

## Chapter I

### Citizenship and human rights

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## CHAPTER I - Citizenship and Human Rights

The study of citizenship in the Latin American context poses a dual difficulty. The first is general in nature and faced by anyone working with this concept, since it contains both an empirical and a normative frame of reference. The empirical reference has to do with citizenship as it is manifested in each historical or social context, while the normative relates to citizenship as an ideal that is usually enshrined in constitutions and expressed in the feelings, expectations, and values, more or less diffuse, of social actors. The second difficulty is that, in the Latin American context, this “bivalence” (often a source of ambivalence and analytical confusion) involves an additional layer of empirical and normative references. When the social sciences in Latin America (as well as political ideologies or conventional wisdom) refer to an ideal of citizenship, it is against a mental backdrop implicitly or explicitly informed by the specific experiences of citizenship in developed countries that transforms that empirical world of experiences into an idealized world.

By adopting as the ideal reference citizenship as it actually exists or existed in Europe or the United States, social analysis enters into a game of mirrors from which it is hard to extricate itself inasmuch as it adds many layers of confusion between the ideal and the real, or the normative and the empirical, by intermingling the ideal with complex and constantly mutating historical realities. Social scientists, then, find themselves in the position of having to explain—based on an idealized and homogenized image of those countries that fails to take into account the diversity of national trajectories—why we lack certain characteristics typical of developed countries.<sup>2</sup>

However, if for the most part, Latin American political models were imported, the “original” models, in turn, were influenced by diverse national experiences and subject to constant mutations. The construction of citizenship,

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<sup>2</sup> For a more thorough discussion of this issue, see Bernardo Sorj, *“Crises e horizontes das ciências sociais na América Latina”*.

whether in France, the United States, Japan or Germany, was, and still is, a complex, arduous, and uneven process that cannot be distilled into a static, stylized image based on its representation toward the latter part of the twentieth century. These circumstances clearly preclude a simple comparison between the relative homogeneity of democratic institutions in the central countries (as seen from the periphery) and the difficulties experienced by developing countries. What is more, in addition to the misuse of concrete historical experiences, Latin American social sciences tend to apply the normative theoretical models of citizenship shaped in developed countries, resorting to abstract constructs disconnected from their historical and cultural roots.

The most harmful consequence of characterizing citizenship as it is observed in developed countries as the ideal and desirable world is that it is contrasted with an image of citizenship in Latin American countries as a world of paucity and deceit, an empire of inequality and arbitrariness. This analytical Manichaeism contributed to the development of a two-tiered unrealistic image: that of advanced countries and that of developing countries; instead of pointing out contrasts and complexities, social analysis metamorphoses into censure and demonization. Rather than uncovering the different historical forms and meanings of the social construction of citizenship, the social sciences often mainly reflect the frustration of intellectuals and local middle classes with their own societies. This attitude, while understandable, fuels a secular tendency to demoralize existing democratic institutions; at the same time, the social sciences miss the opportunity to demonstrate that Latin America is a goldmine of social experiences that, upon closer examination, pose theoretical and practical issues that are just as relevant for advanced capitalist countries.

### ***The diverse forms of citizenship***

The concept of citizenship challenges the social sciences to distinguish between its meaning in the conventional wisdom, with its powerful normative component, and a more rigorous notion with empirical-analytical value. This problem is particularly acute in Latin America where, in recent decades, the concept of citizenship, or

“access to citizenship” has evolved into “access to the ideal world,” and has been used in this sense by most social movements and nongovernmental organizations, as well as by “socially responsible companies,” international entities, and public policy makers. As a result, citizenship has become a polysemous concept imbued with essentially normative connotations.

The first step in elucidating the concept of citizenship consists of inserting it into the dynamics of each historically determined society where it acquires specific characteristics. Our interest here is to characterize citizenship in modern societies. In the modern world, citizenship has always been associated with different types of political systems (for example, liberal, fascist, communist, or fundamentalist theocracies). Our analysis will focus only on citizenship in capitalist countries with liberal democracies. And even in those countries, citizenship presents enormous historical and national diversity, so we must also identify its varied institutional mechanisms and forms in contemporary Latin America.

Here we risk stumbling into a form of relativism in which there could be an infinite number of “citizenships.” We must therefore discern, through theoretical and comparative analysis, the essential common components for the existence of a liberal-democratic citizenship, without which the possibility of citizenship in a democratic capitalist society would be unimaginable.

Citizenship in the modern world is, in the first instance, a mechanism for inclusion/exclusion, a way of defining who is an integral part of a national community. It is, therefore, the expression of a collective construct that organizes relationships between the social subjects created in the process of determining who is, and who is not, a full-fledged member of a politically organized society. This ascriptive feature of citizenship is generally ignored inasmuch as it is defined in terms of individual rights. Citizenship is an institution that confers a specific entitlement; it is a ticket to enter the national community that provides access to a series of rights – a ticket that is obtained, of course, based on a system of criteria (for example, place of birth and nationality of direct ancestors) set forth by the

established authority. Access to citizenship, then, is the filter used to determine who may participate in each nation's system of political and social rights.

Secondly, citizenship presupposes the existence of a cultural and social community associated with a national identity. In other words, citizenship is associated with the expectation of shared language(s), codes of behaviour, tastes and customs (with all of their regional or social variations), and the sense of a common destiny. The classic expression of this sense of common destiny was military service based on universal conscription, linked to the willingness to die for one's country. This innovation emerged with the French Revolution and, beginning with Napoleon Bonaparte—father of the imperialist patriotic wars—made it possible to convert the entire citizenry into cannon fodder for military exploits that would culminate in two world wars.

While it is true that the national dimension of citizenship, as we will see, is subject to growing crisis (one has only to cite the emergence of professional armies and the end of mandatory military service as a sign of the times), that create tensions between citizens and the national community, citizenship as an identity built on an historical-cultural community remains a constant in modern times.<sup>3</sup>

Alongside the family, citizenship is the initial point of affiliation for modern men and women. It establishes the basic coordinates of their identity, origin, and place in the world. For a long time, nationality was viewed as a natural fact, and the type of debate introduced by egalitarian ideologies centered on the unequal distribution of family wealth among those born within each national society. In today's globalized world, the perception of the origin of social inequality increasingly is associated with the arbitrary fate of having been born in one country as opposed to another, rather than with uneven access to social wealth determined by the equally arbitrary fate of having been born into a particular family. Based on this new perception, then, citizenship is an unequally distributed asset and the main source of stratification of the opportunities available to the inhabitants of the contemporary globalizing world.

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<sup>3</sup> See Dominique Schnapper, *La communauté des citoyens*.

Contemporary citizenship is always twofold: it refers to individuals as part of a nation or individuals as part of a people. . The citizen identifies the individual as part of a community, in which the citizen recognizes him or herself, and is recognized, as an equal. Between the two poles of individual-community, there is a constant tension— since from the time of the French Revolution<sup>4</sup>—that plays out in the conflict between those who place emphasis on individual freedom and those who uphold the value of equality and/or fraternity.

The components of the individual-nation duple are not separate and distinct. The individual is simultaneously a unique being—inclined to optimize personal interests using his or her instrumental rationality—and part of a sociocultural community endowed with a system of values and a sense of belonging where the individual finds the motivations and social context in which to apply his or her reflexive capacity and social insertion strategies. That is to say that autonomy and liberty are meaningful and can only exist in the context of a community substratum of shared values. If it is true that the individual presupposes the existence of community, then it is also true that the modern community in democratic societies can only exist as an expression of the will of free individuals.

The formation of the “national community” was a multilayered process in which languages, dialects, and transnational loyalties were suppressed, altered, or replaced by a homogeneous culture stressing, above all, “loyalty to the fatherland” Institutions associated with the Old Regime took on new meaning and were integrated into the framework of the new society. One of the most eloquent examples of the latter was the redefinition of the institution of marriage and the role of women. The principles of liberalism did not lend themselves readily to a life contract and the subordination of women. The French Revolution and the Napoleonic Code solved the problem by transforming the family and women into pillars of the national community responsible for producing and raising future citizen-soldiers and citizen-mothers.<sup>5</sup> The subordination of women to the needs of the national community is

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<sup>4</sup> See, for example, Ladan Boroumand, *La Guerre des principes*.

<sup>5</sup> See Ignacio Terradas, “Familia y ciudadanía en la Revolución Francesa”.

symbolized by Marianne, where the female figure became the most important visual image of the nation. It was only through protracted social struggle that women were able to establish themselves as individuals and dissociate themselves from their role as reproductive agents at the service of the nation.

Citizenship is, then, a slippery concept, a sort of “hinge” situated at the intersection of the individual and the community. It is the mechanism by which individuals can lay claim to their individual liberty and simultaneously assert their belonging to the group. Belonging is an acknowledgment that one’s individuality is contingent upon the course taken by the the national society, since the group destiny will affect one’s personal destiny, and that citizenship cannot be passive or self-centered, even when confined to the defense of individual freedom. In democratic societies, the public sphere is the political space where the individual will is translated into the collective will, where individuals negotiate their personal interests and their versions of the common good.

The individual-nation duple also refers us to the various traditions of building citizenship and, specifically to two major currents: the U.S. Revolution and the French Revolution. While the first was essentially political in nature—its main objective was to protect citizens from the State so that each individual could enjoy his or her freedom to the fullest extent—, the second sought to reconfigure the social order by assigning the State an active role in the realization of society’s shared values.<sup>6</sup> The French Revolution invokes the republican tradition; it is premised on political participation and assigns the State an active role as the expression of the will of the people and guarantor of the values of solidarity and fraternity, which are implemented through social institutions (particularly the school system). These two visions subsequently were joined by republican-socialism whose values of equality were promoted and upheld mainly by the working class.

These two interwoven principles—that of community and that of the individual—are the two pillars of modern citizenship: the sovereignty of the people and equality of

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<sup>6</sup> An interesting comparative analysis of the 1776 and 1789 revolutions contrasting the views of Hannah Arendt and Habermas can be found in Antonio Negri, *O poder constituinte*, Ch. 1, pp. 24-41.

citizens before the law. The principle of sovereignty represented a radical departure from the traditional notion of temporal power as the expression of divine will or some other transcendental source.<sup>7</sup> In the modern vision, the authorities and the law are seen as emanating from society itself and their agents exercise authority as delegated by the people. The principle of the individual meant that the new sovereign entity, the people, would be made up of individuals equal before the law and endowed with the same package of rights and duties.

Citizenship is an historical reality and as such, evolved over time as it was absorbed by societies with diverse traditions and social structures. Despite the wide range of concrete experiences, or perhaps because of them, theoretical models were developed in an effort to synthesize the evolution of citizenship. The most widely disseminated of these, T. H. Marshall's model,<sup>8</sup> continues to be a benchmark in much of the specialized bibliography—particularly that of Anglo-Saxon origin—despite the ample criticism it has attracted. For this reason, we will examine it more closely.

According to Marshall, citizenship developed as the ideal of equality spread from the legal sphere into the political and social spheres. Equality before the law fueled the struggle for equality in political participation (universal suffrage) which led, in turn, to progress in the area of social rights. According to Marshall, social citizenship in capitalism is rooted in the contradiction between legal and political systems established to ensure equality among citizens, and an economic system based on unequal access to property. Political rights, and later social rights, offset the disjuncture between the two systems by seeking, not socioeconomic equality among citizens per se, but rather equal opportunity, basic security, and protection of the most vulnerable sectors of society (children, the mentally ill, the sick, the unemployed).

Marshall's model was criticized as an abusive generalization of one particular experience—the British—, as well as for its unilineal evolutionary vision, its naïve optimism, and its historical fatalism (keep in mind that even though alternatives to the liberal/social-democratic model, such as Nazism and Communism, were

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<sup>7</sup> As Marcel Gauchet shows in *La religion dans la démocratie: parcours de la laïcité*.

<sup>8</sup> See T.H. Marshall, *Citizenship and Social Class and Other Essays*.

defeated, this was not preordained, as Mann points out<sup>9</sup>). Marshall also failed to predict other areas of rights (such as ecological, cultural, and those of sexual minorities), and the crisis of the welfare state two decades after the publication of his famous conference.

Studies on citizenship in Latin America frequently cite Marshall's work to demonstrate that processes associated with the evolution of rights in the region were totally different than such processes in Europe. The problem is that Marshall's stylized model cannot be replicated, in practice, in any European country: not in Mediterranean countries (in Spain, Italy, and Portugal, many "social rights" were implanted by authoritarian regimes), nor in Germany, where social rights were the invention of a political system that had yet to universalize civil rights. Even in the United Kingdom, progress on rights was not a natural endogenous process, but was associated instead with social transformations triggered by its participation in two world wars and with the prestige the Soviet Union conferred upon the Labor Party in the 1944 elections. In the United States, the full civil integration of African Americans postdated the social policies implemented by the Franklin Roosevelt administration.

Therefore, the fact that the Latin American experience does not dovetail with Marshall's model is not an anomaly requiring an explanation as such. Citizenship-building processes are unique, just as the economic structure of capitalism in each country presents its own nuances.

The main theoretical issue that Marshall did not, in fact, address was the complex relationship between different rights. Far from a process of harmonizing various values, from the outset, the history of citizen's rights has featured persistent tensions around the need of harmonizing the wide variety of conflicting demands that are constantly emerging out of society. .

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<sup>9</sup> Michael Mann, "Ruling Class Strategies and Citizenship". See also, among others, Martin Bulmer and Anthony Rens (orgs.), *Citizenship Today*; Bryan Turner, "Outline of a Theory of Citizenship".

## *Citizenship and the antinomies of human rights*

As Bobbio points out,<sup>10</sup> different categories of rights (legal, political, social) reflect different kinds of relationships between the citizen and the State. While civil rights developed mainly as citizen defense mechanisms *against* the arbitrary power of the State, political rights are the expression of the *integration/participation* of citizens in the State and, finally, social rights contain citizens' *demands* of the State. From the sociological standpoint, the way rights develop reflects the institutionalization of mechanisms to integrate the social groups that capitalism originally condemned to positions of subordination and/or poverty.

Different rights are associated with different values and their implementation, again according to Bobbio, can produce antinomies. For example, the right to property might clash with distributive rights, the right to smoke or take drugs might be at odds with public health policy, and the right to information could conflict with privacy rights, and so forth. It was necessary to find a coherent solution to the antinomic nature of rights in the legal system, particularly in modern societies governed by the Napoleonic Code. In these cases, the State's desire to monopolize the law was associated with the development of a systematized and complete legal regime in which the judge's only function was to apply the law. As we shall see, accompanying the increasing diversification of rights was a parallel increase in the discretionary powers of judges or constitutional courts as the highest authority for legal interpretations and rulings on the hierarchy of priorities associated with the values expressed in legislation.

It should be noted that the antinomic nature of rights is evident in the difficulties associated with the simultaneous application of different values that are considered absolute. This should be distinguished from political antinomies, that is, the way actors perceive the impact of those values in the political arena. . For instance, the passage from civil to political citizenship, and from political to social citizenship, sowed panic among sectors of the dominant classes who feared that universal suffrage or new social rights would mean the end of private property. The

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<sup>10</sup> Norberto Bobbio, *A era dos direitos*.

history of liberal capitalism, particularly (but not only) in Latin America, is rife with attempts to limit universal suffrage and coup d'états that totally disregarded the will expressed at the polls.

Recognition of the antinomic repercussions of applying the values underlying different types of rights is essential to understanding the political, social, and ideological dynamics of modernity; it raises the importance of not confusing rights (as a value system) with law (as a legal system). The latter always will represent a practical, if not precarious, means of harmonizing antinomic values and therefore will reflect an effort to delimit and prioritize the values expressed in "rights" in their generic sense, each one of which is absolute from the ethical standpoint.

Underlying the antinomy of human rights values is a dual entitlement that is at the root of modernity: the full exercise of individual liberty and the equality of all citizens in a national community. The former speaks to individualistic values, while the latter signifies supra-individual values of solidarity. The former presupposes a State that actively ensures the freedom of each individual and the latter a State that ensures the access of the most disadvantaged sectors to minimum conditions of social integration.

Historically, it was the propertied classes that endeavored to confine the model of capitalist modernity to the defense of individual liberties, while the working and poor classes hoisted the banner of equality and social justice. The core dilemma of liberal modernity is how to expand collective interests without diminishing or destroying individual freedoms. Philosophers, political scientists, and ideologues have long sought definitive answers to this dilemma, yet the solution will always be precarious and changing. And although this dilemma eludes a consensus-based, definitive response, history offers a negative lesson: any effort to eliminate one right in favor of another, whether to build an egalitarian society without free individuals or to assert individual freedoms in the absence of solidarity, transforms society into either a prison or a jungle.

The conflict, usually violent (at least in the perception of social actors), between individual liberty and social equity—or, as Luc Ferry and Alain Renault put it,<sup>11</sup> between freedoms-rights and entitlements-rights (entitlements vis-à-vis the State), also known as material rights—traverses modern political history and found its classic expression in the clash between liberalism and socialism and communism. Efforts to create models of society navigated, and still navigate, between those who, in the name of individual rights, refuse to accept that the State should ensure greater equality and those who, in the name of equality, are willing to restrict and even eliminate individual freedoms. But, as we shall see, the redefinition of social actors and the types of equality demanded alter the terms of this synthesis.

In classical socialist tradition, and particularly that associated with the work of Karl Marx, critiques of civil and political liberties were articulated in the name of a social reality embodied by the European proletariat of the mid 19<sup>th</sup> century. According to Marx, equality before the law was a façade that masked the very real inequities in living conditions. The “man” referred to in human rights discourse, according to Marx, is the self-centered individual, isolated and separate from the collective. The communist movement, and part of the socialist movement, never succeeded in divesting themselves completely of the notion that individual rights and the modern legal system were at the service of the dominant classes.

In Latin America, up until the 1970s, the local version of this mindset included the notion that the Judiciary (and, in general, the Legislative Branch) were at the service of the oligarchy and imperialism and that strong governments and the destruction of “bourgeois” liberal institutions were required to carry out reforms that would ensure economic development and wealth distribution policies.

As Claude Lefort showed,<sup>12</sup> the Marxist perspective is based on a world vision that reduces society to relationships of exploitation and domination. In that universe, there is no room for politics except through a sudden revolutionary explosion, since the prerequisites of political life include freedom of thought,

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<sup>11</sup> Luc Ferry y Alain Renault, *Philosophie Politique*.

<sup>12</sup> Claude Lefort, *L'invention démocratique*, Ch. 1, “Droit de l'homme et politique”.

expression, and association, individual autonomy, the existence of a public sphere, and civilized forms of opposition. In synthesis, an autonomous legal sphere is the precondition for ongoing social regeneration, including the defense, expansion, and creation of new rights.

In Latin American countries the experience of the military dictatorships of the 1970s and 1980s and the fall of communism propelled leftist intellectuals in the direction of a human rights-centered ideology. Yet a vast gray area still shrouds the relationship between human rights and the institutions that are supposed to guarantee them, and it is nourished by extreme social inequality, gross disparities in access to administration of justice, corruption, and the disillusionment afflicting political life. At the same time, an obsolete, anti-liberal Marxism persists, along with a tendency to associate liberal democracy with U.S. hegemony, and a fascination with authoritarian regimes that espouse egalitarian social policies and/or offer a discourse hostile to economic and cultural globalization, even if it entails the suppression of individual liberties, freedom of expression, political and trade union organization, and cultural creation.

If, in the name of equality, some sectors of the “left” were willing to sacrifice individual liberties, some right-wing sectors, fearing the advances made in the demands of working and poor sectors, sought to restrict access to suffrage and trade union organizations.

That said, although the arguments emanating from the left and the right may reflect unilateral visions, both sides raise legitimate theoretical and practical issues: what are civil and political liberties worth absent a minimum level of access to the wealth of civilization and effective opportunities to compete in the labor market? By the same token, social solidarity cannot become the justification for the State to amass enormous discretionary power and expand its sphere of action into areas that impinge on individual liberties.

The growing complexity of the legal system beginning in the early 20<sup>th</sup> century, including its absorption of new social rights, sparked a liberal reaction to the

Judiciary's struggle to maintain its particular standing in the political system. As the legal system gradually became a depository for material rights, the Judiciary moved away from upholding society's basic, universal values, to become just one more political actor. From a conservative standpoint, Max Weber previously had lamented this "substantiation" of the Law, a view that was revisited nearly a century later, and from a different angle, by Habermas in his critique of the State's colonization of society.<sup>13</sup>

Now, at the dawn of the 21<sup>st</sup> century, instead of a Marshall model—in other words, of a series of citizenship styles that are cumulative over time—a very different process is in evidence. It is characterized by the implosion of rights; the transformation of civil and political rights through the incorporation of new social subjects (gender-based, children, sexual minorities), the emergence of new spheres of rights (such as ecological, reproductive, and information) and a mutation (generally a decline) of seemingly consolidated social rights, in particular those related to the workplace.

Marshall's proposed framework, involving the concept of civil and political citizenship completed by social citizenship, made sense in that the latter had to do with a series of rights that could be regarded, in a way, as an extension of the former, since the right to property is a core element of access to civil life. In effect, social rights relating to the workplace constituted a new form of property distribution by means of what Robert Castels described as access to "social ownership."<sup>14</sup>

Returning, then, to the initial issue of the fundamental mechanisms that serve as prerequisites for the existence of citizenship, at least in the current phase of the crisis of the postwar "social-democratic synthesis"<sup>15</sup> in which labor rights have been fragmented and increasingly take a back seat to a myriad of new rights, perhaps it is necessary to revisit the distinction between fundamental rights, meaning those that enable the exercise of citizenship, and those rights associated with the demands of specific groups.

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<sup>13</sup> See Jürgen Habermas, *The Theory of Communicative Action*.

<sup>14</sup> See Robert Castel and Claudine Haroche, *Propriété privée, propriété sociale, propriété de soi*.

<sup>15</sup> See Pierre Rosanvallon, *La crise de l'état-providence*.

In the context of the proliferation of rights, either conventional wisdom is followed—and each one is defined as a new “dimension” of citizenship and therefore synonymous with “rights”—or they are assigned a precise theoretical and political meaning. Regardless of the legitimacy of any connotation that conventional wisdom might attribute to the notion of citizenship (and an analysis of the different ways in which this term is appropriated and used is a relevant subject for social science research), from the analytical standpoint we can identify two very different sets of rights as they relate to citizenship.

The first cluster is made up of civil and political rights that affect all citizens universally. Inasmuch as they affirm the equality of all individuals, these rights are preconditions for democratic life and for the struggle for specific rights. The second cluster comprises demands by specific social groups, usually entitlements-rights, which often serve as prerequisites for the effective enjoyment of civil and political rights.

This distinction enables us to examine the systemic tension between the basic mechanisms that guarantee the existence of citizenship in liberal capitalist societies and the new rights that emerge and are legitimized in the name of fundamental rights. It likewise facilitates an examination of the nature of the changes that occur as the legal system absorbs new rights. In democratic capitalist societies, confining citizenship to civil and political rights does not mean rejecting the social and moral relevance of other rights or forgetting that civil and political rights are constantly changing. The distinction between rights associated with citizenship and specific rights serves the theoretical purpose of creating a frame of reference for analyzing the impact of the demand for new rights—usually related to specific social groups—on the underlying conditions for preserving the legal-political system in modern societies.

This perspective allows us to tackle a central issue in contemporary societies: the transition from “rights” to law. The latter cannot be regarded simply as a translation of “real” social demands into formal legal language. Two types of action

are required if this transition is to be effective. The first, which will be discussed later, refers to the political and institutional development of new rights in such a way that they can be assimilated effectively by the legal system and by government institutions, after having been formulated by the political party system and included on a political agenda. The second area of action is to integrate the new rights into the language and specific categories of the law. As we shall see later in the example concerning labor law, this means recognizing that legal categories are not merely a reflection of social realities, but are rooted in another sort of abstraction and discourse, in particular the abstract category of the individual as a legal subject upon which modern interactions are constructed.