name one current social problem which was not political at the same time and

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human welfare, busing, anything that touches the social sphere, are to be excluded from the political scene, then I am mystified. I am left with war and speeches. But the speeches can't be just speeches. They have to be speeches about something." Richard Bernstein, 'Rethinking the Social and the Political' in Bernstein, *Philosophical Profiles,* 250

Pitkin asks the same question "What keeps these citizens together as a body? . . . What is it that they talk about in the endless palaver of the *agora*?" see: Pitkin, 'Justice', 336.

[404] Deranty and Renault, 'Democratic Agon', 51

[405] Jean Bethke Elshtain, *Public Man, Private Woman* (Princeton University Press 1981)

[406] Benhabib, *The Reluctant Modernism,* 158

himself referred to different issues, including public housing.[407] Arendt responded in the following way:

> "Let's take the housing problem. The social problem is certainly adequate housing. But the question of whether this adequate housing means integration or not is certainly a political question. With every one of these questions there is a double face. And one of these faces should not be subject to debate. There should not be any debate about the question that everybody should have decent housing."[408]

For Arendt, "[t]here are things where the right measure can be figured out. These things can really be administered and are not then subject to public debate. Public debate can only deal with things which – if we want to put it negatively – we cannot figure out with certainty".[409]

Thus, Arendt conceded a possibility of presenting social issues in such a manner as to render them political. On this account, social issues are, in principle, politicisable if they can be an object of public debate and contestation. This is consistent with Arendt's notion of politics as being about 'transforming, deprivitising and deindividualising into a shape fitting for public appearance' the issues that before that lead 'shadowy lives' in the private sphere. [410]

At the same time, in the same passage, Arendt continues to insist that there are certain issues that should never be part of political action. It seems to me that Arendt is making a distinction between two types of social issues: those that rightly belong to the private sphere and should never become the content of politics and the issues that "lead 'shadowy lives' in the private sphere, whereas in fact do not belong there.

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[407] Bernstein, 'Rethinking the Social and the Political' in Richard Bernstein, *Philosophical Profiles: Essays in a Pragmatic Mode* (Cambridge, Polity, 1986)
[408] *Ibid.* 251
[409] Arendt's response during the same workshop citied in Benhabib, *The Reluctant Modernism,* 156
[410] Arendt, *The Human Condition*, 50

Now, she is not convincing when it comes to the necessarily private nature of the first category of issues. As Richard Bernstein rightly notes "the question whether a problem is itself properly social (and therefore not worthy of public debate) or political is itself frequently the central political issue".[411] And Nancy Fraser further criticises Arendt for taking human needs to be natural and given.[412]

But with the second leg of her distinction, Arendt opens up a new possibility, a possibility of conceptualising the social as, what James Clarke calls, "not yet political",[413] and what Hanna Pitkin coined as "absence of politics where politics belongs."[414] The social here stands for precisely the sphere where human needs are rendered natural and necessary. It is this idea of the social that threatens the political. Clarke explains it well:

> "In the political arena, necessity means that the ends of political action are already pre-established and pre-determined. If necessity (natural or otherwise) determines political debate, then 'debate' would be reduced to finding the most efficient means for realising 'necessary' ends or, if these ends come into conflict, pitting necessity against necessity."[415]

If human needs are inevitably subject to the political processes of contestation, to present them as natural necessities means to remove issues from the political debate where they belong and to assign them to the social sphere governed by administrative and bureaucratic rationality. Following Arendt's reference to the issue of housing, she must be understood as saying that human needs can "'become' political when mediated through public interaction,"[416] when they become part of

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[411] Bernstein, *Philosophical Profiles,* 252

[412] Nancy Fraser, *Unruly Practices: Power, Discourse and Gender in Contemporary Social Theory* (University of Minnesota Press 1989) 160

[413] James Clarke, 'Social Justice and Political Freedom: Revisiting Hannah Arendt's Conception of Need' (1993) 19 *Philosophy and Social Criticism* 333, 342

[414] Hanna Fenichel Pitkin, *The Attack of the Blob* (University of Chicago Press 1998) 253

[415] Clarke, 'Social Justice', 343

[416] *Ibid.* 342

political deliberation and debate. In other words, the politics of needs is a politics of politicisation of the issues unduly relegated from the public sphere.

Now Christodoulidis and Schaap challenge this revision of Arendt.[417] According to these authors, Arendt is incapable of conceptualising the moments of politicisation because politics, for her, takes place only among equals who have already overcome social domination. It is only after 'a pre-political act of liberation' from necessities that citizens can engage in political action. I already elaborated on this criticism when I discussed 'the right to have rights'. But it needs to be noted again that nowhere does Arendt present equality as a *prerequisite* for political action. Christodoulidis and Schaap are right in arguing that for Arendt equality is not something individuals *demonstrate* in the public sphere by challenging those who deny it to them. Equality, for Arendt, is not a fact to be revealed. It is a social construct. However, and this is a crucial point, it is constructed only *through* action. It exists only while action lasts. Even though Arendt never puts it in these words, the act of liberation does not need to be a pre-stage, it can be concomitant with foundation of freedom. There is nothing in her theory that would disallow the excluded to act politically and, with it, simultaneously construct equality where there was none before.

That she does not see a theoretical problem with the politics of needs can be observed on the example of the labour movement that she discusses in *The Human Condition*. Arendt allows two opposing interpretations of the working class: as a political subject and as an interest group.[418] Referring to the revolutions of 1848 and to the Hungarian revolution of 1956, Arendt points out that the labour movement played an important role in revitalising the political field. But, even though economic (i.e. non-political for Arendt) and political issues were often intertwined in this movement, she urges us to maintain a distinction between two dimensions of the movement: the *political* labour movement, on the one hand, and the politics of trade unions and of official political parties, on the other. This distinction corresponds to the above one between a political subject and an interest group. Trade unions and

[417] Christodoulidis and Schaap, 'Arendt's Constitutional Question', 113

[418] Benhabib, *The Reluctant Modernism,* 142

political parties were not revolutionary according to Arendt. Instead, they vied with other factions of the society in a selfish contest for the benefits of the respective classes. In other words, they sought incorporation within the existing configuration rather than 'a new form of government'. The *political* labour movement, on the other hand, "desired a transformation of society together with a transformation of the political institutions in which this society was represented".[419] This distinction was never clear-cut. It would only appear in rare moments of revolutionary upheaval. While the political movement experienced defeat after defeat over the course of history, and while currently they are indistinguishable from any other pressure group,

"for a time it almost looked as if the movement would succeed in founding, at least within its own ranks, a new public space with new political standards".[420]

For Christodoulidis and Schaap, the example of the labour movement only "bears out the contradictions in Arendt's thought in a revealing way".[421] According to this interpretation, Arendt "is caught" between acknowledging a world-disclosing act on the part of the labour movement and the impossibility to recognise as political "what is distinctive about what the labour movement discloses to politics." [422] In other words, while the labour movement was about socio-economic matters, in order to qualify it as a genuinely political one, Arendt has to abstract the movement from its sources and substance. As a result, "she deprives [the movement] any possible political purchase".[423]

But Arendt seems to suggest something else, something similar to the discussion around the housing issue above. As Gündoğdu points out, Arendt was well aware that both the labour movement and the trade unions promoted socio-economic issues. What she draws our attention to is the difference between the approaches to those

[419] Arendt, *The Human Condition*, 216
[420] *Ibid.* 219
[421] Christodoulidis and Schaap, 'Arendt's Constitutional Question', 114
[422] *Ibid.* 115
[423] *Ibid.*

issues.[424] Arendt seems to suggest that the labour movement succeeded (if only momentarily) to transform social issues into political ones. What does this mean?

Benhabib's answer is that, for Arendt:

> "[e]ngaging in politics does not mean abandoning economic or social issues; it means fighting for them in the name of principles, interests, values that have a generalizable basis, and that concern us as members of a collectivity. The political for Arendt involves the transformation of the partial and limited perspective of each class, group, or individual into a broader vision of the 'enlarged mentality'".[425]

However, Benhabib's interpretation leaves space for anti-political politics about which Clarke spoke in the passage cited above. It is possible to defend natural needs in the name of a principle or of some theory of justice. After all, the idea of a 'collective concern' can be easily reconciled with technocratic governance which claims to represent the interest of the community as a whole. But, for Arendt, this would be "a perverted form of 'acting together'"[426] which threatens the very public sphere that political action is supposed to maintain. Benhabib's interpretation does not describe the whole picture. But Arendt herself is not giving a clear guidance either. I would like to suggest that to complete the above account we need to go beyond, rather than against, Arendt. We need an account of conflictual politics to supplement Arendt's framework.

On the one hand, I agree with the critics that Arendtian idea of politics does not take into account sufficiently the importance of confronting vertical structures, focused as it is solely on a horizontal dimension. She makes two similar moves in the course of her discussions of the possibility of politicising social issues, and of the participation of the excluded in the political process through the invocation of the right to have

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[424] Ayten Gündoğdu, *Rightlessness in an Age of Rights: Hannah Arendt and the Contemporary Struggles of Migrants* (Oxford University Press, 2015) 82-83

[425] Benhabib, *The Reluctant Modernism,* 145

[426] Arendt, *The Human Condition*, 203

rights. In both cases, Arendt seems to gloss over the antagonistic dimension of politics, idealising the latter. But critics like Christodoulidis and Schaap wish to prove more than that. They claim that Arendt is *un-revisable* for the purposes of conceptualising a *politics* of needs.

It is true she does not provide adequate theoretical tools for analysing how the moment of politicisation - for some, the quintessential moment of politics[427] – confronts the systems that are based on the very fact of the depoliticisation of the issues in question. To be sure, Arendt's idealised image of politics is not one of antagonism but that of a concerted action among equals; action *with*, not *against* or *for* others. But, Arendt does not disallow such a politics conceptually. She does provide – even if against her own intentions - an avenue for thinking transformations, while, importantly, warning us against the dangers of anti-political politics.

I now turn to Nancy Fraser who, while criticising Arendt for the naturalisation of needs-talk, offers, what I believe to be, an extension of Arendt's argument towards a more conflictual theory of the politics of needs. I will then try to link the discussion on needs with rights.

2. NANCY FRASER AND THE POLITICS OF NEEDS-INTERPRETATION

In her much-cited work, Nancy Fraser explicitly invokes Arendt and employs her notion of 'the social' as a reference to a sphere of depoliticised needs.[428] For Fraser, all needs are subject to political interpretation and contestation. Needs are always

[427] Deranty and Renault, 'Democratic Agon', 51

[428] Nancy Fraser, 'Struggle over Needs: Outline of a Socialist-Feminist Critical Theory of Late Capitalist Political Culture' in Nancy Fraser, *Unruly Practices: Power, Discourse and Gender in Contemporary Social Theory* (University of Minnesota Press, 1989). It should be noted that Fraser agrees with Arendt's critics on the main issues which I tried to repudiate in this chapter

contextual and contested.[429] Even though they are often presented as natural, with the emergence of needs into the public realm, they lose "their illusory aura of naturalness as their interpretations become subject to critique and contestation." [430]

There are, of course, what Fraser calls, 'thin needs', i.e. the needs that are stated in abstract terms and are uncontroversial, like a need for food or for shelter (the first leg of Arendt's distinction). We can even agree that the government has a duty to provide for these needs. But as soon as we start substantiating this claim, we encounter a plethora of views and controversies both on the exact nature of the need, as well as on the model of its realisation.

Thus, Fraser forcefully attacks the idea that needs are pre-given and instead affirms their political character. Instead of distribution of satisfactions, she focuses on the politics of needs-interpretation.[431] The politics of needs is not reducible to power struggles for the provision of pre-defined needs. The object of contestation cannot be confined to the ways of satisfying a need. We have to further inquire into what exactly is the content of that need, who gets to decide on it, whether the public sphere where these needs are interpreted is unduly exclusionary or asymmetrical in terms of power relations between the interlocutors. Thus, Fraser's concern is not with needs as such but with the discourses around needs.[432] Fraser identifies three forms of needs discourses that structure the politics of needs-interpretation. These are oppositional, reprivatisation and expert discourses.

Oppositional forms of needs-talk takes place against official interpretations which deny certain issues their political character. This refers to a process of publicising what has been privatised by dominant discourses. Here we have a conflict between official institutional politics and the idea of politics which entails different discursive

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[429] *Ibid.* 163

[430] *Ibid.* 160. For the distinction between "need" and "necessity" see: Pitkin, *The Attack of the Blob*, 190. For a critique of Arendt's tendency to conflate need with natural necessity, see: Fraser, *Unruly Practices,* 160n; Andrew Schaap, 'The Politics of Need' in Andrew Schaap and others (eds), *Power, Judgment and Political Evil: In Conversations with Hannah Arendt* (Ashgate 2010) 164

[431] Fraser, *Unruly Practices,* 163

[432] *Ibid.* 162

arenas and different, non-official publics. This form of politics consists in politicising those needs which are not contested within the official political sphere or which are contested only within "relatively specialised, enclaved, and/or segmented publics".[433] It is through oppositional politics of needs that new political and social identities are forged. The subordinate groups constitute themselves as political subjects by articulating alternative interpretations of needs from below.[434] The politics of radical needs - i.e. needs that exceed the possibilities of the extant order - which we discussed in Chapter Two, is also part of this oppositional discourse. (The importance of keeping radical needs separate from other oppositional politics of needs will become evident shortly below).

Reprivatisation discourses can be understood in terms of their reaction to oppositional politics. Here we have an attempt to render private those issues that unofficial publics contest. Assigning potentially political issues to the market mechanism is a paradigmatic example. But even if certain needs achieve the status of the *political*, even if they are admitted to political contestation, they risk being accommodated in the 'social'. As we already learned from Arendt, the social is where the government takes up a role of a housekeeper, administering the needs of the society through expert knowledge represented by different social scientific discourses. With this, the people are positioned as passive recipients of aid rather than as participants in the interpretation of their own needs. The expert discourse then is a different form of depoliticisation from that of reprivatisation. Instead of abdicating the role in satisfying needs as in the latter case, the state, through expert discourses, translates "politicised needs into administrable needs".[435]

The juxtaposition of Food Sovereignty and Food Security in the context of *La Via Campesina*'s struggles is a good case study on different modes of the politics of needs.[436] As we saw, Food Security is the official discourse employed by the UN and other major international organisations. It treats the question of food either as a

[433] *Ibid.* 166
[434] *Ibid.* 171
[435] *Ibid.* 174
[436] See the discussion in Chapter Two

technical matter to be dealt by experts (expert discourse) or employs the market mechanism as a way of solving the problems with the provision of food (reprivatisation). The discourse of Food Sovereignty, on the other hand, is an (radical) oppositional discourse which opens up a political process over the issues of the socio-political organisation of the production and distribution of food. But how do we express the oppositional politics of needs in terms of rights?

3. SOCIAL RIGHTS AND THE POLITICS OF NEEDS

If Arendt shows us how rights are part of a bottom-up political action, how they are open-ended and independent from pre-political principles, how they are practices of deliberating on the issues of public importance, including those currently assigned to the private sphere, we need to go beyond her to capture the oppositional (and *radical* oppositional) politics of rights. Even though her notion of the right to have rights, as explained above, indicates a constant possibility of the politics of challenging exclusions, her ideal of political action, as was already noted, remains one that happens among equals, hence, her lack of consideration for the struggles against oppressive systems and for the conflictual nature of rights-claims.

In order to thematise the oppositional politics of needs-interpretation in terms of rights-claims, we need to go beyond Arendt's conception of rights as proposals. If we adopt the latter idea, we can render the right to have (social) rights as a right to be included in the open-ended political processes of deliberation and debate on the issues of the sources, character and ways of realisation of the human needs in question, i.e. participate in the interpretation of needs and in the formulation of social rights.

If we construct social rights-claims as Arendtian proposals we will fail to capture the moment of confrontation with the extant order. On this account, proposal-rights can

be issued both by the included and the excluded. Yet, no particular attention is paid to the distinctive challenge facing the excluded, that of overcoming the systems of exclusion in the first place. Rights as proposals with their horizontal effects are not enough to explain the radical nature of rights unless we supplement it with the account of how they have, so to speak, *vertical* effects in challenging extant orders. What Arendt neglects is that rights are useful precisely in the situation when they are denied. And a proposal cannot register as a political act unless the denial of rights registers. She too readily presumes the existence of a space where politics can happen, whereas such a space has to be won. She misses the struggles to be accepted and recognised as a political proposal-maker in the first place, to be recognised as a political subject. What we need then is a proper account of the conflictual nature of rights.

Now, I would like to suggest that there are (at least) three possible ways of thematising the conflictual dimension of social rights-claims. Depending on which of these three conceptions we adopt, the potential scope of the politics of needs changes and the possibility of articulating radical needs is furthered or undermined. Before exploring these conceptions, in order to understand what is at stake here, we can look at how Fraser links needs-talk with rights. She ends her article by briefly discussing the issue of translating needs into rights. Firstly, she argues that a *justified* interpretation of needs will be a result of inclusive communicative processes which are structured around the "ideals of democracy, equality, and fairness".[437] Secondly, needs justified in this manner can become the content of social rights.

Fraser seems to have no problem with channelling the justified needs through social rights understood as individual claims. But does not the fact that the politics of needs-interpretation is geared towards framing justified needs through individual rights already limit the scope of that politics? What if the oppositional needs talk ends up articulating a radical need the realisation of which points beyond the system of individual rights? Even if we concede that a radical need can be justified through a

[437] Fraser, *Unruly Practices*, 182

consensus-oriented communicative procedure, how can such a need be represented in terms of individual rights? Or, is it that the discursive field is already structured at the exclusion of certain political projects? Fraser does not seem to think so. At some point, talking briefly about an example of housing, she concedes the possibility that the process of interpreting the need for housing can, hypothetically, arrive at the conclusion that urban housing has to be decommodified.[438] But how does Fraser imagine expressing, let alone guaranteeing, such a need in terms of *individual* social rights without significantly limiting the idea of decommodification itself?

To be fair to Fraser, her focus is on needs and their interpretation, and the concept of rights is only secondary to her project. What Fraser's example demonstrates though, is that we cannot detach the question of the form of rights from the analysis of the nature of politics that aims to be channelled through that form. If the point of politics is to deliberate and agree on the content of social rights, the latter's legalistic form might set boundaries to what can be counted as a legitimate object of political contestation. I now turn to two theories that offer different accounts of the conflictual character of rights: *discourse* and *agonistic* theories. Chapter Seven will discuss the third possibility of conceptualising the relationship between oppositional needs-talk and rights.

As we will see below, discourse theory is ultimately a setback on the radical promise of the political model. While accommodating the conflictual politics of rights - where the excluded demand inclusion in the creation of the norms that should govern potential rights-holders - discourse theory falls prey to the same problems that we discussed in Chapter Three with relation to the juridical model. Like liberal theories, the discourse-theoretical approach subordinates rights to a pre-political function and, as a result, cannot conceptualise an open-ended politics of rights i.e. a politics which is capable of configuring new socio-political systems as opposed to reinforcing the *status quo*.

[438] Fraser, *Unruly Practices*, 163

In contrast, the agonistic approach offers a more promising account of the conflictual politics of rights which is simultaneously open-ended. But agonists too fail to accommodate the transcendent potential of rights-claims in that agonists ultimately reduce rights-claims to not-yet-enforced individual claims. In other words, as in the case of the judicial model and discourse theory, rights are seen as parasitic on law.

I will further suggest that the structure of a rights-claim assumed by all these theories is that of a directive speech act. Here a rights-claim is a directive addressed to the extant order to have one's rights guaranteed within the possibilities of that order. I argue that with this conceptualisation of a rights-claim the fundamental legitimacy of the order is recognised and the possibility of articulating a radical need is circumvented. As I explain in Chapter Seven it is only the idea of challenge-rights that can offer an alternative, more radical, way of extending the political model towards the transformative politics of rights.

Chapter Six

Rights as Demands:
Discourse-Theoretical and Agonistic Conceptions

In last two chapters we explored the proposal-structure of rights-claims. Hannah Arendt helped us explain how, in contrast to the juridical model, rights are not constrained by extra-political considerations; that they are proposals which, instead of bypassing the political sphere and invoking pre-political entitlements, initiate a bottom-up and open-ended political action that triggers a process of deliberation and contestation over the matters of public interest. I then moved on to discuss the application of this framework to the politics of social rights. Against critics, we saw that not only does Arendt allow politicisation of human needs, but we can make much use of her notion of 'the social' in terms of a litmus test for the moments of depoliticisation. Connecting the discussion on the politicisation of needs with

Arendt's conception of rights as proposals, I suggested that we can understand a social right-claim as an invocation of a right to have (social) rights, that is, a right to participate in the interpretation of needs and formulation of social rights. Here, a social right-claim can politicise the needs that are assigned to technocratic governance or to the market. However, to channel the *oppositional* politics of needs, which I discussed with reference to Nancy Fraser's work, I argued that we needed to go beyond Arendt. What the account of rights as proposals lacks is the appreciation of the distinctive role that rights play in the situation when they are denied by the

institutional order. In other words, Arendt failed to thematise the oppositional or conflictual dimension of rights.

So, once rights are understood as political proposals – as opposed to extra-political entitlements - a further question arises as to what is the mode of interaction of rights-claims with the institutional orders which do not recognise/enforce them. In other words, what is it that rights-claims perform when they are articulated *against* institutions, rather than, or in addition to, being offered as proposals to fellow-citizens?

I suggested that there are three possible accounts of the conflictual character of rights. I further pointed out that the possibility of articulating radical needs through rights depends on which of this accounts we favour. This chapter will outline two such accounts: the discourse-theoretical and the agonistic.[439] A framework for constructing the third - *radical* - conception will be presented in the next chapter.

Both the discourse and the agonistic theories of rights espouse the political model of the relationship between rights and politics: the content of rights is not determined as a matter of a philosophical enquiry but as a result of bottom-up political processes. Furthermore, both of these theories incorporate the Arendtian idea of rights as proposals where rights-claims open up a space for political processes of deliberation and contestation. What these theories add to the Arendtian conception is the focus on the situations when rights are denied and when new rights are claimed *against* the existing formulations thereof.

I start with discourse theory. On the one hand, according to this approach, the content of rights is not determined pre-politically but by potential rights-holders themselves. In this, discourse theory follows the political model. But, on the other hand, in order to conceptualise a politics of rights which challenges the authoritative

[439] I use the term broadly to define a philosophical stance which emphasises the unavoidability of conflict in a political community and its productive role in generating democratic politics. I believe at this general level of description both Lefort and Rancière are *agonists*. For different classifications of the agonistic approaches to the theory of democracy see: Andrew Schaap (ed), *Law and Agonistic Politics* (Farnham, Ashgate, 2009); Mark Wenman, *Agonistic Democracy: Constituent Power In The Era Of Globalisation* (Cambridge University Press 2013). I will further discuss Agonism in Chapter Six.

formulations thereof, this approach falls back on the problematic premises of the juridical model. On this view, Human rights stipulate the conditions of possibility of communicative freedom without which there can be no meaningful participation and no legitimate norms. Therefore, rights-claims have a pre-given function of creating a free communicative space. It is this function, grounded in a context-transcending discourse principle, which gives rights their 'veto power' against the existing articulations of rights, fuels the conflictual politics of rights and limits the scope of political proposals. Insofar as, on this view, rights-claims are not open-ended they cannot question the socio-economic arrangements which might be culpable in creating the need for rights in the first place. The issues connected with these arrangements are left to 'ordinary politics' which happens within the space established and regulated by rights. Rights are conflictual but only to the extent that is necessary for legitimating the political sphere. In this sense, discourse theory comes dangerously close to the liberal theories discussed in Chapter Three and betrays the radical promise of the political model.

Section Two will outline the agonistic theories of Claude Lefort and Jacques Rancière. These theorists offer both a sharper focus on the politics of the excluded that is channelled through rights-talk and an understanding of such a politics in terms of an open-ended practice which is capable of configuring new political systems rather than merely reinforcing the *status quo*. Politics, on this account, takes place precisely through the process of contesting particular instantiations of rights. For agonists, rights can be infinitely re-constructed and re-articulated, and, in fact, it is through such reconstructions that the political life is understood to exist. Arendt's notion of the right to have rights discussed in previous chapters already pointed towards this direction. But what agonists do is to focus on the situations of exclusion and to elevate the right to have rights (without explicitly referring to this concept) into a generative principle of democratic politics.

Following this account, I recast the politics of social rights as a practice of politicising needs *against* the depoliticising discourses of the prevailing system, by demanding

inclusion in the open-ended process of deliberation and contestation over the issues of the sources, nature and model of realisation of the needs in question.

But while agonists can teach us much about the conflictual character of rights, they fail to thematise the possibility of transcendence of the liberal constitutional order and thus fail to question the need for rights itself. This is because, for agonists, the politics of rights is always oriented towards the institutionalisation of individual claims. What changes through such a politics is merely the substance of the rights and the identity of the right-holder. In fact, as I argue in Section 3, the agonistic conception of rights shares similarities and, more importantly, limitations with both liberal and discourse theories. In order to bring out the differences and similarities between these different conceptions more starkly, and to further distinguish them from the idea of rights as challenges which I will introduce later, I take my cue from speech act theory. What I would like to suggest is that we can classify different theories of rights in terms of the assumptions that they make as to the performative character of a rights-claim. I argue that liberal, discourse and agonistic theories understand rights-claims in terms of directives. The problem is that a rights-claim understood as a directive which is addressed to the extant order implicitly recognises the capacity, and therefore the fundamental legitimacy, of that order to realise the content of the directive. The difference between these approaches is only that, if for liberal theories this directive incorporates a pre-political consideration (I call this demand-conception), for discourse-theorists and agonists a directive is articulated contextually, through political action (command-conception). The next chapter will argue that it is by going beyond the directive-structure of rights-claims that we can capture the ruptural nature of which, in turn, allows the articulation of radical needs.

1. THE DISCOURSE-THEORETICAL CONCEPTION

The discourse-theoretical approach to human rights was famously developed by Jürgen Habermas. What Habermas purports to do is to resolve, what he sees as, a tension in both contractarian and liberal traditions between democratic or majoritarian decision-making and individual, subjective liberties; between public and private autonomy; between popular sovereignty and human rights. His famous argument is that there is no asymmetrical dependence between the principle of democracy and that of basic rights. Instead, democracy and rights presuppose each other and are "co-original".[440] Here is what he says in an important passage:

> "At a conceptual level, rights do not immediately refer to atomistic and estranged individuals who are possessively set against one another. On the contrary, as elements of the legal order they presuppose collaboration among subjects who recognise one another, in their reciprocally related rights and duties, as free and equal consociates under law. This mutual recognition is constitutive for a legal order from which actionable rights are derived. In this sense 'subjective' rights emerge equiprimordially with 'objective' law."[441]

Habermas' point is that rights do not exist in the state of nature, but are conferred by co-citizens on each other for the purposes of regulating the collective life in such a way as to guarantee every individual's freedom and equality. Human rights are internally connected with popular sovereignty, and this internal connection "consists in the fact that the system of rights states precisely the conditions under which the forms of communication necessary for the genesis of legitimate law can be legally

[440] Jürgen Habermas, *Between Facts and Norms* (Cambridge: Polity 1996) 122
[441] *Ibid.* 89

institutionalized".[442] To engage in a free communication and deliberation on the laws that are to govern a society, individuals have to have their rights guaranteed.

Crucially, what underpins Habermas' co-originality thesis is his *discourse principle*. The discourse principle states that: "only those norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity as participants in a practical discourse."[443] This principle is what ultimately legitimises human rights. Only to the extent that the law is the product of their own will, can it be said that citizens are legitimately bound by it. In other words, discourse theory sees rights-bearers to be active participants in contextualising governing norms. Discourse theory purports to show that human rights not only enable but also express the autonomy of individuals.[444] Human rights, then, stipulate conditions of possibility of communicative freedom without which there can be no meaningful participation, and hence no legitimate norms.

Seyla Benhabib is a prominent follower of Habermas' discourse-theoretical approach to human rights.[445] For her as well, human rights need to be legally embedded in order to guarantee the exercise of communicative freedom.[446]

Benhabib argues that rights-claims in general have the following form:

> "I can justify to you with good grounds that you and I should respect each other's reciprocal claims to act in certain ways and not to act in others, and to enjoy certain resources and services… In order to be able to justify to you why you and I ought to act in certain ways, I must respect your capacity to agree or disagree with me on the

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[442] *Ibid.* 104

[443] *Ibid.* 93

[444] Rainer Forst, 'The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach' (2010) 120 Ethics 711, 712

[445] Rainer Forst is another prominent figure in this tradition. See ibid. see also: Rainer Forst, 'The Basic Right to Justification: Toward a Constructivist Conception of Human Rights', (1999) 6(1) Constellations 35

[446] Seyla Benhabib, 'Reason-Giving and Rights-Bearing: Constructing the Subject of Rights' (2013) 20 (1) Constellations Volume 38*;* Seyla Benhabib, 'Is There a Human Right to Democracy?' in *Dignity in Adversity: Human Rights in Troubled Times* (Polity 2011)

> basis of reasons the validity of which you accept or reject. But to respect your capacity to accept or reject reasons means for me to respect your capacity for communicative freedom".[447]

The role of human rights is to protect a communicative space where people can reach a consensus on the law that should govern them.[448] Everyone has a basic moral claim to such a space. Benhabib appropriates Hannah Arendt's notion of the right to have rights to define this basic claim. Here the right to have rights is not a right to belong to a political community as Arendt, according to Benhabib, understands it, but a right to be part of the process of devising further set of rights that is going to govern the society to which a person belongs.[449] Human rights protect this basic right and hence the space where citizenship rights will be negotiated. Thus, human rights are not concerned with mere inclusion; they are not about minimum conditions of membership in a political community as in the case of the functionalist theory of Joshua Cohen discussed in Chapter Three. Rather they are the conditions for the existence of democratic politics – i.e. "political struggles, social movements, and learning processes" - through which the right to have rights is continuously and variously articulated.[450]

Crucially, even though human rights are preconditions for deliberation on the laws that should govern society, a specific content of those rights itself is contextualised (and thus its legitimacy and legitimate diversity in different places of the world is established) through democratic politics. These 'preconditions' then are themselves

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[447] Benhabib, 'Reason-Giving and Rights-Bearing', 38-39

[448] Laura Valentini, 'Human rights and Discourse Theory: Some Critical Remarks' (2014) 17 Critical Review of International Social and Political Philosophy 674

[449] Forst calls it 'a right to justification'. See: Forst, 'The Basic Right to Justification'. I argued in Chapter Four that Arendt too understands the right to have rights precisely in this sense, as a right to participate in the creation and maintenance of rights. But, as we will see, while Benhabib ultimately subordinates this right to a pre-political principle, in Arendt this right is open-ended and can configure a new political order.

[450] Seyla Benhabib, 'Another Universalism: On the Unity and Diversity of Human Rights' (2007) 81(2) Proceedings and Addresses of the American Philosophical Association 7, 16

subject to interpretation through the same process of deliberation.[451] Benhabib takes this to be a hermeneutic circle which:

> "'always already' presuppose[s] some understandings of what constitutes the conditions under which people can 'fairly negotiate' on equal and reciprocal grounds the terms of their coexistence. In a back-and-forth conversation which draws upon contextually established meanings, on the one hand, and internationally binding human rights interpretations, on the other, these norms are given further specificity… democracy is the contentious public conversation through which citizens and other stake-holders struggle over the meaning and extent of their rights; democracy and human rights mutually interpret each other. They are coeval."[452]

This means that the circumstances necessary for the exercise of communicative freedom will vary from community to community. Every society contextualises human rights norms on its own terms, and in order for such a contextualisation to be legitimate, it should be the result of democratic self-determination, upheld via democratic institutions. For Benhabib, human rights are cosmopolitan norms which "assume flesh and blood" through, what she calls, democratic iterations.[453] By democratic iterations she means "complex processes of public argument, deliberation, and exchange – through which universalist rights-claims are contested and contextualised, invoked and revoked, posited and positioned – throughout legal and political institutions as well as in the associations of civil society."[454] Through this 'iterative acts' "citizens articulate the specific content of their scheduled rights, as

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[451] Seyla Benhabib, *Dignity in Adversity: Human Rights in Troubled Times* (Polity 2011) 71

[452] Seyla Benhabib, 'Defending a Cosmopolitanism without Illusions. Reply to My Critics', (2014) 17 Critical Review of International Social and Political Philosophy 697, 706

[453] Forst develops a similar line: "Human rights constitute the inner core of any justified social structure without being concrete regulations that the legal system must simply mirror. The form that the rights take must be determined discursively by those effected." Forst, 'The Basic Right to Justification', 48

[454] Benhabib, *Dignity in Adversity,* 129

well as making these rights their very own"[455] and thereby proving that they are not mere subjects of law but also its authors.[456] Iterative acts are both guided by law and transcend, revise, re-articulate legal enactments.[457] Benhabib thus leaves a decision on the exact content of human rights norms to self-governing societies to be formulated and contextualised by justifying them to all the affected.[458]

Yet, the ultimate validity of human rights does not depend on the outcome of democratic politics. Instead it stems from the context-transcending discourse principle embodied in the right to have rights. This is why, incidentally, rights always retain their conflictual character; they retain, what Rainer Forst calls, a "veto" power to challenge the democratically articulated schedule of rights and demand its reformulation.[459] Only once the discourse principle is implemented we can say that we have a legitimate articulation of universal norms.[460] Thus, a democratic procedure does not exhaust the content of human rights. They have transcendent power that points beyond particular legal articulations. Here we see how discourse theory leans towards the juridical model in that it provides in advance the conditions of legitimacy for rights. As a result, there is always a possibility of arriving at one correct answer as to what a human right is, and there is always a possibility of achieving the final articulation of such a right.

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[455] *Ibid.* 75. "much moral and political discourse is 'iterative,' never in the sense of being repetitive but in the sense of always expanding the universe of meaning to which our concepts refer by their ever new and contentious deployment. Every iteration involves making sense of a so-called 'original' in new and different contexts. Strictly speaking, there is no such 'original' but rather a set of meanings, precedents, and practices that are taken to be authoritative. Through such iterations, meaning is enhanced and transformed; when the creative iteration of that 'authoritative' original stops making sense, then the original loses its authority upon us as well". *Ibid.*

[456] Seyla Benhabib, 'The Legitimacy of Human Rights' (2008) 137(3) Deadalus 94, 98

[457] Benhabib, 'Another Cosmopolitanism', 61

[458] We can see here how, in contrast to Cohen, Benhabib directly links human rights to the idea of democratic self-government. See: Seyla Benhabib, 'Reason-Giving and Rights-Bearing' 46. However, sometimes Benhabib seems to suggest that a definitive list of rights can be derived from a more basic right to have rights. On this ambiguity see: Kenneth Baynes, 'Discourse Ethics and the Political Conception of Human Rights' (2009) 2 Ethics & Global Politics 1, 3-6 On the question of using discourse theory to draw up a specific list of human rights see also Benhabib, 'Is There a Human Right to Democracy?,' in *Dignity in Adversity: Human Rights in Troubled Times* (Polity 2011) 79–82, and
Forst, 'The Justification of Human Rights', 735.

[459] *Ibid.* 719

[460] Benhabib, 'Another Cosmopolitanism', 49

As Bonnie Honig notes in her response to Benhabib's Tanner Lectures, the latter operates with a "subsumptive logic in which new claims are assessed not in terms of the new worlds they may bring into being but rather in terms of their appositeness to molds and models already in place: incomplete, but definitive in their contours".[461] Rights-claims are thought in terms of a "petition for subsumption or recognition under existing categories".[462] Elsewhere Honig points out that "new rights-claims do not necessarily demand mere inclusion in a previously stabilized order. They may. But they may also demand a new world. They may unsettle previously existing categories of right."[463] It is in neglecting this capacity of rights-claims to unsettle existing categories that discourse-theoretical conception cannot account either for the open-dimension of rights-claims.

In sum, the discourse-theoretical approach to human rights takes important features both from the juridical and the political models. In contrast to the orthodox conception, discourse theory does not derive rights from 'the state of nature', even if it shares with the former the need to integrate some idea of human agency into the conception of human rights. Furthermore, not unlike the functionalist conception, discourse-theoretical approach understands human rights in relation to the existing human rights doctrine and practice. In line with the functionalist conception, discourse theory largely avoids providing a definitive list of rights.[464] However, it also distrusts functionalist conception's close association of human rights with the *status-quo*. Instead, discourse theory rightly criticises the functionalist one that the latter's preoccupation with 'an overlapping consensus', leads to unjustified toleration of repressive regimes.

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[461]Bonnie Honig, 'Another Cosmopolitanism? Law and Politics in the New Europe,' response to Seyla Benhabib, *Another Cosmopolitanism, The Tanner Lectures* (Robert Post, ed. Oxford University Press 2006) 110

[462]*Ibid.* 111

[463]Bonnie Honig, 'The Time of Rights: Emergent Thought in an Emergency Setting' in David Campbell and Morton Schoolman (eds.) *The New Pluralism: William Connolly and the contemporary global condition* (Duke University Press 2008) 90

[464]Baynes, 'Discourse Ethics and the Political Conception of Human Rights', 3-6

Discourse theory goes a step further than the orthodox and the functionalist theories in terms of taking the internal perspective of the claimants of rights, and in allowing a broader discretion for bottom-up politics in formulating the content of rights. But, while discourse theory goes beyond both the orthodox and the functionalist approaches in terms of linking the idea of democratic politics to human rights, and allows certain variations of rights in different contexts based on the outcomes of democratic politics, as in the two conceptions discussed in Chapter Three, it too fails to grasp the open-ended nature of human rights-claims.

As was already stated in the context of the juridical model, insofar as human rights are conceived of as protections of some pre-political normative principle - whether it is agency (the orthodox conception), the requirements of global public reason (the political conception), or indeed the requirements of communicative freedom (the discourse-theoretical conception) - they cannot invoke a political imaginary that goes beyond these predetermined itineraries.

The following section will explore two agonistic theories of Claude Lefort and Jacques Rancière who further clarify the conflictual character of the politics of rights and conceptualise the latter in terms of the open-ended claims which can configure new political systems rather than merely aspire to realise pre-political ideals.

2. THE AGONISTIC CONCEPTION

2.1 LEFORT AND THE SYMBOLIC DIMENSION OF RIGHTS

In order to understand the meaning of human rights, claims Lefort, we should analyse the fundamental transformation that the French Revolution inaugurated. Already under the monarchical system, with the notion of the king's two bodies, power was separate from and legitimised by right. It was the monarchical institution which

incarnated right invested in it by some divine providence. The living king exercised his legitimate power with reference to this right. In practice this meant that the king's power was unrestricted "to the extent that right seemed consubstantial with his own persona".[465]

The new formulation of rights in the revolutionary declaration introduces a new principle of legitimacy. It overcomes the pre-revolutionary image of power as possessing absolute legitimacy and standing above society.[466] The principle of right is no longer embodied *by* and fixed *in* one institution or person. Instead it is *man* that founds right, thereby establishing a whole different relationship between right and power: "Right and power are no longer condensed around the same pole. If it is to be legitimate, power must henceforth conform to right, but it does not control the principle of right".[467] As Lefort notes, "the notion of human rights now points towards a sphere that cannot be controlled; right comes to represent something which is ineffaceably external to power."[468] Crucially, who this man - the subject of human rights - is and what his rights are, is indeterminate, and, as a result, "the tribunal before which his right is asserted is not visible".[469] With the dissolution of the markers of certainty in modernity, there is no single doctrine or ideology that can resolve this indeterminacy. But instead of attacking it - as Arendt and others, including Marx, do

– Lefort understands this indeterminacy as a function of the 'symbolic efficacy' of human rights that guarantees that no power "whether religious or mythical, monarchical or popular" will ever claim to have finally fixed their meaning.[470] It is this *symbolic dimension* of rights - completely missed by a formalistic juridical focus – that guarantees their universality and allows rights to exceed any juridical formulation, escape final appropriations and be always available for re-appropriation by political activists. As was already discussed in Chapter One, Lefort engages with Marx's

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[465] Claude Lefort, *The Political Forms of Modern Society. Bureaucracy, Democracy, Totalitarianism* (MIT 1998) 256

[466] Claude Lefort, *Democracy and Political Theory* (David Macey trans., University of Minnesota Press 1988) 31

[467] *Ibid.*

[468] Lefort, *The Political Forms,* 255

[469] Lefort, *Democracy and Political Theory*, 32

[470] Lefort, *The Political Forms,* 258

critique of rights. For Lefort, Marx is not wrong in reducing rights to the function of concealing the relations of exploitation and oppression. It is true that the bourgeois state proclaimed and legitimised itself as a protector of rights of every citizen while in reality protecting the interests of the rich and the powerful. Yet, according to Lefort, Marx was blinded with the liberal ideological image to the extent that he could not see what kind of a change the introduction of rights brought about. He could not see in the emergence of rights an opening of a hitherto unavailable political space where ideology and brute force could prevail, but which could no longer be reduced to these.

Therefore, while the juridical model as well as discourse theory can envisage a future where human rights are finally realised, in other words, while those theories take the meaning of human rights to be, in principle, fixable, Lefort lets us see how the act of institutionalisation never exhausts the meaning of rights. Every formulation "contains the demand for their reformulation… From the moment when the rights of man are posited as the ultimate reference, established right is open to question."[471]

The interrelation between rights and politics becomes apparent when we look at Lefort's conceptualisation of democracy. Lefort attributes the birth of democracy to the same fundamental indeterminacy that emerges with modernity.[472] On the one hand, power can no longer be legitimised by a transcendental source. At the same time, for a society to exist as such, it needs to be represented by a state "by virtue of which society apprehends itself in its unity and relates to itself in time and space".[473]

But now the legitimacy of a state, and hence the identity of a society, cannot be guaranteed by an unquestionable order whether founded in nature or in God. Power is in constant need of legitimation, always open to challenge. This is not to say that there will be no attempts for a transcendent grounding. The point is, though, that power is and remains *democratic* insofar as it belongs to no one, when it is "an empty place"[474]. This ensures a perpetual questioning of the legitimacy of the

[471] *Ibid.* 258
[472] Lefort, *Democracy and Political Theory*, 19
[473] *Ibid.* 17
[474] Lefort, *The Political Forms,* 303

institutionalised order, ensures that society's identity never becomes identical with actual society, that there is always a gap between the real and the symbolic society.[475] Democracy, then, is "a regime founded upon the legitimacy of a debate as to what is legitimate and what is illegitimate – a debate which is necessarily without any guarantor and without any end".[476]

The intrinsic connection between human rights and democratic politics is evident now. Rights, notes Lefort, are 'a generative principle'[477] of democratic politics in that they - exceeding any authoritative articulation - trigger the struggle for legitimacy which foregrounds democracy. The symbolic dimension of rights is a constitutive element of political society.[478] It makes sure that democracy is never identical with its institutionalised form.[479] As a result, both rights-violations and rights-claims are political because they concern the entire constitution of society.[480] As Lefort puts it, "where right is in question, society – that is, the established order – is in question".[481] Rights-claims are political in that they challenge the entire order, questioning the extent to which the regime allows its own questioning, i.e. the extent to which the regime is democratic.

Lefort certainly allows us to capture the open-endedness and the conflictual nature of rights-claims. There are no pre-determined conditions of legitimacy here. Rights are not preconditions for politics, but are constitutive of political action. But, he never attends to the transcendent dimension of rights.

Lefort's idea of the politics of rights seems to belong to the liberal constitutional order. Firstly, he emphasise the role of rights in guarding the private sphere. According to him, rights establish and maintain a 'buffer zone' against the state; a

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[475] Wim Weymans, 'Defending democracy's symbolic dimension: a Lefortian critique of Arendt's Marxist assumptions', (2012) 19(1) *Constellations* 63, 67

[476] Lefort, *Democracy and Political Theory*, 39

[477] Lefort, *The Political Forms,* 260

[478] *Ibid.* 259

[479] James Ingram, 'The Politics of Claude Lefort's Political: Between Liberalism and Radical Democracy.' (2006) 87(1) Thesis Eleven 33, 43

[480] Andrew Schaap, 'Human Rights and the Political Paradox' (2013) 55 *Australian Humanities Review* 1, 17

[481] Lefort, *The Political Forms,* 258

public space, where ideas are circulated, social networks are created, and where social power can be mobilised and new, alternative political projects can be formulated. [482] Secondly, even though he conceives of rights as always exceeding their institutionalised forms through their symbolic dimension, at the same time he seems to find the moment of institutionalisation necessary. First of all, because of the need to secure the buffer zone just noted. Secondly, because it promotes an 'awareness' of rights, which further contains a possibility of instigating democratic struggles.

It is true, Lefort is mindful of the dangers of institutionalisation. While the latter is crucial - because "awareness of rights is all the more widespread when they are declared, when power is said to guarantee them, when liberties are made visible by laws"– institutionalised rights also threaten democratic politics with "the possibility of a concealment of the mechanisms indispensable to the effective exercise of rights by the interested parties".[483] In other words, institutionalisation, on the one hand, allows political activists to make use of rights and, on the other hand, is always susceptible to presenting particular formulations as beyond contestation.

However, Lefort falls prey to the legality critique, explained in Chapter One, insofar as he seems to favour constitutional politics revolving around the claims to individual rights to be guaranteed by the legal order. Rights, here, are treated as ends in themselves. Similarly, he does not escape the depoliticisation critique. Wendy Brown's comments on Lefort, briefly mentioned in Chapter One, is relevant here. If Lefort sees rights as articulating a democratic sphere of the perpetual contestation and the revision of particular instantiations of power, Brown is asking "who or what is contesting and revising? And what guarantees that this putative contestation and revision is [more] than a mere negotiation of power and position?"[484] In other words,

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[482]For a discussion of Lefort's two different accounts of the role of rights in democracy see: James Ingram, 'The Politics of Claude Lefort's Political: Between Liberalism and Radical Democracy' (2006) 87(1) Thesis Eleven 33

[483]Lefort, *The Political Forms,* 260; on the dangers and 'the paradox of institutionalisation' of rights see: Neil Stammers, *Human Rights and Social Movements* (Pluto Press 2009).

[484]Wendy Brown, 'Revaluing Critique: A Response to Kenneth Baynes' (2000) 28 Political Theory 469, 474

Lefort is not attentive to the possibility of constant reproduction of oppressive social relations that get depoliticised through a supposedly democratic process of claiming and institutionalising rights. His framework cannot provide us with theoretical tools for identifying when rights-claims actually challenge oppressive social arrangements and when they depoliticise and perpetuate the latter behind the façade of democratic contestation.

2.2 RANCIERE AND THE POLITICS OF THE EXCLUDED

Rancière brings to light the moment of a challenge to the extant order. Rancière's intervention in the debate on human rights should be situated in the context of his general ideas about politics and the process of subjectivization. As I already showed in Chapter Two, Rancière makes a crucial distinction between the police and politics. The police order presents itself as necessary and does not allow alternatives. It is:

> "an order of bodies that defines the allocation of ways of doing, ways of being, and ways of saying, and sees that those bodies are assigned by name to a particular place and task; it is an order of the visible and the sayable that sees that a particular activity is visible and another is not, that this speech is understood as discourse and another as noise."[485]

In Rancière's words, the police 'distributes the sensible'.[486] This entails everything that in common usage is called politics: the systems of governance and administration, electoral politics etc. In contrast, politics in Rancière's usage is a moment when the police order is challenged. The political subject does not exist in

[485]Jacques Rancière, *Disagreement: Politics and Philosophy, (*Julie Rose trans., University of Minnesota Press 1999) 29

[486]Davide Panagia, 'The Sharing of the Sensible', in Jean-Philippe Deranty (ed), *Jacques Rancière: Key Concepts* (Acumen 2010)

the police order, it emerges in the moment when the latter is ruptured, when the subject demonstrates its own exclusion from and the contingency of the police order which presupposes this exclusion. Politics articulates *dissensus* with the existing distribution of the sensible.

Now, human rights for Rancière can be both the instruments of the police order as well as those of politics. Not unlike Lefort, Rancière points to the gap between the particular instantiations of human rights and their universal appeal. However, Rancière is also more attentive to the fact that this gap is not a benign one, and that it exposes the hypocrisy of rights in proclaiming human beings equal and free against the reality of inequality (something Lefort is reluctant to admit). In their universality, rights contain a truly egalitarian promise, but in their concrete reality perpetuate particular oppressive relations.

But against those who are ready to dismiss rights for this, - Rancière's main object of criticism is Arendt - Rancière sees the gap between the rights of man and the rights of the citizen, or between universal and inscribed rights, as "the opening of an interval for political subjectivization".[487] It is by making something of this gap, by building "a case for the verification of the power of the inscription",[488] by articulating dissensus, that a political subject emerges. Against the abstract equality of human rights human beings can test their own equality in the social order through political action. Through politics individuals demonstrate their humanity, their actual inequality in the constituted order and a sheer contingency of this state of affairs.

To illustrate, Rancière invokes an example of the struggle of Olympe de Gouges during the French Revolution, where this 'revolutionary woman' famously stated that if women were equal under the guillotine, they were also entitled to the equal participation in the political life. Thus, through their action, by enacting their rights, the women demonstrated that they had the rights that they were denied by the constitution. With this, Rancière arrives at a paradoxical formulation: "The Rights of

[487] Jacques Rancière, 'Who is the Subject of the Rights of Man?', (2004) 103 South Atlantic Quarterly 297, 304
[488] *Ibid.* 303

Man are the rights of those who have not the rights that they have and have the rights that they have not."[489] Human rights are then an always available resource for those who have been denied the rights that they, *per* human beings, are entitled to.[490]

Turning to social rights in particular, following both Lefort and Rancière, we can recast the politics of social rights in terms of a practice of claiming rights *against* the authoritative formulations thereof, whereby the authoritative interpretation of needs that underlie those rights is challenged in the name of a right to be included in the open-ended process of deliberation and contestation over the issues of the sources, nature and model of realisation of the needs in question.

But like Lefort, Rancière too fails to account for the transcendent potential of rights-claims. While Rancière does offer an important alternative to both human rights sceptics and the proponents of consensus-politics, his idea of the politics of rights is more attuned to the struggles for inclusion within the liberal constitutional order - even if this inclusion would mean the reconstitution of that order - rather than radical politics that would transcend that order. Costas Douzinas rightly observes regarding Rancière that:

> "[r]ight-claims bring to the surface the exclusion, domination and exploitation and the inescapable strife that permeate social life. But at the same time, they conceal the deep roots of strife and domination by framing struggle and resistance in the terms of legal and individual remedies which, if successful, lead to small improvements and marginal re-arrangements of the social edifice."[491]

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[489] *Ibid.* 302

[490] James Ingram, 'What Is a 'Right to Have Rights'? Three Images of the Politics of Human Rights' (2008) 102 American Political Science Review 401, 412

[491] Costas Douzinas, 'Adikia: On Communism and Rights' in Costas Douzinas and Slavoj Žižek (eds), *The Idea Of Communism* (Verso 2010) 95-96

Both Lefort and Rancière ultimately reduce rights-claims to not-yet-enforced individual claims. In other words, as in liberal and discourse theories, rights are seen as parasitic on the bourgeois law.

To better grasp this limitation on the part of the agonistic conception of rights, its inability to conceptualise the transformative potential of rights, and to see how this limitation is shared with the juridical model and the discourse-theoretical approach, we need to look closely at the structure of a rights-claim that is assumed by these approaches. In order to bring out the differences and similarities between these different conceptions more starkly, and to further distinguish them from the idea of rights as challenges which I will introduce later, I take my cue from speech act theory. What I would like to suggest is that we can classify different theories of rights in terms of the assumptions that they make as to the performative character of a rights-claim.

3. PERFORMATIVITY OF RIGHTS-CLAIMS

John L. Austin's famous contribution was to clarify how we actually *do* things through uttering words instead of 'just saying something'.[492] Not all sentences, argued Austin, are assessable in terms of their truth-value. As a classic example goes, the sentence
'I bet you sixpence it will rain tomorrow' cannot be either true or false. This utterance is issued in order to make a promise and, whether the promise is kept or broken, one cannot adequately describe it as true or false. The same goes for the activity of claiming rights. 'We have a right to free speech' uttered in the context of a law lecture might be a mere description of valid law or morality and, therefore, subject to the evaluation in terms of its truth-value. But the same utterance made in the course of a public protest could be performing several acts. It could be a *request* to enforce an entitlement, a *criticism of* the rights violations, a *warning* against possible violations,

[492] John L. Austin, *How to Do Things with Words* (2nd edition, Clarendon Press 1975)

a *promise* to fight against violators; it could also be about urging others to join in the struggle for rights or, indeed, as I will show, about *challenging* the extant order.

Because these examples of promising, demanding, criticising, warning, urging and challenging are about performing certain acts rather than 'just saying something',

Austin calls them *performatives*. Performatives are nether true nor false. They can only be successful or unsuccessful, or, to use Austin's vocabulary, 'felicitous' or 'infelicitous'. '(In)felicitousness' of a performative speech act depends on whether appropriate conventions are cited and conventional procedures followed. In other words, success of a *performative* depends on the satisfaction of certain 'felicity conditions'.[493]

The analyses of rights based on speech act theory has not received sufficient attention in literature. To my knowledge, it is only Karen Zivi's recent monograph that addresses at a considerable length the performativity of rights-claims.[494] I would like to briefly discuss her contribution especially because she uses the Arendtian framework and seems to adopt the conception of rights as proposals elaborated above.

Zivi's view is that it is by taking rights-claims as performative utterances that we can grasp their democratic potential. She builds her argument around Austin's distinction

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[493] Austin offers the following list of felicity conditions:
"(A .I) There must exist an accepted conventional procedure having a certain conventional effect, that procedure to include the uttering of certain words by certain persons in certain circumstances, and further,
(A .2) the particular persons and circumstances in a given case must be appropriate for the invocation of the particular procedure invoked.
(B.I) The procedure must be executed by all participants correctly
and (B.2) completely.
(Γ.I) Where, as often, the procedure is designed for use by persons having certain thoughts or feelings, or for the inauguration of certain consequential conduct on the part of any participant, then a person participating in and so invoking the procedure must in fact have those thoughts or feelings, and the participants must intend so to conduct themselves, and further
(Γ.2) must actually so conduct themselves subsequently." Austin, *How to Do Things,* 14-15

[494] Karen Zivi, *Making Rights Claims: A Practice of Democratic Citizenship* (Oxford University Press 2012); see also: Linda Zerilli, *Feminism and the abyss of freedom* (The University of Chicago Press 2005), Zerilli explains rights-claiming as a performative practice that creates a space for politics. See also: Anja Eleveld, 'Claiming Care Rights as a Performative Act' (2015) 26 Law Critique 83, Eleveld discusses claiming women's rights as a performative activity which contributes to democratic practices

between illocutionary and perlocutionary dimensions of speech acts. It is along conventional/non-conventional axis that Austin distinguishes illocutionary acts from their perlocutionary effects. Utterances, argues Austin, "will often, or even normally, produce certain consequential effects upon the feelings, thoughts, or actions of the audience, or of the speaker, or of other persons".[495] These 'consequential effects' are what he characterises as a perlocutionary dimension of a speech act. These effects can be said to be 'natural' rather than 'conventional' and hence, the speaker has no control over them. For example, an utterance 'shoot him' can be an illocutionary act of commanding, ordering, urging etc. One might successfully issue such an illocution provided she follows proper linguistic or extra-linguistic conventions. However, if this illocutionary act succeeds in persuading the addressee to shoot, an act of *persuasion* will be a perlocutionary effect thereof. 'Persuasion' cannot be achieved conventionally. It cannot be guaranteed in advance. Similarly, a rights-claim can be said to be successful when it authorises enforcement. But actual enforcement can only be a perlocutionary effect.

Zivi moves on to criticise the way leading theories view rights-claims solely in terms of illocutionary acts.[496] These theories, argues Zivi, are concerned with identifying and fixing in advance the felicity conditions for a successful invocation of rights and with it try to bring the activity of rights-claiming under control. The most common way of talking about rights, continues Zivi, is captured by Ronald Dworkin's metaphor of 'trumping'.[497] Even though Dworkin's particular understanding of what rights as trumps mean is widely disputed, Zivi notes a certain consensus among academics that ultimately the function of rights is to bring to an end a particular debate within which they are invoked. In other words, it is generally assumed that the main performative role that rights serve, one way or another, is that of trumping.[498]

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[495] Austin, *How to Do Things,* 101

[496] Zivi, *Making Rights Claims,* ch. 2

[497] Ronald Dworkin, 'Rights as Trumps' in Jeremy Waldron (ed.) *Theories of Rights* (Oxford University Press 1984)

[498] *Ibid.* 28-35

However, as Austin's account of perlocutionary effects reminds us, utterances can never be fully dominated by the speaker. It is in this remainder, in the non-conventional consequences produced by rights-claims, that Zivi finds their democratic and political potential.

Zivi suggests to look at rights-claiming as a democratic practice of *persuasion* rather than that of trumping. This practice "recognises the plurality of individual perspectives and the impossibility of definitive political outcomes."[499] Rights-claims are perlocutionary acts with uncertain effects, opening up a political space where ideas can be contested and deliberated. Zivi's idea of rights as acts of persuasion is similar to the notion of rights as proposals. What she does is to add a perlocutionary dimension to the illocutionary act of proposal. While this is an interesting extension of the Arendtian framework, it suffers from the same limitation when it comes to bringing out the radical dimension of rights-claims. The question arises as to who is persuading whom on what and how does this process of persuasion naturalise the issues and subjects excluded from the process. Zivi, like Arendt, fails to focus on the potential conflict between the exclusionary institutional system and the rights-claimants. An act of persuasion loses its political edge in the situation when political proposals are not admitted to the public sphere in the first place.

The urgent political task is to demonstrate the exclusion and thereby to open up a space, hitherto foreclosed, where the politics of persuasion can have a purchase. This is what I believe both discourse and agonistic theories to be suggesting. How do these theories understand the performativity of rights-claims and how do they differ from other conceptions of rights, notably from the juridical model? To answer these questions we need to go back to the basic concepts of speech act theory.

[499] *Ibid.* 43

3.1 DEMANDS AND COMMANDS

John Searle further clarified and developed Austin's speech act theory and offered a more sophisticated taxonomic system whereby different groups of speech acts, as well as types of utterances within those groups, can be classified. With the help of a set of felicity conditions,[500] Searle identifies five such groups: representatives, commissives, expressives, declarations and directives.

My contention is that the structure of rights-claims assumed by liberal, discourse and agonistic conceptions is most adequately explained in terms of a directive speech act. The reasons become clear when we analyse directives in the context of their felicity conditions.

It is the *essential* condition which Searle takes to be the most important of all felicity conditions[501] when it comes to the basis for a taxonomy. He later refers to it as an illocutionary point. This is the point, or the purpose, of an utterance, i.e. what an utterance aims to achieve. The illocutionary point of directive speech acts consists in the fact that directives are "attempts… by the speaker to get the hearer to do something".[502] Despite general differences between the political and the juridical models, liberal, discourse and agonistic approaches assume that, at the end of the day, a right-claim is a directive which attempts to make the addressee institutional order recognise/enforce the claimed right.

We can further compare these conceptions of rights in terms of the sincerity condition which Searle explains as "differences in expressed psychological states".[503]
We can say that a claimant of a right expresses a *wish* that the addressee order

[500] Even though Searle does not use this term, for the sake of simplicity, I will stick to Austin's term 'felicity conditions' when talking about Searle's 'conditions'. See generally: John Searle, 'A Classification of Illocutionary Acts' (1976) 5 Language in Society 1
[501] ibid 13
[502] *Ibid.* 11
[503] *Ibid.* 4

realises certain entitlement. This sincerity condition will become important later for distinguishing rights as directives from rights as challenges. Meanwhile, it is interesting to see how we can express a *distinction* between different conceptions of rights in terms of speech acts.

Let us look at *preparatory* conditions. It is possible to distinguish between speech acts in terms of "differences in the status or position of the speaker and hearer as these bear on the illocutionary force of the utterance", as well as in terms of "differences between those acts that require extra-linguistic institutions for their performance and those that do not".[504] Employing these dimensions, I would like to suggest that we can understand the difference between, on the one hand, liberal theories and, on the other hand, discourse and agonistic theories in terms of a difference between speech acts of command and demand respectively.

As Searle and Vanderveken explain,[505] a speech act of command is a directive which has as its preparatory condition *the existence of the rules governing the relationship between the speaker and the listener*. Since the juridical model formulates the necessary conditions for a successful rights-claim in advance of political processes, I am going to call this a *command-conception of rights*. Insofar as liberal theories justify a right through a philosophical inquiry – whether this inquiry is into human nature or public reason - a claim thereof acts as a command calling for an enforcement by the duty-bearer.

In contrast, we can understand a speech act of *demand* precisely as a directive which lacks prior authorisation. Therefore, insofar as, with the discourse-theoretical and agonistic accounts we do not have answers prior to democratic politics as to which rights-claims justify enforcement, bottom-up claims against the existing formulations of rights can be classified as demands.

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[504] John Searle, *Expression and Meaning: Studies in the Theory of Speech Acts* (Cambridge University Press 1979) 7

[505] John Searle, and Daniel Vanderveken, *Foundations of Illocutionary Logic* (Cambridge University Press 1985) 201

Interestingly, then, liberal, discourse and agonistic theories all assume a somewhat similar structure of right. They end up equating a rights-claim with a directive. The difference between these theories is only that, if for liberals this directive is derived in advance of political processes, for discourse and agonistic theorists the directive is articulated contextually, through political action against particular institutional arrangements. We can clarify the problem with this construction by looking at the preparatory conditions of speech acts.

Every directive requires, as a preparatory condition, that the hearer is *capable* of performing the propositional content of the speech act and that the speaker believes in the hearer's capacity.[506] In the case of both commands and demands the hearer is deemed capable to realise the command or the demand respectively and the speaker assumes this capacity. If one adopts the view of rights as directives, then it follows that the claimant presupposes that the extant order is a legitimate duty-bearer who, within its own possibilities, is able to enforce that right. Both command-rights and demand-rights invoke the possibilities provided by the *status quo* and assume that the propositional content of these speech acts can be realised within those possibilities.

Rights-claims understood in this manner cannot articulate radical needs, i.e. the needs that are produced by the extant order but the satisfaction of which exceeds the possibilities of that order. Instead, rights naturalise and perpetuate the existing system of needs. Thus, neither rights as commands nor rights as demands, being the forms of directive-rights, are compatible with the radical conception of rights. The transformative potential of rights slips away from these approaches. This does not do justice to the reality of actual practices of rights-claiming by social movements, where rights are used with an eye on transcending particular institutional orders. I will argue in the next chapter that it is only the idea of *rights as challenges* which can express and channel the ruptural force of rights-claims, and hence transformative politics. Thus, if the proponents of the political model discussed so far understand the politics

[506] John Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge University Press 1969) 66

of rights to be tethered to liberal constitutionalism, the next chapter wants to dispense with the directive structure of rights-claims all together and pave the way for the idea of rights as *challenges*.

Chapter Seven

Rights as Political Challenges

In the last chapter I argued that the agonistic theories, as in both liberal and discourse theories, endorse the conception of rights as directives. The problem with this account is that a directive-right recognises the capacity and, hence, the fundamental legitimacy of the extant order. Therefore, radical needs whose realisation exceed the capacity of the established system, cannot be expressed through rights understood as directives.

Furthermore, using the tools of speech act theory I further distinguished between two forms of directives. Insofar as liberal theories proceed by establishing the criteria of validity for rights independently of political processes, ultimately subordinating the latter to the former, I called this the command-conception of rights. A speech act of command is a directive that presupposes the existence of the rules governing the relationship between the speaker and the listener. Similarly, provided a right is justified through a philosophical inquiry, a claim thereof acts as a command calling for an enforcement by the duty-bearer. On the other hand, we have discourse and agonistic theories which leave the formulation of the content of rights to politics. Here, we do not have answers prior to democratic processes as to which rights-claims justify enforcement. This is why I called this the demand-conception of rights. A speech act of demand differs from that of command precisely by lacking prior

authorisation. Crucially, both commands and demands are forms of directives, inapt for articulating radical needs and, therefore, not suited for transformative politics.

If rights as proposals fail to capture the political struggles of the excluded who demand rights that they are denied, and if demands and commands for material goods in the form of directives addressed to the bourgeois state cannot but express egoistic needs, this chapter suggests thinking of rights-claims in terms of *declarations* and *challenges*. I argue that the act of declaring rights constitutes the claimant, and the act of declaring rights *which articulates radical needs* constitutes a *radical* political subject with a potential for transforming the prevailing social relations. In this respect, I look at Ayten Gündoğdu's new book where she proposes an interesting perspective on *new* rights-claims. She analyses them in terms of the political practices of founding. Even though her account rightly emphasises the importance of the declaratory dimension of rights, she presumes too readily that the radical potential can be captured solely through this dimension. At points, it seems that in her examples a newly formed political subject declares new rights with transformative potential, only to then petition the extant order for its enforcement. I argue that the radicalism of the subject that a declaration brings about can be consistently theorised only if we look at its interaction with the institutional order. It is in the institutional dimension that the transformative nature is either revealed or depoliticised. The act of declaring is not necessarily opposed to that of directing, and if the enforcement of declared rights is left up to the extant order, the latter will enforce them in only way it can, by *reforming* itself and in the process de-radicalising the rights-claimant.

While retaining the insights that rights as declarations present us with, I move on to offer a conception of *rights as challenges*. I argue that it is through a challenge-right that we can express the ruptural capacity of rights-claims. In order to construct such a conception, I will first distinguish the speech act of challenge from the speech acts of demand and command. This will allow me to juxtapose challenge-rights to both forms of directive-rights. By a challenge I mean an act which *urges someone to prove a proposition that the latter wants to be generally believed to be true*. Similarly, radical rights-claims should be understood as challenging the proposition that *the*

extant order is capable of enforcing all the rights. This is the proposition based on which the extant order legitimises itself, and the challenge is precisely to that legitimacy. This is an act with an intention to demonstrate the addressee's inability and, therefore, its fundamental illegitimacy. What the issuer of a challenge expects from the hearer is either the latter's capitulation or an endeavour to justify the proposition, something the challenger believes is destined for failure. In summary, to claim a right to radical needs is an act of provocation that ruptures the prevailing social relations and, as a result, opens up a political space where transformative ideas can be deliberated and contested and a radical subject can be constituted. If commands and demands ultimately aim at reforming the system, challenges aim at transformation. *La Via Campesina*'s call for food sovereignty, which we have been referring to in this thesis, is precisely such a challenge. It is neither a directive waiting for a top-down enforcement, nor merely a proposal to fellow citizens to deliberate on the issue (Arendtian proposals). It is a political *act in itself*; a political act of challenge.

1. RIGHTS AS DECLARATIONS

It has been argued that rights-claims in the form of directives end up legitimising and perpetuating the fundamentals of the addressee institutional system. By looking at different theories of rights, two sub-forms of directive-rights have been identified: commands and demands. In the former case rights are conceptualised as embodying certain pre-political or extra-political principles, the realisation of which is justified on the basis of some political morality. Here rights act as commands upon the pre-established duty-bearers. In contrast, the latter form refers to the claims which articulate new rights or reconstruct existing ones, giving them a new meaning. In short, rights as demands, in contrast to commands, are not justified prior to political processes.

Even though demand-rights ultimately share the flaws generally associated with directives, they still bare more similarities with transformative rights-claims (i.e. the rights to radical needs) than command-rights do. Neither demand-rights nor radical rights enjoy recognition by legal or other normative frameworks. They both are claimed against existing normative orders and by the political subject who has no standing before those orders. The difference, however, lies in that radical rights aim at transforming the extant order, whereas demand-rights, due to their structure, reproduce the fundamentals of that order.

In this section, I would like to discuss a declarative form of rights-claims that both radical rights and demand-rights have in common. I will argue that, even though this declarative dimension is crucial for understanding the process whereby a political subject is constituted, an act of declaring in itself is not sufficient to capture the transformative nature of rights. In this respect, I will discuss a recent work by Ayten Gündoğdu[507] who, mistakenly in my view, believes that radicalism of rights-claims can be consistently analysed by looking at the declarations thereof without paying attention to 'the second stage', that is, a vertical interaction with the extant order against which the political subject has been constituted. I argue that Gündoğdu cannot avoid collapsing radical declarations of rights into directives. Retaining the insights of declarative function of rights, I then move on to rethink rights as challenges.

According to John Searle, declarations bring "a state of affairs into existence by declaring it to exist".[508] Declaration is the only speech act the successful issuance of which translates into the correspondence between the propositional content (what the utterance is about) of the utterance and reality. If the illocutionary point of a directive is to make the world match the propositional content of the utterance, and if the illocutionary point of an assertion is the reverse one – making the propositional content correspond to reality, with declarations we have both 'directions of fit'.[509]

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[507] Ayten Gündoğdu, *Rightlessness in an Age of Rights: Hannah Arendt and the Contemporary Struggles of Migrants* (Oxford University Press, 2015)

[508] John Searle, 'A Classification of Illocutionary Acts' (1976) 5 Language in Society 1, 13

[509] *Ibid.* 4

Declarations are unique speech acts in that they commit the speaker to the truth of the statement while at the same time making the statement true by merely uttering it. They "bring about a change in the world by representing it as having been changed."[510] If I order you to shut the door, irrespective of whether the propositional content of shutting the door actually takes place, I successfully performed the speech act of order. But with declaratives, a boss saying to an employee 'you are fired' at the same time effectuates the act of firing. In other words, when it comes to declarations "saying makes it so". [511] This is why some authors point to their 'magical' character.[512]

Now, Searle suggests that declarations, with a couple of exceptions, require extra-linguistic institutions to be successful.[513] So, for a declaration 'I declare this meeting closed', the speaker needs to be authorised according to the governing rules. But what about revolutionary declarations which institute new social orders without prior authorisation?

Jacques Derrida takes the insights of speech act theory to explain this paradox of political foundations:

> "The "we" of the declaration speaks "in the name of the people." But this people does not yet exist. They do not exist as an entity, it does not exist, before this declaration, not as such. If it gives birth to itself, as free and independent subject, as possible signatory [of the declaration], this can hold only in the act of the signature. The signature invents the signer. This signer can only authorize him- or herself to sign once he or she has come to the end, if one can say

[510] John Searle, *Mind, Language and Society: Philosophy in the Real World* (New York: Basic Books, 1998) 150

[511] Searle, 'A Classification of Illocutionary Acts', 13

[512] Nick Fotion, *John Searle* (Teddington: Acumen 2000) 51; Slavoj Zizek, *Enjoy your Symptom! Jacque Lacan in Hollywood and Out* (London: Routledge, 1992) 97

[513] John Searle, 'A Classification of Illocutionary Acts', 14-15. Exceptions from this rule, according to Searle, are supernatural declarations and declarations that concern the language itself. An example of the former would be when the God says "let there be light". An example of the latter is when one says: 'I define, abbreviate, name, call or dub'

> this, of his or her own signature, in a sort of fabulous retroactivity."[514]

Similarly, Claude Lefort, talks about the French Declaration of the Rights of Man as:

> "an extraordinary event: a declaration which was in fact a self-declaration, that is, a declaration by which human beings, speaking through their representatives, revealed themselves to be both the subject and the object of the utterance in which they named the human elements in one another, 'spoke to' one another, appeared before one another, and therefore erected themselves into their own judges, their own witnesses."[515]

In the case of *La Via Campesina*, declaration of peasants' rights and of their right to food sovereignty constitutes the peasantry as a political subject, as a subject which bears radical needs. This is how Ayten Gündoğdu conceptualises new rights-claims. She sees them as new beginnings that break away from the instituted normative frameworks. Referring to Arendt's critique of absolute foundations, Gündoğdu argues that instead of seeing human rights as authorised by extra-political or pre-political sources, in order to capture the essence of new rights-claims, we would do better to focus on the "political practices of founding human rights" and on "a new political and normative world" that they inaugurate.[516] Rights on this account originate in public declarations, and public declarations themselves bring about the subject who is entitled to rights. Again following Arendt, Gündoğdu points out how similar to revolutionary declarations, the declarations of new rights-claims confront us with the "abyss of freedom", of new beginnings that lack prior authorisation.[517] By

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[514] Jacques Derrida, 'Declarations' in Jacques Derrida, *Negotiations: Interventions and Interviews 1971-2001* (Elizabeth Rottenberg ed., Stanford University Press 2002) 48

[515] Claude Lefort, *Democracy and Political Theory* (David Macey trans., University of Minnesota Press 1988) 38

[516] Gündoğdu, *Rightlessness in an Age of Rights,* 166

[517] *Ibid.*

declaring rights, people emerge as the authors of their own laws, the authors of history that, in Arendt's words, "suddenly begins anew".[518]

However, my contention is that the nature of the subject that is constituted through a declaration can only be consistently theorised after we explain the passage from the horizontal level of declaration to the vertical level of the interaction between the institutional order and the claimant. It is in the vertical dimension that the radical nature is either revealed or alternatively neutralised. My point is simply that the act of declaring is not necessarily opposed to that of directing. If the enforcement of declared rights is expected from the extant order, the latter is going to comply in only way it can, by reforming itself and, as a result, undermining the possible radicalism of the subject.

Gündoğdu is a good example of someone who ignores the importance of this second stage and tries to capture the transformative character of rights through the analysis of the act of declaring alone. For this reason, I argue, the initial radical core of her theory of rights collapses into the problematic politics of directing. Thus, while largely agreeing with Gündoğdu's description of how a transformative political subject is constituted through rights-claims, I find her account incomplete. It is by analysing the incompleteness of her argument that we will arrive at the proper conception of radical rights.

Interestingly, Gündoğdu explicitly juxtaposes the 'political genre' of declaration to the act of "petitioning".[519] If the latter invokes an external authority with the power to grant rights, the former, instead, stands for a public utterance through which human beings recognise each other as rights-holders.[520] What she means by rights-claims as petitions is that such rights are already recognised within existing domestic or international legal systems.[521] In other words, petitions for her amount to command-rights but do not seem to include demand-rights. As we will see, it is the

[518] Hannah Arendt, *On Revolution* (Penguin Books 1990) 28
[519] Gündoğdu, *Rightlessness in an Age of Rights,* 171
[520] *Ibid.* 172
[521] *Ibid.* 165

latter that Gündoğdu has in mind when she discusses her version of 'radical' rights. I argue that Gündoğdu errs in not thinking of petitions along the lines of directives as conceptualised in this thesis. Not only command-rights, but demand-rights too ultimately invoke an external authority, insofar as institutionalised rights are the ends of the practice of rights-claiming.

In the very beginning of the chapter in question, Gündoğdu makes references to the 'radical dimension' of rights.[522] Her stated intention is to focus on those "new rights claims that *cannot* be fully authorised by existing legal and normative frameworks",[523] i.e. the claims that challenge the very fundamentals of the extant order. A concrete case that Gündoğdu is looking at in this respect is the protest movement of undocumented immigrants in France and its call for 'papers for all'.

Though in the course of their struggles *sans-papiers* also demand the enforcement of already existing rights, it is precisely in the potential reconfiguration of sovereignty and citizenship, which is implied in the demand for 'papers for all', that Gündoğdu finds the movement's transformative character. Yet, the discussion of this transformative dimension all but fades away in the pages to come.

Even though Gündoğdu sets for herself a radical agenda to conceptualise new rights-claims as those that *cannot* be fully authorised by the existing legal and normative frameworks,[524] the meaning of this 'impossibility of authorisation' is never developed. What is discussed is *non*-authorisation as part of the definition of new rights-claims, i.e. new rights-claims are considered to be those which *are not* authorised, or, in some ways, go against the official formulations of rights. At times, she talks about the 'contingency and fragility' of the new rights-claims, the 'political and legal recognition' of which is by no means guaranteed,[525] and focuses on the 'inventive political practices' of claiming rights, whereby the claimants declare

[522] *Ibid.* 164
[523] *Ibid.* [emphasis added]
[524] *Ibid.* 165
[525] *Ibid.* 168

themselves as speaking and acting beings, as capable of making rights-claims, and in the process reinventing the idea of human rights.

However, this description can cover both transformative claims and the claims for reform. Unfortunately, Gündoğdu never distinguishes between the two. As a result, her theoretical framework is unable to account for the moment when the declarations of transformative claims are translated into reformist directives.

Take the case of *sans-papiers*. It is definitely true that their struggles in the name of rights contain the potential of 'insurgency',[526] specifically in the demand for 'papers for all' that threatens the structures of sovereignty, citizenship and nationality. But it is also not hard to imagine *sans-papiers* getting their 'papiers', while at the same time the host state restricting its immigration policy. The achievement of the legal and political recognition of these rights, would arguably amount to nothing but a minor reorganisation of the *status quo*. Yet, there is nothing in Gündoğdu's argument that would not applaud this development as constituting "a type of citizenship enacted by those who do not have a legitimate standing and yet who thrust themselves into the public spaces from which they are excluded." [527] Here, the radicalism of 'papers *for all*' and of the emerging political subject will be traded for the process of "the continuous reinvention of human rights" within the *status quo*.[528] Rights seem to be *declared* only to end up being directives for enforcement.

Overall, the author seems to be content with an argument that the perspective of *declaring new rights as the political practices of founding* allows us to see that rights are not reducible to the instruments for regulating the extant order and can, in principle, turn against that order. [529] Herein resides their 'insurrectionary' potential. But she is dubious about the nature of confrontation that is implied here. In particular, whether this confrontation leads to the transformation or mere reform of the given system.

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[526] *Ibid.*
[527] *Ibid.* 198
[528] *Ibid.*
[529] *Ibid.* 173

What I would like to suggest is that the difficulties with Gündoğdu's account stems from the fact that she runs together two distinct 'modalities of constituent power' which are to be found both in Arendt and Rancière, the two authors whose theories Gündoğdu uses extensively. These are the modalities of *augmentation* and *revolution.*[530] It is not an either-or matter when it comes to these two types of politics. Yet, we need to be clear when the latter, more radical form, is substituted by the former. This is something Gündoğdu fails to do. It will be worthwhile to examine these two forms of politics and the confusion of them in Gündoğdu's work. As I will argue, we have to thematise transformative rights in terms of *revolutionary* politics.

1.1 AUGMENTATION OR REVOLUTION?

In his recent book, Mark Wenman differentiates between the theories of agonistic politics and those of radical democracy with respect to the different understandings of constituent power that they espouse.[531] If the former sees politics in terms of gradual augmentation of existing rules, practices and institutions, the latter concentrates on ruptural moments that call forth the fundamental transformation of the existing order. If the dominant democratic theories subsume the constituent power under the constituted one in the name of justice, rights or rationality, agonistic and radical democratic theories privilege the constituent power over any institutionalised form thereof.

For the proponents of agonistic democracy, the priority of the constituent power is *relative*. Politics always presupposes a certain authoritative structure, a given horizon, with reference to which it takes place. According to agonistic theories, this horizon is liberal constitutionalism, which is being *augmented* through the moments

[530] Mark Wenman, *Agonistic Democracy: Constituent Power In The Era Of Globalisation* (Cambridge University Press 2013)
[531] *Ibid.*

of genuine innovation. In contrast, with radical theorists we have an absolute priority of the revolutionary subject. What these authors emphasise is not an expansion of and an innovation inside the given order, but a radical break with that order. Politics here is conceptualised in terms of 'rupture' and 'subversion' rather than 'improvement' and 'reform'.[532]

Now, what do new rights-claims express for Gündoğdu; the politics of augmentation or that of radical rupture? It seems to me that she promises the latter but delivers the former. This is understandable since Arendt, whose framework she uses, does not make clear demarcations between the two ideas. Arendt's theorisations of civil disobedience is an example of augmentation, whereas her accounts of radically new beginnings in the eighteenth century revolutions is akin to those of radical democrats. Neither is Rancière, another author that Gündoğdu uses extensively, clear about the issue, so that there is no agreement between commentators on whether to include Rancière in the agonistic or the radical democratic camp.[533] Agonism and radical democracy may well be reconcilable. Yet, when analysing transformative movements like *sans-papiers* or *La Via Campesina*, we need to be attentive to whether the theoretical framework we use properly channels their radical claims.[534]

Overall, while an important aspect of radical politics, the act of declaring rights is doomed to be collapsed into the act of directing if not supplemented by a proper account of the interaction of rights-claims with the established order. Below, I turn

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[532] Wenman, *Agonistic Democracy,* 90

[533] Wenman includes Rancière in the radical camp. See: Wenman, *Agonistic Democracy,* 11. Andrew Schaap takes Rancière to offer an agonistic theory. See: Andrew Schaap, 'Introduction' in Andrew Schaap (ed.), *Law and Agonistic Politics* (Farnham, Ashgate, 2009). My contention is that while

Ranciere's theory of subjectivization, as we saw above, potentially invokes radical politics, his account of human rights (discussed in Chapter Six) seems to tilt towards the politics of augmentation. There is then an incongruity between the *transformative* potential of Rancière's political subject and the *reformism* of his human rights claimant. As soon as we get to his conception of human rights we lose the idea that politics is about radical rupture. It becomes reduced to the process of the reinvention of rights. Gündoğdu seems to fall into the same trap. For a critique of Rancière from a radical perspective see: Alain Badiou, *Metapolitics* (Verso 2005) 107-124; Jodi Dean, 'Politics without Politics' (2009) 15(3)
Parallax 20.

[534] For a radical conceptualisation of *sans-papiers* in Alain Badiou see: Nail Thomas, 'Alain Badiou and the Sans-Papiers', (2015) 20(4) Angelaki 109; for a comparison between Badiou and Rancière on the issue see: Ernst Van Den Hemel, 'Including but not Belonging. Badiou and Rancière on Human Rights'
(2008) 3 Krisis 16

to speech act theory again to offer such a theory. I conceptualise rights as revolutionary claims that challenge the existing system with an aim of bringing about a rupture. This rupture than creates a political space where the radical subject can be constituted and radical ideas can be deliberated and contested.

2. RIGHTS AS CHALLANGES

I argued that rights have a transformative potential when they articulate the needs the realisation of which cannot be effectuated within the given system. This is what Marx called radical needs. I showed how the act of declaring such rights constitutes a political subject as a bearer of radical needs. What I would like to do now is to theorise the interaction of the transformative claims with the addressee institutional system.

My contention is that such claims do not expect enforcement like directives do. Rather, they aim to demonstrate the impossibility on the part of the addressee order to realise what is being claimed and, with it, to demonstrate the need of transforming that order. Rights-claims here are provocations that open up political processes with a potential for transcending the prevailing social relations. This is how, I suggest, we should treat the claims such as those to food sovereignty. The latter was never meant to be a directive awaiting for a top-down enforcement. It was meant to be an *act in itself*; a political act of challenge.

In order to formulate the meaning of rights as challenges, I will compare and contrast the latter with the concept of rights as directives, in both command and demand forms. For this purpose, I will return to Searle's theory of the structural conditions of linguistic utterances according to which he identifies and distinguishes between different speech acts.

I already mentioned how, for Searle, the *essential* condition, or the illocutionary point, is the most important felicity condition. The illocutionary point is the point of the utterance, i.e. that which an utterance tries to achieve linguistically. It differs from the perlocutionary intent which is about causal effects of a linguistic act, i.e. what follows causally from the utterance of words.[535] I will differentiate between the three speech acts of demand, command and challenge in terms of their perlocutionary intentions shortly. Meanwhile, it is important to note that Searle classifies challenges in the category of directive speech acts along with commands and demands.[536] This category is characterised, as we already know, by the illocutionary point which consists in 'an attempt to get the hearer to do something'. There are some problems with this classification though. It has been suggested to locate challenges into a new category of *provocatives* with the illocutionary point distinct from that of directives.

[537] On this alternative view, the illocutionary point of provocatives is "to test some proposition that the recipient wants believed by seeing whether the recipient will or can perform a certain action". [538] I believe this perspective on challenges best captures what radical rights-claims are about and properly distinguishes them from commands and demands. Looking at other felicity conditions will help us understand why.

We can continue with the *preparatory conditions*. These conditions have to be in place before a speech act can be properly issued. One of the preparatory conditions of all directives, on Searle's classificatory system, is that it is not obvious to either to the speaker or to the hearer that the action called for by a speech act will be performed in the normal course of events. This condition is met by all three speech acts: the right that is demanded, commanded or is used as a challenge is not enforced as a matter of course.

More importantly, there is another preparatory condition which marks a crucial difference between commands and demands, on the one hand, and challenges on

[535] See John L. Austin, How to Do Things with Words, (2nd edition, Clarendon Press 1975) 101-132
[536] John Searle, 'A Classification of Illocutionary Acts', 11
[537] Barry O'Neill, *Honor, Symbols and War* (University of Michigan Press 2001) 109
[538] *Ibid.*

the other. This condition is also shared by all directives and consists in the fact that the hearer is *capable* of performing the propositional content of the speech act.[539] Furthermore, the speaker *believes* in such a capacity on the part of the hearer. In the case of both commands and demands the hearer is capable to perform a command or a demand respectively and the speaker assumes this. Going back to rights, as we already established, both command-rights and demand-rights refer to the possibilities provided by the *status quo* and assume that the propositional content of these speech acts can be realised within those possibilities.[540] But challenges do not necessarily presuppose an ability of the hearer to perform certain action. Moreover, in some cases the issuer of a challenge assumes that the hearer will not be able to perform the propositional content. At the same time, it is obvious that not all challenges presuppose the hearer's inability. For instance, to challenge exam results means to call for a revision thereof, and to challenge someone to a car race is an invitation to participate in a contest, without necessarily doubting the ability of the examiner to examine in the first example, or the ability of the potential competitor to race in the second. But imagine a debate where the speaker, being confident of her truth, demands from the hearer to prove her wrong. Here the ability of the hearer to perform the demanded action is called into question. The challenger assumes that the challengee will be unable to prove the former's wrongness. This is why the preparatory condition, Searle identifies as necessary for all directives, does not apply to challenges, unless, of course, we are willing to break down the speech act of challenge into several sub-groups. But since our inquiry is not in speech act theory *per se*, I will merely use this ambiguity with the classificatory system of speech acts to illustrate the distinctiveness of the rights as challenges from the rights as directives (i.e. demands and commands).

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[539] John Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge University Press 1969) 66

[540] *Ibid.*

There is a further difference based on the *sincerity condition* which Searle defines in terms of *the expressed psychological states of the speaker*.[541] If the issuer of directives *wishes* the hearer to perform an action, the issuer of a challenge may *wish* to prove the incapacity of the hearer, or alternatively, may express the *belief* that the hearer will be unable to perform an action. So, the claimant of a challenge-right wishes to prove, or expresses the belief, that the extant order is incapable of realising the right.

This brings us to another preparatory condition that should hold for a challenge: *the existence of a prior proposition which is being challenged*. 'Prove it if you can' is usually uttered in the course of a debate with a history to it; the speaker confronts a proposition which precedes the challenge and which the hearer would like to be generally believed to be true. Similarly, a challenge to exam results presupposes the proposition that the marking process was just. But what kind of a prior proposition do we encounter in the case of radical rights-claims? It needs to be clarified at this point that the challenged proposition I have in mind here does not consist in the official recognition of the claimed right by the addressee institutional system. This would render a rights-claim into a command. We already discussed how a command has a preparatory condition that a particular normative relationship between the speaker and the hearer has to be present. Rights-claims are commands when the right *is,* or according to some political morality, *should be* recognised by the addressee legal or political system, burdening the latter with an obligation to realise the entitlement in question. In contrast, demands are partly defined in terms of the absence of such pre-existing normative frameworks. Now, similar to demands, challenges lack prior authorisation, and do not correspond to the duties on the part of the hearer to realise the content of a challenge. What is being challenged is not a (false) proposition by the extant order that *the claimed right* is already enforced, but

[541] Searle, 'A Classification of Illocutionary Acts', 4. Searle lists sincerity condition for different speech acts: "A man who states, explains, asserts, or claims that p expresses the belief that p; a man who promises, vows, threatens or pledges to do a expresses an intention to do a; a man who orders, commands requests H to do A expresses a desire (want, wish) that H do A; a man who apologizes for doing A expresses regret at having done A; etc." *Ibid.*

the proposition that the order is capable of recognising and enforcing, *all the rights that need to be recognised and enforced*, and that, therefore, that order is just and legitimate. What a radical rights-claim does is to challenge the assertion of the extant order to its own legitimacy and justice.

We can further bring out these differences by looking at perlocutionary intentions of rights-claims. The perlocutionary intention of a challenge-right is not, like it is in the case of demands and commands, to establish a right/duty relationship with the extant order, that is, in other words, to make the latter recognise and enforce the claimed right. It is instead to demonstrate the fundamental wrongness of the system and the urgency of transcending it. What the issuer of a challenge expects from the hearer is not compliance, but either capitulation or an endeavour to justify the assertion, something the challenger believes is destined for failure. If commands and demands ultimately aim (perlocutionary intention) at reforming the system, challenges aim at transforming it.

Conclusion

This thesis began with an exploration of two Marxist critiques of rights: the legality and the depoliticisation critiques. In particular, I showed, firstly, the manner in which individual legal rights necessarily reproduce capitalist social relations and the capitalist system of needs which reduces human needs to greed, and secondly, the role of rights in depoliticising those oppressive social relations that require rights in the first place. Chapter Two discussed Marx's notion of radical needs, the realisation of which requires transcendence of the prevailing system of needs, and concluded with an open question as to whether rights can articulate radical needs.

In search for answers, I distinguished between two models of the relationship of rights and politics: the 'juridical model', which subordinates politics to rights, and the

'political model', which takes rights to be constitutive of politics, and suggested that it is on the basis of the latter that we have to construct the radical theory of social rights. I suggested that the radical politics of social rights should be understood in terms of a contextual, bottom-up, ruptural and potentially transcendent practice.

I explored the contextual, bottom-up and open-ended character of the politics of social rights through Hannah Arendt's notion of rights as proposals. Arendt explained how rights are formulated by the potential rights-holders themselves following political proposals and how they are capable of configuring new political realities. Yet, the conception of rights as proposals failed to account for the conflictual element in rights-talk. I suggested that there are at least three possible conceptions of rights that could serve as an extension of the political model towards a conflictual account. I argued that the possibility of articulating radical needs depend on which of these conceptions we adopt. The last chapter discussed two such conceptions offered by discourse and agonistic theories. I suggested that discourse theory was a setback from the radical promise of the political model in that it considers rights to have a pre-political objective of securing a space where legitimate politics could take place. Rights are conflictual only as far as the establishment of a political space goes. They cannot themselves constitute a new political system.

It is the agonistic approach that provides a conflictual account of the practice of claiming rights which is simultaneously open-ended. However, while providing a useful focus on the politics of the excluded and on the symbolic efficacy of rights for channelling such a politics, I suggested that the agonistic approach, similar to discourse theory, presupposes a particular structure of a rights-claim. To claim a right on this account amounts to a *directive* to have one's rights enforced by the addressee.

Directive speech acts assume the capacity of the addressee to deliver the content of a directive. Similarly, a rights-claim understood as a directive recognises the capacity and, hence, the fundamental legitimacy of the extant order. Radical needs whose realisation exceed the capacity of the established system, cannot be expressed through rights understood as directives.

The conception of rights as challenges, then, completes the radical theory of social rights. The understanding of the structure of a rights-claim in terms of a challenge allows us to capture the ruptural capacity of rights. It is this rupture that allows transformative ideas to be formulated and pursued.

In sum, after taking the idea of rights as proposals from Arendt, merging it with the conflictual account of rights by the agonistic approach, and now adding to this the notion of a challenge-right, we can conclude with the following formula for a radical theory of social rights: *to claim a social right to a radical need is to challenge the system of capitalist needs and thereby articulate a political space where an open-ended and potentially transcendent process of deliberation and contestation over the nature, sources and ways of realisation of the needs that rights invoke can take place*.

I believe that this theory allows an adequate interpretation of the movements like *La Via Campesina.* While rights are not the sole medium for articulating radical demands they provide a useful vocabulary familiar to both friends and ideological enemies. While the existence of such a shared language is far from being enough for the purposes of transformative movements, the theory I developed here, I believe, provides helpful analytical and critical tools for evaluating existing institutions.

In the last chapter, I will look at social rights adjudication in order, firstly, to clarify the depoliticising consequences of understanding rights as demands and commands, and, secondly, to test the appositeness of courts in terms of channelling the radical politics of social rights. I argue that the framework of three conceptions of rights-claims developed in the last two chapters offers a good perspective on how courts depoliticise needs in different ways by treating rights-claims as commands and demands. Furthermore, against certain optimism about the transformative potential of courts, I argue that the manner in which existing forms of social rights adjudication frame rights-claims disallows the possibility of registering rights as challenges. As a result, courts are not capable of creating a political space where transformative formulations of rights can be deliberated and contested.

Chapter Eight

Adjudicating (the Politics of) Social Rights

I would like now to use the conceptual apparatus developed in previous chapters to analyse the role of courts in adjudicating the politics of social rights. This inquiry will be helpful both in terms of understanding the ways in which framing of rights as demands or commands depoliticises the need in question, and in terms of testing certain optimism discernible in current literature regarding the transformative potential of courts. After exploring the problems with adjudicating directive-rights, my conclusion will be that the manner in which existing forms of social rights adjudication frame rights-claims disallows the possibility of registering rights as challenges. As a result, courts are not capable of creating a political space where transformative formulations of rights can be deliberated and contested.

Generally, justiciability of social rights is a topic of fierce debate.[542] Some commentators – invoking the principle of separation of powers - stress the lack of democratic legitimacy on the part of the judiciary when it comes to deciding on social rights. For others, it is more about the lack of institutional competence, insofar as

[542] For a summary of these debates see: Craig Scott and Patrick Macklem, 'Constitutional Ropes of Sand or Justiciable guarantees?' (1992) 141 University of Pennsylvania Law Review 1; Ran Hirschl, *Towards Juristocracy: the Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004). See also: Conor Gearty and Virginia Mantouvalou, *Debating Social Rights* (Hart Publishing 2011)

social rights implicate complex technical issues of public resource allocation. For all these critics, the legislative and executive branches of government are more appropriate domains to enforce social rights.[543] It is in terms of the concerns with justiciability that social rights adjudication is mostly analysed and criticised. My criticism however goes beyond this concern and focuses more on the strategic usefulness of courts for the politics of radical needs.

There is a growing literature inquiring precisely in the potential of social rights adjudication to bring about social change.[544] This wave of scholarship has been inspired mainly by the judicial activism in the global South, where courts have produced landmark decisions on social rights. In particular, South African social rights jurisprudence has been hailed as ground-breaking and in line with the transformative aims of the country's Constitution.[545] Similarly, Brazilian courts are often praised for their vigorous defence of the justiciability of social rights.[546]

Danie Brand helpfully identifies two approaches to the relationship between social rights adjudication and transformative politics. [547] The first approach is an outcome-

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[543]For recent defences of justiciability of social rights see: David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford University Press 2007); Cecile Fabre, *Social Rights Under the Constitution: Government and the Decent Life* (Oxford University Press 2001); Jeff King, *Judging Social Rights*, (Cambridge University Press 2012); Frank I. Michelman,

'Socioeconomic Rights in Constitutional Law: Explaining America Away' (2008) 6 International Journal of Constitutional Law 663

[544]Roberto Gargarella and others (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Routledge 2006); Varun Gauri and Daniel M. Brinks (eds) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press 2010). Vilhena Vieira, Frans Viljoen and Upendra Baxi (eds.), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria University Law Press 2013)

[545] Eric C. Christiansen, 'Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice' (2009) 13 Journal of Gender, Race and Justice 575

[546]Daniela Ikawa, 'The Role of the Brazilian Supreme Court in the Implementation of Women's Rights: Bridging Constitutional Norms and Reality' in Vilhena Vieira, Frans Viljoen and Upendra Baxi (eds.), Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa (Pretoria University Law Press 2013); Samuel Friedman and Thiago Amparo, 'On Pluralism and Its Limits: The Constitutional Approach to Sexual Freedom in Brazil and the Way Ahead' in Vilhena Vieira, Frans Viljoen and Upendra Baxi (eds.), Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa (Pretoria University Law Press 2013)

[547]Danie Brand, 'Courts, socio-economic rights and transformative politics' (PhD thesis, Stellenbosch University 2009) 2-8

oriented one, which sees this relationship in a positive light. The focus is on the court's role in achieving particular transformative goals, whether this is the eradication of poverty, of inequality etc.[548] This inquiry proceeds by acknowledging the transformative potential of adjudication and then suggesting the ways of realising that potential. For instance, the leading commentator on South African constitutional law, Sandra Liebenberg, identifies several ways in which courts could facilitate social change. Liebenberg suggests that courts should provide robust remedies; champion transformative discourse by pointing to the underlying structural problems that generate the problems with need-satisfaction; *and* try to change background legal rules. She further talks about making adjudication more accessible and participatory, improving the mechanism of the implementation of decisions etc. [549]

In contrast to this constitutional optimism,[550] some authors have focused, instead, on the extent to which courts allow a space for transformative politics.[551] This approach concentrates not so much on the outcomes produced by certain institutions like the judiciary, but on those institutions themselves and the ways in which they undermine transformative politics and depoliticise the needs in question.

It is this latter, more negative, focus on courts' role in social transformation that I would like to adopt here. I argue that the differences between the conceptions of rights in terms of commands, demands and challenges, which I developed in this thesis, provide an interesting perspective on the limits of adjudication and on the manner in which the politics of needs is depoliticised depending on the conception of right that the court adopts.

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[548] Marius Pieterse, 'Resuscitating socio-economic rights: constitutional entitlements to health care services' (2006) 22 South African Journal on Human Rights 473; Pierre De Vos, 'Grootboom, the right of access to housing and substantive equality as contextual fairness' (2001) 17 South African Journal on Human Rights 258

[549] Sandra Liebenberg, 'Needs, rights and transformation: adjudicating social rights' (2006) 17 Stellenbosch Law Review 5, 31 ff

[550] This optimism is noted in: Neil Walker 'The idea of constitutional pluralism' (2002) 65 Modern Law Review 317, 318

[551] Karl Klare 'Legal culture and transformative constitutionalism' (1998) 14 South African Journal on Human Rights 146; Henk Botha 'Metaphoric reasoning and transformative constitutionalism (part 2)' 2003 Tydskrif vir Suid-Afrikaanse Reg 20; Andre J. van der Walt 'Resisting orthodoxy – again: thoughts on the development of post-apartheid South African law' (2002) 17 SA Publiekreg/Public Law 258; Brand, 'Courts, socio-economic rights and transformative politics'

Employing Katherine Young's classification of the forms of social rights adjudication, I will explore the ways in which these forms necessarily foreclose, in different ways, the possibility of registering a challenge-right and, therefore, channel transformative politics.[552] The forms under consideration are: peremptory, deferential, conversational, and experimentalist reviews.

Peremptory review stands for courts' direct engagement with socioeconomic issues. Here, a court leans more towards the command conception of rights where the content of rights is determined outside the political sphere. It is here that the depoliticisation of the sources of the needs in question as well as the depoliticisation of the structural problems that disallow their satisfaction are most likely to occur. This takes place when courts individualise and single out rights-claims. We will see this on the example of Brazilian social rights jurisprudence.

In contrast, deferential review does not directly define and enforce individual claims to social rights but instead limits itself in favour of the other branches of government. This decision is usually based on an alleged lack of either technical expertise or of democratic legitimacy on the part of the judiciary. In the first form of deference, courts treat social rights as commands insofar as the needs that underlie those rights are deemed to be beyond political interpretation and are reduced to the expert discourse. In the second case, rights-claims are framed more in terms of demands, where needs are taken to be political and the formulation of the substance of the right as well as the model of its realisation is considered to be a matter of political

[552] Young's typology is more nuanced than is necessary for my purposes. See K. G. Young, 'A Typology of Economic and Social Rights Adjudication: Exploring The Catalytic Function Of Judicial Review' (2010) 8 International Journal of Constitutional Law 1. Young introduces "five major stances adopted by courts in economic and social rights adjudication. In adopting deferential review, the court assumes that the greater decision-making authority is placed on the elected branches in interpreting economic and social rights and in determining the obligations that arise. In conversational review, the court is instead reliant on the ability of an interbranch dialogue to resolve the determination of rights. A third type of review is experimentalist review, whereby the court seeks to involve the relevant stakeholders—government, parties, and other interested groups—in solving the problem which obstructs a provisional benchmark of the right. Managerial review occurs when the court assumes a direct responsibility for interpreting the substantive contours of the right and supervising its protection with strict timelines and detailed plans. Finally, peremptory review is involved when the court registers its superiority in interpreting the right, and in commanding and controlling an immediate response." *Ibid.*

deliberation and contestation. But it is the officially constituted institutional sphere that is considered as an only proper space for democratic politics. This excludes the role of bottom-up politics in formulating the substance of demand-rights as well as in questioning the models of their realisation. All the judiciary is willing to do is to ensure the procedural fairness of technical or democratic decisions respectively. This in turn risks reproducing the *status quo* and the existing system of needs.

Conversational review neither defers to other branches in the above manner, nor does it directly define and enforce social rights as in peremptory review. Instead, courts take a middle ground and organise a dialogue around the issues raised by social rights-claims with the other branches of government. But this form of review remains too close to the deferential stance by confining itself to an inter-branch dialogue and to the procedural review of official political processes.

The experimentalist model of social rights adjudication goes furthest when it comes to creating an inclusive space where needs and the ways of their satisfaction can be politicised. If, as we learned, demand-rights articulate unauthorised claims against official formulations of rights and thereby initiate a process of deliberation and contestation, the court under experimentalist review is most attuned to channel such rights-claims. It allows destabilisation of the system and facilitation of a newly emerged political sphere. But experimentalist review, like other forms of adjudication, is limited, insofar as an individual right - which it defines in broad terms in order to be later formulated through a deliberative process - is already presented as an end in itself. This model too frames a social right-claim as a directive and, therefore, falls short of registering a radical challenge to the existing system of needs.

Therefore, I will conclude by suggesting that none of the four models of social rights adjudication is capable of registering a challenge-right. The subject that each of this models creates, or allows to be created, out of a rights-claimant is necessarily an issuer of a directive who, thereby, recognises the fundamental legitimacy of the addressee order.

1. BRAZILIAN COURTS AND COMMAND-RIGHTS

The Brazilian judicial system is now famous for its rigorous defence of social rights, and in particular of the right to health. Courts have demonstrated unprecedented decisiveness in dealing substantively with the matters invoked by social rights. On the other hand, Brazil is also a good illustration of how social rights adjudication depoliticises needs by individualising them, and hence neglecting broader social problems and structural determinants thereof.[553]

The Constitution of 1988 is a strong basis for the judicial activism of Brazilian courts. It incorporates social rights, such as rights to health, food, education, housing and social security, and along with civil and political rights proclaims them to be fundamental. In addition, the Constitution provides often quite specific rules which should guide the governmental programmes and policies in implementing social rights.[554] Till mid-90s of the last century the constitutional provisions on social rights were deemed non-justiciable. Such rights were considered to be 'programmatic', and thus realisable by political and executive branches by devising viable and effective policies to that end. This, however, has not so far translated in a strong welfare state and the Brazilian society remains mired in huge inequality and deprivation. While the promise of the progressive constitution is largely unrealised at the level of governmental policy, following late-90s the Brazilian judiciary has assumed a much more decisive and assertive role in adjudicating social rights.

Backed by robust constitutional provisions, Brazilian courts have been persistently disavowing concerns with institutional legitimacy and competence, and directly engaging in the definition and enforcement of social rights, and, based on individual claims, issuing injunctions requiring from the state to meet the needs of the litigants.

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[553] For a history of social rights jurisprudence in Brazil, see Flavia Piovesan, 'Brazil: Impact and Challenges of Social Rights in the Courts' in Malcolm Langford (ed) *Social Rights Jurisprudence. Emerging Trends in International and Comparative Law* (Cambridge University Press 2008)

[554] Piovesan, 'Brazil: Impact and Challenges' 183

It is the right to health that got the biggest attention. This right has been interpreted as stemming from the right to life. A good example is the case *Diná Rosa Vieira v Município de Porto Alegre*[555] which concerned an access to HIV/Aids medicine, and where the Supreme Court held that the right to health was inseparable from the right to life. The Court proceeded to argue that the state could not render such a right into a shallow constitutional promise and that it was responsible for guaranteeing universal and equal access for all citizens to necessary medical treatment.[556]

Furthermore, the right to health, and to life, has been juxtaposed to the financial interests of the state, where the former is consistently privileged by the courts. In a famous case, a terminally ill man required an expensive treatment provided only by one private clinic in the US. The Supreme Court upheld the lower court's decision to grant a mandatory injunction against the state. The Court held that:

> "given the choice between protecting the inviolability of the right to life, which qualifies as an inalienable subjective right guaranteed by the Constitution of the Republic (article 5, main clause), or allowing, contrary to this express fundamental prerogative, a financial, secondary interest of the State to prevail, ethical and legal reasoning allows the judge only one possible option: the indeclinable respect for life"[557]

The individualistic approach to social rights, where mandatory injunctions are imposed upon other branches to realise the entitlements of *individual* rights-claimants, has been criticised by Octavio Ferraz, who identifies several major problems with this sort of judicial activism.[558]

The main problem with the Brazil style judicial activism, according to Ferraz, is *resource availability*, or rather its limitedness. Due to the constrains of the state to

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[555] RE 271286 AgR/RS-Rio Grande do Sul (2000)

[556] Piovesan, 'Brazil: Impact and Challenges', 186

[557] Federal Supreme Court, DJ, Section 1, of 13 February 1997, No. 29, p. 1830, (as cited in Piovesan, 'Brazil: Impact and Challenges' 186)

[558] Octavio Ferraz, 'Harming the Poor through Social Rights Litigation: Lessons from Brazil' (2011) 89 (7) South Texas Law Review 1643

provide for the needs of every citizen, argues Ferraz, the judicial branch should limit itself, at best, to defining broad contours of social rights to be then substantiated and enforced by democratically elected branches.[559] Otherwise, such an activism leads to unduly privileging particular individuals over others, especially if we take into account the fact that Brazilian courts understand the right to health as an *absolute* right to the best treatment available, which results in very high costs, the attitude that further strains the limited healthcare budget. [560] Importantly, it is only those who actually enjoy ease of access to the judicial system, i.e. the better-off part of Brazil's population, that can take advantage of social rights adjudication leaving the poor once again excluded. On top of that, those comprehensive programmes that could benefit general population are threatened by judicial decisions that force the state to reallocate funds, again, harming the poor.[561]

Ferraz's criticism demonstrates the pitfalls of treating social rights as commands, i.e. as pre-political claims which bypass the political sphere where the needs in question could be deliberated and contested. Peremptory review, *a la* Brazil, depoliticises, by not addressing, the broader social problems, instead, focusing on individual cases. Furthermore, a deeper level of depoliticisation of the structural determinants of needs is evidenced, again, on the example of the right to health and in particular when we look at the cases concerning the provision of antiretroviral drugs.

It is no secret that HIV infection is largely concentrated in the poor and the disadvantaged communities and countries. The poor and the disadvantaged all over the world are precisely those groups that are exposed to drug-addiction, prostitution, the lack of appropriate education etc., i.e. the main sources of the spread of the disease. These social and political issues of structural inequality and deprivation were the concerns that motivated the prominent grassroots campaign for the provision of HIV drugs in Brazil in 1990s.[562] Today, internationally praised Brazilian response to

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[559] *Ibid.* 1659

[560] *Ibid.*

[561] *Ibid.*

[562] Richard Parker, 'The Global HIV/AIDS Pandemic, Structural Inequalities, And The Politics Of International Health' (2002) 92 Am J Public Health 343; see also: Heinz Klug, 'Campaigning for Life:

the HIV crisis is largely based on court orders rather than government programmes.[563] Instead of addressing the deep social determinants of the problem, the judiciary treats the social right to health as a command and decides cases on an individual basis with individual injunctions, thereby naturalising the need in question.

2. ADJUDICATING DEMAND-RIGHTS

It is now generally acknowledged that the South African Constitution has a transformative orientation.[564] As former Chief Justice Pius Langa eloquently put it, the Constitution provides:

> "a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex."[565]

Building a New Transnational Solidarity in the face of HIV/AIDS and TRIPS' in Boaventura de Sousa Santos and César A. Rodríguez-Garavito (eds) *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press 2005)

[563] Octavio Ferraz, 'Harming the Poor', 1651. "The impact of these court orders is significant. Estimates of the Federal Ministry of Health for the state of São Paulo, the most densely populated state in Brazil with close to 40 million people, show that BRL85 million (approximately USD43 million)—the equivalent of 30% of the overall budget for high-cost drugs and more than 80% of the original budget for AIDS drugs—was spent in 2005 to comply with injunctions ordering the funding of new AIDS drugs not included in the government's health policy for more than 10,000 individuals." ibid

[564] Karl Klare, 'Legal Culture and Transformative Constitutionalism', 150; Sandra Liebenberg, *Socio-Economic Rights Adjudication under a Transformative Constitution* (Juta 2010);

[565] Former Chief Justice Pius Langa, *The challenges facing transformative constitutionalism in South Africa* (Prestige Lecture delivered at Stellenbosch University on 9 October 2006)

Budlender AJ makes a similar point in *Rates Action Group v City of Cape Town: "*Ours is a transformative constitution. . . Whatever the position may be in the USA or other countries, that is not the purpose of our Constitution. Our Constitution provides a mandate, a framework and to some extent a blueprint for the transformation of our society from its racist and unequal past to a society in which all can live with dignity." Cited in Sandra Liebenberg, 'Adjudicating Social Rights Under a Transformative Constitution', in Malcolm Langford (ed) Social Rights Jurisprudence. Emerging Trends in International and Comparative Law (Cambridge University Press 2008) 76

Karl Klare describes transformative constitutionalism as:

> "a long-term project of constitutional enactment, interpretation, and enforcement committed to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction."[566]

Adjudicating social rights is an important aspect of South Africa's transformative constitutionalism. Chapter Two of the Constitution is dedicated to the Bill of Rights which together with civil and political rights also lists social rights to housing, healthcare, food, water, social security and education. Crucially, these rights, according to the Constitution, are directly enforceable in courts.[567] Taking into account, on the one hand, the understanding of the transformative direction of the Constitution and, on the other hand, the concerns with its own democratic legitimacy and institutional competence, South Africa's Constitutional Court has produced several landmark decisions.[568]

Yet, as I will argue, the models of adjudication adopted by the Court are not capable of registering a challenge-right. The key to explaining this limitation is to look at how the Court understands the structure of a rights-claim.

Except of one dimension of deferential review which we will mention below, all the forms of adjudication that the Court adopts recognises the political nature of the needs that social rights articulate and aims to facilitate, to different degrees, deliberation and contestation over the sources, nature and ways of realisation of those needs. The difference is that if in the deferential and conversational models of adjudication, the process of deliberation and contestation is contained to the official political sphere, experimentalist review extends to, what Fraser calls, unofficial public

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[566] Karl Klare, 'Legal Culture and Transformative Constitutionalism', 150

[567] The Constitution of the Republic of South Africa Act, 1996, Section 38

[568] Occupiers of 51 *Olivia Road v City of Jhb*, 2008 (5) BCLR 475; *Port Elizabeth v. Various Occupiers*, 2004 (12) BCLR 1268; *Soobramoney v. Minister of Health*, KwaZulu-Natal 1997 (12) BCLR 1696; South Africa v. Modderklip (CCT 20/2004); *Minister of Health and Others v. Treatment Action Campaign and Others* (1) 2002 10 BCLR 1033; *Khosa and Others v. Minister of Social Development and Others* (CCT 12/03); *The City of Johannesburg v. Rand Properties (Pty) Ltd, Occupiers of Erf* 381, *Berea Township and Others (WLD)* 3 March 2006, Case No 253/06 SCA

sphere, which include social movements, NGOs, general public etc, i.e. those who are outside the institutionally constituted public spheres.[569] I will look at each of these models in turn.

2.1 DEFERENTIAL REVIEW

Deferential review is at the other end of the spectrum from the Brazilian approach. Here, courts defer to legislative or executive branches. It is the democratic legitimacy of the former or an epistemic superiority of the latter that guides courts' deferential stance.[570] In comparison to the Brazilian judiciary, the South African counterpart has been rather cautious in several important decisions.[571] The Supreme Court has avoided defining the content of social rights and has largely limited itself to the assessment of the *rationality* of the decisions made by other branches of the government.[572]

The famous *Soobramoney v Minister of Health*[573]*, KwaZulu-Natal*[574] present an example of this model.[575] *Soobramoney* was first case involving social rights that reached the Court. The Court had to decide on the issue of whether a state hospital

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[569] Nancy Fraser, 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy' (1990) 25/26 Social Text 56

[570] Young, 'A Typology of Economic And Social Rights', 8

[571] For a criticism for this cautious stance see: Brian Ray, 'Policentrism, Political Mobilization, and the Promise of Socioeconomic Rights' (2009) 45 Stanford Journal of International Law 151, 154; Sandra Liebenberg, 'Adjudicating Social Rights Under a Transformative Constitution', in Malcolm Langford (ed) *Social Rights Jurisprudence. Emerging Trends in International and Comparative Law* (Cambridge University Press 2008); Katharine G. Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 Yale Journal of International Law 113, 139–40

[572] Danie Brand, 'The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or "What Are Socio-Economic Rights For?,"' in Henk Botha and other, *Rights And Democracy In A Transformative Constitution (SUN Press 2003)* 33, 37

[573] [1997] ZACC 17

[574] 1997 (12) BCLR 1696

[575] Stuart Wilson and Jackie Dugard, 'Constitutional Jurisprudence: The First and Second Waves." in Malcolm Langford and others (eds.) *Socio-Economic Rights in South Africa: Symbols or Substance?* (Cambridge University Press 2013); Dennis Davis, 'South African Constitutional Jurisprudence: The First Fifteen Years' (2010) 6 Annual Review of Law and Social Science 285

violated the right to health of Mr Soobramoney, a terminally ill man in need of periodic renal dialysis, when it refused to treat Mr Soobramoney due to the lack of resources available to the province of KwaZulu-Natal and because the patient did not qualify for the existing healthcare program. The Court took into consideration a broader context of healthcare rationing and the choices that health services have to make in providing for diverse needs of every citizen: "These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters."[576] It was further stated that "if governments were unable to confer any benefit on any person unless it conferred an identical benefit on all, the only viable option would be to confer no benefit on anybody."[577]

What the Court was willing to do is to evaluate the rationality of the resource-allocative policy of the government.[578] In this respect, it was held that the healthcare program based on which the hospital refused the treatment was not unreasonable and was applied in good faith and rationally to Mr Soobramoney.[579]

Thus, motivated by the principle of separation of powers and its own lack of democratic legitimacy,[580] the Court left the decision on social rights up to the political branch of the government by noting that the issue involved "difficult choices to be

[576](1998) 1 SA 765 CC para 29

[577](1998) 1 SA 765 CC para 53

[578]As Ferraz rightly points out, by adopting basically an administrative law test of reasonableness, a deferential court diminishes the relevance of constitutional provisions and abdicates its own constitutional powers. In other words, there is no need for constitutionally entrenched rights if we are evaluating merely the procedural aspects of political and executive decisions on the interests protected by social rights. Octavio Ferraz, 'Between Usurpation and Abdication? The Right to Health in the Courts of Brazil and South Africa' in Vilhena Vieira, Frans Viljoen and Upendra Baxi (eds.), Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa (Pretoria University Law Press 2013) 385

[579](1998) 1 SA 765 CC para 29

[580] Theunis Roux 'Legitimating transformation: political resource allocation in the South African Constitutional Court' (2003) 10 Democratization 92

taken at the po*litical level* [my emphasis] in fixing the health budget, and at the functional level in deciding upon the priorities to be met."[581]

But by deferring to the political branch, what the judiciary does is to confine political processes to the formally constituted institutional structures.[582] Thus, if the peremptory model of Brazilian courts depoliticises by *individualising* needs and disregarding the possible structural determinants thereof, the deferential stance of the South African Court depoliticises by either assigning the interpretation of needs to the expert discourse or by narrowing down the political field and disallowing bottom-up, conflictual politics of needs. While, in the latter case, social rights are treated as demand-rights - to be formulated and enforced following political processes - crucially, politics are reduced to the official sphere of *electoral* politics, at the expense of a broader notion which would include unofficial publics. As a result, the possibility of politicising the structural problems that produce the needs in question is limited.

How can, then, courts instigate rather than close down *non* and *anti*-institutional political processes? How can they avoid being too deferential towards other branches, but at the same time stop looking for the easy ways out of structural problems, the ways like peremptory review that further depoliticises those problems?

The dialogical model of adjudication, which I am going to outline now, and which includes the conversational and experimentalist forms of review, does provide some answers. While conversational review ultimately remains betrayed by its deferential tendencies, experimentalist review allows involvement of a wider society in litigation. Yet, ultimately both of these forms, like peremptory and deferential reviews, treat rights as directives and thereby, as we learned in this thesis, restrict the scope of the politics of needs and fail to register a challenge-right.

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[581] (1998) 1 SA 765 CC para 29

[582] Brand, 'Courts, socio-economic rights and transformative politics', 8

2.2 A DIALOGICAL MODEL

In addition to peremptory and deferential reviews, courts sometimes resort to dialogical forms of review.[583] Conversational and experimentalist forms from Young's typology can be both located within this dialogical model. The former can be understood as a dialogue between courts and other branches, whereas the latter implies participation of a wider society. I will discuss each in turn.

Mark Tushnet explains conversational review thus: "The basic idea of [conversational] judicial review is to encourage interactions—dialogues—among the branches about which of the competing reasonable interpretations of constitutional provisions is correct".[584] The idea is that the court and the legislature should work together in interpreting social rights and the obligations stemming from those rights. However, the last word remains with the legislature. In Rosalind Dixon's words, conversational review "allows courts both to define rights in relatively broad terms and to adopt strong remedies, provided they defer to legislative sequels that evidence clear and considered disagreement with their rulings."[585]

A conversationalist stance can be observed in the famous South African *Grootboom* case.[586] This case concerned a group of adults and children who - due to 'appalling conditions' in their informal settlement - moved to occupy a private land. After being eventually evicted from the property, the group brought a case seeking an order against the government to provide them with an adequate shelter or housing. The claim was based on the constitutional right to housing guaranteed by Section 26 of the Constitution. The Constitutional Court found the government program on housing in breach of the Section 26 (2) according to which "[t]he state must take

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[583] Christine Bateup, *The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue* (2006) 71 Brook. L. Rev. 1109

[584] Mark V Tushnet, *Weak Courts, Strong Rights* (Princeton University Press 2008) 209

[585] Rosalind Dixon, 'Creating dialogue about socio-economic rights: Strong-form v weak-form judicial review revisited' (2007) 5 International Journal of Constitutional Law 391, 393

[586] 2001 1 SA 46 (CC)

reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right." The Court held that the government failed to take "reasonable measures… to provide for relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations. "[587]

For Dixon, the decision in *Grootboom* demonstrates how courts can stir a middle ground between deferential and peremptory stances and give "clear voice to the vulnerability and urgent need of the claimants without engaging in deep normative reasoning that might implicitly have suggested that every [citizen] had an inalienable right to immediate access to emergency shelter.. at state expense".[588]

Unlike *Soobramoney*, the Court in *Grootboom* engaged with the legislature in a long-term project of revising the housing plan. It is true, the last word was left to the legislature, but the Court participated in giving shape to rights, participated in a dialogue.[589]

But conversational review looks too much like the deferential one in that it confines the political process to the officially constituted sphere, foreclosing the possibility of

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[587] 2001 1 SA 46 (CC) para 99

[588] Dixon, 'Creating dialogue about socio-economic rights', 414

[589] Importantly, the success of this conversational model might be evidenced, for the proponents, by the fact that in several years after the case the government adopted a new housing plan oriented towards assisting those in urgent need of shelter. Young, 'A Typology of Economic And Social Rights',

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Yet, the Court also overruled the lower court's interim injunction and was content with merely a declaratory relief. No concrete directions were given to the government to follow, nor did the Court provide specific remedies for the claimants. For some, this amounted to the failure of the Court to give 'teeth' to social rights. See David Bilchitz 'Giving Socio-economic Rights Teeth: the Minimum Core and its Importance' (2002) 119 South African Law Journal 484; Liebenberg 'South Africa's Evolving Jurisprudence on Socio-economic Rights: an Effective Tool in Challenging Poverty?' (2003) 6 Law, Democracy and Development 159; for further criticism see Ran Hirschl and Evan Rosevear, 'Constitutional Law Meets Comparative Politics: Socio-Economic Rights and Political Realities" in Tom Campbell, K. D. Ewing, and Adam Tomkins (eds.) The Legal Protection of Human Rights: Sceptical Essays (Oxford University Press 2011) Jonathan Berger, 'Litigating for Social Justice in Post-Apartheid South Africa: A Focus on Health and Education" in Varun Gauri and Daniel M. Brinks (eds) Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World (Cambridge University Press 2008); Cf M Wesson 'Grootboom and beyond: reassessing the socio-economic rights jurisprudence of the South African Constitutional Court' (2004) 21 South African Journal on Human Rights 284

the politicisation of needs by other stakeholders from a wider public. Experimentalist review promises to be more inclusive.

Under experimentalist review courts are not deferential; nor is the dialogue that they facilitate contained within governmental branches as on the conversational model. This form of review aims to confront structural determinants of social rights violations and to do this by allowing social actors, and not only governmental branches, to participate in the process. [590] Here, more rigorously than in conversational review, courts assess the reasonableness of governmental policies, and, further, create a space where the state and different stakeholders can engage with each other in a 'meaningful' manner. Courts act as catalysts in enabling different parties to reach a solution rather than prescribing one themselves.[591] They enable contestation and stir the process towards a solution.[592]

The case of *Occupiers of 51 Olivia Road v. City of Johannesburg*[593] is an example of experimentalist review. In that case the City Johannesburg tried to evict four hundred occupiers from unsafe buildings for the sake of protecting occupiers' health and safety. The Court demanded from the City and the occupiers to:

> "engage with each other meaningfully … in an effort to resolve the differences and difficulties aired in this application in the light of the

[590] Young, 'A Typology of Economic And Social Rights', 14

[591] *Ibid.* 3

[592] This approach is often analysed in terms of the idea of destabilization rights. These are rights against entrenched institutional systems which lack democratic scrutiny. Destabilization rights challenge the *status quo* of public bodies. According to Roberto Unger, the aim of destabilisation rights "is to serve as a counterprogram to the maintenance of re-emergence of any scheme of social roles and ranks that can become effectively insulated against the ordinarily available forms of challenge". Roberto Mangabeira Unger, 'The Critical Legal Studies Movement', in Keith Charles Culver (ed) *Readings In The Philosophy Of Law* (Broadview Press 1999) 312. Another author explains destabilization rights in terms of 'an extended metaphor'. Stu Woolman, *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (Juta & Company Ltd 2013) 215. These rights are not

"expressly articulated in the Bill of Rights, nor anywhere else in the Constitution. What this term of art depicts is how actual rights and other structures can be used to challenge the *status quo*." ibid. Destabilisation rights work towards disallowing dominant classes from entrenching and solidifying their power. Such rights enable social mobility and an on-going reform. The temporal limit on the presidential term is an example of this. We can say that experimental review is an arena where destabilisation rights are invoked against institutional orthodoxies.

[593] 2008 3 SA 208 (CC) para 5

> values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned."[594]

The purpose of this engagement was to deliberate on how the situation of the occupiers could have been alleviated after eviction and whether the city could make the buildings safer in the meantime. Thus, the Court established a deliberative space where the need for housing could have been interpreted with the participation of the bearers of the need themselves.

Another paradigmatic example of experimentalist review can be found in the Colombian case T-025.[595] There, the Colombian Constitutional Court aggregated more than a thousand constitutional complaints from internally displaced families (IDPs), and decided that the plight of the IDPs amounted to an "unconstitutional state of affairs" and that the violation of their human rights was due to the systemic failures on the part of the state.[596]

The Court ordered the government to devise a coherent plan for tackling the plight of the IDPs and to do its best in finding resources for the realisation of that plan. The government was further ordered to ensure the protection of the minimum core of IDPs' social rights to food, education, healthcare, land and housing. Furthermore, the Court took upon itself to monitor the fulfilment of the orders. This was done through follow-up decisions, public hearings, and technical sessions.[597] The monitoring process created a space for participation of different governmental agencies as well as social groups, such as human rights NGOs, experts and academics and, importantly, the representatives of the affected population. The Court, thus,

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[594] 2008 3 SA 208 (CC) para 5

[595] (2004) Corte Constitucional [CC] [Constitutional Court], Sentencia T-025/04
On another Colombian case, T-780, see: A.E. Yamin and O. Parra-Vera, 'How do courts set health policy? The case of the Colombian Constitutional Court' (2009) 6 (2) PLoS Medicine 147

[596] (2004) Corte Constitucional [CC] [Constitutional Court], Sentencia T-025/04, 80-81

[597] César A Rodríguez Garavito and Diana Rodríguez Franco, *Radical Deprivation on Trial. The Impact of Judicial Activism on Socioeconomic Rights in the Global South* (Cambridge University Press 2015)

established a deliberative environment where the process of politicisation of needs could take place.[598]

Now, this form of adjudication, at least potentially, seems to avoid most of the problems with other forms of review discussed above. Experimentalist review refrains from individualising needs or from confining them to expert discourse; it allows for the revision of structural factors determining the lack of satisfaction of those needs, and does this by opening the process to a wider public, including rights-holders themselves, rather than confining the debate to the intergovernmental sphere.

All this is welcomed. Experimentalist review does have a potential of destabilising rigid and oppressive institutional structures by allowing scrutiny of the structural determinants of the violation of social rights. Experimentalist review is most attuned to channelling demand-rights. Remember, that on the demand-conception a rights-claim articulates an unauthorised demand against existing formulations and thereby initiates a process of deliberation and contestation over the issue. Experimentalist court can perform the role of a destabiliser of the system and the role of a facilitator of a newly emerged political sphere.[599] But this form of adjudication is incapable of registering a challenge-rights and, therefore, creating a space for a radical politics of rights.

Experimentalist review proceeds by affirming an individual right in broad terms and then organises a communicative space wherein the exact substance of that right is deliberated and contested through proposals on needs-interpretation. But experimentalist court already assumes too much. In particular, it treats a legally

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[598] However, as Garavito notes, the displaced group has had the least voice in the proceedings which ultimately was dominated by technical legal and economic language. César A Rodríguez Garavito and Diana Rodríguez Franco, *Radical Deprivation on Trial. The Impact of Judicial Activism on Socioeconomic Rights in the Global South* (Cambridge University Press 2015) 128

[599] Bellamy seems to point towards this role of courts. See: Richard Bellamy, 'Rights as Democracy' (2012) 15 (4) Critical Review of International Social and Political Philosophy 449; 462ff. For a discussion on the role of courts in Arendt's thought which seems to arrive at somewhat similar conclusion see: Marco Goldoni, and Christopher McCorkindale, 'The role of the Supreme Court in Arendt's Political Constitutionalism' in Marco Goldoni and Christopher McCorkindale (eds.) *Hannah Arendt And The Law* (Hart 2012)

enforced individual right as an end in itself, as a goal of the deliberative process. A rights-claim is framed as a directive and the deliberative process only serves the purpose of formulating this directive. If a subject is constituted through a right-claim, as we argued in the previous chapter, then the subject that experimentalist review creates is necessarily an issuer of a directive who recognises the capacity of the addressee to enforce the claimed right and thereby denies the structural implication of the addressee in the production of the needs in question. The subject who issues a right-claim necessarily operates within the possibilities of the prevailing system. In contrast, as we learned in previous chapters, a radical subject is precisely the one who brings about a rupture into the order and thereby initiates a radical discourse of rights. A radical rights-claim is a claim which articulates a radical need which the addressee cannot realise. Thus, while the subject of radical needs challenges the fundamentals of the system, consensus-oriented deliberative framework of needs-interpretation necessarily undercuts the possibility of such a challenge. In short, courts disallow a political space where transformative formulations of rights can be deliberated and contested.

Conclusion

As we saw, courts may co-opt the transformative potential of social rights by reducing the latter either to command or demand-rights. To identify these instances and therefore to warn against overdependence on the judiciary in radical political struggles, I looked at four models of social rights adjudication that are often discussed with relation to the transformative role of courts. Furthermore, I suggested that existing forms of adjudication necessarily frame rights as directives. As a result, courts are not capable of creating a political space where transformative formulations of rights can be deliberated and contested. While recourse to courts might have other strategic benefits for radical movements – whether it is raising public awareness or achieving short-term gains (e.g. poverty alleviation instead of eradicating the sources

thereof)[600] – the judiciary's direct role in radical social change, at least considering the available models of adjudication discussed in current literature, seems limited.

[600] Regarding the indirect role of courts in promoting social change see Mark Heywood 'Preventing mother-to-child HIV transmission in South Africa: background, strategies and outcomes of the treatment action campaign case against the Minister of Health' (2003) 19 South African Journal on Human Rights 278

CONCLUSION

I have argued that rights are not necessarily 'the Master's tools';[601] that they do not have to reproduce the *status quo* of the capitalist order in the manner that the two Marxist critiques of *legality* and *depoliticisation* suggest. Instead, the language of rights is capable of offering a discursive field where transformative ideas can be formulated and pursued.

I conceptualised transformative politics in terms of the politics of radical needs which consists in contextual, bottom-up, ruptural, open-ended and potentially transcendent practice of needs-interpretation. I discussed a transnational movement, *La Via Campesina*, and argued that it is instigating precisely such a politics of radical needs. In particular, it aims at satisfying the radical need to 'feed the world' as the end in itself rather than as the dictate of the capitalist market. With this

'impossible' demand, *La Via Campesina* challenges the extant order and initiates an open-ended and potentially transcendent political process of deliberation and contestation over the nature, sources and ways of realisation of the need for food. I argued that *La Via Campesina* does not err in employing the language of social rights to communicate its transformative visions. This thesis, then, proceeded to offer a radical theory of social rights capable of expressing the politics of radical needs and capturing the transformative core of this movement.

[601] The expression used by Audre Lorde in her 'The Master's Tools Will Never Dismantle the Master's House' in Audre Lorde, (ed.) *Sister Outsider* (The Crossing Press 1984)

I attempted to demonstrate how rights, on the one hand, can challenge capitalist social relations and the liberal legal order which sustains those relations, and, on the other hand, constitute a new political system. I argued that without reconceptualising rights in this manner, we are unable to comprehend those social movements who employ the language of rights for challenging the existing systems and for articulating transformative visions of a new world. Crucially, conceptual poverty on the part of the dominant accounts of rights has a political significance: it depoliticises and co-opts radical imaginaries.

With the help of Hannah Arendt's theory of law as *lex,* this thesis suggested that we need to rethink rights as political alliances and agreements and rights-claims as political proposals between co-citizens. Here, the content of rights is formulated through a political action of the rights-holders themselves, as opposed to being derived from the pre-political sphere. Rights as proposals initiate a bottom-up and open-ended political process of deliberation and contestation over the issues of collective interest invoked by those claims.

However, I pointed out that even though Arendt's notion of the right to have rights intimates a politics of the excluded, hers is an idealised image of politics as a concerted action of co-citizens. What Arendt does is to presume too readily the existence of a space where politics can happen; she neglects the role of rights in the struggles to be accepted and recognised as a political proposal-maker in the first place. Therefore, in order to identify the conflictual dimension of rights-claims we needed to go beyond Arendt. I suggested that depending on how we conceptualise this politics-generating moment of conflict, in particular, how we understand the structure of a rights-claim, the potential scope of political proposals changes and the possibility of constituting a new order is furthered or undermined. From three possible accounts of the conflictual nature of rights, I started with discourse theory. I attempted to show how discourse theory grounds the conflictual nature of rights in the pre-political, discourse principle, thus, neglecting the potential of rights to constitute new political systems as opposed to reinforcing *the status quo*.

The second, agonistic, account of how rights oppose the existing formulations thereof was more promising. I took from this conception the focus on the politics of the excluded and, importantly, the emphasis on the symbolic dimension of rights which makes rights unfixable and an always-available resource for conflictual politics. But the agonistic approach too failed to capture the transformative capacity of rights-claims.

To explain this limitation and pave the way for an alternative conception, I referred to speech act theory. I distinguished between two acts that rights-claims can be said to perform: directing and challenging. It is the former that agonistic theories (as well as discourse and liberal theories) seem to adopt. A speech act of directive assumes the capacity of the addressee to perform the propositional content of that speech act. Similarly, a rights-claim as a directive recognises the capacity and, therefore, the fundamental legitimacy of the addressee extant order and denies the latter's structural implication in the production of the need for rights.

I suggested that we capture the transformative potential of rights by thematising rights-claims in terms of a speech act of challenge. By a challenge I meant an act which *urges someone to prove an assertion that the latter wants to be generally believed to be true*. Similarly, radical rights-claims should be understood as challenging the proposition that the *extant order is capable of enforcing all the rights that need to be enforced*. This is the proposition based on which the extant order legitimises itself, and the challenge is precisely to that legitimacy. This is an act with an intention to demonstrate the addressee's inability to live up to its own promise and, therefore, demonstrate the order's fundamental illegitimacy. What the issuer of a challenge expects from the hearer is either the latter's capitulation or an endeavour to justify the proposition, something the challenger believes is destined for failure. Crucially, this challenge opens up a political space where transformative ideas can be deliberated and contested.

In sum, after taking the idea of rights as proposals from Arendt, enriching it with the idea of the symbolic efficacy of rights, and further reworking all this with the notion

of a challenge-right, I have arrived at the following formula for a radical theory of social rights: *to claim a social right to a radical need is to articulate a fundamental challenge to the extant order and, thereby, to inaugurate a political space where an open-ended and potentially transcendent process of deliberation and contestation over the nature, the sources and the modes of satisfaction of the needs in question can take place*.

I believe that this theory is able to do justice to the practice of the social movements like *La Via Campesina* and interpret their use of the language of rights adequately. Ultimately, rights-talk is not the only medium for channelling transformative political projects. Yet, it offers a helpful vocabulary that is familiar both to the rulers and the ruled. Demonstrating the transformative potential of rights amounts to re-discovering a language, a discursive field, that we share with our ideological enemies through which radical ideas can be formulated and communicated.

While rediscovering such a shared language is far from being enough for the purposes of transformative movements, the theory I developed here, I believe, provides helpful analytical and critical tools for evaluating existing institutions, which proclaim themselves as guardians of our rights.

So, I concluded by arguing against certain optimism about the transformative potential of courts in recent academic literature. I suggested that the framework of differentiating between demand, command (both forms of directive rights) and challenge rights offers a good perspective on the appositeness of courts in terms of channelling the radical politics of social rights. This framework helped us see how courts depoliticise needs in different ways by treating rights-claims as commands and demands. Furthermore, I argued that the manner in which the existing forms of social rights adjudication frame rights-claims disallows the possibility of registering rights as challenges. As a result, courts are not capable of creating a political space where transformative formulations of social rights can be deliberated and contested.[602]

[602] This radical theory of social rights can be further developed along the lines of Emilios Christodoulidis' notion of the 'strategies of legal rupture'. See: Emilios Christodoulidis, 'Strategies Of

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