

Why Care?: The Trouble with Social Rights

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While not everybody will agree that social rights are good in general, the ranks of the «not-everybody» will fill when one wants to decide who needs which particular social rights. Even those who claim to be philosophically and practically supportive of the idea and the benefits of social rights find it difficult to come up with a strong argument for them and usually invoke vague or weak obligations to support the victims of capitalism or, if you will, the market society or the mere necessity to preserve social peace by a minimally redistributive social policy. Social scientists have plausibly claimed the objectives of social rights – public goods and services – as well as the institutions necessary for their distribution, in particular the welfare state, to be in a deep crisis¹ and have further suggested that the welfarist Utopian energies are exhausted². Against this background it seems daring or naive or both to look for a stronger defense of social rights. Nevertheless, this is what I undertake by trying to answer the question why we the people should care about other people, and why their private misery should be a matter of public concern.

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¹ See, e.g., C. OFFE, *Democracy Against the Welfare State? Structural Foundations of Neoconservative Political Opportunities*, in «Pol. Theory», 15, 1987, 501; P. TAYLOR-GOODY, *Legitimation Deficit, Public Opinion and the Welfare State*, in «Soc.», 17, 1983, 165, 175. For a historical overview of the futility, perversity and jeopardy critiques, see A.O. HIRSCHMANN, *The Rhetoric of Reaction*, 1991.

² J. HABERMAS, *Die Krise des Wohlfahrtsstaates und die Erschöpfung utopischer Energien*, in *Die neue Unübersichtlichkeit. Kleine politische Schriften*, V, 1985, 141.

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I. *The Quest for Social Security in Modern Society*

The inquiry into the troubled history of social rights leads the patient student back to the cradle of modern society. An adequate answer to the why-care question requires that one briefly recapitulate phenomena and processes that generally come under the heading «secularization» or «secularity» and are widely understood as the «decrease of religious ties, transcendent attitudes, other worldly expectations, and cultic practices in private and public daily life»³, or a simple (irreversible) process of the dissolution of traditional religion⁴, or merely a linear transformation of the traditional social form and concepts of religion into both modern social and political forms and concepts. Quite obviously this perspective is (a) marked by a rather narrow political-theological understanding of secularization and (b) dominated, especially in the German context, by Carl Schmitt's political theology⁵, according to which all crucial concepts of modern state doctrine are merely secularized theological concepts.

In contrast to this interpretation I shall emphasize discontinuity and compensation rather than transformation. This perspective does not preclude structural analogies or transformative processes. In general terms, secularization marks the «breaking-off with the transcendent»⁶, characterized by Hannah Arendt as a complex relationship between *Weltverlust und Weltgewinn*. Radical secularity does not consist in contrasting modern life with the divine foundation of a society but is more connected with the idea of a society «as constituted in something which (does not transcend) contemporary common action»⁷. While traditional societies are constituted by a metaphysical order, the members of a modern society do not

³ H. BLUMENBERG, *Säkularisierung und Selbstbehauptung*, 1983², 9.

⁴ Cfr. T. LUCKMANN, *Lebenswelt und Gesellschaft*, 1980.

⁵ C. SCHMITT, *Politische Theologie*, 1934. For a related version, see C. OFFE and U.K. PREUSS, *Democratic Institutions and Moral Resources in Political Theory Today*, in D. HELD (ed), *Political Theory Today*, 1991, 143; see also M. STOLLEIS, *Geschichte des öffentlichen Rechts in Deutschland*, 1988, 273; E.-W. BÖCKENFÖRDE, *Die Entstehung des Staates als Vorgang der Säkularisation*, in *Recht, Staat, Freiheit: Studien zur Rechtsphilosophie, Staatstheorie und Verfassungsgeschichte*, 1991, 92 (discussing a notion of secularization which is at least implicitly critical of transformation or deficit theories).

⁶ M. GAUCHET, *Die Erklärung der Menschenrechte: Die Debatte um die bürgerlichen Freiheiten 1789*, 1991, 109, 111, 114, 115.

⁷ C. TAYLOR, *Liberal Politics and the Public Sphere*, 1992 (unpublished manuscript, on file with the author).

act «within a framework which is there prior to and independent of their action»⁸. This is what has come to be regarded as the signature of modernity.

The various philosophical critiques of the «Divine Order», the socio-political movements of protest against the hierarchical structures of domination upon which Western thought and societies traditionally rested⁹, produced a secular milieu step-by-step¹⁰. Notably, social contract and natural law theories, skepticism, secular humanism and the philosophy of the Enlightenment, religious wars, the Reformation, and the pluralization of religious beliefs, the advance of natural science¹¹, and the democratic revolutions deserve credit for eventually liberating a political imaginary, allowing to envision the people and their associations as an autonomous civil society faced with the endless task of self-government and creating their own destiny in public controversy against an open historical horizon. One aspect of this task is the establishment of a legitimate authority. This is the recurrent «democratic question» modern societies are confronted with, for secularization undermines divine rights, holy traditions and other transcendent footholds for authority and disrupts the symbolic representation of societies as incorporated by the monarch. The other widely neglected aspect concerns the problem of social security in a «disenchanted world». Secularization not only affected the legitimation of political authority but also the creation of a social bond between the isolated members of a decorporated society no longer symbolically represented as a mystical «*body politic*» and no longer integrated in a firm and unquestioned status hierarchy with its loyalties and responsibilities sanctioned by traditional law. The «society of individuals» is bereft of social obligations that came with a status (*noblesse oblige*) or a sacrosanct tradition and must depart from the vision of a common descent. This then is the double task, implied by the idea of a political and social citizenship: to create a legitimate political order and to provide for the security of the members of society.

For more than two hundred years the citizens feuded with themselves and others, their desire for freedom struggling with their desire for stability. The endless series of attempts to bring political authority under control and to guarantee freedom from political

⁸ *Ibidem*.

⁹ Cfr. M.C. TAYLOR, *Erring: A Postmodern A/theology*, 1984.

¹⁰ A.D. GILBERT, *The Making of Post-Christian Britain: A History of the Secularization of Modern Society*, 1980.

¹¹ S. TOULMIN, *Cosmopolis: The Hidden Agenda of Modernity*, 1990.

fears¹² inspired a variety of politico-legal inventions to hold despotism at bay: natural and human rights, the rule of law, the division of powers, checks and balances, and judicial review. Yet this quest also led to various escapes from freedom, the most disastrous being the desertion of masses of people under the umbrella of secular ersatz-religions of the nineteenth and twentieth centuries. Inspired by Toulmin's analysis of modernity, it is tempting to suggest that under the banner of freedom from (political) fear, our ancestors sought the union of cosmos and polis¹³.

The demise of the old social order and the erosion of traditional social ties and responsibilities may be characterized as a shift from the (fictitious) feelings of kinship and common descent, from obligations not dependably guaranteed by status of citizenship and/or membership in a political community¹⁴. The discourse on the «social question» elucidated this quest for security and suggests that it is not limited to the economic compensation for life risks in an industrial society but encompasses the threats and anxieties that accompanied the transformation of social roles and structures, as well as the anxieties caused by an endless series of agricultural crises and famines, religious and civil wars that raged across Europe in the seventeenth and eighteenth centuries, and recurring epidemics too devastating and indiscriminate to be accounted for as visitations of God's wrath aimed at distinct sinners¹⁵.

It is against the background of political collapse and innovation, social unrest and change, religious reformation and intolerance, recurrent crises and miserable living conditions that the iconography and (normative) interpretation of poverty and wealth were secularized. Poverty – like invalidity, sickness, old age – obtained

¹² Thomas Hobbes may be regarded as the progenitor of this search for political peace and order. See also J. DEWEY, *The Quest for Certainty: A Study of the Relation of Knowledge and Action*, 1929; F.L. NEUMANN, *Demokratischer und autoritärer Staat*, 1967, 184; R. RORTY, *Philosophy and the Mirror of Nature*, 1979; G. FRANKENBERG, *Angst im Rechtsstaat*, in «Kritische Justiz», 11, 1978, 353.

¹³ See generally TOULMIN, *supra* note 11.

¹⁴ See T.H. MARSHALL and T. BOTTOMORE, *Citizenship and Social Class*, 1992, 62.

¹⁵ See generally J. ATTALI, *Die karnibalistische Ordnung: Von der Magie zur Computermedizin*, 1981, 67, 147; C. BEGEMANN, *Furcht und Angst im Prozeß der Aufklärung zu Literatur und Bewußtseinsgeschichte des 18. Jahrhunderts*, 1987; J. DELUMEAU, *Angst im Abendland: Die Geschichte kollektiver Ängste im Europa des 14. bis 18. Jahrhunderts*, 1985; J. DELUMEAU, *Rassurer et protéger: Le Sentiment de Sécurité dans l'Occident d'Autrefois*, 1989; W.H. MCNEILL, *Plagues and Peoples*, 1976. It is true though that «social security» was originally interpreted as «economic security». TOULMIN, *supra* note 11. See F.-X. KAUFMANN, *Sicherheit als Soziologisches und Sozialpolitisches Problem*, 1973², 92.

the status of a social problem of industrial societies and dominated the public discourse on security that shaped the struggles for new institutions of indigent relief and welfare. In this process the responsibilities for the support for the poor and unfortunate were constantly reallocated, shifting between public (the state, municipalities) and private agencies (family, private associations, the churches), and the answers to the «social question» oscillating between «nationalization» and «privatization»¹⁶.

The different events, movements, and ideas pressing towards secularization liberated societies, which we have come to call «modern», from the heteronomy of a sacred order and unquestionable tradition but rendered problematic the imaginary frame of reference or *cadre d'appartenance* within which personal and collective identities could be developed and new social responsibilities formed. Therefore the quest for social security has to be understood not only as a struggle for decent living conditions and for adequate protection against the risks of life in an industrial society and their dire economic consequences but also for the creation of a polity/political community that grants its members the recognition, social appreciation, and political participation necessary for self-realization within the cultural horizon of a society¹⁷.

II. Why Care?—Some Paradigmatic Answers

While it can be argued that in pre-modern/traditional societies, the question of who is responsible for whom is always already answered by unquestionable religious duties and by obligations that are tied to a certain status and/or are venerated as an unquestionable tradition, the secular milieu of modern societies brings to the fore the problem of who has to care for whom, and, more specifically, why «we» should care about people not related to us, and why their private misery should be a matter of public interest and concern.

To these questions that have been asked throughout the modern era mainly by opponents of public assistance to the poor and unfortunate, the dominant Western schools of thought have given irritatingly different answers. Conservative thinkers tend to conjure up the communities of yore against the heartlessness of secularized

¹⁶ Cfr. M. KATZ-C. SACHSSE (eds), *Public/Private Relations and the Welfare State*, 1993; M. WALZER, *Spheres of Justice: A Defense of Pluralism and Equality*, 1983, 64.

¹⁷ See generally A. HONNETH, *Kampf um Anerkennung: Zur moralischen Grammatik sozialer Konflikte*, 1992; A. HONNETH, *Integrität und Mißachtung*, in «Merkur», 12, 1990, 1043.

societies, their ethics of subsidiary care more often than not romanticizing the often violent poor relief regimes of the Middle Ages. By contrast, Rousseau mobilized the «logic of the heart» against the «heartlessness of reason» and distinguished compassion as the noblest of all political sentiments and the cardinal virtue of members of a *société civile*. For many of the French revolutionaries and for Thomas Paine, one of their most ardent admirers, the magic of pity consisted in the fact that it opens the heart to the suffering of the others, thus retrieving and consolidating the natural ties between human beings¹⁸. Hence nothing less than (human) nature was believed to answer both social questions affirmatively. The adversaries of this position¹⁹ – notably the Kantian school of thought – have always rejected the notion of solidarity as a «natural affection» and criticized pity as a most dangerous passion in politics. They claim that compassion is unfit for the «light of the public» because it cannot prove its sincerity and therefore invites the charge of hypocrisy, which in politics is prone to lead to the persecution of hypocrites. From this point of view solidarity is not a feeling reflected on oneself but instead seeks to establish a lasting community of interest with the suppressed and exploited «in deliberative freedom from the changing moods and sentiments» (*in abwägender Freiheit von Gefühl wie Leidenschaft*)²⁰. The common interest by which solidarity takes its bearings consists in the «greatness (or dignity) of man» or in the «honor of the human species». Though dignity makes for a strong normative argument in favor of a morality of public care and concern, this vision does not include a positive legal duty to redress people's misery.

A far cry from ameliorist impulses, conservative nostalgia or romantic compassion, classical theories of the market society seem to derive their «solutions» for all social problems from contractualism²¹. They depict a society of autonomous, freely competing individuals. Within the free exchange of commodities in relations structured by contracts, the profit-maximizing monads are

¹⁸ J.J. ROUSSEAU, *Discours sur l'Origine et les Fondements de l'Inégalité parmi les Hommes* (1755), Paderborn 1984, 66; T. PAINE, *The Rights of Man* (1791), Liberal Arts Press 1953, 73.

¹⁹ See H. ARENDT, *Über die Revolution*, 1963, 73.

²⁰ See H. ARENDT, *Between Past and Future. Eight Exercises in Political Thought* (1954), Penguin Books 1977, 155; H. ARENDT, *The Human Condition*, 1958; G. KATEB-H. ARENDT, *Politics, Conscience, Evil*, 1984, 11-48; RÖDEL et al., *Die demokratische Frage*, 1989, 166; S. BENHABIB, *Situating the Self: Gender, Community & Postmodernism*, 1992, 90-95.

²¹ Cfr. J.S. MILL, *On Liberty*, 1910; F.A. HAYEK, *The Constitution of Liberty*, 1960.

entitled to move within a system of limited irresponsibility: outside contractual obligations and some personal responsibilities for «dependents»²², the individual market participants are allowed to be carefree. The notion of equal freedom is radically disconnected from the material preconditions of freedom (equal chances) and epitomized by a set of liberal rights delineating the sphere of individual autonomy. Dominant, yet never uncontested, liberalism from the beginning had to deal with two major challenges. (A) The destructive impact of the capitalist mode of production and the blatant failures of the market system invoked a series of reformist, ameliorist, or revolutionary movements and critiques – the socialist/social-democratic challenge – that ultimately forced liberalism to strike a «New Deal», permitting the invisible hand to pass its magic hat for the benefit of market victims and social peace. The results were the welfare state, insurance systems and fairly weak social rights. (B) Liberalism's possessive individualism somehow had to accommodate the enduring, intuitive yearning for solidarity and community outside contractual relations (the communitarian challenge). It has been suggested that the welfarist reaction to the social-democratic challenge is an adequate answer to the quest for social security, and that the social state has put to rest why we should care about other people, and that (weak) social rights suffice to silence the communitarian critique. I shall argue in the following that this response is far from persuasive.

III. *Real Community and Solidarity? – Groups and Insurance*

To ascertain the enduring intuitive yearning for solidarity and community, we have to move away from the market and contractualism as well as the bureaucratic state and clientelism to social groups and movements. For more than a hundred years – and especially in the second half of the nineteenth century – autonomous associations, such as trade-unions, Friendly Societies, Burial Societies and other benefit clubs, and organizations operating according to the principles of *mutualité* and *solidarité*, have made various attempts to guarantee genuine social security for their members²³. These organizations not only established funds, based on voluntary contributions, from which benefits were paid in sickness, infirmity, and old age, to members, widows, and orphans; they

²² Cfr. N. FRASER-L. GORDON, *Dekodierung von «Abhängigkeit»*, in «Kritische Justiz», 26, 1993, 306.

²³ See E.P. THOMPSON, *The Making of the English Working Class*, 1964, 451; J. JUILLARD, *Fernand Pelloutier et les Origines du Syndicalisme d'Action Directe*, 1971.

also took care of a decent burial and provided «public houses» for their members to «meet together, talk together, and drink together». It is extremely probable that had they trusted solely to the sense of duty – the duty of insuring against sickness – and merely required the members to pay their weekly contributions to a collector, very few societies of the kind would have remained in existence²⁴. Later in the nineteenth century the organizations of the workers' movement such as the trade-unions, the Social Democratic Party in Germany, and the Labour Party in England advanced the idea of self-help and developed a practice that can be characterized as the self-production of economic and social security.

These answers to the question of why we should care about others are more demanding in a normative sense even if more precarious than means-tested public assistance. Yet they still have to be regarded as solutions too narrow to solve the problem of social integration in a society of individuals. For group solidarity and, consequently, the self-production of social security, are limited by the underlying vision of an almost organic community constituted by «class», «gender» or other ascriptive features such as old age (Grey Panthers) or, more recently, sexual orientation (gay or lesbian groups). While solidarity of this kind reacts against the contractualism of the market society and illustrates the inherent economic bias of compulsory insurance or welfare regimes, it remains situative and its inherent particularism is not likely to transcend the confines of a shared negative experience or the threat of a common suffering. Those outside a particular experience generally do not come into view²⁵. Minorities who are excluded from the status and benefits a market society grants its other members not only cannot expect the solidarity of the «vested groups» but also have to compete with other disenfranchised groups for inclusion, i.e. access to the public sphere and to public funds. Therefore one may assume that the anti-capitalist solidarity of a shared negative experience usually has a spin towards difference and particularity, affirming the fragmentation of society rather than working towards integration.

Social scientists have suggested that the answer to the problem of solidarity might be found elsewhere. Instead of relying on workers' (women's or other types of group) solidarity, they turn to science,

²⁴ Cfr. S. SMILES, *Thrift*, 1875.

²⁵ A rather dramatic illustration of the limiting effect of a shared experience is the split between gays who are HIV-positive and gays who are not. The latter, even if active in self-help groups, are suspected to be unable even to understand the plight of «positiveness.»

which for a long time has been promoting the idea that the world is susceptible to systematic improvement through a sustained application of human effort and intelligence²⁶. For many centuries poverty has been listed as one of those problems pressing for scientific solutions and calling for public concern. Nevertheless the interpretations of poverty have long resisted secularization even after the large-scale production of poverty was hardly justifiable in religious terms. Additionally, the increasing number of groups disenfranchised by the competitive economy (primarily women, children, handicapped, the aged, rural workers, and artisans) and the poverty that was visibly produced by the hazards of industrialism (accidents, exploitation, poor health protection at the workplace) dramatized the destructive impact of capitalism. It would be interesting to trace the hesitant secularization of poverty through its key interpretations: as a sign of God's grace or a divine punishment, as a natural catastrophe or «artificial problem», as a moral defect or individual failure, or as a social problem or economic risk, etc. Such a history of the key words would reveal the various shifts between the «privatization» of poverty (or wealth) and its «publication» as a secular phenomenon first, and then as a social and economic problem²⁷. May it suffice in this context to note that the idea of a risk that can be insured secularizes and ultimately socializes responsibility and danger in a two-fold way: it allows one to decouple (a) the threat of sickness, poverty, invalidity, etc. from any individual suffering, and (b) the compensation for consequences from individual failure, transferring both to a general system of compensation²⁸. In retrospect, François Ewald elevates the risk calculus and derives the concept of insurance from the multitude of institutions created by the destructive-creative advance of industrial society. These organizations have to be regarded as the main institutional arrangements for the anticipation and compensation of modernity's self-created economic insecurities while at the same time pro-

²⁶ Cfr. GILBERT, *supra* note 10; TOULMIN, *supra* note 11; H.R. MURPHY, *The Ethical Revolt Against Christian Orthodoxy in Early Victorian England*, in «American Historical Review», 60, 1955, 800.

²⁷ Cfr. A.J. HEIDENHEIMER, *Secularization Patterns and the Westward Spread of the Welfare State, 1883-1983: Two Dialogues About How and Why Britain, the Netherlands, and the United States Have Differed*, in «Comparative Social Research», 6, 1983, 3, 36-37.

²⁸ See U. BECK, *Risikogesellschaft: Auf dem Weg in eine andere Moderne*, 1986; U. BECK, *Gegengifte: Die organisierte Unverantwortlichkeit*, 1988, 179; F. EWALD, *L'Etat Providence*, 1986. For a critique of the conceptual vagueness and of the lack of historical «breadth» of the risk discourse, see N. LUHMANN, *Risiko und Gefahr*, in «Soziologische Aufklärung: Konstruktivistische Perspektiven», 5, 1990, 131; W. BONSS, *Vom Risiko: Unsicherheit und Ungewißheit in der Moderne*, 1995.

ducing the insurance state (*L'Etat providence*)²⁹. Defining poverty as an insurable risk, the modernization and secularization of indigent relief reaches the level of contractualism and strips poverty of its traditional meanings. Though Ulrich Beck, following François Ewald, talks about «the liberation from traditional forms of solidarity» and a «social compact»³⁰, he forgets to mention that the risk calculus and contractual insurance relationships are «morally modest»³¹. One may doubt whether it is adequate to talk of the «solidarity of the insurance community» as long as contributions to and benefits from insurance are based on the principle of equivalence, and as long as the risk calculus produces and reproduces three different groups: the insured, those ineligible for social insurance because of high income, and in particular those excluded because they lack the income necessary for insurance contributions. And it seems even more questionable whether a compulsory insurance scheme for economic security can generate a *lien social* or *cadre d'appartenance* for members of a post-traditional society³². However, the more insurance moves away from mathematical calculations and becomes integrated, the more they approach a citizen insurance system (*Staatsbürgerversorgung*).

IV. Towards a Stronger Version of Social Rights: Historical Prelude

The principles guiding the early consideration of public benefits in France differed considerably from German state paternalism. Under the influence of the Enlightenment, even before the French Revolution, prominent French statesmen had already attempted to reform the traditional and repressive poor relief system, officially informed by rational humanism and at least aware of a growing literature on social rights. A mundane concept of *fraternité* (*Brüderlichkeit*) replaced the traditional notion of charity but still excluded many groups, notably women³³. The idea of social rights

²⁹ BECK, *supra* note 28, at 180.

³⁰ *Ibidem*, at 179.

³¹ C. OFFE, *Akzeptanz und Legitimität strategischer Optionen in der Sozialpolitik*, in Ch. SACHSE-H.T. ENGELHARDT (eds), *Sicherheit und Freiheit: Zur Ethik des Wohlfahrtsstaates*, 1990, 179.

³² Cf. T.H. MARSHALL, *Der Wohlfahrtsstaat: Eine vergleichende Untersuchung, in Bürgerrechte und soziale Klassen: Zur Soziologie des Wohlfahrtsstaates*, 1992, 178, 180.

³³ P. KRAUSE, *Die Entwicklung der sozialen Grundrechte*, in G. BIRTSCH (ed), *Grund- und Freiheitsrechte im Wandel von Gesellschaft und Geschichte: Beiträge zur Geschichte der Grund- und Freiheitsrechte vom Ausgang des Mittelalters bis zur Revolution von 1848*, 1981, 402.

also inspired the constitutional projects of the revolutionaries. During the debates on the Declaration of the Rights of Man and of the Citizen, different groups presented proposals for social rights³⁴. The Jacobins finally pressed for the formal constitutional recognition of society's responsibility for the needy, which was laid down in the draft of the Constitution of 1793³⁵. Public assistance was considered as the (utilitarian) flipside of the social contract. The citizens were supposed to be entitled to all blessings of their social bond. The birth of the individual as the member of civil society was to be underscored by rights symbolizing and securing membership – and making the social contract worthwhile. From the point of view of the selfish individual, Sieyès formulated that «the citizens are collectively entitled to everything the State can do in their favor»³⁶.

One revolutionary project of 1789 (which never came about nor was even discussed by the Convention) allows us to glimpse a justification for public assistance quite different from quasi-religious human dignity and happiness-paternalism or economic individualism: «After society has taken care of everybody's security, . . . it owes a further obligation to care for the personal happiness of all members it is composed of». The new composition of the political body on the basis of the rights of private subjects, so goes the novel idea, necessitates public assistance to preserve their status as private persons and (public) citizens³⁷. St. Just specified the «logic of welfare» within a civil society of autonomous individuals: «To bestow all French citizens with the means to satisfy the most urgent needs, without being dependent on another person, on anything else than the law and without mutual dependence as individuals»³⁸. For the first time, safeguarding the material conditions of autonomy appeared as a societal responsibility – not a duty inscribed in a traditional role or status, nor an abstract obligation or mandate of the state administration.

Even though the Constitution of 1793 sanctified public assistance as a «sacred obligation» and laid down that «Society owed its needy citizens support by procuring work for them or securing livelihood for those who are unable to work», the question of whether civil society can disregard the decay of one of its member's autonomy was soon put to rest – then briefly resuscitated – in the preamble of

³⁴ See GAUCHET, *supra* note 6, at 109.

³⁵ See *Fr. Const.* arts. 1, 34; *U.S. Const.* pmb.

³⁶ GAUCHET, *supra* note 6, at 111.

³⁷ *Ibidem*, at 114.

³⁸ *Ibidem*, at 115.

the Constitution of 1848 («by fraternal assistance the Republic secures the livelihood of the needy citizens»), and later buried under the «social question» and dealt with in rather repressive terms. Compared to Prussia, Bavaria or Great Britain, the official French regime of poor relief remained in a state of liberalist paralysis after the Revolution. Welfare as public assistance fell prey to the politics of *laissez faire*. Society's obligations towards the miserable and unfortunate were interpreted as threatening to undermine the principle of competition and the functioning of the labor market. The market society of isolated competitors eclipsed the society of mutually responsible individuals; throughout the nineteenth century possessive individualism under the guise of *liberté* prevailed over *fraternité*/solidarity and social rights.

V. (Post-)Liberalism and the Trouble with Social Rights

History (in particular the fate of the revolutionary project of 1789), theory (in particular liberal concepts of rights), the practices of the welfare state, and the limitations and fragilities of group solidarity suggest two options for our problem. Perhaps there can be no solidarity on the level of society, which means it is hopeless to argue for strong social rights. This option would confirm the triumph of the system of limited irresponsibility and would suggest that we should embrace insurance schemes as the best possible answer to economic (in)security. The alternative would be to approach the problem from a radically different angle. Since there are no easy answers it might help to reassess the structural limitations of liberal, social-liberal, and postliberal concepts of social rights.

The liberal as well as the welfarist paradigm not only share a «productivist picture of an industrial-capitalist society»³⁹ but also a narrow concept of social security disconnected from the problem of social integration. Consequently, social rights and entitlements assumed the role of compensatory measures for the benefit of market victims. The right to a public education, though not always identified as a social right, may be regarded as an exception to the rule insofar as its enjoyment was meant to lead to qualifications not restricted to market participation.

Liberal as well as welfarist concepts of rights share a radically pre-social notion of autonomy as a property of isolated and centered⁴⁰ actors. Consequently, even welfarist attempts to overcome

³⁹ HABERMAS, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaates*, 1992, at 617.

⁴⁰ For a critique of the centered subject, see J. FRUG, *Decentering Decentralization*, in «Chi. Law Review», 60, 1993, 253, 258.

the social blindness of liberal legal formalism generally remain fixated on the negative status of individuals and are preoccupied with the question whether and which social entitlements are necessary to generate private autonomy. Both liberals and welfarists tend to regard rights as things that are allocated or distributed. While justice is reduced to the equal distribution of rights in the liberal paradigm, it is reduced to the equal distribution of collective goods in the welfarist paradigm.

Yet the problem of welfarism is not so much so its «paradigm of distribution»⁴¹ but that it reiterates the dichotomy between private and public autonomy and permits the citizens only to appear as recipients/clients of the welfare bureaucracy who are more or less entitled to a share of a public good or of special social services. By the same token, welfarists have to defend themselves against the charge that they do not adequately address the tension between the welfare state and democracy⁴².

The economism, individualism, and clientelism of the welfarist paradigm lend themselves to a paternalism, including the authoritative-authoritarian definition of needs and their bureaucratic testing; this paternalism may alleviate the plight of the poor, redistribute incomes, and guarantee social peace but does not solve the problem of social security. Liberalism has no use and no answer for the question of why we should care about others and trusts counterfactually that social integration will be brought about by competition on the economic and political markets and their corresponding civil and political rights advancements. By contrast, welfarism implicitly addresses the question «why care?» but delegates the response to the state or social insurance respectively. And the answer is morally modest and precarious in terms of security: unemployment insurance establishes a duty to solidarity only among workers. The more societies run out of work, the more this solidarity becomes precarious⁴³. And the modern public relief or welfare regime, though said to express a residual social solidarity for the poor, neither treats them as normal citizens or as persons of equal human value⁴⁴ nor does it abstain from demanding and controlling their willingness to work. It is tempting to praise the moral mod-

⁴¹ HABERMAS, *supra* note 39, at 636.

⁴² It should be noted that the conflict between democracy and welfare no longer expresses itself in regulations that punish the recipients of poor relief with the loss of their right to vote. See H. RICHTER et al., *Das Sozialfürsorgerecht: Erläuterungen des gesamten Fürsorgerechtes der Deutschen Demokratischen Republik*, 1957, 9; MARSHALL, *supra* note 32, at 180.

⁴³ See C. OFFE, *Das Dilemma der Sicherheit*, in «Die Zeit», 49, 1988, 24.

⁴⁴ MARSHALL-BOTTOMORE, *supra* note 14, at 61.

esty of the welfare-state-plus-insurance solution as realistic. Yet, recent diagnoses of welfarism suggest that one should resist this temptation⁴⁵.

If these are the main complementary pitfalls of liberalism and social-liberal welfarism, then any move away from the contractual society and its alter ego, the bureaucratic welfare state, has to be probed as to how it deals with these challenges.

The critique of productivism can be answered by taking secularization seriously (and not treating it as a phenomenon of political theology) and by considering the rights-holders not as market subjects or victims but as authors and addressees of law (Habermas) or, more dramatically, as makers of their own destiny and society in a disenchanted world, to stress self-rule over law-rule⁴⁶. The idea of rights or, for that matter, a new paradigm of law, will then be informed by the picture of societies marked by the confrontational coexistence of people with different life perspectives and world views, needs and interests. Hence social integration becomes a crucial problem in radically pluralist societies. That is why law has to accommodate all kinds of conflicts, economic and non-economic. Bereft of any higher plan or transcendent wisdom that would allow such incurably modern societies to steer into a safe or at least predictable future, law makes a difference and is legitimate only if geared towards generally acceptable conflict resolutions that foster social integration, rather than privileging *a priori* certain actors or types of conflict. Consequently, law has to focus on the rules and arenas for the conditions and consequences of social controversy (*Streitkulturrecht*). And rights – civil, political, as well as social rights – have to be introduced from their perspective (and not from the vantage point of a presumably superior legal theory) because they invariably though differently affect the participants of social conflicts.

Within legal theory neither autonomy nor rights can be adequately conceptualized as a property of the isolated individual or centered subject. Autonomy, so it seems, is generated and only possible in co-sociation with others. «Men and women come together because they literally cannot live apart»⁴⁷. The exercise of one's autonomy implies always the self-limitation of one's autonomy to make (private) autonomy possible. By the same token, rights are not things

⁴⁵ See OFFE, *supra* note 1, at 501.

⁴⁶ F.I. MICHELMAN, *Welfare Rights in a Constitutional Democracy*, in «Wash. U. L.Q.», 1979, 659.

⁴⁷ M. WALZER, *Welfare, Membership and Need*, in M.J. SANDEL (ed), *Liberalism and Its Critics*, 1984, 200, 201, [hereinafter *Liberalism and Its Critics*].

but «social relationships». To be more precise, they establish relationships or give them a particular (though often less than determinate) meaning with «institutionally defined rules specifying what people can do in relation to one another»⁴⁸ or what they can expect from one another. This implies that rights presuppose and shape autonomy; in particular, they draw the line between private and public autonomy (provided that distinction is made).

The distinction between private and public autonomy, though analytically helpful, lends itself to lopsided and functionalist concepts of social rights. If one considers social rights necessary for safeguarding private autonomy by turning market objects into market subjects or, more abstractly, by obliging the state to provide for the material conditions of self-determination⁴⁹, the argument tilts toward economic security. If one considers social rights necessary for reinforcing representation⁵⁰, for safeguarding public autonomy by qualifying citizens to improve the rationality of collective decisions⁵¹, or by enabling them to make use of their public freedom⁵², the argument has a «politicist» tilt toward democratic participation. Each position suggests that one does not even have to – or simply cannot – justify social rights independently because they are already related to other rights or implied in private or public autonomy as functional prerequisites. It can be shown, however, that social rights hold no privileged position with regard to either private or public autonomy. A «life in dignity», «self-rule», and «public happiness» depend at least as much on a fair share of the life chances a society has to offer as on other people's social appreciation of oneself as a fellow citizen/human being/legal co-sociate. Yet one can claim that in a secularized polity a person's self-esteem and dignity always depend on the freedom and actual capacity to «self-rule»⁵³.

⁴⁸ I.M. YOUNG, *Justice and the Politics of Difference*, 1990, 25.

⁴⁹ R.E. GOODIN, *Reasons for Welfare: The Political Theory of the Welfare State*, 1988, 153.

⁵⁰ See generally J.H. ELY, *Democracy and Distrust: A Theory of Judicial Review*, 1980; MICHELMAN, *supra* note 46; GOLDBERG v. KELLY, 397 U.S. 254, 265, 1970.

⁵¹ See W. ABENDROTH, *Zum Begriff des demokratischen und sozialen Rechtsstaates im Grundgesetz des Bundesrepublik Deutschlands* in E. FORSTHOFF (ed), *Rechtsstaatlichkeit und Sozialstaatlichkeit*, 1968, at 114. The idea of a «Staatsbürgerqualifikationspolitik» has a somewhat paternalistic tinge; see U.K. PREUSS, *Verfassungstheoretische Überlegungen zur normativen Begründung des Wohlfahrtsstaates, in Sicherheit und Freiheit*, *supra* note 31, at 106, 125.

⁵² RÖDEL et al., *supra* note 20, at 166.

⁵³ See C. TAYLOR, *Cross-Purposes: The Liberal-Communitarian Debate*, in N.L. ROSENBLUM (ed), *Liberalism and the Moral Life*, 1989, 159.

For a stronger argument, it is crucial to consider that (a) social rights may be necessary to ascertain the dignity of people, and (b) their realization infringes upon the capability and willingness to act of those who are required to contribute to the public transfer of income. So as neither to depoliticize nor to overpoliticize the idea of social rights, they have to be given, theoretically and practically, equal treatment. Instead of underprivileging social rights as «implied» or «relative»⁵⁴ or overburdening them with «no participation without housing»⁵⁵, it seems preferable and more plausible to argue for social rights as self-incurred obligations to limit one's autonomy in order to realize it in society. This argument does not presuppose that we draw a line between private and public autonomy or give preference to one or the other. The independent argument for social rights makes it quite clear that they are not to be had «by implication» or «by logic» or by a self-enforcing «imperative of public freedom» but are rather a project that has to stand the test of public controversy.

This argument should also take care of a critique that implicitly holds social rights in low esteem as instruments of the welfare state that allow only the «passive participation of the individual in pre-fabricated pieces of the national product»⁵⁶ and to another critique that deplores the exclusive orientation of the welfare-state paradigm toward «the just distribution of socially produced life chances»⁵⁷. The first critique resonates with the charge of welfare paternalism or social disempowerment (*Entmündigung*). The second addresses itself to the question of distributive justice. Both dramatize the structural reductionism built into the welfare state and, arguably, woven into the very texture of social rights. Both envision social rights as establishing a relationship between the state: as the agent of economic security, on the one side and the recipients of public money or publicly funded social services on the other. Both disregard the implications of membership in a political community.

By contrast, the argument indicated above is based on the social nature of autonomy and relies on a minimum of mutual appreciation without which the reciprocal duty of citizen's to care for each

⁵⁴ HABERMAS, *supra* note 39, at 150.

⁵⁵ For a more detailed development of this perspective, see RÖDEL et al., *supra* note 20, at 166. For the liberal position, see I. BERLIN, *Two Concepts of Liberty*, in *Liberalism and its Critics*, *supra* note 47, at 15, 17.

⁵⁶ H.H. RUPP, *Vom Wandel der Grundrechte*, in «Archiv des öffentlichen Rechts», 101, 1976, 161, 180.

⁵⁷ HABERMAS, *supra* note 39, at 633.

other's fate would have no foundation. It establishes a relationship between the members of civil society first, rather than bringing the state in first as the security or distributive agent. It is then a matter of public controversy and majority decisions what kind of institutions (social bureaucracy, public or private insurance, municipal offices or social networks) are set up and funded to handle the problem of social security. Furthermore, the argument does not conceive of social rights as «rights to a (fair, minimum, maximum) share of something», such as money, work, housing, health care, education, etc., to alleviate the economic situation of the rights-holders (which in practice goes along with a high level of social control). It envisions social rights as potentially empowering all citizens to be able to fully participate in the social, cultural, economic and political life of their society, enabling them, as far as possible and desired, to decide by themselves how to solve their problems and resolve their conflicts. This orientation deconstructs the traditional structure of social rights as individual entitlements to a share of a public good to be distributed by the state. It tries to give social rights a different orientation and content.

A point of departure is the basic right to the self-organization of social security or to «equal resources»⁵⁸ which implies the right (a) to define one's social affiliation and (b) to organize one's life, define the support one needs, and choose the social context for its realization. This may be called a necessary condition of social security which is not considered a problem by liberals and ideologized by conservatives as «self-reliance». Its institutional expression is the principle of subsidiarity.

This right presupposes (a) that public funds and services (health care, housing, public assistance, etc.) are generally available, and it requires as a matter of right (b) that the members of a political community have the option either to use public social services or to obtain monetary or non-monetary public assistance for self-organized social services (day-care for children, home care for handicapped or old people). The kind and amount of public assistance as well as the controls tied to it would have to be regulated democratically with respect to the underlying idea that social rights in a democratic republic have to be understood as empowerment rights⁵⁹.

What if persons are not able, for whatever reason, to make the kind of choices implied by the right to self-organized social secu-

⁵⁸ Cfr. R. DWORKIN, *Liberal Community*, in «Cal. Law Review», 77, 1989, 474.

⁵⁹ See generally M. WALZER, *Philosophy and Democracy*, in «Pol. Theory», 9, 1981, 379.

riety? Again this approach does not come up with a clear-cut standard but only a limiting and constraining criterion (or regulative idea) that can be brought to bear against «welfarist» disempowerment. The intensity and duration of any such heteronomy, however benign it may be, depends on the actual capability of people to decide for themselves what they need, or to pick a guardian to make the necessary choices. Authoritarian arrangements can therefore be made subject to a *prima facie* «empowerment test» which would help distinguish between more or less intensive and intrusive forms of tutelage such as straightforward «incapacitation», «advocatory self-help», «protective structures» or public assistance for self-help groups or self-organized networks.

The next step would bring us to a conglomerate of social rights ranging from the minimalist Hobbesian right to life and related conceptions covering not more than a modest level of subsistence to Marshall's right «to a share in the full social heritage and to live the life of a civilized being according to the standards prevailing in the society»⁶⁰. The approach offered here would of course be close to the latter position in arguing for social rights necessary to guarantee a modicum of social security that individuals or associations may need to fully enjoy their autonomy in a given society. Yet, those needs which have to be recognized beyond those social needs protected by social rights is not a matter of democratic or legal theory but depend on the social struggles and political decisions in a historically specific socio-cultural context⁶¹.

Why should «we», the members of a political community⁶², feel obliged to care for others – at least to the extent of expressing this solidarity in our political support for an empowering public assistance and in the recognition of social rights geared toward that objective? If we discount the emergence of altruism as a logical by-product of democracy or a natural inclination to justice, the answer leads to what some communitarians call «civic virtue», «sense of solidarity», or «communal spirit»⁶³. Even declared non-communitarians who basically trust that social integration is brought about by rights and reasons plus moderate governmental

⁶⁰ MARSHALL-BOTTOMORE, *supra* note 14, at 33.

⁶¹ WALZER, *supra* note 47.

⁶² For conflicting views on membership as a social obligation, see Walzer, *supra* note 47; F.A. HAYEK, *Equality, Value, and Merit*, in *Liberalism and Its Critics*, *supra* note 47, at 80, 95.

⁶³ See, e.g., TAYLOR, *supra* note 53; M.J. SANDEL, *The Procedural Republic and the Unencumbered Self*, in «Pol. Theory», 12, 1984, 81; A. MACINTYRE, *Patriotismus eine Tugend*, in A. HONNETH (ed), *Kommunitarismus*, 1993, 84.

interventions⁶⁴ or rely, at least basically, on good reasons and their «motivating force»⁶⁵ for those acting communicatively have to invoke «energies», «traditions», and «civic virtues» outside legal institutions to make the system work at the end of the elaboration of the «system of rights» and often only in passing⁶⁶. Especially in the field of social policy, authors refer to the idea or duty of solidarity but find it difficult to tailor it to the universalist dress-code⁶⁷. Legal positivists, all too carefully avoiding the idea of an «unwritten constitution», attempt to glean welfare rights from constitutional provisions that do not explicitly mention them but can be interpreted, though not in terms of a strict interpretivism, as «signal[ing] the existence of federal constitutional rights beyond those listed elsewhere in the document»⁶⁸. How so? Due to «our nation's commitment to representative democracy»⁶⁹.

I prefer to relate the mutual obligation to care for the material conditions of other citizens' autonomy to a «basic convention», an explicit or implicit, original and reiterated, very fragile and always temporary promise. The idea of a convention is to accentuate the self-reflexive attitude of people who consider what they are doing when they come together in the exercise of their public freedom, and when they form a political community. To enjoy their autonomy in society citizens must realize, in whatever simple or sophisticated way, that they depend on others who they, consequently, have to accept – at least tolerate – as different but equal. This requirement can be satisfied by tolerance or by treating every person as politically and legally equal. This duty intensifies for members of a political community. Their membership, which is expressed by their voice option (over their exit option) and generally by their legal status as citizens, includes the further obligation to provide for the conditions of autonomy. Protection of other people's autonomy means attending to their needs and making sure that goods are distributed in proportion to need.

⁶⁴ Cfr. DWORKIN, *supra* note 58.

⁶⁵ HABERMAS, *supra* note 39, at 146.

⁶⁶ *Ibidem*, at 158-59.

⁶⁷ See PREUSS, *supra* note 51, at 116, 118, 123; J.H. ELY, *Constitutional Interpretivism: Its Allure and Impossibility*, in «Ind. Law Journal», 53, 1978, 399, 445; MICHELMAN, *supra* note 50, at 665.

⁶⁸ ELY, *supra* note 67, at 445.

⁶⁹ ELY, *supra* note 67, at 448; see also MICHELMAN, *supra* note 50, at 669 n. 54 (pointing to the «possibility that tradition offers an extrapolable trajectory for evolutionary change»).

The idea of a convention accentuates that whatever people agree upon is practically relevant only if settled in the minds of the parties concerned as an action-guiding obligation. The obligation has to show in the social practices and institutions of a society. Indications of a convention that works are (a) the «militant tolerance» of people that hold radically different views, prefer «strange» lifestyles or fight for antagonistic interests, tolerating these parties as opponents rather than enemies that have to be banned from the public arenas, and (b) civil solidarity with the poor and disadvantaged as citizens not only entitled to charitable compensation but to the kind of assistance that generates self-esteem and enables them to feel part of and support the basic convention. Social policy, underscored by empowering rights, could thus mesh into an admittedly thin *lien social* that would inform the people which «political community» they belong to – a civil society that burdens its members with the never-ending task of self-rule and that takes this task seriously enough to provide for everyone's capacity to participate in carrying it out.

The magnitude of this task suggests that civil solidarity based on a convention of the different members of a social collective may be too abstract and can only be a necessary condition. It is here that the plurality of group solidarities and local communities come in as further elements of social integration. Very tentatively one might argue that the new social movements in politics and the various self-help groups, initiatives and networks in the realm of social policy set out to realize the precarious forms of democratic self-rule and of the democratic production of social security. If we consider only the women's movement, the gay movement, the ecology and peace movements, the «Grey Panthers», AIDS self-help groups, poor people's movements, and other local networks and initiatives, it is tempting to say – in view of their victories and defeats – that they disrupt the structures of possessive individualism. Their social practices, based on a sense of social solidarity, are laid out to constitute relations of mutual support which make visible the beginnings of a social bond not dismembered by the competitive economy. It is an open empirical question to what extent they base their demands on self-rule, autonomy, and social security in the sense elaborated above. One can already conclude, however, that they confront the economic system of limited irresponsibility and its spin towards privatization with the vision of a civil society of higher social density.

Scuole economiche e problema dello stato in Italia nel secolo XIX*

Antonio Cardini

Se potessimo riassumere in una breve e forse generica definizione quale fosse il problema – sotto il profilo storico – che si presentò agli italiani del secolo XIX dovremmo dire che fu la scoperta della propria arretratezza. La raggiunta consapevolezza cioè del divario che separava la penisola dal resto d'Europa in almeno due settori, la costruzione dello stato e l'industrializzazione.

La scoperta di questo distacco interessò gruppi limitati ma via via crescenti di classi dirigenti. E si può dire che dalla discesa di Napoleone, nel XVIII secolo, sino ai nostri giorni, questo inseguimento dell'Europa sia divenuto a vario titolo e in varie forme, il principale obiettivo da conseguire per l'Italia moderna¹. Lasciamo da parte le cause della decadenza italiana, tema, assieme all'epoca in cui questa si verificò, molto discusso specie, e non a caso, dalla storiografia risorgimentale e postrisorgimentale². Premeva conoscere le ragioni della mancata costruzione dello stato su suolo italiano; la questione dominò la vicenda italiana nel XIX secolo perché il 1861 fu inteso come un momento rinviato dal XVI o dal XVII secolo, quando lo stato moderno si costituì in Europa.

Nell'ultimo terzo del XIX secolo si affermò inoltre il nuovo e più perfezionato stato amministrativo contemporaneo, mentre il problema delle classi dirigenti liberali era costruire un nuovo stato su basi deboli o insistenti quali erano quelle offerte dai piccoli stati preesistenti³.

* Relazione tenuta al seminario: «Stato moderno. Uno studio storico-concettuale: scienze storiche, teoria politica e scienze economico-sociali in Italia tra otto e novecento» (Istituto storico italo-germanico in Trento, 14-15 giugno 1996).

¹ A. CARDINI, *Il grande centro. I liberali in una nazione senza stato: il problema storico dell'arretratezza politica (1796-1996)*, Bari-Roma 1996.

² G. QUAZZA, *La decadenza italiana nella storia europea. Saggi sul Sei-Settecento*, Torino 1971.

³ A. CARDINI, *Il grande centro*, cit.