

# “Positive” and “Negative” Rights: Shortcomings of the Church’s Social Teaching

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**Abstract:** After taking a somewhat biased and rather paternalistic approach towards human rights, the official teaching of the Catholic Church hurriedly converted to proclaiming such rights with great conviction, although in a much broader but less precise way. Nevertheless, there was a risk of adding error to error: the past “error” which did not consider the metaphysical reach of individuals’ natural rights (especially in terms of the duty to resist growing political power) and the present “error” which is broadly based on a way of thinking that tries to match needs with rights (very broad legitimization of the authority of the State but seriously compromising individual liberties). Unfortunately, the Social Doctrine of the Church, according to Popes, demonstrates the lack of the realism and the doctrine of natural law that the libertarian tradition has expressed to guarantee individual natural rights and freedoms.

**Keywords:** Human rights, natural rights, Social Doctrine of the Catholic Church, individual liberties, libertarian tradition.

As reference to natural law has attenuated in the course of history, the tendency to think that the only surviving right is a positive one has gained ground. Thus, “human rights” have increasingly lost their negative character (as rights that must *not* be violated) and have been more and more broadly interpreted. It is by no means a coincidence that the growing interest in social justice runs parallel to the increasingly loud call for human rights – but as rights that are understood in a broad and inclusive way.

Following the tendency to extend an increasing number of types of rights to each individual, in the texts of the Social Doctrine of the Catholic Church (see Justice and Peace 2004:n. 34; CCC 1992:n. 1807s), we rarely encounter the question of “false rights” (see *Iustitia et Pax* 1974:n. 34). In the ecclesiastical teachings – especially those of the past, which were often still wary of human rights – the most usual way of avoiding the simple recourse to rights was to evoke – with a good dose of paternalism – the much more recommendable “duties” approach, even though these still risked being obscured by “rights” which were much more acceptable. An example of this is to be found in the words of Pope Pius X (1903-1914) in a significant letter to the French bishops, directing them to “preach fearlessly their duties to the powerful and to the lowly [...]. The social question will be much nearer a solution when all those concerned, less demanding as regards their respective rights, shall fulfill their duties more

exactly” (Pius X 1910). His message is not very convincing since it seems to admit – albeit only indirectly – that there is an irreconcilable conflict between rights and duties. If we are not clear about “what we should receive”, inevitably rights must be placed in relation to “what we should give”. Skirting the real question of denouncing false rights (quite simply inadmissible) and identifying genuine rights (intangible and absolute), the Magisterium seems constrained and condemned to link rights and duties, constantly trying to counterbalance them. Indeed, the call not to neglect this link between rights and duties pervades the social teaching of the Church to this day. The “rights as abilities” (*facultas*) and the “duties as obligations” (*obligatio*) are so inseparable that only the observance of the *obligatio* can require the recognition of the *facultas* (see John XXIII 1963:n. 568s.; *Iustitia et Pax* 1974:n 3-4).

From a different point of view, for example, that stemming from the libertarian tradition, this complex balance between rights and duties is, quite simply, meaningless, as the call not to abuse one’s own rights. In this context, it is worth recalling the American libertarian Murray N. Rothbard (1926-1995), an economist and social philosopher, who thought that rights were extremely clear, precise and absolute; as such, they need no compensation or mitigation. They are no less intangible because they do not need to be tempered by duties and they are no less inviolable for fear that the holder of rights can enjoy them to the full. Unlike ecclesiastical teaching, libertarian theory maintains that the only difference to consider and explain is the *essential* difference between genuine and false rights.

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## REAL RIGHTS AND FALSE RIGHTS

First, we must examine and explain what the terms “positive” and “negative” mean in the field of human rights. This recurrent counter position was adopted mainly to distinguish between the different concepts of liberty. It has its roots in the classical difference suggested by Benjamin Constant (1767-1830) (1982:219-239) to distinguish between the liberty of the ancients and the liberty of the moderns, where the liberty of the ancients is described as part of belonging to the *res-publica* (therefore liberty “to” participate), while the liberty of the moderns is characterized by the absence of constraints (therefore liberty “from” obligations). Put even more simply, Isaiah Berlin (1909-1997) translated the liberty “to” and the liberty “from” as positive and negative liberties (see Berlin 1969). Liberty is positive when one has been freed from constraints. Thus, liberty is freedom from need, ignorance, and so on. By contrast, negative liberty is less ideal and more practical because it only depends on being able to exercise one’s own powers and use one’s own possessions.

The impossibility of holding both positive and negative liberties (see Lottieri 2001:168) – an experiment attempted by the author John Rawls – is confirmed by the liberal and libertarian theory according to which any type of liberty that is not strictly negative will always lead to a form of obligation imposed on others. The positive liberty of some people will always negate the liberty of others. For this reason, Rothbard was unable to move away from the basic definition of liberty provided by Locke (2003:245) in his *Second Treatise of Government* (1690), i.e. “liberty is to be free from restraint and violence from others”.

Consistent with the recognition of social justice, which necessarily implies a positive dimension to justice that does not only (and negatively) strive to balance individual relationships and does not only give “to each his own”, the Church’s teaching has acquired a positive concept of rights. As for other important questions, it is the same where rights are concerned – what differentiates the Social Doctrine of the Church from liberalism in general, and from radical liberalism in particular, is a “broad and ideal conception”. The broad concept of the common good and justice is therefore accompanied by a broad conception of human rights themselves. According to libertarian theory, while the limited concept of these rights is the condition of genuine liberty, the positive notion of rights – also expressed by the Magisterium – demonstrates the

distance between the two approaches. The most immediately important question is to understand which rights are genuine and which are false and, further, which rights spring from the nature of man and which, instead, are accorded to individuals, fairly arbitrarily, by the fairly acceptable extension of the functions of public authority. According to the concept of positive rights ruled out by libertarianism and embraced by the Church, the call for a right cannot ignore the entity (generally the State) that must guarantee it. Such a right makes a positive demand because it asks for something, therefore every conceded right must be matched by a duty to be performed by somebody else. Therefore, all positive rights constitute costs that someone else must bear. Within the logic of the rights formulated by the Church, with the exception of the right to life, there are no rights that do not entail obligations for someone else or costs to be borne by some part of society. On the contrary, the negative concept of rights, belonging to the liberal tradition, does not allow a right to impose a duty on society (or on the State); this concept refuses a positive duty resulting from the concession of a right to others.

Although a right can be defined as “what is due” to someone, the difference between the positive and the negative concept of rights cannot be reconciled: is it a right to receive some goods and services or is it a right not to be limited in exercising one’s own liberty? In the same way as for liberty – to which we do in fact recognize a positive and a negative interpretation – for rights too, it is one thing to support the claim of some for guaranteed services (health, education, and employment for example), but it is quite another to maintain that all people have the right not to have their rights (life, liberty, and property) limited. Rights considered as negative – the only ones recognized by the liberal tradition – coincide, therefore, with the liberty to use own resources, obviously without harming anyone else, without being improperly obstructed. So, we could say that in a liberal (or libertarian) sense, the natural rights of each person consist in not suffering any unjustified and, therefore, violent interference from others. Human rights should not be imply *doing* something positively, but rather not *suffering* any coercion negatively.

Rothbard very much appreciated the writings of the Jesuit James A. Sadowsky<sup>1</sup> from whom he wanted to

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<sup>1</sup>Father James A. Sadowsky (1923-2012) professor at the Fordham University of New York. Rothbard (1998:XLVI) solemnly thanked the Jesuit Sadowsky.

take the definition of right. Father Sadowsky's (1974:120-121) view of the rights belonging to an individual was in line with his liberal outlook: "when we say that one has the right to do certain things we mean this and only this, that it would be immoral for another, alone or in combination, to stop him from doing this by the use of physical force or the threat thereof". It should be understood that this kind of definition does not necessarily imply a moral use of one's *personal* liberty or property; on the contrary, it means that any kind of interference with the liberty or property of others will be judged immoral. Quoting Sadowsky, Rothbard said that the Jesuit's definition undoubtedly created the distinction between genuine individual rights (recognized as intangible) and the way in which they can be morally or immorally exercised. But if this second aspect is "a question of personal ethics", it is the work of political philosophy to deal with the licitness of relations between people within society. It is in this light that Rothbard (1998:24) wrote his introduction to *The Ethics of Liberty*, making it clear that it is "a man's right to do whatever he wishes with his person; it is his right not to be molested or interfered with by violence from exercising that right".

## THE LOCKEAN TRIAD

Rothbard placed himself within the liberal concept of rights with John Locke (1632-1704) as its main point of reference; in consequence the libertarian view could not but recognize in the English philosopher the great and systematic inventor of the "libertarian, individualistic, natural-rights theory" (Rothbard 1998:24). A crucial reference is the principle of self-ownership from which Locke constructs, in a simple way, his liberal perspective: observing the nature of things, the English philosopher takes the view that man is a proprietor and, by virtue of this, has a property in his own person and in the proceeds of his work. From these basic assumptions, Locke considers society as something that tries to ensure the freedom that the institutions can and must guarantee, based on a consensus that can always be revoked. There is an obvious distance from Thomas Hobbes (1588-1679), who thought that power—which should prevent the *bellum omnium contra omnes*—requires, on the contrary, the sacrifice of individual liberty; whereas for Locke, individual liberty is precisely what should be safeguarded above all else and he observed that men join together in institutions to protect it. This positive concept of society (and of the "state of nature"), and

the idea that basic individual basic liberties are the only reason to justify a political pact (which would nevertheless be completely subordinated to individual liberty), led Locke's work to be considered to be, "On the Edge of Anarchy" (see Simmons 1995).

Rothbard would have been very proud of this allusion to anarchy for the same reasons that pushed the entire liberal tradition, including its libertarian and anarcho-capitalist components, to look at Locke, the philosopher of anti-absolutism. In Locke, in fact, the inalienable rights of individuals are based on human nature which, by recognizing each individual as the proprietor of himself, can be traced back to the right to life, liberty and property, in an elementary and basic way. As regards the subject of paternal power and royal power, as early as in the "First Treatise of Government" Locke had hinted at what would later be called the "Locke an Triad" (life, liberty, property) (Locke 2003:147,256). It was, however, only in the "Second Treatise" that the English philosopher dealt more fully with the topic of "political or civil society". Locke (2003:147,256) argued that man is born "as has been proved, with a title to perfect freedom and an uncontrolled enjoyment of all the rights and privileges of the law of Nature" and, therefore, every man is equal to any other man. So, "equally with any other man," he has – by nature – "a power to preserve his property" because it belongs to those essential elements of the nature of man that can never be violated, i.e. "life, liberty and property", which must be defended "against the injuries and attempts of other men".

The Locke an Triad should clarify the dividing line between real rights and false rights. In an age when rights proliferate, in the wake of Locke, Rothbard's considerations, on the distance separating real and false rights is very clear and allows no misunderstanding. A false right must necessarily involve an invasion of another individual's personal space and some form of coercion, whereas a real right simply demonstrates the immorality of any imposition on others and the unlawfulness of oppressing them in any way. Therefore, in practice, real rights are limited to the right to life, liberty and property. Indeed, one could even say - as did the singular Russian-American essay writer Ayn Rand (1905-1982)—that the three real rights can be summed up in one fundamental right: the right of each to their own life, considering that "the right to life is the source of all rights – and the right to property is their only implementation" (Rand 1964:90).

## SOME BASIC PRINCIPLES THAT VALIDATE RIGHTS

### The Non-Aggression Principle

The question of rights revolves around the concepts of liberty, the individual, society; relationships with the State and, therefore, the Welfare State. It is a basic political and social theme and this is why the question of rights is of fundamental importance for Rothbard and his philosophy of non-aggression. In fact, for Rothbard, the question of natural rights coincides with the principle of non-violence. The only authentic rights are those that are consistent with the effects of the axiom of non-aggression<sup>2</sup>. When he describes the libertarian creed, he starts by defining it as “the absolute right of every man to the ownership of his own body” (or of himself), then as the “equally absolute right to own and therefore to control the material resources that he has found and transformed” and, therefore, as the absolute right “to exchange or give away” what he possesses (Rothbard 2006:85). Therefore the libertarian creed contains, no less explicitly, the three rights that Locke had stated in the form of life, liberty, and property.

For Rothbard, any other right can only be false because it necessarily requires violating someone else's liberty. If real rights are only those arising from the opposite of coercion, false rights are those that are exercised by removing something from others, thereby contravening the principle of non-aggression and exerting some form of violence. Rand (1964:92) explained it thus, “Any alleged ‘right’ of one man, which necessitates the violation of the rights of another, is not and cannot be a right”. This could be the first principle for libertarians to apply in order to identify a real right: a right can never be regarded as authentic if it involves coercion or the violation of the fundamental rights of another person. The principle of non-aggression implies the recognition of something that *must absolutely not* be violated and, at the same time, something that *absolutely must* be guaranteed. Reiterating this axiom, Rothbard (2006:164) argued that no right could ever be established by contradicting the ethical principle according to which no man can be dispossessed of his life or of his property. In his opinion, the libertarian ‘right’ to self-ownership does not require “the coercion of one set of people to provide

such a ‘right’ for another set. Every man can enjoy the right of self-ownership, without special coercion upon anyone”.

### The Universality Principle

Right, which come from the nature of man and not from the circumstances of society or the level of its cultural awareness, can also be verified in terms of their universality. In other words, a real right must, by its very nature, apply to every individual and must be able to be enjoyed in any place at any time. A right, because of its characteristics, is universal and, therefore, what cannot be generally applied to all human beings at all times and in all places cannot be considered an authentic right. In this case too, a right can only be universally applied if it is conceived as a principle that does not impose any obligations on others (see Rand 1964:93). If this were not the case, there would not only be regular conflicts between rights, but the universal application of rights would always depend on duties. Lastly, would it ever be possible to divide rights – which are inherent to the nature of man – into recent or ancient rights? An authentic right must have always existed. Recently acquired rights can be considered to be the result of changing cultural awareness and the situation at the time, but these cannot be included in the group of rights that are authentic in nature. Rothbard (2006:164) believed that, “a right, philosophically, must be something embedded in the nature of man and reality, something that can be preserved and maintained at any time and in any age. The “right” of self-ownership, of defending one's life and property, is clearly that sort of right”. Would it be possible to speak of rights for materials and services that elude this kind of verification? Materials and services that are the result of social development, but which are contingent to it? Since something that is ethical has a general and perpetual nature with no limits of time and space, universality must also imply, first and foremost, that what is true for one individual is true for all, and what is true for all individuals must be true for one (see Vernagione 2003:127). A right without this characteristic could not, therefore, be qualified as a human right. Instead, positive rights are a very recent acquisition— indeed, they are also called “modern” rights. They have their origins in social change and, fundamentally, stem from the relationship that develops between the State and the citizen. Unlike those identified by Locke and reaffirmed by Rothbard, civil and social rights can only be understood in modern terms. Conversely, if we consider rights as a way of

<sup>2</sup>On the basis of Locke's principle of self-ownership, the axiom of non-aggression maintains that aggression against the person or the property of others is always wrong. This is the fundamental principle of the political philosophy of libertarianism.

interpreting the principle of justice according to which nothing should be taken away from the person it belongs to (*unicuique suum*), then the liberal and libertarian rights – understood negatively – represent something so ancient that they can be correctly defined as natural rights, i.e. inherent to human nature itself.

### The Proliferation Principle

Further proof of the impossibility of generalizing social and civil rights is the fact that they are increasing in number. How are we to judge this proliferation in the number and types of rights? Ayn Rand (1964:91) describes this trend as the inflation of rights, saying that in the same way as a country's wealth can be destroyed through monetary inflation, "so today one may witness the process of inflation being applied to the realm of rights". Moreover, for Rand, this proliferation of false rights represents the process whereby free society is corrupted because the true meaning of individual rights becomes distorted, opening the way to collectivism. One sign of this is the expanding recognition of the rights of groups, races and ethnicities. This quantitative increase of new rights that the Church's Social Doctrine welcomes positively in an effort to keep pace and with the intention of advancing the promulgation of new rights that we can see in both civil and international contexts, suggests a confused interpretation of what is natural and what is, instead, at the mercy of changes in political awareness. In this way Catholic teaching backs the tendency to consider any extension of civil rights as a social achievement. Surely, the proliferation of rights will never end if it continues to be fuelled by the widely held belief that the State is responsible for dealing with every new problem to emerge.

### The Principle of Conflict

Stating rights in a positive way always leads to a conflict between those who claim a positive right and those who will have to provide the necessary resources. This not only underlines the fact that rights with a positive intention cannot coexist with negative rights, but it highlights the *de facto* conflict between the holder of the negative right to liberty and property and the holder of the positive right to obtain something from the State or from society. Therefore, another way of verifying the authenticity of rights and distinguishing them from false rights is, for the libertarian, the observation that real rights do not create any conflict because they do not harm the prerogatives of anyone else. The same cannot be said of positive rights (see

Boaz 1997:85-87). Among authentic rights there can be neither contrast nor contradiction: respect for a person's life does not encounter any serious objection; the intangibility of liberty and property does not conflict with any other right (and a presumed right to encroach on liberty or property could not be considered an authentic right). However, the proclamation of civil rights contains more than one element of conflict not only between different interests, but between rights (or perceived rights) which oppose each other or which nevertheless require a problematic balancing of rights and duties. But it should be clear that a right that is claimed at the expense of another cannot be considered authentic (see Rand 1964:93). If liberty is a real right, this is demonstrated by the way in which the liberty of one person does not harm anyone else, but brings benefit and utility for all. No-one can claim the right to take away all or part of the liberty of another person - by doing so aggressors would not be exercising a right, but instead they would be acting abusively. Such behaviour cannot be justified because it is not possible to rightfully claim something which belongs to someone else: this would always be considered as a denial of another person's rights. If we tried to compare these two actions, the emerging conflict would be enough to prove that we are in the presence of a false right. In fact, when ever the right of one person is in conflict with that of another, then at least one of the two rights is false. What is more, in the proliferation of rights created by the political process, the conflict between natural and civil rights can be resolved only through legislation and by means of coercive measures to support civil rights at the cost of natural rights. This is what happens when some rights are granted to people by removing something from other people without their consent (see Rothbard 1998:41). Unlike the Catholic interpretation that calls for constant interaction between rights and duties to smooth the relentless conflict between the claims of the various parties (see Banchi 1944:32), from the libertarian perspective, conflict is impossible because natural rights are the only authentic rights and a natural right does not engender any conflict with other natural rights.

Conversely, the conflict inexorably emerges between positive rights created by political means (see Vernaglione 2003:32-222): when a kind of social duty is imposed on some citizens for the benefit of others (to whom the law has guaranteed some social rights), this cannot fail to cause a conflict between those claiming social rights, on the one hand, and those whose

property will ensure the necessary resources, on the other. Moreover under the libertarian natural-law theory, this opposition of social and natural rights is at the root of much conflict within society. The contrast between political and natural rights cannot fail to provoke an increase in social conflict and even rekindle a class war. This was the case of Affirmative Action in the United States, which established legal privileges for minorities: it did not only encourage integration between the different ethnicities, but it also gave rise to clashes between groups and also strengthened racism (see Felice 2007:59.62). That the rights granted by political process fuelled social conflict had already been observed by the American politician John Caldwell Calhoun (1782-1850). He described the formation of two large social groups (less distinct today than in the past): tax payers and tax consumers, which led to mutual hostility (a kind of animosity which is still alive today if we consider the tensions between the self-employed and public sector employees) (see Calhoun 2007:16). The brilliant Frenches say writer Frédéric Bastiat (1801-1850) also commented on the subject: from the time when rights are granted by the State, there will be no limit to taking advantage of them and each individual will be inclined to seek benefits for himself and sacrifices for others (see Rand 1964:93). By taking from some people in order to give to others (and Rothbard argues that this cannot happen without the violence of coercion), inauthentic rights inevitably generate not only a sense of injustice, but also lead to social divisions, whereas the exercise of the natural rights produces social order. In fact, the assertion of authentic rights can only be a seed of peace because they guarantee justice. Creating a false right, based on an abuse of power, will produce oppression and, in some way, educate and prepare for it, whereas the preservation of a real right, will necessarily generate peace and social order.

### **The Principle of Coherence**

What are the implications of the conflict embedded in positive rights? First of all, it invalidates the coherence of the intangibility of authentic rights. Here, congruency is achieved because respecting rights constructs society in the best possible way to prevent abuse and violence. However, there is another effect under the civil law system because positive rights are admissible, i.e. any affirmation of a false right not only denies the coherence of the notion that the (authentic) right of one person is never in conflict with that of another, but it directly corresponds to a contraction of genuine human rights. Each time an inauthentic (or,

more simply, a non-natural) right is granted, there is a corresponding and inevitable contraction of a real (or, more simply, natural) right. Libertarians think that positive rights do, in fact, destroy negative rights because if the negative rights ensure individual liberty, the positive rights attack what is inviolable by nature. The classic example given by libertarians is that of taxation which is imposed to the detriment of the right to property. However, if it is true that resorting to taxation is the prerequisite condition for positive rights, other examples and other cases could also be given to show that, in effect, any type of positive right implies a corresponding restriction of natural rights. To distinguish real from false rights, Rand (1964:93) speaks, respectively, of political rights and economic rights claiming that the former are slowly being destroyed by the affirmation of the latter. In her opinion, if freedom begins with the proclamation of individual rights against society and the State, the end of freedom begins with the creation of false rights thanks to which the individual is once again subordinated to society. The more these inauthentic rights are asserted, the more real rights are reduced, in a process of corruption of the civilization which reduces the importance of the individual vis-à-vis the establishment. To explain this involution, Rand also paraphrased Gresham's law (without citing it), claiming that bad rights drive out the good with the effect of an immediate reduction of the same amount of freedom as has been removed by the restriction of intangible rights.

### **COST AS A MEANS OF VALIDATION**

We should not overlook the economic aspect, in addition to the other validation criteria used by libertarians to recognize and distinguish the quality of rights. If a law is authentic because it is universally enforceable and a right is, instead, false—because it is only applicable in specific situations – the following consideration is necessary: an inviolable right is natural not only because it does not require structures to be created for it to be respected, but also because, due to its universal character, it cannot require costs and expenses. In other words, a genuine right does not have an economic cost, a false right, on the other hand, imposes one. Positive rights, due to their basic nature, involve substantial costs, whereas negative rights require that nothing be taken away from anyone else. Therefore, the rights that libertarians call false are not only harmful, but also costly because they require a complicated redistribution mechanism. Authentic rights, however, since they have no cost, are not only free from the forced transfer of resources, but can also

always be enjoyed immediately. A consequentialist argument would prove that positive rights have an economically harmful nature and that their complex implementation has greatly reduced overall prosperity (see Murray 1997:45s,57). But even apart from any utilitarian type of consideration, it is not possible, of course, to ignore the relationship between the high level of public spending that was needed to start the Welfare State and the impossibility today to meet the costs of the expansion of social rights. This is now common knowledge and is mentioned in any discussion about the depletion of the resources that the State has employed to guarantee positive rights (Rothbard 2006:175s).

If it is difficult to question the Welfare State with its assumptions anchored in social justice, it is also true that no nation can now afford the costs created by initiatives that were supposed to resolve all and any social problem (see Murray 2007:5s). This sort of economic failure forces us to face the facts and to discount the utopian aspects of all ideologies. Thus the crisis of the Welfare State caused by its non-sustainability raises questions about the overall morality of a system based on an increasingly broad granting of rights. "The impression that there is an uncontrollable linear expansion of rights, and of social rights in particular, has now evaporated, it has revealed itself to be the wrong idea", writes Roberto Bin (born 1948), a well-known Italian jurist, adding (2004:112) that "the scarcity of available financial resources calls for objectives to be selected, and performance levels to have limits".

The very morality of the Welfare State is essential to understand the nature and to validate the authenticity of rights. But the question is also mandatory for a critical analysis of the position of the Social Doctrine of the Church. In spite of making formal reference to natural law as the foundation of human rights, the Doctrine, in fact, by recommending an extension of rights, advocates, more or less unconsciously, a positive conception of those rights. This implies abandoning the traditional anchor to the natural-law theory and a step sideways towards theories of legal positivism.

### **Justice and Politics**

Rothbard (2006:164) wrote that, "a 'right', philosophically, must be something embedded in the nature of man and reality". In fact in the libertarian natural-law tradition, real rights are distinguished from

false rights basically because of their natural origin. In principle, this approach appeared to be suitable for the Catholic Church but, in reality, the social teaching of the Church directly supports positive rights (which are typical of the continental tradition), as an alternative to negative rights (typical of the Anglo-Saxon tradition). To evaluate this natural origin from the libertarian point of view, therefore, we tried to apply some of the validation principles and we concluded that the distinction between real and false rights can be clearly discerned in the difference between the positive and negative rights according to the both traditions.

Considering that they belong to the law of justice embedded in the nature of man, individual rights, so as not to deny their essence, can never be the result of coercion or cause harm to anyone. They must apply at all times and in all places and they cannot be extended in a purely formal way. They cannot contradict themselves by coming into conflict with other claimed rights or with other holders of presumed negative rights. In addition, a right can never claim to be an alternative right or infringe another's right, nor – if it is a natural right – must it depend on other resources or be subject to costs. In brief: human rights could be such because they spring from nature and from no other cultural circumstance or institutional agreement. This basic notion, which is the ethical foundation of Rothbardian theory, belongs to a significant part of the libertarian movement. This is demonstrated by figures like Rand (1964:90) for whom "the source of rights is man's nature" and the American philosopher, Robert Nozick (1938-2002), for whom "individuals have rights" (1974:IX), which means that there are personal prerogatives that no-one can violate. Nozick (1974:IX), following this affirmation, recognized in rights something so far-reaching as to frame a detailed question on the role of the State considering "how little room individual rights leave for the State". It is necessary, therefore, to question the relationship between these rights and the State.

In fact there is a final way, according to libertarian thought, to distinguish the real from inauthentic rights and which summarizes and crowns all the others - it can be expressed in this way: real rights derive from the nature of man, false rights derive from the State, or, in other words, the nature of man is the basis of authentic rights, while the State is the basis of false rights.

Looking closely, this discrepancy only highlights their reconcilable conflict that Rothbard found between

the nature of man and the State. The State is in constant opposition with the freedom of man: in order to express itself, human nature needs spaces that must be left free by the State. In contrast to the Social Doctrine of the Church, which considers the State not only a natural reality, but something that is necessary for personal fulfilment, Rothbardian libertarianism believes that the State is an unnatural entity that adulterates the demands inherent in the nature of things. Since its establishment, the modern State—according to the libertarian tradition—came into being through violence and oppression (see Rothbard 1998:231-232) and continues to grow through taxation and bureaucracy. Therefore, individual rights, according to Rothbard, are the great bulwark against the invasion of the State, which will—clearly—have very little reason to guarantee such rights. Since the State is always against private property (see Mises 2002:67-68), then, for libertarians, it is naive to hope that the State will defend individual rights. When this happens, it is not thanks to the State but in spite of the assumptions on which the modern State is founded: the total State is, in fact, one in which the control of property is total and any space to affirm private property is, however, a free space that the State will try to invade. The more perfect the State is, the less respect there will be for property so that the degree of completion of the State apparatus can be seen in the degree of the State's opposition to private property.

This is why, in a good interpretation of the entire liberal tradition, Ayn Rand considered the rights of the individual as a means to subordinate the State to moral law and, in this perspective, it is more than justified to look with suspicion at the State as the most deadly enemy of rights (see Rand 1964:93-94). Therefore, she could only recommend placing individual rights strictly outside the scope of politics.

The naturalness of human rights proclaimed by liberal and libertarian thought collides with the positivity of civil and social rights, which the teachings of the Church also support.

In fact, especially after the Ecumenical Council, there followed many stances expressing agreement with the basic contents of the Universal Declaration of Human Rights of the United Nations in December 1948. In the words of the newly elected Pope John Paul II, this attitude of harmony is summed up (1978) thus: "it would be a desirable goal to have more and more States adopt these Covenants in order that the content of the Universal Declaration can become ever

more operative in the world. In this way the Declaration would find greater echo as the expression of the firm will of people everywhere to promote by legal safeguards the rights of all men and women without discrimination of race, sex, language or religion".

Negative rights do not need any other form of recognition other than the evidence stemming from the nature of things and—precisely because of their negative character—must primarily be exercised against power and the State. Indeed, John Acton (1834-1902) liked to say (1988:492) in this regard that "all liberty consists *in radice* in the preservation of an inner sphere [of the conscience] exempt from State power". Negative rights not only do not require the State to endorse them, but act instead as a bulwark against coercion exerted by the State, which has far greater capacity than any other entity (see Rothbard 1998:187). By contrast, positive rights can only be exercised through the State, and in some way—they emanate directly from the State. These rights are, in fact, created by the State and only have any force thanks to the power accorded to them by legislation.

Positive rights are produced and created by the State (see Rothbard 2006:51-52). We would not have these rights if there had not been a process of centralization of authority and duties which consolidated power that is legitimized by the concessions it grants. For this reason as well, libertarian thought believes that positive rights are unnatural: they are a pure formulation of policy, according to which the apparent beneficiary is the citizen who receives the new rights, but, what is actually enhanced is the power of the State that bestows the rights. It is precisely in this way that the State becomes increasingly irreplaceable because, without it, it would not be possible to ensure social rights. The greater the number of these rights, the greater becomes the legitimacy of the State and its policies. First of all, a right is positive if an identified entity has a duty to provide it; and, conversely, a right loses all substance in the absence of the entity that guarantees it. Therefore the entity that recognizes a right is, at the same time, the one that agrees to take responsibility for what appears to be a duty. The entity that can take on duties is the only one that can grant rights. What other possible entity is there, then, if not the State?

The major declarations of human rights therefore end up by developing in to a set of broad claims as to the potential of the State. Individuals are granted the



broadest rights while the State is recognized as having the broadest duties to guarantee them. But the State cannot fulfill these duties without extensive powers. The more duties the State must fulfill, inevitably, the greater the need for the powers for the policy makers. The very milestones in the history of the conquest of political liberties and social rights have essentially been stages of consolidation of the State's apparatus. This aspect also reveals the difference between the Anglo-Saxon liberalism that defends individual rights and the continental liberalism that is typical of all social reformers. If individual rights have been claimed against a despotic power to contain its abuses, it is very strange that for the same purpose, reformers always call for an increase in the powers of the government (see Matteucci 2011:166).

Looking into the question more deeply, the proclamation of these rights is a creative act, through which a sort of poietic – or creative – function is performed (see Galvao de Sousa 2009:222). This reveals the true nature of the rule of law, i.e. the State is based not on a (natural) right external to itself, but on its own production of legislation, thus making itself self-referential, increasingly by granting or recognizing rights for which it is itself the author and provider.

The conclusion reached by the Swiss historian Gonzague Reynold (1880-1970) could be relevant to Rothbardian thought. Reynold (1934:73) came to talk about something very similar to a *pactum sceleris*<sup>3</sup>. The State grants all the rights but in exchange it wants to be seen as the only entity able to dispense them. In this way, a kind of exchange and agreement between the State and the citizen is generated. The citizen recognizes that all the power is held by the State, which, in exchange, grants all possible rights to the individual. Reynold certainly adopts a very serious and challenging metaphor. It is usual, in fact, to speak of a *pactum sceleris* in relation to crimes of corruption, i.e. those agreements made between the corruptor and the corrupted. In any case, there is a kind of barter between liberty and power, which is far from surprising in the modern conception of the State and politics. It is precisely this kind of barter, already envisaged by Hobbes, that forms the basis for Contractarian theories.

Even leaving aside all the considerations about the religious prerogatives that the new political entity takes

on—considerations that are present both in the liberal interpretation (see Mises 1962:525), and in that of the Magisterium (see John Paul II 1991:25c)—the State, in fact, stands out as the source of rights because it becomes the only power that must be respected and from which we may obtain now rights. In this creation of rights, individuals become citizens, i.e. people who are no longer defined in relation to their original dignity and the rights they receive from nature, but only in relation to their relationship to the State, and thus in terms of the social rights that only the State can provide. In this way, rights are no longer natural because their basis is not to be found in the nature of man; they now come from the rule of law. This is a dramatic change because it transfers the basis for human rights from the nature of the individual to the authority of the State, which generates the most profound process of social transformation.

Paradoxically, it is precisely on the question of rights that the most unique heterogenesis of ends occurs: the rights are transformed from the prerogatives that all persons possess independently of any political recognition, into concessions that, formally, seem to enrich them with new claims, but which actually strengthen the power of the State in its role as regulator. What is accomplished in the conversion of negative rights into positive rights is the shift of the role of the protagonist. In the case of negative rights, the protagonist is the individual because what is in question is that which cannot be denied, while, in the case of positive rights, the main protagonist is the State because what is in question is what it can grant and, indeed, must be granted. The paradox here is that in the name of an enlargement of rights, not only those that are essential to man (and therefore authentic) are denied, but the individual's own liberty is genuinely compromised because it is found to be increasingly subject to political and State-dependent decisions.

It is no coincidence, then, that when there are numerous and increasingly various rights, those related to the nature of the person end up by being legally neglected and, often, politically suppressed. This is the reason why, on the contrary, from the libertarian point of view, any real right always relates back to private property. Theoretical requirements and the need for concreteness converge to reaffirm that any right that is not reflected in the right of ownership is inconsistent, humanly speaking. Therefore, all rights are essentially property rights. Thus, no human right can be separated from the right to property (Rothbard 1998:113). To the

<sup>3</sup> In his brief introduction to Chapter III (entitled "Nous sommes en révolution: de la révolution française à la révolution russe, du socialisme au communisme"), Gonzague de Reynold speaks of the "alliance de l'individu et de l'État contre l'ancien régime".

frequent criticism directed at libertarians, the latter insist on the impossibility of evaluating rights that are not related to property rights and the impossibility of replacing the soundness of the right to liberty anchored to the inviolability of property. For this reason, Rothbard wrote that, “the basic flaw in the liberal separation of ‘human rights’ and ‘property rights’ is that people are treated as ethereal abstractions” (Rothbard 2006:52).

Mises (2002:68) argued that “there has never been a political power that voluntarily desisted from impeding the free development and operation of the institution of private ownership”, and declared that the State ends up by antagonizing those very human rights that it formally declares it must guarantee. This libertarian interpretation contains, on the one hand, the impossibility of considering the State as the guarantor of natural rights and, on the other, the clear difference between the rights that effectively derive from the nature and those which, instead, come from the State. The latter, by taking on the task of recognizing rights, takes a central role in the great question about the relationship between freedom and power, thus becoming the arbiter of a problem in which it is itself an active part. For this reason, therefore, the libertarian interpretation maintained that political institutions are no longer conceived as a means of guaranteeing inalienable rights, but as a way of achieving unnatural ends which, as such, must be justified in ethical terms (Cubeddu 1997:79).

The positive rights that are also proposed by the Church’s Magisterium cannot be achieved in a natural way because they do not require just any authority but, necessarily, they need the administrative and bureaucratic structure typical of the modern State. Thus, in the absence of such a structure, it would be impossible either to guarantee or to exercise these numerous rights. A whole other question, however, arising from the conception of the foundationalist libertarians in general and from Rothbard’s thought in particular, concerns the recourse to the nature of man to discern the authenticity of individual rights which, precisely because they relate solely to the nature of man, have no need of the State, first to be promulgated and then to be exercised. Indeed, the State, that great protagonist of positive rights, becomes the first antagonist of negative rights, leading libertarians to believe that life, liberty and property are safeguarded not by the modern State but, in a more efficient way, by those natural law systems that the modern State has replaced. For libertarian thought, then, individual rights must be affirmed not with the help of the State, but in

opposition to it because, as Mises (2009:79) wrote, “Liberty is always freedom *from* the government”.

## SOME CONCLUSIONS

On the question of conformity with human nature in different conceptions of rights, the comparison between the Social Doctrine of the Church and libertarian thought probably reaches its most challenging and sensitive point. And also its most problematic point—because the application of the ultimate criterion of social morality and political morality remains discordant.

In conclusion it should be noted that the reference to natural law as the basis of human rights, an explicit and common reference for both the Social Doctrine of the Church and for Rothbard’s theory of natural law, did not prevent them from reaching contrasting perspectives. This very obvious discordance brings up once again the idea of a difference between the notion of *lex naturalis*, i.e., theologically-based natural law and the notion of individual *natural rights* so dear to the libertarians (see Cubeddu 2004; Di Nuoscio 2013; Novak 1999). Rothbard (1998:21) –in this regard– while observing that the classical theory of natural law involves slipping towards collectivization, believed that overall there was continuity between the two conceptions. In the strictly theological sphere, however, a certain skepticism seems to prevail concerning the complementarity of the two approaches (*lex naturalis* and natural rights). There is probably also a mutual misunderstanding of what is meant by “an inalienable right”, given that both positions refer to rights which, being “inalienable”, are recognized in natural law. What is more, there is no clarification—and this is a detectable gap in Catholic social teaching—about which of the two conceptions of human rights (positive rights or negative rights) relates best to the nature of man. The choice is between the positive and extended interpretation of rights, which Catholic social teaching has made its own, and the negative and limited understanding of rights, typical of Anglo-Saxon liberalism. Which of these conceptions of human rights better responds to the objective nature of a human being? The positions are so far apart that the common reference to the natural law does not seem to have any useful meaning. Two citations can demonstrate this lack of communication quite well. In the Catholic camp, statements like that of Monsignor Toso represent the clarification of a common feeling: “a blatantly neo-liberal and conservative mentality [...] will come to argue that social protection is not an inalienable right”

(Toso 2003:548). And the contrast is clear if we listen to Rothbard arguing that the Welfare State "could not work because it violates the very nature of man and the world, especially the uniqueness and individuality of every person, of his abilities and interests" (Rothbard 2006:380-381). Both strands reaffirm their parentage in natural law and yet it is easy to imagine that each of them would be more at ease standing beside positions that share the same view of the Welfare State, even if in a consequentialist way, rather than along side positions that do not. Nevertheless, the two strands probably converge in a common reference to natural law. However, the central ethical question is summarized in the choices which tend to conform to the idea of "human nature". The divergence in their conclusions, even if very marked, does not elude the need to judge the two traditions of thought in terms of their ability to relate to human nature, and to try to discover which of them is most appropriate to interpret it.

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