A Constitution for Human Rights: Between Abstract Principles and Social Transformation

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1. Introduction

Human rights have become increasingly incorporated in modern constitutions, and along with it, political and legal views on the relationship between the two. This constitutional phenomenon stems from the need to protect the rights of all by the highest and foundational norm, as an assurance of a peaceful society. This premise has arguably become the cornerstone of contemporary constitutionalism. A significant proportion of constitutions around the world feature a Bill of Rights, a list of basic rights that state authorities must observe and protect[1]. Moreover, in recent years the development of alternative models of constitutionalism such as those from the Global South[2] and the inclusion of a large number of rights, both civil and political rights and social, economic and cultural rights[3], have given impetus to this trend. However, despite their constitutionalisation the effective implementation of rights is still deficient, and it is still not clear how the constitutionalisation of rights impact on positive social transformation.

The constitutionalisation of rights has become a liberal-positivist hegemony. It sets a particular ideological structure for the construction of subjectivities and makes certain assumptions about the relationship between constitutions and human rights. The former is a document considered to be the conceptualisation of an agreement of the highest legal standing; the latter untouchable principles. Under the liberal-positivist approach the constitutionalisation of human rights runs the risk of bringing with it a process of de-politicisation that undermines not only the emancipatory essence that human rights should have, but also the vigour of democracy in the community, the subjectivisation of people collectively, and the opportunity to debate and decide on the most relevant matters of social and political life. The result is a constitution with a long list of rights but also a people without a voice or chance to act *politically*, to transform their social interactions, and to recalibrate their social compass.

The aim of this Working Paper is to assess the relevance of the hegemonic constitutional perspective on human rights. It argues that, detached from other social and political considerations, it is not effective in securing its own standards for humanity. A constitution alone cannot transform society by means of legal commands and discourses. It demands a more thorough involvement and transformation of social and political structures for effect. While most of the literature on the field has been focused on the constitutionalisation of rights, particularly after the boom of international human rights law, this paper aims to explore what follows the constitutional incorporation and social implementation of rights. To do that, this analysis will look critically to the process of constitutional inclusion and assess whether it has had a positive or negative impact on rights implementation and social transformation. For a better understanding of the relationship between rights and constitution, three different theories will be drawn on: social, political, and legal schools of thought. One of the goals of this work is to reject a hierarchical approach to rights and constitutions, on the one hand, and the democratic polity on the other, and to refocus the question more holistically how human rights are, or ought to be, about social transformation.

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[1] Philip Alston, *Promoting Human Rights through Bills of Rights: Comparative Perspectives* (Oxford University Press, 1999), 7–11.

[2] I use this term in the way it has been developed by some scholars as Boaventura de Sousa, among others, to whom the distinction between the Global South and the Global North is not a geographical matter, but rather a division derived from an epistemological and political abysmal separation. Shortly, for Boaventura the countries pertaining to the Global South are those posited on the periphery of the modern world system, which in the past were called Third World Countries. Boaventura De Sousa Santos, *Epistemologies of the South. Justice against Epistemicide.* (Paradigm Publishers, 2014), 10; Boaventura De Sousa Santos, "Three Metaphors of a New Conception of the Law: The Frontier, The Baroque and the South," *Oficina Do CES* 64 (1995): 15; Boaventura De Sousa Santos, *Para Descolonizar Occidente. Más Allá Del Pensamiento Abismal* (CLACSO, 2010), chap. 1. For a particular analysis of the recent developments of constitutionalism of the Global South see Daniel Bonilla Maldonado, ed., *Constitutionalism of the Global South* (Cambridge University Press, 2013).

[3] César Rodríguez Garavito, *El Derecho En América Latina. Un Mapa Para El Pensamiento Jurídico* (Siglo XXI, 2011).

Outlining this position, the argument will be developed in four sections. First, a brief analysis will be offered of dominant conceptualisations of a constitution and its relation to human rights. This discussion addresses the features of the liberal-contractualist political approach, and, from a legal perspective, the positivist approach, to provide the current understanding of constitutions and human rights. Second, the impact of the constitutionalisation of human rights will be critically discussed, with evidence of three particular consequences that surround this constitutional hegemony: a *legitimisation* of the legal order; a *concentration* of democratic political power; and a process of *de-politicisation*. The argument here is that with the incorporation of human rights into the constitution there is a loss of political power, with people deprived of discussion, deliberation, and decision-making power on the fundamental issues of social and political life. Third, the last section focuses on some possible theoretical solutions to enhance the role of constitutions for the effective implementation of rights within society. It proposes a particular model of *critical constitutionalism* followed by a radicalisation of the democratic system and the 'de-principleisation' of human rights, for a wider political conceptualisation of the constitution and a deeper social transformation.

The general argument in this paper is about the constitutionalisation of all human rights and its consequences. However, it would seem to apply with greater force to situations where socioeconomic rights are constitutionalised. The claims underlying these rights are economic and social claims that ought, according the argument of this paper, be contested and negotiated within the political process if they are to be realised in a manner that leads to social transformation. Their de-politicisation and juridification would not only fossilise them within a centralised liberal-positivist constitutionalism dominated by the state, but also disempower the very people that these rights are aimed at emancipating.

2. The Hegemonic Structure: Dominant Approaches to Constitutions and Human Rights

The constitutionalisation of rights represents a hegemonic strategy. It enshrines an ideological mechanism that structures a particular significance of human rights and constitutions that works as a vehicle for the establishment of a dominant conception of the social, legal, and political world.[4] As a hegemony, the constitutional incorporation of rights informs the conceptualisation of rights, but also exercises a particular dominion over the right-holders and relevant subjectivities.[5] As a result, this authoritative scope brings with it the totalising conception of constitutional human rights that may serve as a legitimiser but does not aid in its effective implementation.

Through a political and a legal branch, the hegemonic nature of the constitutionalisation of rights ends up configuring a collective conscience of the existence and protection of rights. It develops a liberal-contractualist dimension that understands a constitution as the transmission of political power for peaceful social and political order, hence for the establishment of a conception of the good life.

[4] In this work, I use the term "hegemony" having in mind the theory developed by the Italian Philosopher Antonio Gramsci. For him, hegemony is about the political and cultural capacity to unify, through ideology, a social group characterised by deep social and political differences that, however, follow particular moral and political aims given by a dominant or hegemonic class. Luciano Gruppi, "Los Cuadernos De La Cárcel," in *El Concepto de Hegemonía En Gramsci* (Ediciones de Cultura Popular, 1978), 95–99; Antonio Gramsci, *Cuadernos de La Cárcel* (Ediciones Era, 1975), 339. Iñigo Errejón and Chantal Mouffe, *Construir Pueblo. Hegemonía Y Radicalización de La Democracia* (Icaria, 2015), 13–17.

[5] One of the main features of a hegemonic system is the chance it has to lead and domain particular social groups for ruling a community. In Mouffe's interpretation of Gramsci, hegemony serves for the ruling of allied classes and the dominion of opposing ones. Chantal Mouffe, "Hegemony and Ideology in Gramsci," in *Gramsci and Marxist Theory*, ed. Chantal Mouffe (Routledge & Kegan Paul, 1979), 178. Antonio Gramsci, *Further Selections from the Prision Notebooks*, ed. Derek Boothman (ElecBook, 1999), 145.

On the other hand, the legal branch functions through a positive normative scope that tries to enforce human rights by commands, expecting their auto-realisation once established in the highest legal norm. This section addresses the main features of these political and legal branches, while the following section two deals in more detail with the consequences of this hegemonic view.

The Dominant Political Approach to Constitutions

On political grounds the constitution has two main functions: first, it serves to outline institutional action or its creation, second, it can also refer to controls and power limitations.[6] Put together, the constitution refers to a "structural and operational pattern"[7] that describes the nature and function of a political community, which preserves harmonious relations of those within it. Considering the second function, this limitative essence of the document is the outcome of an "agreement".[8] From a contractualist political approach, the constitution thus represents a materialisation of an agreement reached by individuals to set out rules and institutions that make social and political life peaceful.

According to some theorists, however, this contractualist approach does not necessarily reflect a consensual meaning. For instance, Thomas Hobbes stipulated agreement on the settlement of a particular political order derived from the need to avoid the state of war. It is a rational choice made by community members in order to establish a commonwealth defined as "one (person) of whose acts a great multitude, by mutual covenants one with another, have made themselves [...], to the end he may use the strength and means [...] for their peace and common defence".[9] As Freeman stated, agreement under Hobbes' theory is "agent-centred". It works as an instrumental vehicle with no clear link to any moral consideration, that makes people enter into such an agreement for reasons other than their principal desires and interests.[10] Whilst a Hobbesian perspective is more interested in conforming to a sovereign power for peace and security, for John Locke an agreement is of collective consent for the establishment of political order. This comports with the establishment of a government for the protection of life and property. In contrast to the position upheld by Hobbes, Locke argues that collective consent is no excuse for an absolutist government or tyranny, as "men would not quit the freedom of the state of nature for, and tie themselves up under, were it not to preserve their lives, liberties and fortunes, and by stated rules of right and property to secure their peace and quiet".[11] For this reason, it has been considered that Lock's social theory sets a horizontal or 'aboriginal' contract between political agents whilst Hobbes emphasises a more vertical model for the constitution with a less constrained state.[12]

Constitutional trends of late have seen a revision of thinking under the contractualist theory and the emergence of the 'right-based' approach.[13] From this perspective, agreement under a constitution is not based only on rational choices guided by the establishment of a government, but rather, on some further moral claims which all or most subjects must consider valid to approve consent. For example, John Rawls' theory establishes political coercion through a constitutional regime. This can only be considered valid if it is exercised through the acceptance of principles and ideals that all citizens are

[6] Dario Castiglione, "The Political Theory of the Constitution," *Political Studies*, 1996, 417.
[7] Karl A. Wittfogel, *Oriental Despotism: A Comparative Study of Total Power* (Yale University Press, 1963), 101–2.
[8] Samuel Freeman, *Justice and the Social Contract: Essays on Rawlsian Political Philosophy* (Oxford University Press, 2007). James M. Buchanan, *Freedom in Constitutional Contract*, 1977, 11.
[9] Thomas Hobbes, *Leviathan*, ed. Rod Hay, *Prepared for the McMaster University Archive of the History of Economic Thought*, vol. 79, 1957, 106.
[10] Freeman, *Justice and the Social Contract: Essays on Rawlsian Political Philosophy*, 20.
[11] John Locke, *Second Treatise of Government* (Hackett Publishing Company, Inc., 1980), para. 137.
[12] Hannah Arendt, "Crises of the Republic: Lying in Politics, Civil Disobedience on Violence, Thoughts on Politics, and Revolution" (Harcourt Brace & Company, 1972), 86; Hannah Arendt, *On Revolution* (Penguin Books, 1963), 169; D. Luban, "Just War and Human Rights," *Philosophy and Public Affairs* 9, no. 2 (1980): 167.
[13] Freeman, *Justice and the Social Contract: Essays on Rawlsian Political Philosophy*, 20.

expected to endorse as reasonable and rational agents.[14] In Rawls' words, the principles that set out the basic structure of society constitute the main object of agreement as they are "the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association."[15] James Buchanan offers a different approach. Buchannan argues that agreement cannot be reached under ideal or hypothetical situations, such as the original position defended by Rawls.[16] For him individuals are not equal subjects but rather they live in a situation of personal inequality[17] that leads them to coexist and produce in a shared social world with limited resources. When agents realise "personal conflict would be ubiquitous in anarchy, the extreme individualist is forced to acknowledge the necessity of enforcement agents, an institutionalised means of resolving interpersonal disputes."[18] Whilst Rawls' views can be considered a moral contractual theory, Buchanan's ideas conceptualise an empirical approach closer to Hobbes.[19]

Regardless of their differences, all contractualist theories have a major common factor. This is the assumption that a constitution represents the outcome of a process of transmission of political power for a set of rules related to society's moral or functional compass, as well as the creation and limitation of a superior political force able to regulate this social contract. The central thinking of these schools of thought is the idea that a community of individuals agree to transfer some political power for the establishment of a regime that must recognise some rights as basic elements, together with an assurance of their protection.

The Dominant Legal Approach to Constitutions

If contractualism is the dominant political approach to constitutions, positivism is its legal basis. Positivism seeks to explain the special qualities of law as a regulatory mechanism of human behaviour, what constitutes valid law, and why we obey it.[20] The thinking rests on the assumption that law is derived from a social fact rather than from a moral or divine source. This means that a distinction must be drawn between law and morality. From this point of view, the law constitutes a normative system that 'exists' as a social factor that imposes a set of normative duties or mandates on all individuals.[21] Hence, legal positivism can be understood as a transitional process for the juridification of a political agreement as reached by a community. By means of this process a political consensus can be coupled with a normative character, which facilitates its coercive imposition and enforcement within society.

This approach stipulates that a constitution is the highest norm within a legal system, from which all other norms and rules derive. John Austin is arguably the foremost scholar on this matter. For Austin, a constitution represents the bedrock of law as it works as a depositary of the sovereign power,[22] and sets the guide for the validity of all other norms. It encompasses a set of commands that all persons should conform to as they are given by the sovereign: a socially recognised "effective

[14] Frank I. Michelman, "Rawls on Constitutionalism and Constitutional Law," in *The Cambridge Companion to Rawls* (Cambridge University Press, 2006), 395–96.
[15] John Rawls, *A Theory of Justice* (Harvard University Press, 1971), 10.
[16] James M. Buchanan, *The Limits of Liberty. Between Anarchy and Leviathan* (Liberty Fund, 1975), 71.
[17] James M. Buchanan, "A Hobbesian Interpretation of the Rawlsian Difference Principle," *Kyklos* 29, no. 1972 (1976): 5–25.
[18] Buchanan, *The Limits of Liberty. Between Anarchy and Leviathan*, 9.
[19] Miguel Ángel Rodilla, "Buchanan, Nozick, Rawls: Variaciones Sobre El Estado de Naturaleza," *Anuario de Filosofía Del Derecho* 2 (1985): 229–84.
[20] H.L.A Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71, no. 4 (1958): 603–6.
[21] Leslie Green, "Legal Positivism", The Stanford Encyclopedia of Philosophy (Fall 2009 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/fall2009/entries/legal-positivism/>.
[22] John Austin, *A Plea for the Constitution*, 2nd ed. (London: John Murray, 1859), 37. Cited in Isabel Turégano, "Reconstructing Austin's Intuitions: Positive Morality".

authority which depends on habitual obedience to its commands".[23] Hans Kelsen, to whom a constitution represents a solemn document that contains those rules which regulate the creation of the general legal norms,[24] is another clear representative of legal positivism. Kelsen's theory does not make a claim on the moral or just validity of norms, but rather only on a formal validation of inferior norms to the constitution. For Kelsen, a norm would be valid only if it is created in accordance with the constitution. Softer versions of positivism, such as from Hart, consider the constitution not only the top norm on a hierarchical order, but as the fundamental one that works as the rule of recognition[25] for other norms and even the whole social system.[26] An important distinction between Kelsen and Hart's positions is that for the former a constitution must find its support on a legal base, while for the latter it may rest on historical or social considerations.[27]

Regardless of the differently espoused claims, legal positivism has become a useful tool for a deeper understanding of the establishment of a particular state model. Casting the constitution as the highest norm from which all actions and other norms must derive their validity has created the assumption that legal and political order should fit into the provisions stated within the constitution. With this a 'constitutional state' characterised by the supremacy of statutory law has become the dominant model,[28] dubbed 'Rechtsstaat' in the German tradition, 'L'État de droit législative' in the French, or familiarly enough, 'The Rule of Law' within the Anglo-American theory.[29] Tom Campbell pointed out that this sort of "prescriptive legal positivism", as he called it, meant nothing but a governance of general, public, and clear rules, "that governments ought to operate through and be subject to and that other organisations and individuals must accept and obey".[30]

The Liberal-Positivist Constitutional Approach to Human Rights

The conjuncture between the dominant political and legal approaches to constitutions and rights impacts on the understanding of the latter. While early strands of liberal constitutional positivism did not particularly emphasise human rights, recent works have shown a deeper interest in the existing relationship between human rights and the constitution. These approaches have been deeply influenced by the consideration that human rights as elements attached to a constitution should be considered as untouchable. This idea will be analysed in more later, but it is relevant to draw out some key basic points.

In the common law tradition, Ronald Dworkin is arguably one of the most influential scholars of human rights and the constitution. His theory represents a fierce critique to the positivist approach, particularly to the school of thought defended by Hart.[31] Nevertheless, Dworkin's critique itself has been linked to a positivist approach of interpretation, or to what some scholars have referred to as "constitutional positivism".[32] Deeply rooted in the US constitutional tradition, Dworkin's arguments concern the way judges must interpret law in 'hard cases.' By drawing a distinction between rules and principles, Dworkin believes that the factors that determine conclusions in a judicial decision need

[23] Isabel Turégano, "Reconstructing Austin's Intuitions: Positive Morality and," in *The Legacy of John Austin's Jurisprudence*, ed. Michael Freeman and Patricia Mindus (Springer, 2013), 307.
[24] Hans Kelsen, *General Theory of Law and State* (Transaction Publishers, 2006), 125.
[25] H.L.A Hart, *The Concept of Law* (Clarendon Press, 1994), chap. 6.
[26] Michael Payne, "Hart ' S Concept of a Legal System," *William and Mary Law Review* 18, no. 2 (1976): 299.
[27] Luis Duarte d' Almedia, James Edwards, and Andrea Dolcetti, eds., *Reading the Concept of Law* (Hart Publishing, 2013), 208.
[28] Giorgio Pino, "The Place of Legal Positivism in Contemporary Constitutional States," *Law and Philosophy* 18, no. 5 (1999): 519.
[29] Martin Loughlin, "Rechtsstaat, Rule of Law, l'Etat de Droit," in *Foundations of Public Law* (Oxford University Press, 2010), 312–41.
[30] Tom Campbell, *Prescriptive Legal Positivism: Law, Rights and Democracy* (UCL Press, 2004), 3.
[31] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978), ix.
[32] James A Gardner, "Whose Constitution Is It ? Why Federalism and Constitutional Positivism Don't Mix," *William & Mary Law Review* 46, no. 4 (2005): 1245.

not be derived only from legislation. However, what makes his analysis key for this discussion is the way in which Dworkin understands the process of adoption and the validity of a certain set of rights in the constitution. For instance, he understands the constitution as a "complex set of principles and policies that justify [that] scheme of government",[33] that is "designed to protect individual citizens and groups against certain decisions that a majority of citizens might want to make, even when that majority acts in what it takes to be the general or common interest".[34] At this point, Dworkin introduces into his theory as a somewhat contractualist approach to democracy. In his words, the only "way in which a society that aspires to be a democracy should decide what abstract principles or rights to declare in its constitution [should be] by popular referendum."[35]

Two elements are key to understanding Dworkin's theory of human rights and constitutions. First, agreement under democracy works two-ways: an accord must be reached with the participation of all members of a political community, of free moral agents who should be treated with equal concern,[36] and democracy must be understood as "collective communal action." Democracy is thus not only majority rule but "legitimate" majority rule that cannot effect change to those constitutional rules that are a prerequisite to democracy.[37] Regarding the conceptualisation of rights in the constitution, for Dworkin human rights are a political trump card held by individuals to protect themselves against decisions adopted by a majority when there is not a "sufficient justification for denying them what they wish to have or do or for imposing a loss or injury upon them."[38]

Similarly, Luigi Ferrajoli keeps up the idea that rights are a prerequisite to democracy, that a minimum equality of rights is needed for it to work. In fact, he considers democracy to not be just a matter of participation but of the equal-holding of rights. The role of human rights in Ferrajoli's continental law theory parallels Dworkin's in the common law world. Their main coincidence is with Ferrajoli's idea that human rights are a counter-majoritarian guarantee, that they work as the law of the weakest. According to Ferrajoli, when human rights are incorporated into the constitution they adopt a particular form as fundamental principles that sustain constitutional order. They regulate not only the formal but also the material validity of law. Ferrajoli argues that a main advantage of this new model of constitutionalism lies in the fact that law is able to self-regulate not only its production but also its material validity.[39] The relationship between human rights and the constitution in this school of thought is what he called "the sphere of the undecidable", that is, a set of rights for the basic structure of a state, which that cannot be changed or got rid of by legislative majorities. Regardless of the proximity of both theories on this point, there is a critical disjunction in the way the two thinkers address legal positivism. Dworkin regards the role of principles in law as a fracture of legal positivism, while Ferrajoli upholds the idea that the incorporation of such principles represents a fortification and perfection of legal positivism.[40] For the latter, apart from being considered as ethical principles that configure the essence of a state, rights are also deontic rules – constitutional norms – that mandate their own observance and guide the production of law.[41]

To conclude, current hegemonic theoretical understandings of human rights and constitutions rest on the idea that the latter is a legal document reflecting agreement by a political community as well as a repository of basic principles – human rights – to guide legal and political interaction. For this

[33] Dworkin, *Taking Rights Seriously*, 206.
[34] Ibid., 254.
[35] Ronald Dworkin, "Constitutionalism and Democracy," *European Journal of Philosophy* 3, no. 1 (1995): 10.
[36] Ibidem, 5
[37] Ibidem, 2
[38] Ronald Dworkin, *Taking Rights Seriously*, op. cit., xi
[39] Luigi Ferrajoli, "El Derecho Como Sistema de Garantías," in *Derechos Y Garantías. La Ley Del Más Débil* (Trotta, 2004), 20.
[40] Luigi Ferrajoli, "Constitucionalismo Principialista Y Constitucionalismo Garantista," *DOXA. Cuadernos de Filosofía Del Derecho* 34 (2011): 24.
[41] Luigi Ferrajoli, "El Constitucionalismo Entre Principios Y Reglas," *DOXA. Cuadernos de Filosofía Del Derecho* 35 (2012): 802.

approach, when human rights are incorporated into the constitution they become sacred relics that must not be touched. In fact, the constitution becomes the legal guardian for human rights. This approach could have its shortcomings. Considering human rights as a set of abstract principles protected by the constitution could have some negative effects for their execution and guarantee. The understanding of human rights as constitutional and as abstract principles draws a social and political border of excision and division that arguably undermines the social and public discussion of such rights. At the same time, it gives the state the power to unilaterally determine the content, the limits, and the holders of such rights. The following section will address these claims in more detail.

3. The Shortcomings of Current Constitutionalism: Alternative Approaches to Constitutions and Human Rights

Conceptualising human rights into a constitution is no guarantee of their realisation; on the contrary, constitutionalisation has consequences that raise both theoretical and practical questions. For instance, it limits the potential scope and plasticity of such rights, often ruling out any further analysis or review of their functionality and effectiveness. On a more practical level, it undermines social participation and the very development and exercising of such rights. In both cases, the constitutionalisation of rights under the liberal-positivist paradigm brings with it a process of concentration of political power, a legitimisation of the legal order, and the de-politicisation of the people that, together, limit the discursive universe of rights, thus endangering their emancipatory essence.

Constitutionalisation of Rights: A Process of Legitimisation and Concentration

One of the main problems with the human rights constitution is that the legal system is often regarded as a closed and coherent one. When liberal-positivist theories argue that constitutionalised human rights become fundamental principles that determine the validity of other norms and the democratic character of a particular political community, they also claim that the constitution must be understood as the norm of all norms. To say the constitution is the basic norm that *must* shape all other elements within the legal and political system involves a principle of command.[42] This is a set of orders that, as Ferrajoli states, conceptualises human rights as norms that mandate not only what authorities must do, but also what individuals are to abide by. The clearest consequence of this approach is the juridification of human rights, understanding a constitution only or primarily as a normative matter; a superior command that prescribes how should we act and how should we think about human rights.

In general, legal positivism has focused more on the nature and validity of law within society, rather than on its functionality.[43] This is arguably one of the weakest points of legal positivism in assuming rights to be legally prescriptive norms and hence their functionality and effectiveness as an automatic consequence of their juridification, a 'legal fetishism.' It is a false hope that reality can be transformed by means of normative production; there needs to be "an awareness of the tension between the enactment of law and its application."[44] Legal positivism has strong arguments to support the nature and validity of human rights for the legal system, but little about their implementation. However, human rights are neither statist nor static principles cemented in the constitution. Their very nature

[42] Carl Schmitt, *Constitutional Theory*, *E-Duke Books Scholarly Collection*, 2008, 62.
[43] B Z Tamanaha, "Socio-Legal Positivism and a General Jurisprudence," *Oxford Journal of Legal Studies* 21, no. 1 (2001): 1–32.
[44] Julieta Lemaitre, "Legal Fetishism: Law, Violence, and Social Movements in Colombia," *Revista Jurídica de La Universidad de Puerto Rico* 77, no. 2 (2008): 333.

demands practice, dynamism, debate, exercise, and constant implementation. The idea that law and human rights be represented as a power to be exercised just by means of commands should be abandoned, in favour of an approach that understands that rights should involve constant social interaction towards their effective implementation.

The idea that a constitution can transform social reality by its prescriptive nature has given rise to the term 'constitutional fetishism.'[45] This also involves the belief that a constitution provides a sense of stability and security to the dispositions and the rules that it enshrines.[46] When written into the constitution, it is commonly taken for granted that human rights adopt a canonical form,[47] and that their content is stable and protected against change[48] and majoritarian threats. However, some scholars have come out against this position. Carl Schmitt argued that the written character of a constitution does not necessarily give norms their validity and force. For him, a norm is fundamental when it derives from a recognised authoritative office, not just from a constitution.[49] Hannah Arendt made a similar claim when she argued that a constitution "be a tangible 'wordly entity' but which nevertheless is never a subjective state of mind, like the will."[50] These arguments espouse the thinking that the authoritative character of human rights norms does not derive precisely from their incorporation into a constitution, but rather from the social and collective decisions that those rights must be enshrined in it. The question now stands: if the authority of human rights norms is not derived from the constitution, and if constitutionalisation is not enough to assure effective implementation, what then are the consequences of their inclusion?

Writing human rights into the constitution has consequences on social and political interaction as well as the maintenance of legal order. Their inclusion publicly legitimises the existence of the legal order. This follows Kant's analysis, that "all actions relating to the rights of other men are wrong, if their maxim is not compatible with publicity."[51] With this, human rights in the constitution give authorities the opportunity to act, or not to, in the name of human rights. They are a justification of state action.[52] However, this apparent legitimisation is only formal as it creates the expectation of the existence of rights and their functionality in the community. It relies on the formal features of the coherent and systematic order of the legal system. This gives the legal system a power of dominance based on "rational grounds".[53] In Weber's terms, this is the chance to find an obedience that "rest(s) on a belief in the legality of enacted rules and the right of those elevated to authority under such rules to issue commands."[54]

The incorporation of human rights into the constitution as the basis for an ascendance of legal order to a power of dominance is not necessarily an act of insubordination. It means that under the legal positivist approach the popular belief is that human rights exist simply because they are stated in the constitution. Bourdieu explains this as the symbolic effectiveness of coherence and systematic-ness[55]

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[45] Richard D. Parker, "Here, the People Rule: A Constitutional Populist Manifesto," *Valparaiso University Law Review* 27, no. 3 (1993): 564–65.
[46] Jeremy Waldron, "Constitutionalism: A Skeptical View," in *Contemporary Debates in Political Philosophy*, 2010, 8.
[47] Jeremy Waldron, "A Right-Based Critique of Constitutional Rights," *Oxford Journal of Legal Studies* 13, no. 1 (1993): 26.
[48] Schmitt, *Constitutional Theory*, 68.
[49] Ibid., 69.
[50] Arendt, *On Revolution*, 157.
[51] Immanuel Kant, *The Perpetual Peace* (Slought Foundation, Philadelphia and the Syracuse University Humanities Center, 2010), 52.
[52] Jacques Rancière, *Momentos Políticos* (Capital Intelectual, 2010), 27.
[53] Max Weber, "The three types of legitimate rule", *Berkeley Publications in Society and Institutions*, 4 no. 1 (1958): 1-11
[54] Max Weber, *Economy and Society. An Outline of Interpretive Sociology*, ed. Guenther Roth and Claus Wittich (University of California Press, 1978), 212–16. Max Weber, *Economía Y Sociedad: Esbozo de Sociología Comprensiva* (Fondo de Cultura Económica, 1964), 707. Max Weber, *Max Weber on Law in Economy and Society*, ed. Max Rheinstein (Harvard University Press, 1954), 336.
[55] Pierre Bourdieu, *On the State : Lectures at the Collège De France, 1989-1992.*, English ed, 2014, 170.

that a constitution and the law in general represents. That is, citizens obey the constitution and believe they have human rights because they know and acknowledge[56] that the constitution is the basic and most important norm within the legal, political, and social system. They submit to it because they know and acknowledge that it includes norms that prescribe the implementation and application of their rights. Whilst this does not bring with it guarantees for the effective and social implementation of rights, it does help to ensure the existence of, and obedience to, a legal order. The constitutionalisation of rights is not only a legitimising process but also an exercise of concentration. The latter develops the constitution as a mechanism for the codification of the 'universal',[57] of everything that belongs to and matters to the community. It argues that human rights are of utmost popular interest, and when recognised by a constitution, they take on a universal significance for social and political life. This process raises two important consequences. First, there is the perception of social peace,[58] as the 'universal' is taken for granted as being protected and secured. By incorporating the most relevant interests and people's concerns, the constitution moves forward and foresees every possible conflict in order to pacify it by its reduction into a constitutional norm.[59] Second, it gives power to the management of the 'universal'.[60] Through this process of concentration of the universal, the constitution is the instrument for the fusion between the legal or objective, to the real or subjective. In brief, the constitution thus becomes a dispositive for the knowledge, acknowledgement, reproduction, and adherence to a 'new universal' that is now presented as self-evident and undisputed.[61]

With the convergence of human rights and the constitution comes a new phenomenon: the social world is perceived as self-evident. For the human rights constitution, it means the emergence of a social perception that the incorporation of the former into the latter guarantees their existence and effectiveness. As the constitution holds its cherished place as the basic legal norm, then there is nothing else to do or to demand towards its recognition. This has been referred to as "doxa"[62] and poses a dilemma for the validity and enforcement of human rights within society. According to Bourdieu, doxa reflects "that which is beyond question and which each agent tacitly accords by the mere fact of acting in accord with social convention."[63] It is the immediate adherence to the normal, as dictated by the norm that is reduced to its own compliance.[64]

When a human rights constitution compounds the social/real with the legal/command, it reproduces a particular new universal that creates classifications. It also tells us how to think and behave. Alternatively, it sets the basis for the conformation, a replicating of a doxa for the self-guarantee of such rights derived from their constitutional inclusion. Given the 'supreme' command that a constitution possesses, doxa tends to be greater,[65] and brings with it the absence of social discussion of these rights due to the assumption that our rights are self-guaranteed and self-enforced. We arguably only accept this process of constitutionalisation because of the belief that the inclusion of such rights was by means of a certain legal process for a noble end. However, the consequence is the emasculation of social dialogue, implementation, and activism over rights.

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[56] For Bourdieu "the act of obedience presupposes an act of knowledge, which is at the same time an act of acknowledgment". Ibid., 164.
[57] Ibid., 193.
[58] Ibid., 168.
[59] Rancière, *Momentos Políticos*, 27.
[60] Bourdieu, *On the State : Lectures at the Collège De France, 1989-1992.*, 101.
[61] Pierre Bourdieu, "Structures, Habitus, Power: Basis for a Theory of Symbolic Power," in *Outline of a Theory of Practice* (Cambridge University Press, 2014), 164.
[62] Pierre Bourdieu, "Language and Symbolic Power," *Polity Press*, 1991, 129; Bourdieu, *On the State : Lectures at the Collège De France, 1989-1992.*, 174.
[63] Bourdieu, "Structures, Habitus, Power: Basis for a Theory of Symbolic Power," 169.
[64] Pierre Bourdieu, *Poder, Derecho Y Clases Sociales* (Desclée De Brouwer, 2001), 217.
[65] Bourdieu, "Structures, Habitus, Power: Basis for a Theory of Symbolic Power," 165.

Constitutionalisation of Rights: A Process of De-politicisation

The idea of rights as self-guaranteed ironically contributes to a loss of popular political power as it removes these rights from a social or communal debate. "Doxa" brings with it the exclusion of certain issues from universal discourse. When human rights are left to the constitution so are our expectations that all is resolved, that they be exercised by a good government.

This de-politicisation is a process of consensus that attempts "to get rid of politics by closing the spaces of dissensus by patching over the possible gaps between appearance and reality."[66] The underlying belief is that when human rights are incorporated into the constitution they acquire a canonical form, but at the expense of a political form that excludes them from the social and political field as rights take on an untouchable and protected form.

Various scholars have weighed in on the effects of de-politicisation. Jacques Rancière argued it finds its roots in a process of consensus[67] that can be traced back to the liberal idea of agreement. To consider a constitution as the highest norm is to affirm that our existence as a political community rests and depends on these norms. As Carl Schmitt saw it, it sets out legal rules for the character of the sovereign instead of delegating it to the people or the community itself.[68] As the thinking goes, if the constitution gives birth to the state, and the state through its institutions protects the constitution's validity, then it is the state which is the legally legitimated entity for the exercise of political power. As a consequence, the constitution becomes state-centred,[69] and a juxtaposition emerges between the state, the constitutional, and the political. The state "thus appears as something political [and], the political as something pertaining to the state."[70]

This juxtaposition casts a particular shadow over human rights. If the constitution is considered as pertaining to the state, then constitutionalised human rights follow the same principle. Rights adopt a new character as political principles that the state can manage and control through its institutions and norms. Thus emerges the idea that the function of a constitution is reduced to limiting state power under the rule of law and to "create boundaries between politics and its societal environs."[71]

The political character of human rights takes on a distinct guise under constitutionalisation. Firstly, considering the 'process of concentration,' human rights as related to the 'universal' do not represent norms only but also symbolic capital: elements that individuals value from their own familiarity with them and the acknowledgement of their usefulness within the social structure of classification.[72] From this sociological perspective human rights are elements acknowledged by individuals as relevant and valuable for their protection, be it the rich or poor, men or women, government or citizen. When human rights are constitutionalised, the constitution emerges as a container of symbolic capital that is linked to the concentration of other kinds of power, such as military or economic power, which it gives the state the opportunity to accumulate and exercise. Bourdieu refers to this as the "meta-capital", "the accumulation of different kinds of capital by the same central power that gives the particular property of exercising power over capital."[73]

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[66] Jacques Rancière, "Who Is the Subject of the Rights of Man," *South Atlantic Quarterly* 103, no. 2 (2014): 306.
[67] Ibid.
[68] Schmitt, *Constitutional Theory*, 63.
[69] Gunther Teubner, "Globalización Y Constitucionalismo Social: Alternativas a La Teoría Constitucional Centrada En El Estado," *Anuario de La Facultad de Derecho de La Universidad Autónoma de Madrid* 9 (2005): 203.
[70] Carl Schmitt, *The Concept of the Political* (University of Chicago Press, 1996), 20.
[71] Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization*, 2012, 17.
[72] Bourdieu, "Structures, Habitus, Power: Basis for a Theory of Symbolic Power," 191–92; Pierre Bourdieu, *Razones Prácticas. Sobre La Teoría de La Acción* (Anagrama, 1997), 107.
[73] Bourdieu, *On the State : Lectures at the Collège De France, 1989-1992.*, 197.

The distinction between 'police' and 'politics' is also key in the conceptualisation of rights as political principles. Ranciére considers police as the "set of procedures whereby the aggregation and consent of collectivities is achieved, the organisation of powers, the distribution of places and roles, and the systems of legitimising this distribution."[74] In contrast, he links the concept of politics to "a series of actions that reconfigure the space where parties, parts, or lack of parts have been defined."[75] This distinction has also been addressed by Chantal Mouffe who believes that 'politics' represents a "set of practices and institutions through which an order is created, organising human coexistence in the context of conflictuality",[76] while "the political" is "the dimension of antagonism that is constitutive of human societies."[77]

Building on this further, the constitutionalisation of human rights and the adoption of political principles under the liberal-positivist approach can be understood through the term 'police.' As symbolic elements, when human rights are constitutionalised they give the state the opportunity to use those rights for the management of political power, for the regulation of social life, and hence for structuring the legal, social, and political scheme of the community. The phrase "the government of human rights"[78] has been coined to describe this move, as a pacifying and legitimising action where the state now appears as prudent and expert, and hence over-legitimised.[79] This process entitles the state to decide on the content, nature, structure, limits, holders, and guarantees of such rights. In short, the constitutionalisation of rights tends to amplify the sphere of the police and to limit the political. As David Kennedy posited, "by consolidating human experience into the exercise of legal entitlements, human rights strengthen the national governmental structure and equates the structure of the state with the structure of freedom."[80]

The right to protest is one area that highlights this approach. Such a right has acquired a particular social and public relevance in recent years. Social movements around the world such as Occupy Wall Street, The Arab Spring, or The 15-M Movement brought on a need to rethink and conceptualise the right to protest as autonomous. While some governments and institutions have said that such a right was not guaranteed in the constitution,[81] some other voices argued that protest was the result of a combined exercise of other rights such as freedom of speech and assembly.[82] The right to protest is a key example of the government of human rights and the social loss of political power. Its recognition is not based upon the social or collective demands, but on the decision of a sovereign institutional power that decides how to interpret, recognise, and limit its application. The

[74] Jacques Rancière, *Disagreement. Politics And Philosophy* (University of Minnesota, 1999), 28.
[75] Ibid., 30.
[76] Chantal Mouffe, *On the Political*, 2005, 9.
[77] Ibid.
[78] I use this term having in mind the idea of «governmentality» coined by Foucault where he argues that "with government it is a question not of imposing law on men, but of disposing things: that is to say, of employing tactics rather than laws, and even of using laws themselves as tactics - to arrange things in such a way that, through a certain number of means, such and such ends may be achieved". Michel Foucault, "Governmentality," in *The Foucault Effect. Studies in Governmentality*, ed. Graham Burchell, Colin Gordon, and Peter Miller (The University of Chicago Press, 1991), 95.
[79] Rancière, *Momentos Políticos*, 28.
[80] David Kennedy, "The International Human Rights Movement: Part of the Problem?," *Harvard Human Rights Journal* ` 15 (2002): 113.
[81] Roberto Gargarella, "El Derecho a La Protesta Social," *Derecho Y Humanidades*, no. 12 (2006): 142.
[82] Eleonora Rabinovich et al. (eds.), " *Vamos a portarnos mal" Protesta social y libertad de expresión en América Latina*, 2011, p. 7. United Nations, *Report of the Special Representative of the Secretary-General on Human Rights Defenders*, Note by the Secretary-General to the General Assembly on its Sixty-second sesión, A/62/225, 13 August 2007, par. 96. ECtHR, *Case of Vogt v. Germany*. Application 1785/91. Judgment of 26 September 1995, par. 50-68. IACtHR, *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile*. Merits, Reparations and Costs. Judgment of May 29, 2014. Series C No. 279. par. 375. Poder Judicial de la Federación, Sentencia al Amparo Indirecto 1690/2014, Juzgado Primero de Distrito en Materia Administrativa del Primer Circuito, México, 2014, 47.

right to protest in the constitution is thus not a social or collective decision, but rather a unilateral and pragmatic choice for police.

The amplification of the sphere of the police is linked to the conceptualisation of human rights as principles. When human rights adopt a form of principles there is a process of abstraction whereby they are deprived of active social participation. Hence, human rights are now posited on an abstract border of juridification that the state can take advantage of to enforce and sustain a government of human rights. This undermines legal positivism's idea of law as an instrument that can foresee any possible social situation, and whose function is reduced to its application, because it impairs the idea of certainty in the norm as one that is now someone's else decision:[83] it is not a matter of an automatic and objective application of a constitutional standard, but a subjective decision taken by whoever holds political power.

The 'pacifying government', by means of the amplification of the sphere of police, is also dealt with under liberal constitutionalism. When the constitution explicitly recognises human rights it does so under a promise of equality; an assumption that all citizens have their rights guaranteed. Here the fusion between the real and the legal becomes clearer and the reproduction of 'doxa' better understood. The consequence of this is the reduction of the political, or the universal discussion of these rights. In Rancière's words, "equality of condition ensures the pacification of political emotions [...] it opens up a social space where the old tensions affecting the centre are resolved by division, by the proliferation of an infinity of points [...] of satisfaction of interest."[84] However, when the constitution protects rights, it also creates a social division and classification, one where it is barely possible to demand a standard when it is seemingly already protected. This phenomenon creates a division and classification in the sense that it fragments social and political cohesion. When the rights of some groups are guaranteed under the constitution, those left outside remain excluded and alone in their struggle.

The constitutionalisation of rights narrows discussion in the sense that the dominant assumption of a constitution is as a document for the limitation and control of power and not for its distribution. This de-politicisation means the transfer of socio-political power from the people to the state is a one-way street, as an expropriation. Hence, the paradox of constitutionalised human rights. On the one hand, the contemporary idea of human rights rests on the assumption that they represent a limit to the power of the state. On the other, through constitutionalisation we let the state concentrate political power that only it can manage in the terms of 'police.' Giorgio Agamben argued, "the rights won by individuals in their conflicts with central powers always simultaneously prepared a tacit but increasing inscription of individuals' lives within the state order, thus offering a new and more dreadful foundation for the very sovereign power from which they wanted to liberate themselves."[85]

The power concentrated in the constitution and the dominance of the state over it is what Agamben refers to as a 'state of exception.' This is a situation in which the 'universal' or the essential elements of social life depend on a sovereign decision by those who have the power to exercise political power.[86] This makes it impossible to discern between the legal and the real, between norms and their application, and between the rule and the exception.[87] Its decision becomes the rule; one that is outside of the legal order. For Agamben, when the application and fulfilment of human rights coincides with a sovereign decision, the 'nomos' of modern politics becomes a 'camp' where we are

[83] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press, 1998), 140.
[84] Jacques Rancière, *On the Shores of Politics* (Verso, 2006), 20.
[85] Agamben, *Homo Sacer: Sovereign Power and Bare Life*, 121.
[86] Ibid., 142.
[87] Ibid., 173–74.

all represented as 'bare lives': lives denuded from any political capacity to act and decide; lives that are reduced to a sovereign decision.[88]

Rights do not belong to us simply because we have never had them. The constitutionalisation of rights under the liberal-positivist approach is thus a fated promise that was born unfulfilled. Putting rights into a constitution and its ensuing de-politicisation demands a transfer of political power that is hardly if ever taken back. Quite simply, citizens do not realise that once constitutionalised, it will be almost impossible to have a say on how to shape new ideals about who should be protected, how rights should be enforced and guaranteed.

According to Rànciere, "de-politicisation is the oldest task of politics"[89] and the liberal-positivist approach is no exception. From constitutionalised rights we have become citizens of servitude with powerless-rights, subjects who have dissolved their power by trusting only the state to guarantee their human rights.[90] Herein lies the paradox of the constitutionalisation of rights: the empowering language in fact merely denotes the loss of our political life that now is locked and reduced to a written document that represents a depositary of hopes and naive social expectations. The following sections will discuss some proposals that aim to offer a theoretical solution to the process of de-politicisation that the constitutionalisation of rights represents.

A Particular Insight to the Constitutionalisation of Socioeconomic Rights: Fighting against Structural Violence and Dominance

The phenomena related to the processes of concentration, legitimisation, and de-politicisation derived from the constitutionalisation of rights can also be seen in terms of socioeconomic rights. Even when some countries in the Global South – especially Latin-America – have developed strong constitutions with large lists of socioeconomic rights in them, the constitutionalisation of such rights has not contributed to a tangible social transformation. On one hand, the incorporation of socioeconomic rights in the constitution has not improved the economic situation of those countries. On the other, it has not represented any particular impact for a democratic and social empowerment.

This can be explained by means of two particular arguments. First, by the existence of a hegemonic perspective that dominates the relation between constitutions and socioeconomic rights. Second, by the traditional liberal scope that informs the nature and structure of actual constitutions.

The fallacious abstraction of constitutionalised rights as principles that involve their self-implementation is reinforced by an economic neoliberal hegemony. This economic structure casts a particular effect for socioeconomic rights as it is not only the political power – the formal government – that decides on their content and limits, but also other power structures that influence the state's political and economic configuration. As a consequence, democratic inequalities and de-politicisation gaps tend to widen, as the people have no control over the economic relations and influences deployed by *de facto* powers. As once stated by Chief Justice Dumbutshena "human rights is an ideology used to achieve power. It has been used hypocritically by the middle classes, in efforts only to protect their own rights."[91] In this context, unless constitutions make a critical shift in order not only to recognise rights but to limit the scope of influence of such powers and classes,

[88] Ibid., 106. For a short explanation of Agamben's theory and some alternative critiques see Ayten Gündoğlu, "Potentialities of Human Rights: Agamben and the Narrative of Fated Necessity," *Contemporary Political Theory* 11, no. 1 (2011): 2–22.
[89] Rancière, *On the Shores of Politics*, 19.
[90] Juan Ramón Capella, "Los Ciudadanos Siervos," *Mientras Tanto* 51 (1992): 51–68.
[91] Anthony George Ravlich, *Freedom from Our Social Prisons. The Rise of Economic, Social and Cultural Rights* (Lexington Books, 2009), 9.

socioeconomic rights will continue to be just good intentions and positive social expectations for a better world.

The liberal structure that modern constitutions enshrine neither contributes to social rights implementation. In fact, the understanding of a constitution as a social and political agreement to maintain order does not leave room for an adequate conceptualisation and implementation of such rights. As agreements, constitutions tend to emerge as closed and coherent systems that protect a certain prior distribution of political power, but not an actual and needed distribution of social and symbolic goods that represent the essence of socioeconomic rights towards social transformation. Under this liberal scope, efficiency of socioeconomic rights is just a tricky promise as the genesis of liberal constitutions shows a clear opposition to the dynamic view present on socioeconomic rights as counter-hegemonic elements that demand a critical distribution of power towards a social hegemonic rupture.

As a consequence of both claims, modern constitutions exercise a structural violence[92] and dominance reinforced by a political intolerance towards groups with a disadvantaged social and political position. When recognised but not effectively implemented, socioeconomic rights just deepen the negative conditions for disadvantaged groups as their political and legal chances to claim an effective and critical transformation end up with the constitutional recognition of such demands that face a powerless destiny to be self-implemented. With this, the pacifying effect of constitutionalisation appears, by means of which social groups are deprived of other political methods to demand the improvement of their social, political, and economic positions within society.

Indigenous peoples are a good example of this situation. When their rights are constitutionalised, they lose the opportunity to decide and interpret the content and essence of such rights; they lose their voice to claim and explain the way they see and understand the world. Instead, now it is the state that decides how the reality for such peoples should be, and hence the way they should abide to it. On these terms, while for indigenous peoples 'autonomy' could mean freedom and self-determination, for government it may mean the loss of political power. While for indigenous people 'territory' could mean the base of their sustenance and a basic element of their identity, for the government it could mean an ideal space for the execution of extractive projects and economic development. In the end, indigenous people not only lose the chance to see transformed and improved their living conditions, but also the chance to be and act politically in order to contribute to a deeper social transformation.

All of this is important for the relation between the real and the legal as the constitutional fetishism of socioeconomic rights cannot transform the social reality and the particular living conditions of the people. What is needed to understand under current social constitutionalism is that the lack of effective implementation of socioeconomic rights represents not only an absence of economic resources, but instead a lack of social and political power that emerges as a condition for oppression and hence as a fertile ground for the exercise of power and violence. This does not entail just physical means but arguably worse, through social and symbolic avenues. As Pierre Bourdieu stated, "there are always, in any society, conflicts between symbolic powers that aim at imposing the vision of legitimate divisions, that is, at constructing groups."[93]

In an example, modern-day forms of workplace slavery back up this perspective. According to ILO statistics, there are over 21 million people living in modern slavery all over the world,[94] 168 million

[92] Ibid., 10.
[93] Pierre Bourdieu, "Social Space and Symbolic Power," *Sociological Theory* 7, no. 1 (1989): 14–25.
[94] ILO, *Hard to see, harder to count. Survey guidelines to estimate forced labour of adults and children*, International Labour Office, Geneva, 2012.

children trapped in child labour,[95] and almost 53 million domestic workers.[96] Although many that make up these statistics are not considered slaves in a historical sense, they face clear human rights violations such as labour and sexual exploitation by private individuals, enterprises, rebel groups, or even states. Statistically speaking, the aforementioned professions may see their employees earn more than the poverty-standard of a dollar per day but they are still considered poor in a social sense. The thinking is that they do not have the basic amount of social resources to resist and stand up against social dominance.

To constitutionalise particular rights such as the right to housing or food does not mean that those in need would have a house or the chance to have a daily meal, particularly when it is the state and its political power who decides the contents and limits of such rights. To enjoy socioeconomic rights is not only about giving and having money to satisfy basic needs, as Peter Singer proposed in his controversial essay *Famine, Affluence and Morality*.[97] Instead it is about of being free from poverty, violence, and dominance, and not just to enjoy a decent standard of living or a right to physical security, as stipulated by some other scholars such as Henry Shue.[98]

As it goes, to have socioeconomic rights is not to have written rights in the constitution. It means having the enough power to withstand dominance,[99] resisting undue social pressure and oppression from the government, from national and transnational companies and third parties, but also our peers. Two main variables appear in this definition: (1) power, understood as the social element that provides a person with moral and material resources to struggle and resist, and (2) dominance as the moral and social submission that some agents can exercise against a person due to her lack of power.

A constitution seriously engaged with socioeconomic rights is not that which just recognises them but one which promotes a decent and civilised society, whose institutions do not humiliate people under its authority and whose citizens do not humiliate each other.[100] It is a constitution that contributes to *not* reproducing the same social schemes that have socially and politically left those in more need in a vulnerable state, and to not generating more pain and suffering than what they have already faced by not being able to have the basic material resources they need to survive.

The correlative consequence of implementing this kind of constitutional duty must be to advance and promote the poor in taking active part in the process of social transformation. As has been argued so far, fighting dominance through socioeconomic rights by means of distributing power is the same as granting access to poor people on the same symbolic options and positions that saw them take their place within societies. On Bourdieu's terms, it is the same as conferring impoverished people equal access to the 'social field' by changing the rules of social practices between the empowered and un-empowered.[101] However, achieving this goal must require changing

[95] ILO, *World Report on Child Labour 2015 Paving the way to decent work for young people,* International Labour Office, Geneva, 2015.
[96] ILO, *Domestic workers across the world: Global and regional statistics and the extent of legal protection*, International Labour Office, Geneva, 2013.
[97] Peter Singer, "Famine, Affluence, and Morality," *Philosophy and Public Affairs* 1, no. 3 (1972): 229–43.
[98] Henry Shue, *Basic Rights* (Princeton University Press, 1980), 18–20.
[99] The work developed by Enrique Dussel on *The Kingdom of God and the Poor* gives a deeper view of the relation between poverty and dominance. For Dussel, "Poverty is a dialectical concept, embracing several terms which mutually define each other. Just as there is no father without a child, and the child is defined by its father, so the poor are defined by the rich and vice versa. Poverty is in no way a pure case of someone lacking something. There is no scarcity without someone having taken the something away from the other, oppressed person". Enrique Dussel, "The Kingdom of God and the Poor," *International Review of Mission* 68, no. 270 (1978): 115–30.
[100] Avishai Margalit, *The Decent Society* (Harvard University Press, 1998), 15.
[101] Pierre Bourdieu, *Distinction: A Social Critique of the Judgement of Taste* (Harvard University Press, 1984), 170.

individual practices and beliefs. This entails modifying the common 'habitus'[102] in which we live, or simply put, our individual practices.

In the end, the aim of having socioeconomic rights in the constitution must be to achieve a real and effective social transformation by means of a deep hegemonic rupture. The goal is to create better and more just societies to reshape our local and global social realities. However, as Judith Shklar posited, "it is vain to hope that the simple effort to establish just institutions can create a 'modus vivendi', let alone build a shared sense of political right."[103] For that reason, we should start to focus our attention not only on the way we build institutions but in the way we change the dominant rules that govern our societies. Bringing back Chief Justice Dumbutshena, "let us begin with ourselves, we the people, we who are sometimes denied our rights. Let us take up the cause of human rights and by force of our determination governments will follow behind us. It is what we believe that matters. Changes and revolutions start in the hearts of men."[104]

This thinking does not pretend to offer any magical and immediate solutions to poverty, dominance, structural violence, and de-politicisation. Social transformation involves deep cultural and historical changes that can cross over generations. The necessary step however is the first one. By modifying the ways in which power is distributed in societies it would be possible to empower those 'on the bottom' and perhaps contribute to such a change, of an insurgent cosmopolitism that gives the most needy the standing and social power to fight against dominant and unjust local and global institutions[105].

4. The Need to Move On: Towards a Critical, Radical, and Transformative Constitutionalism

The threat to rights under liberal constitutionalism is the process of de-politicisation. Human rights are not just legal norms and political principles but social elements of power useful for the defence and practice of collective values. Human rights, then, only matter and mean something when they represent practical and real elements for the protection against social, legal, and political threats with all the possible consequences and practices that those phenomena may imply.[106]

However, de-politicisation makes such a task a difficult feat. Under current constitutional thinking, human rights are distant aspirational principles with little effect on social and political transformation. Latin America is a prime example of this. After several processes of constitutional transformation and despite democratic institutions, human rights violations are still committed and those very rights become an empty and useless discourse.

One possible way to address this problem could be by revisiting the role of legal positivism and the dominant idea of a constitution. Arguably, a normative perspective of human rights that is detached from social and political considerations does not secure human rights realisation. If a constitution can help to transform society, it cannot do so only by means of legal commands and discourses. Instead, an effective relationship between the constitution and human rights demands its

[102] According to Pierre Bourdieu the habitus is "both the generative principle of objectively classifiable judgements and the system of classification of these practices. It is in the relationship between the two capacities which define the habitus; the capacity to produce classifiable practices and Works, and the capacity to differentiate and appreciate these practices and products, that represented social world, i.e., the space of life-styles, is constituted". He continues, "the habitus is necessity internalized and converts into a disposition that generates meaningful practices and meaning-giving perceptions". Ibid.
[103] Judith Shklar, "Obligation, Loyalty, Exile," *Political Theory* 21, no. 2 (1993): 181.
[104] "Commonwealth Africa Human Rights Conference," *Journal of African Law* 36, no. 1 (1992): 23.
[105] Boaventura De Sousa Santos, "Globalizations," *Theory, Culture & Society* 23, no. 2–3 (2006): 397.
[106] Upendra Baxi, "An Age of Human Rights?," in *The Future of Human Rights*, 2008, 1.

involvement with and transformation of social and political structures.[107] There is a need for a different model of constitutionalism, one which is dispositive for the distribution and exercise of political and social power towards the construction and implementation of human rights. This analysis will draw on the concept of radical democracy and the social construction of rights as essential elements for the conceptualisation of 'critical constitutionalism.'[108]

'Critical constitutionalism' arises as a counter-hegemonic theory and among its goals is to advance the dynamic scope of the constitution. This school of thought rejects the idea of visualising the constitution as a set of foundational but programmatic principles of social, legal, and political order. It opposes essentialist ideas about the content and holders of human rights in terms of finished, general, and universal values, identities, and subjectivities. Instead, critical constitutionalism assumes conflict as something inherent to the existence of a political community, and hence the need to develop different mechanisms to achieve an equilibrium but never its complete pacification. Critical constitutionalism is emancipatory as it does not uphold the idea of a complete and a statist accumulation of political power, but rather defends the idea of the constant redistribution of such power as one of the conditions for the existence of constitutional order.

The Theory of Critical Constitutionalism: An Internal Re-examination

If the problem of constitutionalism is de-politicisation, then, for critical constitutionalism the answer would be the need to re-politicise the constitution. In other words, to give it back its content and function for social and critical transformation.[109] This approach advocates re-politicisation as the cornerstone of the critique of the liberal-positivist constitution as an expropriation and accumulation of political power.[110] Thus, critical constitutionalism is an internal re-examination of a constitution as a dispositive instrument for the management of political power. As Carlos De Cabo pointed out, critical constitutionalism is not just about criticising constitutions. Instead, it is about setting in constitutions a critical element of reality towards a complete social transformation.[111]

Re-politicisation means politicising the 'universal,' reassuming the value of our 'bare life,'[112] and recovering the political power of the sovereign. It is a complete "transformation of the entire political horizon."[113] Critical constitutionalism not only deconstructs the design and structure of the constitution but also its functionality for social and political concerns. For human rights and the constitution, re-politicisation implies the chance to understand a constitution as a never-ending and dynamic scenario for the exercising of political power between different political subjectivities that coexist in a state of permanent conflict. Also, it involves the chance to express one's own views as to the content, practice, and guarantee of human rights. Critical constitutionalism and re-politicisation's key theories are as follows:

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[107] Malak El Chichini Poppovic and Oscar Vilhena Vieira, "Reflections on the International Human Rights Movement in the 21st Century: Only the Answers Change," *Sur* 11, no. 20 (2014): 21.

[108] In academia, there are some other terms such as «new constitutionalism» based on some critical perspectives as they "do not take institutions and social power relations for granted but call them into question with a view of revealing the conditions for their radical transformation". Stephen Gill and A. Claire Cutler, *New Constitutionalism and World Order* (Cambridge University Press, 2014), 2–3. However, those perspectives can be considered as external critiques to constitutions and constitutionalism. Instead, in this paper I refer to critical constitutionalism as an internal critique related to the nature, essence, structure and fuction of a constitution. For that reason, and even when both terms can find some identities, for the aims of this paper they should not be confused.

[109] Carlos De Cabo Martín, *Pensamiento Crítico, Constitucionalismo Crítico* (Trotta, 2014), 71.

[110] Carlos De Cabo Martín, "Propuesta Para Un Constitucionalismo Crítico," *Revista de Derecho Constitucional Europeo* 10, no. 19 (2013): 393.

[111] Ibid., 394.

[112] Agamben, *Homo Sacer: Sovereign Power and Bare Life*, 173.

[113] Ibid., 144.

A constitution is not a programmatic plan. To re-politicise a constitution, it must not be understood as "a normative plan to which society should be developed."[114] A constitution is not a prescriptive but a descriptive and constructive instrument of social and political life. To reject the programmatic idea of a constitution is also to deny the fusion between the real and the legal; to understand that its essence and acceptance cannot be based on rational and coherent submission, but rather on its practical and social functionality. This position has particular consequences for constitutionalism and human rights. It demands a real and dynamic relationship between the two.[115] Therefore, constitutionalism should be a matter of real and conflictive life,[116] and not merely the expression of an abstract and performative rationalism on the political and legal fields.[117] Under this scope, human rights are not ornamental elements posited in a world they cannot transform.[118] Instead they are elements of social practice and re-appropriation; particular social and practicable values that should be embraced by different subjectivities in a plural political and legal landscape.

A constitution fosters social empowerment. For critical constitutionalism a constitution is not only a legal norm, but also a political space for social and ideological interaction. For Hannah Arendt it is like the "wall around the city, [...] a definite space secured and structure built where all subsequent actions could take place, the space being the public realm of the *polls* and its structure the law."[119] Social and collective empowerment can only be achieved by means of distribution of power. As a consequence, for critical constitutionalism a constitution cannot continue to be understood as a tool for limiting political power between institutions, but rather as a mechanism for its distribution between institutions, society, individuals, and groups. A constitution is then a dispositive instrument for the control and not for the limitation or restraint[120] of political and social power. In order to do that, critical constitutionalism calls for the recognition of such groups and individuals and 'the people' as valid political subjects to transform the political scenario that a constitution encompasses. As Judith Shklar argued, "control of unequally divided political power [...] it is not a sufficient condition, but a necessary prerequisite. Socially that also means a dispersion of power among a plurality of politically empowered groups."[121]

A constitution is a space where political conflict takes place. For critical constitutionalism a constitution is more than a legal document. It is a political element for the subsistence and reproduction of political life in terms of conflict: "the principle of the dynamic emergence of political unity."[122] In Bourdieu's words, it is an "autonomous social microcosm inside the surrounding social world, within which a particular game is played, the game of legitimate politics."[123] This idea of the constitution is a rejection of the liberal idea of agreement. To assume that there is a conflict in the constitution is to admit that it is a field for the constant interaction and recognition of power relations between different groups that are able to demand and express themselves.[124] As an open and plural field, a constitution cannot totally pacify such conflict, nor is that its aim; it can only work as a vehicle for the equilibrium of those power relations without trying to annihilate or silence them. As pacifying political conflict is not its main objective, a constitution is not concerned with resolving problems

[114] Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization*, 28.
[115] De Cabo Martín, "Propuesta Para Un Constitucionalismo Crítico," 77.
[116] Panu Minkkinen, "Political Constitutionalism versus Political Constitutional Theory: Law, Power, and Politics," *International Journal of Constitutional Law* 11, no. 3 (2013): 592.
[117] Carlos De Cabo Martín, "Constitución Y República," in *IV Congreso Sobre Teoría Y Práctica Del Poder Constituyente. Los Contenidos de La Constitución Democrática* (Universidad de Valencia, 2015), https://www.youtube.com/watch?v=3TGvCnsT8MI.
[118] Samuel Moyn, "The Future of Human Rights," *Sur* 11, no. 20 (2014): 61.
[119] Hannah Arendt, *The Human Condition* (The University of Chicago Press, 1958), 194. For a brillant explanation of Arendt's theory on constitutionalism see Jeremy Waldron, "Arendt's Constitutional Politics," in *The Cambridge Companion to Hannah Arendt*, 2006, 201–19.
[120] Waldron, "Constitutionalism: A Skeptical View," 15.
[121] Judith Shklar, "The Liberalism of Fear," in *Liberalism and the Moral Life*, vol. 27, 1989, 21–38.
[122] Schmitt, *Constitutional Theory*, 61.
[123] Bourdieu, *On the State : Lectures at the Collège De France, 1989-1992.*, 98.
[124] Ibid., 192.

and reaching a final agreement, nor is it about delineating the abstract principles that should resolve those problems. It is an act of coordination for the regulation of "long-term patterns of political and social interaction."[125]

A constitution enables the coexistence of plural identities and subjectivities. Critical constitutionalism is in essence pluralistic. As a field of conflict, a constitution needs to recognise and promote the coexistence and participation of different identities within the social and political backgrounds. The idea is that a constitution must include and recognise different subjectivities to avoid the existence of extra-system groups, individuals, or communities.[126] However, to understand the concept of pluralism is to recognise the "end of a substantive idea of the good life"[127] and to renounce the belief that a constitution can and should dictate and impose a unique perspective of how communities and individuals should live their lives. As noted, a concept of equality comes to the fore here. However, equality must not be understood as homogenisation. In fact, one of the main endeavours of a constitution is to enliven political conflict and to calibrate the scale of equality that all subjectivities should enjoy. Briefly, equality under critical constitutionalism is not a goal, but an element of constant verification and renegotiation.[128]

A constitution is an element for regular transformation. With the enshrining of constant interaction and deliberation in the constitution where many voices can be heard, it becomes the vehicle to a different and improved society.[129] A re-politicised constitution is always open to change. It gives the people the chance to decide on the way they want to lead their political and social life and hence to agree on any particular changes to social, institutional, legal, or political structures. For Upendra Baxi, transformative constitutionalism "signifies not just an orderly enhancement of governance powers directed to fostering national 'development', but rather a redemptive potential construed in terms of effective implementation of human rights."[130] With this, the transformative essence of a constitution is deeply related to the existence of human rights, and especially with their exercise and practice. The constitutional possibilities for change do not just rest on its content but rather on its appropriation and social identification. A constitution is not a relic, it is a mirror on society and allows it to see necessary changes.

Critical constitutionalism as a Political Method: A Path for Human Rights Practice

As a political method, critical constitutionalism is and must be democratic. It represents both a balance of the conflict that takes places within the constitution and also a mechanism for plural recognition and inclusion. In fact, the balanced distribution of political power and the social empowerment that critical constitutionalism promotes can only be achieved by means of a plural, inclusive and respectful public deliberation about the 'universal.'

In essence, re-politicising is democratising. It is assuming the possibility of a wide and inclusive process of deliberation between different individuals and communities that embrace particular, and even contrasting, subjectivities. However, when critical constitutionalism advocates democratic process as a method it is not precisely defending representative democracy as it may contribute to a de-politicisation process. What can be seen in different regions around the world is that representative democracy limits the social expression and articulation of human rights when representatives embrace particular interests rather than collective ones. As a consequence, critical constitutionalism's assumption is based on the idea that representative democracy may not be

[125] Russell Hardin, *Liberalism, Constitutionalism, and Democracy*, 1999, 87–88.
[126] De Cabo Martín, "Propuesta Para Un Constitucionalismo Crítico," 397.
[127] Chantal Mouffe, *The Democratic Paradox* (Verso, 2000), 18.
[128] Rancière, *Disagreement. Politics And Philosophy*.
[129] De Cabo Martín, *Pensamiento Crítico, Constitucionalismo Crítico*, 108.
[130] Upendra Baxi, "Preliminary Notes on Transformative Constitutional," 2006, 30.

enough of a mechanism for the expression and materialisation of social and political claims[131] as it may ignore or distort the demands of excluded groups. Thus, critical constitutionalism resembles more a different and more inclusive conception of democracy: "high-intensity democracy"[132] in Boaventura's terms and as "radical democracy"[133] with Chantal Mouffe.

High-intensity democracy and radical democracy share common ground on a critical mission. They are both based on the premise that democracy is conformed to and exercised by multiple and coexisting power relations.[134] High-intensity democracy is comprised of the idea of establishing shared authority in a social context through a counter-hegemonic combination of representative and participative mechanisms,[135] something that Boaventura calls "demo-diversity",[136] and which is concerned with the idea of democratising democracy.[137] As the thinking goes, high-intensity democracy represents the external layer of democracy for critical constitutionalism. On the other hand, radical democracy represents the internal layer of democracy as it argues for the establishment of a "set of institutions through which domination and violence can be limited and contested."[138] Radical democracy is more concerned with the way social subjectivities and identities are constructed and articulated in a pluralistic society where conflict is indispensable. It assumes and embraces the idea of democracy as a system where an agonist conflict takes place. Instead of trying to eliminate the political conflict in the sense of Carl Schmitt's proposal of the binomial "friend/enemy",[139] the radical approach conceptualises democracy as a relation between "adversaries" endowed with a legitimate existence that should be tolerated[140] in order "to constitute forms of power more compatible with democratic values."[141] This internal layer of democracy fits with the idea of a constitution as a field of political conflict from different groups that deserve the same respect, inclusion, and consideration for democratic debate; subjectivities that are always under construction and never ended.

Critical constitutionalism has two particular considerations for the constitutionalisation of human rights. First, it is related to the possibilities of people getting involved in a political sense with a constitution. Second, it relates to a social construction of human rights that posits them not as abstract and untouchable principles, but as useful social tools for peaceful coexistence without universalisation and homogenisation.

A political involvement with the constitution. As a political method, critical constitutionalism is a form of weak constitutionalism. It opposes the idea that a constitution is a set of rigid dispositions that should perform the regulation of the political, social, and legal life of a community. In Colón-Ríos' words, this weak constitutionalism "requires constitutional regimes to provide an opening, a means of egress, for constituent power to manifest from time to time."[142] This approach offers a particular perspective to the process of de-politicisation in the sense that it tries to recognise people

[131] Diego León Pérez and Gabriel Delacoste, "'Hay Que Empezar de Nuevo'. Entrevista Con Boaventura de Sousa.," *La Diaria*, May 17, 2016.
[132] Boaventura De Sousa Santos, *The Rise of the Global Left. The World Social Forum and Beyond* (Zed Books, 2006), 41–42.
[133] Chantal Mouffe, *Dimensions of Radical Democracy* (Verso, 1992), 2–4.
[134] Mouffe, *The Democratic Paradox*, 32. Boaventura De Sousa Santos, *Democracia de Alta Intensidad. Apuntes Para Democratizar La Democracia* (Corte Nacional Electoral de la República de Bolivia, 2004), 61.
[135] Boaventura De Sousa Santos, *The World Social Forum: A User's Manual*, 2004, 109, http://www.ces.uc.pt/bss/documentos/fsm_eng.pdf.
[136] Boaventura De Sousa Santos, "Para Una Democracia de Alta Intensidad," in *Renovar La Teoría Crítica Y Reinventar La Emancipación Social* (CLACSO, 2006), 78.
[137] Boaventura De Sousa Santos, *Democratizing Democracy: Beyond the Liberal Democratic Canon* (Verso, 2005).
[138] Mouffe, *The Democratic Paradox*, 22.
[139] Carl Schmitt, *The Concept of the Political* (The University of Chicago Press, 1996), 26–30.
[140] Chantal Mouffe, *The Return of the Political* (Verso, 1993), 4.
[141] Mouffe, *The Democratic Paradox*, 99–100.
[142] Joel I. Colón-Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (Routledge, 2012), 2.

and its subjectivities as valid political actors able to make decisions on matters affecting their social lives. It claims to transfer back the sovereign power to those who had it from the very beginning. To do that, weak constitutionalism demands an involvement with a 'second dimension' of constitutional democracy.[143] This is not only at the level of daily governance such as elections or institutional arrangements like police, but at the level of fundamental laws such as human rights and the distribution of political power. The latter represents the chance for "the exercise of the constituent power of the people"[144] meaning that such power can be exercised on a permanent basis "through highly participatory episodes of constitutional changes."[145] In contrast to other dominant approaches to constitutions and democracy, this rejects the idea of an absolute legal certainty as it denies a completely rational constitution enshrining canonical values. In fact, critical constitutionalism in its weak characterisation is a "constitutionalism of uncertainty,"[146] always reinventing itself.

A social construction of human rights. The involvement of the second dimension of democracy is deeply related to the conceptualisation of human rights as fundamental laws. It concerns the possible participation in the political; the most important area for fundamental decisions to be made. This perspective assumes that human rights cannot be abstract principles, but social elements that must be signified and re-signified through social relations respectful of plural subjectivities and identities. To say that human rights can be socially construed necessarily presupposes that they have a diverse structure different from the dominant approach of legal principles espoused by authors like Dworkin, Ferrajoli, or Alexy. Instead, for critical constitutionalism human rights may be understood by what Ernesto Laclau called "empty signifiers".[147] For Laclau these are discursive practices that should articulate the different social claims and demands towards the protection and re-signification of particular elements of the 'universal' in order to protect a collective subjectivity endowed with the sovereign power to decide who are 'the people.' To consider human rights as empty signifiers also reinforces their political and emancipatory essence as social conceptualisation is openly against a process of homogenisation. Critical constitutionalism is about the inclusion of different communities and identities and the existence of agonistic conflict. As such, the social construction of human rights as empty signifiers that are able to bring together a chain of social demands made by plural subjectivities paves the way for a more inclusive articulation and operationalisation of such rights. To sum up, the empty signifiers assumption asserts that the fundamentals of human rights cannot rest on theological or metaphysical grounds alone, but rather through social interactions.[148]

[143] Joel I. Colón-Ríos, "The Second Dimension of Democracy: The People and Their Constitution," *Victoria University of Wellington Legal Research Papers* 1, no. 4 (2011): 12–18; Colón-Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power*, 7.
[144] Ibid., 6–7.
[145] Ibid., 7.
[146] De Cabo Martín, *Pensamiento Crítico, Constitucionalismo Crítico*, 111.
[147] Ernesto Laclau, "Populism: What's in a Name," in *Populism and the Mirror of Democracy*, ed. Francisco Panizza (Verso, 2005), 38–43.
[148] Benjamin Gregg, *Human Rights as Social Construction* (Cambridge University Press, 2011).

Conclusions

Constitutions represent a fundamental dispositive instrument for social and political life. They enshrine the most relevant elements for a collective coexistence and among these components is human rights as the essential glue holding together constitutional architecture. However, neither constitutions nor human rights can be understood as a closed and ended project. If constitutionalism aims to foster the recognition and guarantee of human rights, then a purely legal understanding of a constitution is not enough. A socially transformative and a better-balanced distribution of power between political actors cannot be achieved by printing commands in the constitution. On the contrary, human rights and constitutions are, before everything else, political. Their main function is to consolidate people and to promote a collective identity of recognition and dialogue in a spectrum of plural identities. Hence, in contrast to the liberal-positivist dominant approach, a constitution is not an order for pacification but for problematisation.

De-politicisation endangers the usefulness of constitutions and human rights as it impedes their social appropriation and exercise. When both elements are seen as the top components of a hierarchical legal order they lose their practical and emancipatory essence. They became more governmental and less social. To avoid such loss, human rights must be 'de-principleised' and demystified. This is consistent with the effects of de-politicisation on democracy. Under the socio-political features of contemporary societies, democracy cannot be understood as a system closed to social discussion and deliberation, where power is seized by a formal constitution. In such a case democracy would be inert, useless for social evolution. Instead, what critical constitutionalism demands is the establishment of conditions for the opening up of democracy in substantive and procedural forms. It requires that a plurality of subjectivities can be constructed and exercised on the basis of respect and inclusion, rejecting any attempt towards their homogenisation. At the same time, such subjectivities should be allowed to participate under equal conditions of representation. Bringing these schools of thought together, the de-principleisation of human rights and the widening of democracy mean the re-politicisation of constitutionalism whereby a constitution works for the people and not for the state or legal order. If a constitution is meant for legitimation, then that should be not in aid of the legal order but for the people and their chance to transform their social, political, and legal context.

The loss of political power by 'the people' exemplified by the constitutionalisation of human rights offers an opportunity for a re-examination of the current design of constitutionalism. The understanding of constitutionalism as presented in this analysis assumes that the power of the constituent lies with people and that such power be allowed to emerge from time to time. Nevertheless, in order to make such a project a viable and functional one, the fear of democratic participation must be abandoned. We must transcend the majoritarian evil that, it is said, endangers minorities' rights. Constitutions are not only for the limitation of political power. Instead, they must serve to redistribute that power so as to not merely limit majoritarian positions, but also for empowering minority groups in order to achieve a balanced social and political milieu.

Constitutions and constitutionalism should not be understood anymore as a battle between victors and losers, between weakest and strongest. More than anything, they are political and legal bridges that may help to close social gaps that threaten human rights. Otherwise, social transformation cannot be expected just by the existence of a constitution. Transformation is a collective action and a task for all and it depends unavoidably on the social appropriation of the constitution and human rights, on the collective involvement with the political essentials of a constitution.

The project of critical constitutionalism, concerned with the effective implementation of human rights must be understood, in this sense. It is an inter-disciplinary, holistic, and democratic operation for the creation of a collective, empowered, and socio-political subject that must be allowed to take part in pluralistic and unceasing political discussion. Only then might the people be truly allowed to

talk and decide for themselves. It may be the only chance for their authentic political existence and for a deep social transformation.

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