

Citizenship and *Res Publica*: The Emergence of Republican Rights

LUIZ CARLOS BRESSER-PEREIRA¹

*A fourth kind of citizens' rights – the republican rights – are being recognized and enforced in the last quarter of the 20th Century, after the civil, political, and social rights have been defined. Republican rights are the rights that every citizen has that the public patrimony, the *res publica*, is utilized on behalf of the public interest. While civil rights protect citizens against a powerful state, republican rights protect the state against powerful citizens involved in several forms of rent-seeking. Three major types of republican rights are identified: rights to the environment, to the historical patrimony, and to the economic patrimony. The last, in flow terms, corresponds to the state's revenues, which are permanently threatened by businessmen, bureaucrats, and all kinds of special interest groups, sometime in subtle ways. To identify and contain these threats is a major challenge for modern institutions and law systems.*

History can be viewed as a civilizing process through which humanity learns to live in society, to solve its conflicts and to define its members' rights and duties. We can also think of it as an economic development process through which this same humanity learns to work together, to divide labor, to allocate resources, to cooperate in production, and to compete for social product. In the first case, the resolution of collective action problems deals with state institutionalization and law creation; in the second, it relates to market institutionalization. In both cases it involves a process of power, wealth and income distribution, which should satisfy, minimally, the main political objectives of order, welfare, freedom and social justice. As a society achieves these objectives in a balanced way, the more it will be civilized.

In this paper I shall focus on the political process through which men and women have been searching for order, freedom and social justice. In this way, following Marshall's basic proposal, I will investigate the development of citizenship from the historical assertion, first, of civil rights, then, of political rights, and finally, of social rights. Although these rights have not yet been ensured, they were reasonably well defined and incorporated by constitutions and laws of civilized countries. Then, I will argue for a fourth citizen's right – the republican rights – which have been defined in the last quarter of the twentieth century, but need to be transformed into law and effectively enforced. I will define republican rights as the right all citizens have to the *res publica* or the public patrimony – whether the historical, the environmental, or the economic patrimony – is effectively public, that is, of everybody and for everybody. I will especially try to propose, among the republican rights, a definition for the right to

the economic public patrimony, which may be understood as a stock of assets, but should mainly be viewed as the resource flows which are controlled by the state and non-state public organizations. In this century, when the *res publica* has become very large, representing between one third and the half part of all nations income, the greed of individuals and groups for it has increased, and its protection has become historically imperative. This same century, however, was also the century of democracy, and of the affirmation of citizenship through a complex historical process in which the tensions between private and public realm, between republican, liberal, and socialist values, between individual and collective rights are resolved. Republican ideas preceded liberal ones; they were originated in Roman thought and in Machiavelli, but they gave priority to citizens' duties, not rights.² Socialism came later, and stressed social rights. Yet, when now republican rights are being defined, the condition for the success of the whole citizens' rights enterprise is to combine the liberal and the socialist approach to the republican one.

Rights: A Conquest

The citizen is the member of the nation-state endowed with rights and able to interfere in the production of law. Law, in its turn, is the basic form institutions assume, is the normative system of citizens' rights and duties. Citizenship spreads out and asserts itself as individuals acquire rights and extend their participation in the creation of law. Therefore, rights are at the core of the ideas of law, state and citizenship.

Citizenship rights are conquered rights, they are always the outcome of a historical process through which individuals, groups, and nations strive for acquiring and asserting them. No one has ever been more emphatic and inspired in affirming such view than Ihering: "all and any rights, whether they are people rights, or an individual rights, they only assert themselves by a continuous inclination for fight".³ Bobbio follows the same line.⁴ For him, who adopts a firm position against the idea of natural rights, rights emerge when they can and must do. They are historical rights that emanate from continuous political battles engaged through time. They emerge in determined circumstances, related to the defense of new liberties.

The struggle for the citizenship rights is, in a first moment, a struggle of the bourgeoisie or of middle classes. In the twentieth century, however, this struggle turns wider, a battle in which the poor not only became formal citizens, with the right to vote, but increasingly citizens in actual fact.⁵ In this process, two informational factors assumed a relevant role: education and a free press. On the other hand, citizenship is also a practice, is something one acquires defending his or hers own rights. Therefore sociologists and anthropologists stress the growing

importance of social movements to build citizenship through the assertion of social and individual rights.⁶ The same outcome can be also achieved through the affirmation of consumer rights: defending them the consumer also becomes a citizen.⁷

In Marshall's classical analysis of citizenship rights, civil rights were historically defined first, then political rights, and finally, social rights.⁸ The two first rights conquered by citizens and guaranteed by the state were directly against the state or, more precisely, against a state captured and privatized by an oligarchy or an aristocracy.⁹ In the eighteenth century, the contractarians and the English courts defined the civil rights, which would serve as the foundation for liberalism; in the nineteenth century, democrats defined political rights. These two rights settled the basis of liberal democracies in the twentieth century. Through civil rights, citizens conquered the right to freedom and property, vis-à-vis a state that used to be oppressive and despotic; through political rights, citizens conquered the right to vote and to be voted, therefore to participate in political power against a state which before that, was oligarchic. Finally, in the second half of the nineteenth century, socialists defined social rights, which were in the next century written in the constitutions and laws of countries: besides liberal now the more advanced democracies turned social democracies.¹⁰

The fact that civil rights had been settled against the state seems to be paradoxical: how can the state guarantee rights against itself? The paradox, however, is solved if we observe that new rights are also new standards of behavior among individuals. When new rights are defined, they shift power relations within state and society. Rights empower citizens while reducing the power of the state elites. This paradox is related to Rousseau's paradox: when, through a social contract, citizens lose freedom for the state, they have their new freedom guaranteed by the law of the state, which expresses sovereign general will.¹¹ The state, against which these rights were asserted, 'used to be' despotic and oligarchic. After they were asserted, the rulers lose relative power in relation to citizens, and the state is refrained from being despotic and oligarchic: citizenship was historically being asserted.¹²

Even though citizens' rights against the state have been enforced, at least theoretically, there is the additional problem of guaranteeing human rights against other citizens: the rich and powerful ones. Social rights have this nature. They can be understood as rights against other citizens, if we think, for instance, about worker's rights in relation to their employers. However, when we think about social rights as the right to a worthy survival, to education, culture, health care, these are rights against civil society and the respective state.¹³ If the society possesses material resources to guarantee such needs, they are transformed into rights.

In the last quarter of the twentieth century a fourth kind of right is emerging: the right of citizens that public patrimony effectively belongs to all and should be for all. This paper will focus on these new rights, which we propose to call 'republican rights' – citizens' rights against those who try to capture privately the goods that belong or should belong to everybody. I will focus on a category of these rights: the right to the *res publica* or to the public economic

patrimony.¹⁴ We could say, from a non-historical perspective, that these rights have always existed. Nevertheless, only recently these rights have started to gain a defined agenda among diffused interests. These rights will increasingly deserve the attention of political philosophers and jurists.

However, before examining more carefully the rights to the public patrimony, it is necessary to situate republican rights among other rights, not only from a historical but also from a logical point of view.

The Public and the Private

Habermas observes that Marshall's analysis of the citizenship concept, with three citizens' rights in succession (to which we are adding a fourth, republican) 'is part of a widespread tendency that sociologists call *inclusion*. In an increasingly differentiated society, an increasing number of people acquire increasingly more inclusive rights of access to and participation in an increasing number of sub-systems...'¹⁵ But he warns that Marshall's analysis tells a linear story that does not highlight the crucial role of political rights in citizenship by placing them on the same level as the others. And concludes referring to his theory of communicative action in which democracy plays a crucial role:

Indeed, only rights of political participation ground the citizen's reflexive, self-referential legal standing. Negative liberties and social rights can, by contrast, be conferred by a paternalistic authority. In principle, the constitutional state and the welfare state are possible without democracy.¹⁶

In the second half of the twentieth century, civil, political and social rights were linked under the name of *man's rights* or *human rights*. The Universal Declaration of Human Rights, of 1948, declared the universal validity of these rights, which then became positive at international level with 1966's covenants and other core treaties (genocide, torture). In abstract terms, human rights and man's rights are synonyms: they encompass all rights. However, in historical terms, we will see that the idea of *human rights* appears in the 1970s, identified especially with the civil rights, as a reaction against authoritarian regimes that became dominant in developing countries. Since the 1930s, the great emphasis had been shifted to social rights. Civil and political rights were considered to be assured, or to be 'formal' rights, product of a 'formal democracy' that would only become real or substantive when social rights were also defended. This was the left's classical position until the 1960s. However, in the 1960s and 1970s, when authoritarian rightwing regimes took over in a great number of countries, especially in Latin America, and began to violate civil besides political rights, the left was forced to check its position. Given state violence against left-wing politicians, many of them belonging to middle class, given torture and murder, it became essential to reckon not only political rights expressed in democracy, but civil rights. On the other hand, it became clear that civil rights had to be valorized and extended to the poor.¹⁷

After democracy was restored in many countries, it has become increasingly clear to the democratic segments of society that not only the human rights of the

political opponents to the authoritarian regimes were at stake. It was also necessary to defend civil rights of the poor, of the powerless and oppressed, of the victims of social exclusion.¹⁸ In the 1970s and 1980s, the Catholic Church played in Latin America a decisive role in defense of civil rights, or in a wider sense, of human rights, of both political opponents and the powerless and oppressed ones.¹⁹ At the same time, organized civil society, and particularly the public non-state organizations, came to get an increasingly important role in defense of human rights,²⁰ while the press assumed a more and more strategic role in this matter.²¹ Thus, although in the developing countries authoritarian views are still present in a considerable part of the population, human rights of the poor and the powerless, were revalued, starting from the right to life and to respect, at the same time that democratic values were reasserted.²² Social rights remained important, but the almost exclusive emphasis on them lost legitimacy, since it was based on the mistaken presumption that civil rights were already an all people' conquest – when they were just an elite's conquest –, or on the biased point of view that civil rights would only be guaranteed when social rights would also be.²³

Contradictory Human Rights?

While civil rights are often considered by classical liberalism as 'negative' in the sense that the state should not interfere with the freedom and the property of citizens unless they are harmed, political and social rights require a 'positive' action from the state. Conceptually liberty has two sides: the negative concept of liberty is associated to civil rights and liberalism, while the concept of positive liberty is associated to democracy in the case of political rights, socialism in the case of social rights, and full citizenship in the case of republican rights. Negative liberty is liberty 'from', while positive liberty is liberty 'to'. Citizens have the negative liberty of not suffering restrictions or interference in what concerns their legitimate wishes or interests; they have the positive liberty to participate in the government, share in the public bounty, and be assured that what was decided as public is in fact so. This distinction, that owes its contemporary formulation to Isaiah Berlin,²⁴ though attractive, is relative.²⁵ Actually, in order to guarantee civil rights, government's positive action is also necessary, since it implies administrative costs, as much as social rights. The classical (or liberal) state apparatus – the Parliament, the Courts, the Police, and the Army – were created to guarantee civil rights, in the same way that the Social State apparatus, expressed in Social Security, Education, Health, and Culture Departments, exists to guarantee social rights.²⁶ "Positive liberty", as observes Tétreault, "is the liberty of the public sphere. It is an entitlement to engage in political life".²⁷ Positive liberty involves a republican approach to politics without which negative liberty and the protection of civil rights would be impossible.

While civil rights are individual rights, protecting individuals which are supposed to be selfish only looking for their own interests, republican rights are collective rights in the sense they protect the collectivity, which, on its turn, is also able to act according to solidarity principles in relation to public interest. Yet, republican rights are also individual rights in the sense that each individual holds them.

Considering a scale that goes from the private to the public, from the individual to the collective interest, we would have political and social rights between civil and republican rights. All of the rights are fundamental, and there is no hierarchy between them, but the tension between the civil and the civic, between the liberal citizen who protects his own interests and the republican citizen who protects general interests, is permanent.

This distinction between individual and collective rights is relative. Individual rights may only be guaranteed within a society in which collective action is effective in creating liberal and democratic institutions and in enforcing these rights. On the other hand, collective rights, whose defense directly requires collective action, and a compassionate or solidarity attitude towards those injured, are also rights of each individual citizen.

Three Republican Rights

The emergence of the republican rights is related to the democratization process, which in the twentieth century has become the dominant political regime in the world. Democracy has changed into 'an universal value',²⁸ expressing for citizens a growing concern over public matters.

While the struggle for human rights gained new prominence in the second half of the 20th century, a profusion of new rights appeared. United Nations's documents started referring to 'third generation rights', that include rights to solidarity, peace, and economic development. Among these diffuse interests or third generation rights, some became more specific as social movements behind them gained strength and the possibility of drafting these rights into law turned realistic.²⁹ However, as Bobbio observed, these rights 'constitute a category which is still too vague and heterogeneous'.³⁰ They are aspirations rather than rights. It is not the case of republican rights. They can be reduced to a common theme: just as citizens have the right to liberty and property (civil rights), to vote and be voted on (political rights), to education, health and culture (social rights), they have the right that the *res publica* remain at the service of everyone, rather than be appropriated by patrimonialist or corporative groups that act within society as rent-seeking agents (republican rights).

The threat against republican rights originates either in the patrimonialist perspective of the state – which confuses the public patrimony with the individual or family patrimony – or in the corporative perspective, which confuses the state patrimony with that of organized and corporative interest groups. Corporative and patrimonialist individual or groups are free-riders, are agents which, expecting the majority will not do the same, don't hesitate – individually, in the case of patrimonialism, collectively in the case of corporatism – on privatizing the state, on capturing it. The criminal, the rights violator, is always a free rider. He knows the laws that organize social life, he knows that if everybody transgress the law, the legal system will lose its efficacy and disorder will spread out. However, as the majority obeys the law, he knows there is room for free riding.

We can consider three fundamental republican rights: the rights to environmental patrimony, to the cultural patrimony, and to economic public patrimony. The threat to the environmental patrimony and the cultural patrimony is mainly represented by violent attacks against them. In the case of the public patrimony, which is made up mainly by the state income obtained from taxes, threats are subtler: it is often difficult of being identified. The difference between the threat to private property and to public property is in the fact that holders of private property is permanently on guard, ready to defend their property, while the holder of public property is society, the nation, the group of citizens collectively organized in the state. Or, we know how limited are the possibilities of collective action.

Republican rights are often collective or pluri-individual rights, since they are especially concerned with groups of people, but they are also part of each citizen's rights. Their emergence has constituted a sign of the citizenship advance. In law theory, it is more common to speak of diffuse interests instead of republican rights. As Antunes observes, the emergence of diffuse interests is an unavoidable consequence of the civic maturity of the citizen, at a historical moment in which the state has not offered appropriate normative coverage yet within a wide area of interests. In this sense, Antunes affirms that 'diffuse interests are latent, eventually fragmentary'. It's not easy to define them: 'generally, the figure of public interest can apply to several cultural and social rights and to many programmatic norms of our constitution'.³¹ Therefore, diffuse interests and republican rights assume such a wide character that they end up risking that their own subject is drained down.

The Emergence of Republican Rights

It is difficult to define in law terms republican rights. Thus jurists, prudently, speak of interests instead of rights, and qualify them as 'diffuse'. They also speak of them as collective rights. They are collective rights when the entitlement expresses itself collectively, as the rights of a category or of class of subjects.³² But the republican rights are subjective individual rights since citizens are their holders. Jurists also speak of 'subjective public rights' to designate, in a wide manner, all the rights of individuals in relation to the state: rights that compel the state not to do (not to attempt against freedom, especially) or to do (especially to guarantee the social rights). Republican rights could be included in this category, but defining them in this way means to enlarge excessively the concept, and, at the end, to invert their meaning. When I refer to republican rights, I do not mean the right of the citizen against the state – these are civil rights – but the rights of the citizens of a given state against the individuals or groups who want to capture the public patrimony.

Although they may be based on universal moral principles, republican rights emerge in order to answer concrete problems of modern societies. The systematic defense of the historical-cultural patrimony of nations is an effort that dates from the first half of this century. The awareness of the existence of rights over the historical-cultural patrimony has gradually been gaining force, maybe as a

way to assert national identities in an era of globalization, but it has never assumed a dramatic or urgent character. The rights to the public environment emerged more recently. These rights became universally acknowledged after United Nations' 1992 Stockholm summit. After that, the defense of the environment, originally promoted by radical leftist groups (e.g. European Green Parties), became a general concern.

Thus, when I detect the emergence of republican rights I am not parting from a universal concept of rights – a theme that escapes the objectives of this paper – but I am just signaling that they become historically or sociologically relevant in the last quarter of the twentieth century. Despite Turner's observation of the "deafening silence about rights in sociology", that derives from the difficulty sociologists face in dealing with a normative concept as human rights or citizenship rights, we only can speak of the emergence of a new kind of rights in the moment that these rights become a sociological fact (specifically a 'moral fact' in Durkheim's analysis) that tends to turn into positive law.³³

The defense of the *res publica* is already present in the whole of public law. Penal law foresees the penalties for those who usurp the public patrimony in a corrupt or illegal manner. Administrative law emerges with the bureaucratic reform to defend the public patrimony against corruption and nepotism, albeit not in a very efficient manner. Yet, republican rights related to the economic patrimony only gained their position as a separate set of rights distinct from the others in the last quarter of the 20th century. The most general reason for this new concern with public patrimony or the *res publica* is the huge growth of the state in this century, making the nation's economic patrimony strategic, and the great interest in the protecting environmental patrimony given the damaging effects of industrialization.

Res publica is the public patrimony, it is the economic, the historical-cultural, and the environmental patrimony. It is also possible to think of the *res publica* in terms of a political regime, a republic. The general concepts of public sphere, common patrimony, 'open public space' may be viewed as synonyms of *res publica*, including everything that is public, that belongs to the people, and that is guaranteed or ascertained by law.³⁴ While the consubstantiation of the common good, or of the public interest, the *res publica* assumes a valorizing character. People within the open public space become better citizens if they act less as spectators and more as agents of the common good or the public interest – as republicans.³⁵ Without a republican perspective it is difficult to defend the public patrimony. If citizens lack clear notions of the public space and of the common good or public interest, defense of public patrimony is equally hopeless.

As a more general concept of the public space, the *res publica* or 'the public' includes everything that is public, that belongs to the people, that is of everybody and for everybody, that is manifest and therefore endowed with publicity, that is guaranteed or asserted through public law.³⁶ As an embodiment of the common good or of the public interest, the *res publica* assumes a value character. Once citizens, instead of being mere observers, enlarge their pledges to the common good or the public interest, they will become better citizens.³⁷ Actually, it is impossible to defend the public patrimony if there is no republic,

if citizens don't clearly understand the notion of public space, and of common good or public interest.

The identification of the *res publica* with the state, or with what the state owns, is misleading. The public space includes more than what the state owns, and everything that the state owns is only public as a matter of definition. State property is often appropriated privately, as this paper emphasizes.

Specifically as public economic patrimony, the *res publica* is constituted by the stock of public assets and by the flow of public resources that the state and non-state public organizations undertake. This flow of resources has a fundamental importance. Not only is this flow large, it is also very vulnerable because it is much more subject to private appropriation than the stock of public assets. In this century, while the state and public non-state institutions burgeoned, the former in terms of tax capacity, the later through voluntary contributions, the outright greed and consequent competition of interest groups for those resources exploded as well. The protection of these resources, the spoils of the *res publica*, became imperative.³⁸

The concern about protecting the *res publica* only became dominant in the second half of the twentieth century. Not by chance, in the 1970s, a progressive political scientist in Brazil,³⁹ wrote for the first time about the phenomenon of 'privatization of the state', about the use of the state to further interests of groups, while a conservative economist in the United States,⁴⁰ in a text that opened new paths to the economic theory, defined the 'rent seeking' process – the search for extra-market revenues through the control of the state. They both referred to the same problem: they realized it was necessary to protect the *res publica* against the greed of powerful individuals and groups.

As the protection of the republican rights has become a dominant theme all over the world, it also became clearer that it was necessary to 're-found the republic'. Accountability of politicians and officials is now a central problem in political science. The fiscal crisis of the state, in the 1980s, has turned its institutional reform into a new priority. Division of powers or checks and balances, bureaucratic public administration, and democracy – the main institutions that are supposed to protect public patrimony – had to change: democracy should be improved not only to make politicians more representative and citizens more participative, but politicians more accountable. Bureaucratic public administration, besides improving the system of checks and balances that assure accountability, should become more efficient, i.e., should assume a managerial strategy.⁴¹ In this re-foundation process one thing seems to be clear: the protection of republican rights is an essential task. However, to protect the *res publica*, it is necessary to reach a more precise conceptualization of these new rights emerging in history, and their meaning.

Republican Rights and the Public Interest

Without a clear notion of public interest, it is impossible to define the *res publica*. Corruption and nepotism are obvious offenses to *res publica*. In turn, 'classic' ways of defending the *res publica* are laws, auditing systems, and

parliament reviews against corruption in public purchases, tax evasion, and nepotism. Criminal law attempts to prohibit and punish corruption; administrative law and procedures (for example, a public exam for civil service recruitment) seek to control corruption, tax evasion, and eliminate nepotism.

There are, however, other violations of the right to the *res publica* that are as serious or worse, but perhaps not as obvious. They are all related to state policies intended to be public policies but that actually serve private and indefensible interests. First, the economic policies might provide unduly and excessively certain companies or individuals with a range of state benefits – subsidies, fiscal waivers and protection from competition – without economic justification. Although it is difficult to distinguish legitimate transfers from illegitimate ones, obvious abuses occurred in every country.

Second, social policies often provide benefits and protect the social status of individuals and groups, mainly members of the middle class, who hold greater voting power.⁴² Extreme cases of this type of violation in Brazil were the advantages granted to borrowers from the financial housing system towards the end of the 1980s and those enjoyed by the pensioners of state-owned companies. Once again, the losses of the State Treasury were enormous.⁴³

Thirdly, administrative policies might insulate either all civil servants or certain groups of officials, making it impossible to make them accountable, not checking if they really work, and paying them disproportionately. In Brazil, the rigid tenure ensured to public servants by the 1988 Constitution, generous yet undeserved remuneration for some, and a privileged pension system are, examples of this type of violation of the right to the *res publica*.

Transgressions of this sort against the *res publica* presents, however, a major difficulty. What is public interest? How can one tell whether a certain state policy reflects the public interest or privileges special interest groups? It is not reasonable to identify the state with absolute rationality, with the public interest idea, as Hegel suggested, nor to turn the state into an exclusive agent of dominant classes, as did Marx and Engels.

Actually, in the contemporary social-liberal democracies, marked by political representation of several groups of interests, by class coalitions of all kinds, nobody has the monopoly on the definition of public interest. Each group, each class intends to represent corporately the public interest, in such way that a heterogeneity of conflicting 'public interests' can be found. This doesn't mean, however, that the public interest does not exist, that the defense of the *res publica* in the name of public interest can't be accomplished. Neither it means that the public interest can only be defended indirectly by the action of self-interested – or just selfish – individuals operating in the market, as contemporary radical neo-liberalism intends. It means only that the public interest doesn't exist in an absolute and therefore authoritarian form. It does exist in a relative form, through the consensus reached by civilized and democratic societies on what constitutes the public interest, and, more broadly, on what constitutes a common moral system.

This consensus comes from the distinction between self-interest and civic values, as determining factors of human motivation. If it is accepted that individuals only motivate themselves by self-interest, as it has become current

recently among the neoclassical economists and rational choice political scientists, the idea of a consensus on the public interest becomes contradictory, as the idea of citizenship also does.⁴⁴ As Souza Santos observes, 'the return to the principle of market in the last twenty years represents a social and political revalidation of the liberal thought, to the detriment of citizenship'.⁴⁵ Yet, if the civic values – the values which permit the Greek *paidea* – are viewed as part of the human being, we can then think about consensus formation on the public interest. Education and public debate lead to this consensus in civilized societies.

A civilized society and the creation of consensus upon the meaning of the public interest are the result of substantive rationality oriented towards goals or ends. This substantive rationality will be defined and redefined by society through public debate. Even when instrumental rationality becomes dominant and render the quest for efficiency or economic development a fundamental value, civic values, which allow for collective action and the definition of the public interest, are essential as well. Through public debate founded on civic values, a consensus on the public interest is reached; the public interest becomes the reflection and ultimately, the right, of each citizen. The public interest is the foundation of republican rights.

The public interest exists as a positive concept: it is the interest sanctioned by representatives of the people and protected by the law. In order to move beyond the public interest to the *res publica*, social consensus is important. Social consensus allows the identification of the violation of public interest through publicity, scandal or a collective response of scorn or revolt occurs. Effective transparency of public patrimony's management is the most concrete insurance against violation of republican rights or *res publica*'s privatization.

Poorly Defined Rights

Republican rights are poorly defined, and even worse defended. The characterization of the violence against the *res publica* depends on the existing clearness in society in relation to that it understands as public interest. I can identify three forms of violence, classified by the facility of its identification. They correspond to the classical and the new republican rights I defined previously, with a third form in between.

In the first place there are the classical and well defined forms of violence against the public thing: corruption, nepotism, and tax evasion. In the second place, there are resulting gains of unfounded (but victorious) lawsuits against the state.⁴⁶ Finally, there are the 'modern' and badly defined forms of violence exercised against the public thing: the improper transfers to capitalists, to middle class, and to civil servants, in the name of policies pretended to be public. Besides corruption, tax evasion is a violence that has been included in criminal law in civilized countries.⁴⁷ Nepotism or, more widely, the use of public office in personal interest is generally not regarded as a crime, but society tries to prevent these wrongdoing through administrative law, the requirement of public exams in recruiting civil servants, and auditing.⁴⁸

The success stories related to unfair lawsuits against the state often involve huge damages to the state treasury. They reveal the fact that the judicial system

has not yet succeed in escaping from its liberal, anti-state, bias. In Brazil, the Judicial Branch often acts on these occasions as if we were still before the liberal problem of defending the citizen against an oligarchic and absolute state. There is no doubt that democratic progress in the last two centuries meant guaranteeing individuals rights. Yet, since a reasonable guarantee of these rights was achieved, the problem of protecting the *res publica* assumed a fundamental relevance – relevance that contemporary judicial systems have difficulty in achieving. They are not yet prepared to face the problem, and many times they don't possess a criteria for distinguishing between proper and improper transfers, between abusive and legitimate lawsuits, neither they are sufficiently aware of the violence against the involved citizenship. The defeat of the state in actions of this nature, in certain cases derives simply from corruption, but in most cases it is a consequence of a the judicial system failure in acknowledging republican rights, and of the fact that administrative law is unable to characterize and punish the new forms of damages against the public interest. On the other hand, only recently it has become clear that the first concern of the administrative law must be the defense of the *res publica*, not only against the action of corrupt officials but also, if not especially, against rent seekers.⁴⁹

Finally, there are the 'modern' forms of private capture of the public thing: the fiscal transfers and waivers that assume the form of public policies oriented to income distribution or the promotion of economic and technological development. Here we are in a gray area, badly defined by its own nature. This is the area where, in the past, the patrimonialist forces used to act, and where the corporatism acts nowadays. Patrimonialism was more direct: it openly confused the public patrimony with the private one, while contemporary corporatism is subtler: it defends group interests in the name of public interest. The problem is that, contrary to neo-liberal thought, some of these transferences are morally required, since they involve social solidarity. Distinguishing the proper transferences from the improper ones is a fundamental challenge of modern democracies. The public interest defines itself through a complex process of negotiation among groups, the state serving as intermediary. In several cases, however, the outcome is not the assertion of the public interest but the capture of the public patrimony. In this moment the contemporary state and its respective political regime, democracy, reach a crisis: the state comes to a fiscal crisis and to a governance crisis, and democracy to a governability crisis.⁵⁰

Until now, the law has done little about definition and enactment of the new republican rights. The classical republican rights were for long made positive: fundamentally the right to the public patrimony against several forms of corruption. In such cases, the problem is not of creating new law, but of enforcing them, so that the corresponding republican rights are protected. On the other hand, among the new republican rights, the right to the environmental patrimony and the right to the historical patrimony have also been asserted by the law in many countries.⁵¹ If these rights are not adequately guaranteed it is not for absence of laws, but because the state organizations that should be responsible for auditing the violations and enforcing the law making officials accountable are deficient.

However, in relation to the new right to the public economic patrimony, little has been done to make it positive. These are rights, which society itself has not been able yet to become clearly conscious about. On the other hand, the action of making the rights positive by the legislative branch and the conceptualization and interpretation of these rights by jurists only occur historically when social consciousness has already arisen. Defining better these rights, characterizing better the forms and manners of their transgression, changing them into effective rules is, therefore, a major challenge for lawyers and jurists.

Defenders and Opponents

The awareness, positive character, and the guarantee of republican rights will occur slowly as society accepts the new roles of the state and itself. It is important to remember the forces of support and opposition to the republican rights. The definition of the main defenders is always arbitrary. For each right there are an enormous number of defenders that tend to grow as the right establishes itself. We might distinguish, however, historically some special defenders for each one of the rights.

Each of the previous citizenship rights had a different main defender. The champions of civil rights, in the 18th century, were the English courts and the illuminist philosophers. Political rights were established in the 19th century as democratic politicians committed to popular causes overcame economic liberalism.⁵² Social rights were a direct result of the struggle by European socialists.

The republican rights will have defenders according to their own outlook. The rights to cultural patrimony are defended mainly by artists; environmental patrimony mainly by biologists and environmentalists; the right to the economic public patrimony, finally, by the economists. Nevertheless, it always falls on jurists and philosophers to define these rights, and to the judicial system to implement them. In the definition of the limits between legitimate and illegitimate economic and social policies, the economic theoreticians, with tools based on the concepts of public property, monopolist power, externalities, and transaction costs, have already been offering a major contributions. On the other hand, the economists and public managers working in the finance ministries of various countries are directly responsible for the balance of fiscal accounts and, therefore, for vetoing the misuse of public resources. The decisive role of definition and implementation of the republican right to the *res publica* will always fall to the jurists situated outside and within the state. Outside the state, philosophical and juridical debate will be the starting point for a better definition of the republican rights.

Within the state, the defenders of the *res publica* are the state's prosecutors and attorneys, and, more generically, the judiciary and legislative branches. The state's attorneys protect the state before justice in traditional civil cases where the state is defendant or plaintiff: fiscal cases, condemnations, labor cases. The defense of republican rights falls specifically to the state's prosecutors. In practice, this branch of the government initiates the legal actions related to the protection of the environment; similar actions in defense of the public economic

patrimony are likely to become more frequent in the near future. The judiciary branch will consider the actions having as guidance the law enacted by the legislative branch. Still, even in countries in which positive law instead of common law prevails, the protection of republican rights will largely depend on jurisprudence as it is defined over time.

As mainly constituted by a flow of fiscal revenues, the *res publica* is a fundamental economic community property. Economists, in spite of all their individualism that often leads them to discredit the possibility of collective action, are professionally oriented towards the optimum use of scarce resources. Their permanent temptation is to believe that markets are capable of fulfilling this task automatically. When state intervention becomes inevitable, economists have the means to develop reasonably rigorous methods and criteria in order to evaluate public policies in order to protect the public interest, and to distinguish the forms of state intervention which are legitimate from the ones that are not.⁵³ The economic criteria that they adopt to justify state intervention – positive and negative externalities, increasing returns to scale, monopoly power, information asymmetry, incomplete markets – are naturally hard to apply in actual cases. Yet, as violations against the *res publica* are eventually crude, these criteria are helpful in the evaluation of the problem.

It is necessary, however, to add the moral criteria to the economic ones. When the state ensures universal health care, primary education or a basic welfare system, its expenditures may have an economic justification, but they are basically a response to moral imperatives. Similarly, there might be private appropriation of the *res publica* in which with economic, social and even moral justifications might easily be presented.

Who are these violators who defile the *res publica*? In some aspects, all of us are. After all, Hobbes postulated that men possessed 'natural greed'. Historically, the appropriation of the *res publica* occurred through a patrimonialist mechanism, although, while there was no clear distinction between public and private patrimony, it was not possible to properly talk about *res publica* or about its private appropriation. With capitalist revolution, in the 18th and 19th centuries, followed by the gradual introduction of democratic regimes, patrimonialism and its contemporary forms – clientelism and sheer corruption – were identified as the enemies to be fought.

In the twentieth century, a new institutionalized form of private appropriation of the *res publica* appeared: the corporatist spirit. While patrimonialism mixed public patrimony with family patrimony, corporatism mixed public patrimony with the patrimony of interest groups or those of a corporation. By corporatism I do not mean a form of social regulation associated to the welfare state, but to a form of interest representation that is simultaneously both legitimate and perverse.⁵⁴ It is legitimate because it is part of the political logic of contemporary social-liberal democracies, according to which social groups are supposed to be politically represented and defend their interests. It is perverse because these groups, rather than admitting that they are defending private interests, tend to identify their private interests with the public interest. When someone or some group explicitly defends their interests before the state, this action is completely legitimate. It is not so, however, when the arguments used hide or minimize the

represented private interests, claiming to defend general interests. In this case, it is likely that the privatization of the *res publica* is taking place.

Democracy, the enhancement of classical vertical and horizontal accountability, and the introduction of managerial reform are privileged instruments in preventing this privatization of the *res publica*. The bureaucratic reform represented a considerable advance in the historical process of defense of public patrimony, but besides promoting a rigid and inefficient administration, it was a victim of the corporate spirit of its public officials it created. The managerial reform continues the fight against patrimonialism, and challenges the inefficiency and the bureaucracy's corporatist spirit. To make politicians and officials accountable and protect the *res publica*, managerial reform involves the combination of bureaucratic procedural controls with managerial controls of outcomes; the creation of quasi-markets to allow public service organizations, like hospitals and universities, to compete; and the strengthening of social control mechanisms through the organizations of civil society.

Conclusion

The advance of civilization around the world has occurred historically through the assertion of citizenship rights. The definition of civil rights and their introduction into the laws of countries marked the beginning of the liberal political regimes; the assertion of political rights permitted the emergence of liberal democracies; the definition of social rights permitted the emergence of social democracies. The assertion of republican rights will complete this historical cycle of citizenship assertion. Each one of these rights is built on the earlier one. The first two have asserted individual rights; the last two have asserted collective rights. But individual rights are only viable in the plane of a *polis* in which the public has precedence over the private. In the same way that public interest is only fulfilled when individual rights are guaranteed.

All the rights are rights of the man, are human rights – rights that men have been asserting and trying to make positive in the last three centuries. Their definition and introduction into the laws of countries have been a great civilizing conquest, but it is only a step toward its most general assertion. The latter depends on their effective protection, on the guarantee that they will be extended to the whole society. Although I don't believe in the linear progress of societies, I believe that the tendency towards civilization is dominant. When civil and political rights have changed into 'human rights', in the second half of twentieth century, what was happening was the systematic attempt to extend them to the poorest strata of the population. The definition of republican rights at the end of this century represented the search for a higher level of democracy, and of integration of public and private spheres. Defining republican rights is not an easy task. The difficulty is especially large in relation to the economic patrimony. The *res publica* is represented mainly by the flow of taxes which the state collects every year. Depending on the way such resources will be spent, a public use or a private appropriation of the *res publica* will take place. The *rent-seekers*, the enemies of the public patrimony are many. In the past, they were represented by patrimonialism; in the present they are represented by

corporatism. On the opposite side, the candidates for defenders of the *res publica* are many. Economists have a strategic role in this process, since they are able to define the criteria, which permit to distinguish between the legitimate and illegitimate public expense on a technical basis. But there is also a moral criterion to be considered, which is far beyond economists' capacity. Moral and political philosophers, theologians, jurists, journalists, politicians, social movement activists, all citizens individually and in organized groups are supposed to contribute. It is a challenge for the society as a whole, for a society that, besides being democratic, intends to be civilized.

Notes

- ¹ I am grateful to Andrew Hurrell, David Miller, Denis Rosenfield, José Arthur Giannotti, Fábio Wanderley, Guillermo O'Donnell, Laurence Whitehead, Letícia Schwarz, and Paulo Modesto for their comments.
- ² On the republican citizen and republicanism see Skinner (1978) and Pettit (1997).
- ³ See Ihering (1872) at 15.
- ⁴ See Bobbio (1992) at XVI.
- ⁵ I have called 'citizenship contradiction' the political problem resulting from the existence, in Brazil, of a large number of citizens who have the right to vote, but who are not conscious of their political and social rights and obligations. See Bresser-Pereira (1996).
- ⁶ As Ruth Cardoso (1994) at 90 observes: 'Citizens' rights haven't arisen from the vacuum, they have a history, and refer to a precise concept. But this concept is not anymore able to relate to what actually happens, because it is based on the idea of individual rights and, presently, through the struggle of social movements, there is a full recognition that there are also collective rights'. See also Durham (1984) and Silva Telles (1994) on the subject.
- ⁷ As Letícia Schwarz (1997) points out, the opposition between citizen and consumer is false: 'Through the defense of its rights as consumer, the individual becomes a citizen: The flag starting the race is given by the understanding of the consumers' rights even if this happens in a confused and mistaken manner; the conflicts and negotiations are the track; but, if the finish line is crossed, many people feel their civil dignity rescued.'
- ⁸ - See Marshall, 1950.
- ⁹ - Formally, civil rights are not only rights against the state. They are also rights of each citizen against other citizens who steal or attack him. The criminal law, as a public law, is orientated to guarantee citizens' civil rights against criminals. Or, more widely, to guarantee the rights of the citizens, of the enterprises and of the state itself against criminal actions.
- ¹⁰ This Marshall's remarkable analysis has been object of several kinds of criticism. Maybe the more significant is the one, following the line of Klaus Offe's argument, that Reis (1990 at 168 - underlined by the author) presents. He sees in the social rights assertion and 'in the welfare state the character of a functional requirement of capitalism itself... the practices related to the social policies, instead of representing an additional and somewhat accidental color acquired by the state in the process of capitalistic development, whose market logic would be alien to it, actually form an inherent non-commercial counterpoint to this very logic...' However, there is no accidental character in Marshall's analysis, and the fact that social rights are functional to capitalism, as Offe (1994) has well pointed out, neither takes away their conquest character nor the quality of representing an advance in the democratic process. A different debate is the one about the relative loss of functionality of these rights, since the moment the Welfare State came to a crisis.
- ¹¹ - Through the social contract, which establishes the basis for the sovereign power or for the state, according to Rousseau (1775) at 244 'each one giving oneself to all, gives oneself to nobody; and as each member acquires the same right he surrenders, one gains the equivalent to what one loses, and more power to keep what one already possess'.
- ¹² - As Ferreira Filho (1972) at 74 observed: 'The immemorial experience that the power tends to the abuse, and that this can only be avoided, or at least hampered when the state obeys the law and is fitted in a juridical statute superior to it, translates the rule of law. The civil rights have established the basis for the liberal regimes, the political rights have established the basis for the democratic regimes, and the social rights have established the basis for the social-democratic regimes'.
- ¹³ - I am using civil society in its classical meaning, as society organized and weighted according to the political powers individuals and groups possess, given their organization, wealth, or knowledge, and not as the collection of non-profit organizations. In recent times, given the increasing importance of public non-state (non-profit) organizations, this second meaning became also usual. Often civil society is thought in opposition to the state. This opposition, however, only makes sense when the government, which occupies the state

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- leadership, loses its legitimacy. Normally civil society and the state walk together: the government represents the civil society within the state.
- 14 - I owe Guillermo O'Donnell for the suggestion of naming these rights as 'republican rights' instead of public rights. Initially I thought about using the expression 'public rights', that would be distinguished from the expression 'public right' (in opposition to private right) since it would be always used in plural. This expression, however, may lead to confusion, whereas the expression 'republican rights' is new, permitting to identify rights that are also new.
 - 15 - See Habermas (1992) at 78.
 - 16 - See Habermas (1992) at 504.
 - 17 - According to Jelin and Hershberg (1996) at 3: 'Whereas it was once commonplace to differentiate among civil, political and social rights, and to conceptualize citizenship primarily in terms of social rights, in the 1980s basic human and civil rights could no longer be dismissed or taken for granted. Instead, they became the center of political activism and intellectual preoccupation'.
 - 18 - For example, according to the auditor of São Paulo's Police, Benedito Domingos Mariano, 'the victim of torture is generally man, black, poor and lives in the periphery'. (*Folha de S. Paulo*, January 1st., 1997)
 - 19 - Regarding Brazil, the main document about this comes from the *Arquidiocese de São Paulo* (1985) *Brasil: Nunca Mais*. See also Paulo Sérgio Pinheiro and Eric Braun (1986).
 - 20 - The public non-state institutions are improperly called non-profit organizations. Non-profit or Third Sector organizations include unions, that are corporative. Public non-state organizations are organizations oriented to the public interest. NGOs - non-governmental organizations, are a form of public non-state organization, but charities, foundations, and "private" non-profit universities are also included in the concept of public non-state ownership.
 - 21 - At this level, the works of Gilberto Dimenstein, from the *Guerra dos Meninos* (1990), are essential. These works were joined together and summarized in Dimenstein (1996). The foreword of this book, written by Paulo Sérgio Pinheiro, has a significant title: 'The Past is not Dead: It is not Past Yet'.
 - 22 - This authoritarian attitude expresses itself in the lack of indignation in relation to the actions of violence against the human rights in the socially excluded sectors, or even in the support for those actions from considerable sectors of society. Nancy Cardia (1994), reporting a research on the lack of rejection on the part of the socially excluded against the violence, sees the problem as a case of 'moral exclusion of groups regarded to be on the margins of society', in a context of absence of power of the governed over the rulers, of alienation from the process of law production, of ignorance about the meaning of civil and political rights, and of lack of channels of access to the mechanisms of law protection.
 - 23 - The debate on individual and social rights, however, continues alive, through the discussion on the ideals of freedom and solidarity. See Cardoso de Oliveira (1996).
 - 24 - See Berlin, 1958.
 - 25 - The classical formulation of this distinction is due to Benjamin Constant (1814) at Second Part, Chapter VI, who writes about 'la liberté des anciens et la liberté des modernes'. Berlin wrote his essay on the two concepts of freedom in 1958, in the height of the ideological conflict between liberals and Marxists. Despite being aware that the trade-offs between the two kinds of freedom are necessary, he, as a representative of liberalism, praised negative freedom and emphasized radically the risks of positive freedom, which is 'at times, no better than a specious disguise for brutal tyranny' (1969) at 131.
 - 26 - For a criticism of the theory classifying the rights as they involve positive or negative prescriptions, see Lindgren Alves (1994).
 - 27 - See Tráult (1998: 277).
 - 28 - See Coutinho, 1980.
 - 29 - The first generation rights would be the civil and political rights, and those of second generation would be the social rights.
 - 30 - See Bobbio (1992) at XIV.
 - 31 - See Antunes (1989) at 21-22.
 - 32 - Antunes includes the consumer right among the diffuse interests. This is a right that can be collective, since its holder is frequently a group, category or a class of individuals linked among each other. But it is neither a diffuse nor a republican right. It is a civil right, a right subordinated to the right of property. The consumer's right, although it may be seen as collective, is actually a private right: it expresses the right of the buyers of consumer goods not to be misled in their purchases.
 - 33 - Turner (1993: 163). Durkheim's views on the subject are also in this paper.
 - 34 - See Ostrom, 1991.
 - 35 - According to Janine Ribeiro (1994) at 34, 'the more citizens are reduced to spectators of political decisions, the lesser will be the public character of the adopted policies, the lesser their commitment with the common good, with the *res publica* which gave its name to the republican regime'.
 - 36 - See the Smend's (1934) analysis of the public and public thing problem.
 - 37 - According to Janine Ribeiro (1994) at 34, 'the more citizens get reduced to public, to spectators of political decisions, the less will be the public character of adopted policies, the less will be its commitment to the welfare, to the *res publica* which named the republican regime'.
 - 38 - There is no estimate of this flow of resources if we include the revenues of non-state public entities. However, if we take into account only the fiscal burden, we know that, in developed countries, it grew from about 5 to

10 per cent, in the beginning of the 20th century, to about 30 to 50 per cent of the gross domestic product, presently. In fact, the set of state fiscal waivers that benefits certain groups should be included in the concept of *res publica*. Its inclusion in the *res publica* is justified insofar as the revenue that the state does not collect does not benefit the whole of society, does not correspond to a general reduction of taxes, but to a benefit for certain groups.

³⁹ - See Martins, 1978.

⁴⁰ - See Krueger, 1974.

⁴¹ - See Bresser-Pereira, 1999. On managerial public administration there is an extensive literature, most of it under the name of 'new public management'.

⁴² - The conclusive analysis of the arrest of social policies by the middle class was made by Goodin and Le Grand (1987), when discussing the welfare state. According to the authors, the redistribution efforts of the welfare state are always followed by benefits granted to the same middle class that manages them.

⁴³ - The borrowers of the financial housing system were granted reduction in the indexing of their loan agreements that resulted in a loss for the Treasury of about US\$25 billion. The closed funds of state companies have a system of pre-determined benefit, unrelated to the contributions of its participants, and leaves all responsibility for eventual financial imbalances of the system (presently evaluated at US\$30 billion dollars) in the hands of the company, and, therefore, in the hands of its main share holder, the state.

⁴⁴ - One should observe that, in the same way the citizen of the political philosophers is a social and historical construction, the individual of the liberal economists, who performs freely in the market, despite the radical abstraction involved in the concept, is also a historical construction, being both related to the state which shelter the economic individual and the political citizen. About the socially constructed character of the individual, see Paulani (1996).

⁴⁵ - See Souza Santos (1995) at 255.

⁴⁶ - Obviously, it is not easy to distinguish the 'unfair lawsuits against the state'. Often they are the result of its author's bad faith, and they only succeed if there is corruption of the judge and or of the lawyer who is supposed to defend the state. Yet, these two limit-conditions are not necessary for a law suit against the state to be unfair, be a violence against the public patrimony.

⁴⁷ - Brazil, through law n° 4729, of June 14th, 1965, which defined the crime of tax evasion, was included among these countries. Yet, this law, latter on, was annulled by law n° 8137, of December 27th, 1990.

⁴⁸ - Despite being not regarded as crime, nepotism is generally defined as an 'act of improbity', and so it may generate civil responsibility if it get proved.

⁴⁹ - Actually, administrative law has come presently into a crisis, derived from its strictly bureaucratic origin, which is based on the Napoleonic Code of 1800. While the world was experiencing a technological and managerial revolution, the common body of administrative law remained untouched. From the 1960s, a crisis has then arose, which is analyzed by Medauar (1992) at 226, leading her to conclude that 'before the shifts in the society and in the state, it becomes necessary to make a kind of validity control of traditional conceptions'.

⁵⁰ - I owe this observation to Denis Rosenfield, who, in his letter commenting the first version of this article, wrote: 'There are ways of action, particularly injurious to the *res publica*, which are not only legal, but also correspond to the functioning mode of a type of democratic society'. In my perspective, I would tend to say that the matter is not about an improper functioning of democracy, but a symptom of the challenges it faces, since the political and juridical performance of corporatism, which appropriates privately the public patrimony, is revealing of a certain form of contemporary exercise of politics.

⁵¹ - In the Brazilian Constitution itself, the right to the environment (Art. 225) and the right to the historical and cultural patrimony (Art.216) are explicitly asserted. In addition to that, the Law of Public Civil Action of 1985 has given the citizens, in a pioneering manner, tools to demand responsibility for the damages against environment, against consumers, and against goods and rights of artistic, esthetic, historical, tourist or scenic value. Finally, in the 5th article of the Brazilian Constitution, a collection of republican rights is presented and the popular action is asserted to any citizen, giving possibilities to void damaging acts against the public patrimony, against environment and against the historical and cultural patrimony.

⁵² - See Therborn (1997) and Bobbio (1988).

⁵³ - See particularly Lane (1985), Santos (1988) at chapter 2, Stiglitz (1989, 1994), Przeworski (1990, 1995), and Rapaczynski (1996).

⁵⁴ - For an evaluation of corporate spirit as a form of social regulation see Schmitter (1994), Cawson (1985). I use the expression 'corporate spirit' to designate a system of social-democratic regulation, based on commitment of classes, in the terms classically defined by Schmitter (1974, 1977), while 'corporate spirit' would be only the practice or vice of interest groups in identifying their corporate interest with the public interest.

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