

A NEW CHALLENGE: THE FUNDAMENTAL SOCIAL RIGHTS*

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1. Introduction

In recent decades, philosophers have written plenty about social rights. The analysis is often characterized by the conviction, now unanimous, of the irreversible crisis of the welfare State. Formerly social rights were in their concrete manifestation within a framework of well-being through the various forms of welfare appeared in human history, giving substance to the principle of equality and at the same time strengthening the social bond. With the crisis of the State, the rights, obtained through years of dramatic struggles, are called into question. In this society so aphasic and stunned by the speed of informational rhythms, dedicated especially to the celebration of its singularity, social rights are condemned to be marginalized, under the false accusation of unrealistic costs for the current condition of the public economy. Human rights are primarily divided into two types: rights of the first generation – civil and political – and rights of second generation – economic and social. There was no contradiction between the two “families”, but they integrated themselves such as the second, practical stage of the first. Nowadays it seems that we can “bear” only the rights of freedom, as an expression of increase of individual prerogatives, unique dimension of global citizenship. The impression is that by now the sociality of the rights is considered lower value than the rights of freedom, at the end. This is not surprising since we live in the cultural and political liberalism, where there is not a possible space for a renovated proposition of a debate about social rights, especially about the access to those rights. In this sense, I tried to reflect on the crisis of the welfare State from “specific areas” rather than insisting about concepts, feel as abstract, such as equality, fraternity or solidarity. I have identified four cornerstones from which to try to outline a realistic path of analysis. The first cornerstone is the family. I think the problem of the crisis of the family in the contemporary world is to be read in the condition of

* Relazione svolta alla International Multidisciplinary Scientific Conference – Social Sciences and Arts SGEM Hofburg Vienna, 27 marzo 2017.

individual's disintegration, blinded by his claim of self-determination. The family does not offer a biological salvation but *personal*. Every human being does not come into the world from nothingness but he takes shape in family dimension. He is an individual not only because he acts but he is an individual in the formation of family communication. The second cornerstone is the work. The philosophers talk about the end of the labor society. This implies a profound reflection about the issue of identity. First of all without the "labor society" there cannot be a recognizable dimension of social rights. The Twentieth Century has been called the "century of work" for its social achievements, not only on the material level, but especially for the educational growth of entities engaged in work activities. "Building the world the individual builds himself". Nowadays that statement must be overturned. The individual emancipates himself in solitude, as an ingredient of social change. As Touraine wrote, «modernity rejects the idea of society, destroys it, replace it with the idea of social change»¹. The third cornerstone is the *participation*. The individual researches in space of the right for his identity and his sociality in the double dimension of the public area and private area. The metaphor of the "suburbs" outlines the weak area of the fragile identities where is the quality of the protection of human dignity. In front of these challenges an urgent question arises about the responsibility of the jurist: the spatiality of affective and relational deserts. The new models of the family, the *homo consumens*, the forms of minority to be protected in every direction from the dimension of physicality require that the right always in training ensures the necessary transformations beginning with the "person" that is *plus* of the sense beyond the data that represent it. The meeting between the states of well-being and rules raises the question about the action of the jurist within the social system, which changes rapidly for the pervasiveness of technology, particularly regards the forms of protection access to rights by the person as an individual and as a citizen. In the new forms of politics, there is the problem of access to the participatory dimension today deluded by "democracy Network" which is not for everyone and then for a few autocrats from partial rules and without collective guarantee. The fourth cornerstone is *health*. Right to health means access to medical care for everyone and not according to ability or availability. There is a renunciation of *care*, for economic reasons, today more than ever. The social dimension of the *suffering mass* is increasingly recognized and tolerated. The right to health is one

¹ A. TOURAINE, *Critica della modernità*, Milano, 1993, p. 255.

of the fundamental human rights, it must be safeguarded through the action of the public authorities. Every “cornerstone” has got a double feature: communal and typical for the foundation of social rights. They are provided with materiality in terms of concreteness but also perceived as educational carriers for the emancipation of the human person in his social completeness.

2. Family

Fundamental rights, in my opinion, have more force if they encounter the man not merely in his individual dimension but within a complex construction which is the family. There is no philosophy of law that is not a philosophy of human rights, so there cannot be a right of the individual that is not a right related to his complex condition or family, whatever it may be. What is the family today? The question arises, from sociological point of view. And from what point of view you can be defined? It seems appropriate, in the coherence of our discourse, to talk about *family from the point of view of the family*. Most sociologists read the family from the different points of view (economic, state, political, multimedia). As historical remainders that change themselves following the great changes of society that surrounds them. In this sense in the complex and globalizing society, the family today is moving towards forms more and more plural and fragmented and simplified covering an increasingly weak and marginal role in the social organization. If you look at the family “from inside”, you understand how it can be seen as vital social reality. Family relationships have their own subjectivity. They were born as a form of a human project, always in movement. This implies a relational reading of family as an original relationship, since it follows its own features of differentiation. We may think about gender difference or about generational difference. The family is an original relationship. We may think about level of rule that makes itself (figures of *pre-third* part). The family has a primordial relationship, which exists at the beginning and from the beginning. Family refers to symbolic references and links that establish an identity-solidarity. The family is the matrix of sociality and takes place in the relationship of full reciprocity between the sexes not biological but also cultural in front of the plenty of family models. In this direction, the question to ask concerns around the place of the family in the society of tomorrow. To answer this question it is necessary to make visible the invisible relationship of which the family is constituted and social mediations, equally invisible,

that it realizes. The role of the family in the future will depend on the weight that will have in the community and the range of rights that will be recognized. The attempt to make the family an occasioning community, depriving it of role of vital community, is in place and is repeated in a cyclic way by unrealistic visions. Here comes the role of family policies that, in my opinion, should exploit social qualities of the family and its inherent characteristics such as gift, gratuity, trust, reciprocity, cooperation, promoting itself as interlocutor of the public authorities. Today we talk about decline of the family, a remainders of the past. In fact, the family is a social relationship, “full” in a way intended by Marcel Mauss as *total social phenomenon*². In a changing society the family more than ever is a *structure-refuge* as it represents a stable and secure *nucleus*. Undoubtedly, in recent decades, the family as an institution placed under the sign of a really human freedom has gradually been discredited and rejected in the name of ego prerogatives and the primacy of the culture of feelings. It is the contemporary narcissism that separates the body and ego. The “ancient-style” family still exists in Europe but nowadays it is often a sign of the presence of traditions of immigration. The very ancient-style comes back but from somewhere else. Alan de Benoist wrote: «it is one of the many ironies of history»³. The correlation between privatization of the family and the decline of sociality was typical of bourgeois and individualist modernity: in fact, how much more the society consecrated the abstract individual at the expense of wider circles of belonging, more the family became the refuge of the concrete singularity, and simultaneously the place where the emotions expressed in a special way. The family is still today one of the intermediate structures necessary to build a bridge between the individual and the “social”. Therefore, it is necessary to reject the reactionary point of view that sees the family as an invariant reality since it essentially has not changed in the past, and the progressive point of view, which makes it a provisional entity of which we could do without. The only way to give it a sense in new ways is to put it back in a social environment full of meaning. The future of the family passes through the resuscitation of the “social”. To achieve this, what is missing, in my opinion, it is a return decision to a right *for* the family in addition to a right *of* family. What we mean by right *for* the family? To think about a new distribution of resources and at the same time about the social policies, explicit and subsidiary. To have a broad vision on intergenerational solidarity through the strengthening of the *Welfare*

² Cfr. M. MAUSS, *Saggio sul dono*, Torino, 2002, pp. 43-56.

³ A. DE BENOIST, *Famiglia e società. Origini, storia, attualità*, Napoli, 2013, p. 152.

Mix, that is the active collaboration among the State/family/third sector. If indeed we are citizens no protagonists in a liquid society, as Bauman says, the right must necessarily be “solid”. For this reason, the right for the family has to “materialize” in necessary and rapid measures: childcare, child benefit, support for the elderly and much else. A full-blown *Community care*. The discomfort and loneliness are the price to pay for the social crisis of the family. These conditions can be defined as “lack of time” for the care and responsibility. The family contains the value of duration. In that context the social character of the person takes shape. On the occasion of the XLIX World Day of Social Communications, Pope Francis said there is no perfect family. Families are not formed from rabbits or ants, inasmuch they are outlined in their potential and inhuman functionality. The families are wealth in the difference. This vision of the family never closed could be defined, as the Pope invites to do, “domestic school of forgiveness” in the construction and in the proximity. Family or rather families, at the beginning, in the meanwhile and in the end, as Giuseppe Capograssi says, will always be “union of life with life”⁴.

3. Work

Article 1 of the Italian Constitution says: «Italy is a Republic founded on work». Likewise, article 23 of the Universal Declaration of Human Rights in the 1948 states: «Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment». The right to existence, that is implemented by the value of work, is annihilated in the current historical condition, in the impossibility of a possible liberation from want. The central government, despite the initiatives undertaken especially in the years following the Second World War, was unable to delete factually imbalances, the most remarkable inequalities existing in economic and social sphere. The absence of work dangerously affects the structural and functional balance of the community as it does not allow the individual who *lives* and *works* in this context to pour his vitality in the work for the transformation of *things* and for the building of society. The value of the work is such that it has been considered, over the centuries, inescapable stage in the reflection on the individual-society relationship under the economic aspect and the

⁴ G. CAPOGRASSI, *Opere*, vol. III, Milano, p. 211.

educational one. In the ancient world the work was conceived, for the most part, as negative, only “necessary”, a disvalue. With the Jewish-Christian tradition the idea of work as a value has emerged as a central element of social and political analysis. Without doubt the “doctrine of work” has its matrix in the Hegelian philosophy: especially in the *Phenomenology of Spirit*. In the work of the philosopher of Stuttgart the “struggle for recognition” in the pages reserved for “social Metamorphosis of the Lord and Servant” is a decisive moment for the evolution of individual conscience to self-conscience within the complex structure of work. In Hegel the work is split into modifications the one objective, the other subjective. Work transforms the “thing” with an act that forms the conscience of the agent. There is the transformation of the thing into the formation of conscience, the job is associated and assimilated to the function of the activity apparently opposed, the “culture”. Marx in his theoretical proposal emphasizes the centrality of the production relations that constitute the real foundation, on which stands a juridical and political superstructure, to which correspond definite forms of social conscience. Human history is characterized by the individual-nature relationship mediated by the correlation with other individuals. Such mediation is *necessary* and *free*; in fact, on the one hand the individual *necessarily* produces his natural life, the other he *freely* participates in the project of human development. The twentieth century, the century of ideologies, has seen the interpretation of the work both in terms of doctrine, especially on the Socialist side as a means of liberation from poverty, and in the aspect “existential” underlining the need to escape from the “biological conservation” to affirm the originality of human work. On the side of the Italian philosophy, Gentile, in a second phase of his thought, with his formula “Humanism of work”, emphasizes the *identity* between work and culture inasmuch as «that culture of man, characteristic of literary and philosophical humanism, spreads to surround every form of activities so man creates his humanity working»⁵. In the present scenario there are issues that bind to both aspects: as education and material. There is a massive and persistent unemployment whose consequences are so serious as manifest. It is evident this inactivity strongly undermines the sense of intrinsic vitality of individuals, blocked not only by the real fear of need that was put in danger the existence but also stiffens the individual propensity to the collective growth. The classic concept of unemployment is overtaken as entire generations have never been

⁵ G. GENTILE, *Genesi e struttura della società*, Firenze, 1975, p. 145.

engaged in trial work as materiality and as a culture, or at the most, in some part, they expressed their vitality in a forced way through the *new slavery* of the black economy, as *new social alienation* as an expression of unease generated by the conditions of a work without rights, for an individual who *lives* and *works* in a world of rights more and more. The research of social dignity arises from criticism of inadequacy of political emancipation to the rediscovery of a new social dimension of the rights that takes into account the specific context. *Sic stantibus rebus*, if, as it is, the work is the value for which social individuals refine and educate their vitality in arts, professions and trades, they join themselves and differ themselves about skills, attitudes and abilities, they distinguish themselves by responsibilities, functions and social roles. And if the social balance has a system that is modeled on the value of work as criterion in the arrangement of the values of society characterized by the chronic *lack* of work, there isn't the education and training aspect indispensable to the affirmation and consolidation of its structural and functional equilibrium. The *new* unemployment, characterized by *scarcity* as data, by the reason of the *third industrial revolution* linked to global computerization, demands, to be taken on, in an environment already tried, a new concept of employment, so the unemployed, fallen in the *shadow* of the post-industrial society, can find his own place of social identity, through a pre-employment educational process for the satisfaction of real needs, as «the adoption of juridical instruments that serve to concretely promote cohesion and social inclusion, for example, such as the citizen's right to continuing vocational training and replacement benefits in the transition from one job to another»⁶. Gorz writes, «there can be neither society nor life without work, but not every society and not every life are working society and lives»⁷.

4. Participation

The new social individual is a man of glass, transparent and brittle, at the same time. The jurist has the duty to intervene in front of the changing condition. The individual is within the informational community, with his sensitive data representing the deepest nucleus of his identity

⁶ E. ALES, *Dalla politica sociale europea alla politica europea di coesione economica e sociale*, in E. ALES, M. BARBERA, F. GUARRIELLO (a cura di), *Lavoro, Welfare e democrazia deliberativa*, Milano, 2010, p. 366.

⁷ A. GORZ, *Metamorfosi del lavoro. Critica della ragione economica*, Torino, 1992, p. 169.

and his existential options. The system has to deal with the defense of the personality in its entirety. The ego cannot be reduced to informational material freely available, but should be placed in a position to know which fragments of his identity were made public, and in what ways, as holder of an inviolable right to entirety. On the judicial level, his behavior can never be measured by a machine or a program capable of an automated data processing, as an administrative and judicial measures that resulted automatically from an elaboration of data to establish the profile or personality of the subject would ultimately reduce the constitutive ego surplus. How do we position ourselves in front of who cannot protect himself because bearer of a fragile identity, unable to regain possession of his essence? The contemporary and multifaceted jurist rediscover himself as a technological mediator of human rights in front of the procedures of informatics space, and particularly in the interaction with those techno-sciences that allow us to capture and manage the most relevant information for the operation and government of individual and social life. The model of a jurist as an expert of the “right in formation” alludes to this idea of a right that is formed and transformed through informational processes⁸. It is no coincidence that the right transforms more quickly than ever, therefore it is constantly “in formation”, in the informational society. In this society the great mass of data in movement change constantly social relationships, causing rapid wear of the discipline in force. Philosophy of human rights asks itself a central question for the social and political balance of community life: have the new forms of technology brought into being an increase in the level of welfare to the point of determining a meaningful social inclusion and yet, if it really is so, was everyone given the opportunity to “inclusion”? Again: is the man still subject author or has become the object of artifice? In this sense it is in play the qualification of subjectivity, inasmuch it is always higher the risk of building of artificial solitude as hermeneutic code of the new civilization. Nevertheless, the juridical experience becomes machinery, last frontier of technology for functional dispute resolution: may this mark the path of our juridical culture into oblivion of the *nomos*? The issues posed are, in my opinion, crucial to initiate a reflection about the quality of the protection of the person’s social status, nowadays evident in the asymmetry of social arrangements due in particular to new technological idioms that bring into play the principle of equality, as regards access to rights. Consequently, the right in formation, in being right up to

⁸ Cfr. A. PUNZI, *Diritto in formazione. Materiali per il corso di metodologia della Scienza giuridica*, Torino, 2014.

the truth, must prove the meaning and measure of the concrete coexistence of social act of including. The technological impact can have positive effects on the quality of services to citizens but only if it is mediated by the law, as it is to ensure shared access to so-called intangibles. In other words, thinking about the development of techniques in view of the common good. Consider that the current debate around the theme of so-called digital administration and its importance in relation to the welfare of the citizen in relation to the public administration, and, on the other side, to the set of problems of the juridical issues related to the collection and use of Big Data in the context of private-law relations. The complexity of *smart society*, characterized by the increasing dissemination of information and the accessibility of goods and services in real-time, resides in the no social and especially economic accessibility, that challenges even the advanced model of relationship with the citizen so-called “active” from the Public Administration. The juridical mediation, to be effective, must keep pace with technological innovation processes. The literature on the common goods does not provide an adequate response, given the recurrence of the owner’s theorem in the conceptualization attempts of liquid and functional instances to a new measure for the implementation of social welfare⁹. Also the debate about the use of technology appears particularly meaningful and fruitful of developments, not only in the traditional process, but also in the context of alternatives to state justice, such as arbitration, as well as compared to so-called alternative procedures of conflict management, such as ADR and ODR, as a function of ensuring adequate protection at the current complexity of living together¹⁰. Objective is to verify the actual suitability of the technology to ensure a real increase in the welfare and social act of including, since the emergence of new communication models, of the community administration, of conflict resolution bear within themselves the seeds of new forms of social and economic marginalization. We could be, therefore, in the presence, as an increasingly common terminology, of a milestone in the long journey that still has to battle it out for a final affirmation of an “active citizenship”, otherwise of a citizenship that, above all from the network and through the network, controls, interrogates, proposes and, finally, it should also decide. The way seems to be, then, not only e-government, but also and necessarily e-democracy. We cannot overlook the additional profiles of

⁹ Cfr. Z. BAUMANN, *Vita liquida*, Roma-Bari, 2008.

¹⁰ G. RECINTO, *La natura giuridica del settlement tra giusto processo e giuste Online Dispute Resolution*, in *Dirittifondamentali.it*, 2015, n. 1, (http://www.dirittifondamentali.it/media/1155/recinto_1.pdf).

access to information, with particular reference to that information coming from the public subjects, the real opportunity to participate in the formation of opinions, the dialogue between citizens and institutions, the processes of the selection of the political class and the formation of governments and/or representative assemblies, direct initiative on the part of associated, where there are specific juridical institutions and the involvement of citizens and their specific forms of association in decision-making processes.

5. Health

In articles 2, 3 and 32 of the Italian Constitution, the individual must be protected in terms of the right to health, understood as a basic right and especially as a “social right” since, even in the health dimension, it is essential to proclaim the principle of equality. This condition is even more power in the determination of free health services for the needy, connecting element with the principle of social dignity, the basis of the considerations developed in the direction of the right to access by the individual and the community. In this sense, health comes as good of individual and communities at the same time, in research of the access to care and in the attention to achieving certain standards of quality of life in health. We can think of the “prevention” of the disease as a practice of the right to health, more and more threatened by the policy of reduction to public health. The International Conference of Health and the World Health Organization (WHO) defines health as «a state of complete physical, mental, social welfare and not merely the absence of disease or infirmity. The possession of better state of health that can be achieved is one of the fundamental rights of every human being, whatever his race, his religion, his politics, his economic and social condition. Governments have a responsibility for the health of their peoples: they, to take part in, must take appropriate health and social measures». Between “care” and “health” must be connected as the objective to reach is the well-being. Amartya Sen distinguishes “health equity” from the simple “equity of care”, because the first is not merely the availability of health services, but it is the real possibility of using them to achieve measurable health status based on needs¹¹. The effective exercise of this right includes the elaboration of ethical paradigms inspired by a vision of

¹¹ Cfr. A. SEN, “*Uguali e diversi*” davanti alla salute, in *Kéiron*, 1999, p. 8.

personal and social justice at the same time, that must respect the needs of individuals and communities. In this direction should be accorded the rights that form the kit to the fragile condition of the sick person such as the right to be informed in particular in order to shy away from that numerical anonymity that often typifies the sick in the hospital and suffering in general. The right to health makes sense only if it refers to the man in the concrete in the specificity of his different physical or social conditions. For this reason over the decades various charters of rights have been enacted. Those charters relate to man at different stages of life or in special physical conditions. This process has made a shift of emphasis from the man regarded in the abstract identical as any other man to man considered concretely. The rights of the child, the elderly, the sick and finally people with disabilities. In the 2000 Nice Charter protects the physical and mental integrity of every human being in the front of possible biotechnological techniques applied in humans, recalling the Oviedo Convention of the Council of Europe on April 4th 1997. This juridical document intervenes on *an improper use of biology and medicine that may lead to acts endangering human dignity*, by adopting *the necessary measures to ensure human dignity and the rights and fundamental freedoms of the individual*. Genetic manipulation is the future of man¹², as enucleated by the provisions present in the points dedicated to the human genome. «Although in that context there isn't the term *human dignity*, it is evident that the protection of genetic identity is based precisely on the inviolability of human dignity, to be understood as meaning of right of *all* human beings to integrity of their own genetic patrimony and as the right of *each individual* to the uniqueness of his own genotype, not to be discriminated against because of it»¹³.

6. Conclusion

The knowledge of science on many occasions have contributed to undermine the integrity of the human person, especially since the techno-sciences have marked the “discoveries” of the global era. Paradoxically vision “scientific” post-Enlightenment that has always favored individualism today more than ever prepares the world to standardization through the union “discovery-consumption”, even in the most sensitive fields of the experiment as those related to human health.

¹² Cfr. J. HARRIS, *Wonderwoman & Superman*, 1992, traduzione italiana a cura di R. Rini, Milano, 1997.

¹³ Cfr. P. BECCHI, *Il principio dignità umana*, Brescia, 2009, p. 54.

We refer to the fact that some medicines or technologies that could save the lives of men and women damaged from extremely serious diseases, are not the focus of attention of scientists because they are not marketable. Humans are “suffering mass” not only in the sense of embodiment in its most fragile dimension but also in the sense of belonging to a mass in which personal right to health is lost. You must, at the time of critical consumerism, “homologate” disease, in order to be recognized and protected. To check human health means controlling the body therefore the life. To decide what medicines and what techniques introduce into the market involves more invasive manipulations. There is, as Foucault wrote, in his well-known reflections on bio-politics «a new definition of the patient status in society and the establishment of a certain relationship between the assistance and experience, the assistance and the knowledge; it is due to wrap the patient in a collective and homogeneous space»¹⁴. Who is looking at the other’s body to violate it, to annihilate it or to save it in any event he expresses a proximity and a limit at the same time. A human proximity and a sacred limit. The threshold may be exceeded in a common humanity but in the sacredness of the body, external manifesto of the personal soul. The body is not simply an individual good to leave in indifference or a social good on which you can fix publicly but the “obvious treasure” of every human person to find because it is under the eyes of all. This contradiction can be remedied by recovery of man in his concrete being, in his condition throbbing, where the *nomos* meets the *pathos*.

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Abstract

Due to the current economic public condition, fundamental social rights are today condemned to be marginalized under the false accusation of implying unrealistic costs. In particular, rather than considering abstract concepts, such as equality, fraternity or solidarity, the Author reflects on the crisis of the welfare State in ‘specific areas’ of interest, such as family, work, health and participation that are the pillars of fundamental social rights. These rights are deeply explored to identify the measures that need to be taken in order to ensure their effective application.

¹⁴ M. FOUCAULT, *Nascita della clinica*, Torino, 1998, pp. 208-209.