

## Chapter II

From labor rights to minority rights

Bernardo Sorj

SciELO Books / SciELO Livros / SciELO Libros

SORJ, B. From labor rights to minority rights. In: *Latin America's Elusive democracies* [online]. Rio de Janeiro: Centro Edelstein de Pesquisas Sociais, 2007, pp. 28-57. ISBN: 978-85-99662-21-2. Available from SciELO Books <<http://books.scielo.org>>.

---



All the contents of this chapter, except where otherwise noted, is licensed under a Creative Commons Attribution-NonCommercial-ShareAlike 3.0 Unported.

Todo o conteúdo deste capítulo, exceto quando houver ressalva, é publicado sob a licença Creative Commons Atribuição - Uso Não Comercial - Partilha nos Mesmos Termos 3.0 Não adaptada.

Todo el contenido de este capítulo, excepto donde se indique lo contrario, está bajo licencia de la licencia Creative Commons Reconocimiento-NoComercial-CompartirIgual 3.0 Unported.

## **CHAPTER II - From Labor Rights to Minority Rights**

The freedom-rights and entitlement-rights dichotomy cuts across modern political history. For two centuries in Europe and one century in Latin America, the integration of the worker—or of the working world in general—into the modern legal and political systems was the center of gravity of social conflict over entitlements-rights. This integration was associated with the struggles of trade unions, social movements, and political parties to gain access for all citizens to a minimum package of goods; mostly this was accomplished through the mobilization of national, and even nationalistic, symbols of inclusion although occasionally it occurred within a framework of internationalist notions. As we shall see, social groups have changed and other types of demands and symbols are used today, far removed from the references to the national State and from the socialist utopia centered on the workers' movement.

Our focus then, is on the decline of that worker-employer conflict, in its dominant form, during the 19<sup>th</sup> and 20<sup>th</sup> centuries. Before moving on to contemporary processes, it is important to point out how some of the trends that seem unprecedented to us today, were a response to inherited problems—and therefore are a continuation of them—or constitute trends that were woven, in part, during the struggle to broaden social rights linked to the workplace.

### ***The transition from labor contracts to social rights***

Social justice values predate modern discourse developed around the concept of subjective rights, in other words, around the notion that each individual is a rights-bearing subject, in a world in which the legal system is completely separate from religious institutions and premised on a rational agreement between members of a

community.<sup>16</sup> In contrast to modern individual rights, claims of entitlement to “social rights” occur throughout the history of humankind. In the New Testament of the Bible there are countless examples of guidance referring to the welfare of the poor. And while the concern for the “social” does not presuppose individual rights, the opposite is equally true, as can be observed even today. The fact that individual liberties do not necessarily go hand in hand with social justice is clearly illustrated by Asian societies such as Singapore, Taiwan, or Korea which experienced decades of authoritarian regimes and yet exhibit significantly less social inequity than contemporary liberal Anglo-Saxon societies or even continental Europe.

The establishment of social justice mechanisms in a world of individuals, that is to say, a world in which individuals are the only legitimate subject of rights and relate to their neighbors based on freely established contracts, was an historically formidable and highly complex task. It was in confronting the challenge of maintaining the tension between the values of individual liberty and those of social solidarity—without resorting to the authoritarian responses of communism and fascism—that it became possible to humanize capitalism and build the welfare state.

As Alain Supiot demonstrates,<sup>17</sup> modern law had to address the contradiction implicit in a labor contract in which free and equal individuals consent to relationships of subordination and obedience. It is a contradiction that raises the question of what work really is: an attribute of the individual or a thing? And that which is being subordinated, is it the work or the worker? In order to address this contradiction, it was necessary to establish and legitimize a new area of law: labor law.

Supiot demonstrates how legal remedies to develop labor laws varied according to national traditions. For example, in the Anglo-Saxon common law tradition, with its emphasis on procedural issues and contextual solutions, labor law developed based on distinct scenarios and the definition of different types of “services” provided. In contrast, the French tradition, with its Roman roots, sought

---

<sup>16</sup> See Marcel Gauchet, *La religion dans la démocratie*.

<sup>17</sup> Alain Supiot, *Critique du droit du travail*.

inclusive solutions based on an abstract definition of work and a clear distinction between the individual and the thing. Here the emphasis is on the individual freedom of the parties involved, including the freedom to negotiate one's labor, which represents a radical departure from the medieval tradition. Finally, Germanic law, rooted in the premodern tradition of recognizing labor contracts as personal bonds and obligations ensuring mutual protection, acknowledges the community as an entity distinct from the individual and the State. While the individual-centered vision has trouble regarding the labor contract as anything beyond a relationship between free individuals, the community-centered approach confers on the worker a statutory status as a member of a community of workers, in which the individual labor contract occupies a subordinate position. Hence, the focus of the individual contractual relationship is shifted towards the company, towards a community that joins employees and employers.

The history of labor law, and in particular the individualistic tradition propagated in Europe by the Napoleonic Code, is the history of the process of recognizing the uniqueness of the labor code and the need for specific regulations limiting the arbitrary nature of the contract by taking into account that, although it is a contract between free individuals, what is at stake is not only the work, but also the worker. In other words, the "thing," work, cannot be distinguished from the "individual," the worker. The labor contract, then must take into account not only the object itself—the provision of a service in exchange for remuneration—but also the provider of that service. As we are only too aware, this history is intimately linked to the struggles of social movements, trade unions, and socialist political parties.

This conflict involved the tension between the central role assigned to the individual as a basic category of modern law and the incorporation of categories of social groups conferring a status ("worker"), which classic liberalism sought to toss into the trash bin of history. The recognition of collective categories transformed the worker into a legal category thereby paving the way, first, for the legalization of trade unions, heretofore regarded as a monopoly that impeded free individual

negotiation, and then for the conformation of various collective workers' organizations for the collective bargaining of salaries and working conditions.

This transformation altered the notion of patrimony—an individual's indivisible set of assets and obligations—heretofore viewed as merely an extension of the individual. How to define work? As an object, part of an individual's patrimony and therefore a commodity to be negotiated at the discretion of each person—potentially to the extreme of allowing a slave contract—or as a category giving rise to the intrinsic rights of the individual? As Supiot points out, “the history of labor law was the history of the progressive discovery of the personal dimension of that asset that brought to the fore, not work as an asset, but rather the worker as a subject of rights.”<sup>18</sup> Underlying labor law is a revolutionary idea—one that would later lead to the establishment of consumer protection laws—that asserts that a contract is only valid if it is made between two equal parties negotiating in conditions of equality.

The integration of these rights, and the recognition of new actors such as trade unions, divided the “worker” persona into the subject and the object of the labor contract. This meant acknowledging that the process of exchanging goods (in the case of the labor contract) entails values unrelated to patrimony, in particular the substratum of the body of the employee.<sup>19</sup> This process took place without eliminating the juridical personality of the individual as the basis for social regulation.

This legal revolution profoundly transformed capitalism (just as Marx theorized) based on the assumption that a labor contract can be reduced to a purely commercial exchange.<sup>20</sup> In capitalist societies, however, the labor contract came to be mediated by a social regulatory system that created the uniform conditions and boundaries within which such contracts would be valid, thereby defining the parameters of a commercial contract between two free parties. With the advent of labor laws, the social relations surrounding production were mediated by the

---

<sup>18</sup> Ibid, p.44

<sup>19</sup> See Ibid, p.66.

<sup>20</sup> See Karl Marx, *O capital*.

political-legal system, while the interests and prospects of salaried workers were integrated into the workings of the democratic system.

In this way, it was recognized that work cannot be dissociated from the worker or, more explicitly, that all work involves a worker (which in turn implies recognition of his or her “physicality,” as in, whether that person is a child or adult, man or woman, sick, pregnant, etc.). Labor legislation, then, was concerned primarily with the worker’s body, in other words, protecting workers from physical destruction by or on the job; (the “medicalization” of the worker’s body initially was associated with work hours—and sleep—as well as occupational accidents which had reached epidemic proportions in 19<sup>th</sup> century Europe).

Political regulation and labor legislation partially addressed the problem by assigning the employer responsibility for working conditions, essentially through a universal “social security” mechanism. This mechanism, which was later extended to retirement and to the unemployed, was the result, as François Ewald demonstrated,<sup>21</sup> of the use of statistical know-how, and in particular, the application of business methods to insurance, to solve social problems. In this way, it was possible to socialize the costs of occupational accidents and, subsequently, of old age and unemployment benefits. The right to work, as we have seen, complicated the notion of the contract, although as Ewald pointed out, it also shifted radically the notion of liability. According to the Napoleonic civil code, liability originally was associated with the idea of “fault” and individual responsibility. Conversely, the labor code treats an accident as an “objective” liability rather than the individual responsibility of the worker, and may even hold the employer liable, inasmuch as it recognizes that the worker has forfeited his or her liberty during the employment process.

The affirmation of a legal identity goes hand in hand with affirming the identity of the worker as a specific social group, in other words, with the invention of the modern category of worker. But the opposite is also true: *the weakening of identity is accompanied by a transformation of rights*. While the right to work created a legal construct of work, it also allowed for professional distinctions which

---

<sup>21</sup> François Ewald, *Histoire de l'état providence*.

in turn, would reinforce different employer and employee strategies aimed at creating divisions within the category or obtaining differential advantages for each group. In this way, manual laborers and employees, public and private sector officials, unhealthy working conditions and maternity issues, to give just a few examples, began to be associated with differences in rights; this fragmented the workplace and reinforced the corporativism of professional categories. Legislation subsequently incorporated categories of salaried workers into the upper echelons of the company hierarchy, and in recent decades, based on new management styles and employment flexibilization, a broad spectrum of unstable jobs and self-employment was regulated.

Labor law spawned a movement that ultimately led to a new perception of social rights. There was a recognition that, above and beyond specific work-related rights was a human being, or more specifically, a fellow citizen, who had the right to fulfill his/her basic needs, regardless of employment status—including those who for whatever reason (for example, illness or age) were unable to earn a basic living wage. Because of this, rights that had originated in the workplace (including minimum income, retirement, and medical services) ultimately were extended to all citizens, thereby creating the social welfare state.

The creation of a common threshold of rights to security and welfare reinforced trends toward the fragmentation of workers' rights based on specific categories and subcategories. Given the existence of a universal social safety net, employers sought maximum flexibility and individualization of labor contracts and wage negotiations, thereby recovering some of the terrain lost to expanded trade union power.

In this new context, while the most highly skilled workers pursue increasingly individualized strategies, other groups—civil servants in particular—defend their corporate rights and unskilled workers forfeit their bargaining capacity, dignity, and social recognition. This recreated the impression that work is a commodity devoid of subjective qualities; as a result, trade unions and collective bargaining have been weakened and identities associated to the workplace have begun to be dismantled.

Labor law—and herein lies its significance—revolutionized the basic categories of the legal sphere, as called for by liberal democracy,<sup>22</sup> opening the floodgates to a subsequent explosion of rights.

In the first place, labor law redefined the distinction between inequality and hierarchy. Although hierarchy—referring to different positions in the chain of command—is certainly permitted, and this includes the recognition of a vast gray area in the labor contract to be filled circumstantially—it cannot confer the power to authorize unequal treatment; put another way, the law will not allow discrimination among workers pursuant to criteria external to the workplace. Thus, the labor contract establishes a hierarchy among equals, including relationships of subordination and limits on the exercise of individual will, yet it prohibits discrimination.

Secondly, labor law established an objective fraternity assumed by the State—a responsibility for the common good outside the private sphere and in particular the family—creating a new collective prototype of citizenship manifested in the form of social rights to a minimum level of security. This fraternal prototype was established as a rational structure based on the recognition of the interdependence of the social system, rather than as a product of the subjective solidarity among individuals. In liberal labor codes participation in trade unions or strikes appears as a right rather than a duty. The liberal vision of trade unions was called into question by the Fascist legal order—which reinstated mandatory collective intermediary entities between the individual and the State— and by the revolutionary socialist tradition, which viewed trade unions as a new form of domination.

Labor law was an effort to integrate the collective, solidary aspects of social life into the legal categories of modernity based on the value of universal individual

---

<sup>22</sup> This includes the U.S. legal tradition; for years the Supreme Court tried to block the social legislation introduced by Franklin Roosevelt.

rights. It was a highly complex process, since, as Supiot indicated,<sup>23</sup> the legal value of equality cannot be confused with the ideology of social egalitarianism, a confusion facilitated, in both cases, by the way in which the notion of equality is used. The introduction of values of material equality—implicitly recognized by labor law and designed to require the regulatory intervention of the State—sought to restore the full effect of legal equality without overlooking the tension between the social and legal dimensions.

The law can err through excess or through timidity: in the former case, through the legalization of particular social categories (such as, for example, the unemployed) leading to the consolidation of that status and the stigmatization of some of the social groups it intended to protect. In the latter instance, it can err by allowing social inequality to deepen to the point of jeopardizing, in practice, the effective functioning of legal categories of equality.

The sense of the collective established by social rights endowed workers with an autonomy they had previously lacked as individuals dealing with the employer, without disregard for their status as individual and autonomous legal persons. The public order would thus establish “individual freedoms to act collectively.”<sup>24</sup> Ultimately, labor law and civil law have the same purpose: “to civilize” social relations inside a company, replacing relationships of force—that tended to jeopardize the security of individuals—with relationships of law, so as to transform labor and the company into objects of law.

The importance of the right to work lies in its recognition of the tension between “freedoms-rights” and “entitlements-rights”, and between the sociological and legal dimensions of social demands for rights. As Supiot points out, the legal rationale does not seek to reflect or resolve the concrete inequalities found in each society, but rather to provide the legal instruments through which a peaceful, and, to the extent possible, fair, resolution of conflicts can be reached.

---

<sup>23</sup> Supiot, *op.cit.*, p.135.

<sup>24</sup> *Ibid*, p. 140.

The world of material inequality is tied to different types of power relations among social actors, relations that are in constant flux and upon which the law's capacity to act is limited. To presume that the law can provide a solution to every specific situation of social conflict would destroy the universal rules based on which each subject possesses an autonomous, individual nature. Otherwise, the law would dissolve into society ("represented" by the State in the case of authoritarian societies), giving rise to a reign of the arbitrary and destroying the underpinnings of individual autonomy and fundamental freedoms. As Supiot indicates, "legality presupposes a division between legal rules and other social rules."<sup>25</sup>

We must always keep in mind that the legal person is an abstract construct (in practice, concrete people exist, each with their own unique traits). It is a fiction, and is recognized as such, but it also enables all individuals to participate in the rules of law, which attribute "to each individual a space, an identity, that is, the quality of being a legal subject."<sup>26</sup> The promotion of rights should be focused in such a way that they represent, or modify appropriately, existing legal and institutional frameworks. Otherwise there is a risk of stumbling into ideologies that disregard the real prerequisites for implementing new rights.

### ***Social Inequality, Market and State***

The social system established by the welfare state reorganized the bases for social stratification. In advanced countries (and in several developing countries), the State appropriated between one-third and one-half of the Gross Domestic Product and distributed it through public services. When income distribution is used as a measure of standard of living, individual income (which is still used as a criterion for economic stratification) should be taken into account as well as the cost of the public goods and services to which citizens have access (for example, education, health, safety, justice, and subsidized transportation).

---

<sup>25</sup> Ibid. p.215.

<sup>26</sup> Ibid. p.220.

We have, then, a two-tiered stratification: one determined by individual income and the other by the enjoyment of public goods and services. In principle, stratification based on individual income tends to be much more unequal than that produced by inequities in the distribution of public goods and services, which ideally seek not only equity but also to offset market-driven stratifications. Public goods and services are not always effective at compensating for social inequity and in some cases, especially education, particularly benefit the middle classes. In Brazil, for example, the poorest sectors receive, in general, the least benefit from public services and, in some cases the presence of certain services, such as corrupt or abusive police, can actually constitute a hardship for slum dwellers.

Despite a recent trend to delink social policy from market regulatory policies, social rights and public services have always influenced the labor market and the organization of production. To what extent is it possible to develop effective social policies guided by a principle of fair distribution while simultaneously deregulating the labor market in the direction of “contractualism?” While one potential factor underlying the trade unions’ growing incapacity to uphold and generate social rights has to do with the liberalization of social policies hitherto associated with the corporate interests of groups of salaried workers with more bargaining power, it is doubtful whether, absent social pressure, the State will be guided by “ethical” policies of expanding public services to achieve equality.

In the 20<sup>th</sup> century, at least in developed countries, interpersonal solidarity was replaced in large part (although not totally, since the family, friendship, and philanthropy continue to play a key role) by legally regulated social policies. This shift in responsibility signaled a change in the liberal ideal which, while recognizing the importance of solidarity, regarded it as the moral responsibility of members of “civil society” and therefore foreign to the task of governing.

Labor law was rooted in workers’ struggles and in government and academic research on the causes of the poverty generated by the new industrialized world that pointed to the need for government intervention. And this altered the very nature of social inequity inasmuch as the latter could no longer be attributed to a divine plan or

explained as the product of the natural order of things. Poverty eventually was diagnosed as a systemic dysfunction that could be corrected by social engineering (or revolution).

The main policy for addressing social issues was mandatory social security. As we have mentioned, applied statistical risk control technology constitutes the basis for modern social security. The application of technologies for universal mandatory social security involved two formulas that were applied differently in each country, but were always based on a combination of employee and employer contributions and/or direct taxation.

Over an extended period— from the end of the First World War to the Cold War—a new sphere of government action was consolidated: the social sphere. In advanced countries, the capitalist State became a welfare state and created what Robert Castels termed “social ownership,”<sup>27</sup> a series of collective assets considered to be a functional substitute for individual ownership and designed to ensure individuals access to the material *supports* (education, health, social security) they needed to participate in the labor market and in modern consumption . Rooted in the desire to diffuse class conflict and instill patriotic sentiment in the lower classes, the social welfare state was a social integration project in function of the National State.

The welfare state entered into crisis in the 1970s, although it is important to point out that to this day it continues to be the basis for social integration in advanced capitalist societies. The situation initially was diagnosed as a fiscal crisis due to demographic changes (longer life spans and reduced birth rates, with the attendant modification of the age pyramid so that the system in which the younger generation covered the costs of the older generation was rendered unviable), spiraling public health costs, and rising unemployment.

The crisis of the welfare state is the product of a protracted process in which the “social rights” created around the figure of the worker were generalized and largely delinked from the mandatory social security system that served as their

---

<sup>27</sup> Robert Castels and Claudine Haroche, *Propriété privée, propriété sociale e propriété se so.* .

funding source. As new sectors joined the welfare state, the costs were transferred to “contributing” groups, i.e. workers and employers, or to the State, bankrolled by taxation or inflationary policies. This new context set the stage for the so-called neoliberal policies, supported by broad social sectors who felt harmed by policies to fund the growing costs of maintaining the system or by inflation.<sup>28</sup>

An enormous amount of literature began to point out that a significant portion of the resources that should be allocated to the neediest sectors remained in the middle classes and that social policies, far from serving as a tool for integration, were reinforcing the stigmatization and proliferation of excluded groups. The welfare state, therefore, was eroding on two fronts: from the top, due to public administration problems, and at its base, due to the middle classes’ growing rejection of ideologies espousing social solidarity. Even left-leaning intellectuals began to view increasing government control as an unwarranted, authoritarian intrusion into private life.<sup>29</sup>

Budget administration initiatives to reduce the fiscal deficit in the 1970s, or to comply with the requirements for competitive insertion into the international market in the 1980s, included a series of government reforms, privatization initiatives, and reforms to social legislation. At the same time, a vast amount of literature was being produced on governability and good governance, indicating the need to develop appropriate instruments to ensure transparency and to measure and evaluate the efficiency of public resource allocation. Despite the reform of the welfare state—still in progress in Europe and in most Latin American countries—, which included the modification or elimination of some labor and social security rights, social spending in capitalist countries has remained steady or even risen, as has the percentage of the public budget in the overall Gross Domestic Product.<sup>30</sup> Therefore, it is important to keep in mind that the welfare state continues to be the basis for social solidarity and for expectations concerning basic rights in advanced capitalist States. The core issue today, therefore, has to do with the government’s ability to offset growing market-generated inequities and to limit the noxious effects on the physical and mental

---

<sup>28</sup> Regarding the social impact of inflation in Brazil, see Bernardo Sorj, *A nova sociedade brasileira*, Ch. 3.

<sup>29</sup> See Pierre Rosanvallon, *La nouvelle question sociale*.

<sup>30</sup> Although in most countries a growing percentage of public spending financing was transferred from direct taxes (on income) to socially regressive indirect taxes (on consumption).

health of salaried workers from the deregulation of labor relations produced by the contractual counter-revolution

While the dismantling of corporatist structures eliminates certain privileges that clearly are unsustainable in today's climate, it also corrodes the professional ethic associated with activities that require a certain commitment to collective values, such as public services.

And that is not all; above and beyond the administrative and fiscal difficulties, the crisis of the welfare state reflects a deep-rooted social transformation, that calls into question its legitimacy based on the widening gap between the social base of public policies anchored in productive relationships and the egalitarian ideology associated with the working class on one side, and new trends in modern social interactions on the other. As Robert Castels maintains, starting in the mid 1970s there was a “destabilization of collective ownership or even a weakening of the homogeneous categories that comprised the wage-based society.”<sup>31</sup>

As we have seen, the working world was becoming increasingly fragmented, in part as a result of successful negotiations by different groups of salaried employees. But beginning in the 1970s, a series of internal factors accelerated the internal transformation of the working class. The declining influence of the industrial sector coupled with the growth of the service sector led to a reduction, both relative and absolute, in the number of manual laborers—protagonists of the trade union tradition and egalitarian ideology—within the universe of salaried employees. At the same time, new business administration methods, out-sourcing, job flexibilization, and the shrinking pool of employed manpower, struck at the foundations of trade unions and the occupational strategies associated with expectations of job stability. Finally, the neoliberal ideological wave and the demise of communism further debilitated actors committed to the struggle for a more egalitarian society.

---

<sup>31</sup> Robert Castel, *op. cit.*, p. 108.

### *From anonymous domination to fragmented rights*

The “crisis of the working class”—and its social utopias—is both a cause and effect of the growing individualization of values and social relationships in modern society. This process has led to what some sociologists consider a new phase of modernity (referred to variously as “post-modernity and “high modernity”).<sup>32</sup> At its center is the individual, bereft of transcendental beliefs or tradition and condemned to constant reflexive action, in others words to a subjective world under constant construction and reconstruction.

The contemporary individual can be seen as lacking a rigid system of collective or ideological affinities and splintered into myriad, mutant networks and reference groups. Unlike the previous modern period, in which a relatively solid values system was still in effect through institutions such as marriage, career, education, political party, and ideology, and offered, at least in broad strokes, a secular sense of life (centered around values such as work, country, progress, history, and socialism), the modern individual has evolved into a self-centered universe populated by black holes and disjointed galaxies and enveloped in a sense of intense uncertainty about his or her future and place in the world.

The current de-institutionalization of the individual, whether man, woman, or child, also has weakened the mechanisms and ties that connect the individual to society and to a cultural system.<sup>33</sup> The values upon which school, the workplace, and the State were built are clearly in retreat, if not in a state of collapse. New identities are built around financial success and consumption associated with increasingly customized lifestyles.<sup>34</sup>

---

<sup>32</sup> See, among others, Anthony Giddens and Scott Lash, *Reflexive Modernization*.

<sup>33</sup> See Danilo Martuccelli, *Domination ordinaires*.

<sup>34</sup> On the sociology of consumption see, among others, Daniel Miller (ed.), *Acknowledging Consumption*; Yiannis Gabriel and Tim Lang, *The Unmanageable Consumer*; Don Slater, *Consumer, Culture & Postmodernism*; Pekka Sulkunen, John Holmwood, Hilary Radner, and Gerhard Schulze (eds.), *Constructing the New Consumer Society*; Jean Baudrillard, *Le système des objets*; Mary Douglas and Baron Isherwood, *The World of Goods*; Arjun Appadurai, *The Social Life of Things*; and Zygmunt Bauman, *Life in Fragments: Intimations of Postmodernity*; *El malestar de la pos-modernidad*.

Periods of historical transformation create a “dislocation” between the subjectivity of the formative years and the values and demands of the new times, between individuals and society. This dislocation is experienced as a personal crisis and frequently is a source of resentment, frustration, anxiety, and depression. Beginning at a certain age, it is increasingly difficult to “identify oneself” with the “outside world,” and this produces a profound existential crisis and disillusionment with life. This situation, while common to all historical transformations, has taken on a chronic and intermittent character in contemporary capitalist society.

Living simultaneously in the physical space where he is situated and in the global space to which he is connected, living with an “in the moment” mentality that obliterates any sense of history, and with no one but himself to blame for his suffering, the reflexive individual discovers that his subjective experience represents not freedom but a source of anxiety that requires the constant application of self-help methods, if not chemicals, to keep up the motivation necessary to continue to be self-managing and to endure the constant change and uncertainty of today’s world.

This individual is condemned to experience a constant sense of detachment from the immediate meaning of the social world; to live in a world that is fluid and in constant flux, one for which he is not “prepared” (thus creating a new niche for “continuing education”). The individual is forced to justify his every action calling upon different potential rationales and values; to negotiate each action in the affective world; to feel fragmented by a myriad of desires with no structuring values to be found. In sum, he is condemned to live, as expressed in the emblematic title of Ehrenberg’s book, “the exhaustion of being oneself.”<sup>35</sup> The individual no longer suffers the pressure of the super-I and he directs his energies toward ministering to his desires, now openly acknowledged, but largely unattainable. He is condemned to coexist with his many selves and myriad opportunities to rewrite his life story, transforming each interaction into a negotiation with himself or others, producing a culture in which subjective dramas replace public dramas or, to paraphrase the title of another book, producing a narcissistic culture of the “minimal self,”<sup>36</sup> revolving

---

<sup>35</sup> Alain Ehrenberg, *La fatigue d’être soi*.

<sup>36</sup> Christopher Lasch, *The Minimal Self*.

around private aspirations and the ongoing—and never-ending—construction of a self-image.<sup>37</sup>

Responsible for his own destiny—given that he is free to reinvent his life story at any time—the individual is also responsible for his failures and problems: for not having tried hard enough to get a good job, for not having eaten well enough and ending up with health problems, for not having exercised enough and having aged as a result. The contemporary individual still feels oppressed and dominated, but it is an *anonymous domination*, with no exact name or address. While in the workers' struggles of yesteryear, the enemy had a distinct face (the boss) and the roots of domination were clearly identified (capitalism), the reflexive individual cannot quite figure out who to blame for his ills; this leads to the increasingly prevalent syndrome of depression and a sense of failure, as the person considers himself solely responsible for his misfortunes.

Paradoxically, the new modernity is producing a resigned individual—too busy taking care of his problems to pay attention to collective issues—and at the same time, a more egalitarian individual since, with the breakdown of the old boundaries and subcultures that divided people (such as social status, social class, nationality, and ideology), nothing is left but one's common humanity, the drama of the human condition in which all individuals can see themselves reflected and identified.<sup>38</sup>

From the sociological standpoint, the overemphasis on the individual and on the liberating role of knowledge that pervades modern culture (and was reinforced by psychoanalysis and various self-help therapies) finds its expression in the school of rational choice, and, more recently, in reflexive individualism. The way certain sociological approaches portray the condition of the modern individual—as a reflexive being constantly reinventing his future, or a “risk taker” in Giddens' words—is a questionable and caricatured idealization of contemporary life. The modern individual bears a closer resemblance to another image, also caricatured:

---

<sup>37</sup> See Marcel Gauchet, “*Essai de psychologie contemporaine*”.

<sup>38</sup> George Simmel, in particular, noted the profoundly equalizing effects of world modernization. See *Philosophy of Money*.

that of a prisoner in a cell, from whence he periodically imagines new “life narratives” so as to maintain the illusion that he is at the helm of his own life story.

The idealism implicit in the excessive value placed on subjective experience, on the capacity for learning, and on the role of knowledge in self-transformation recently was critiqued by Danilo Martuccelli.<sup>39</sup> According to this author, the individual is not sustained “internally” but rather by external “supports” that serve to stabilize the subjective experience (from religion to family, from friends to money).

### *The new individualism and collective identities*<sup>40</sup>

The new individualism, subjectively “vulnerable” and exposed to anonymous domination, continues to seek new ways of belonging and to demand new forms of protection, solidarity, and social recognition. According to some authors,<sup>41</sup> this constitutes a radicalization of democracy. Nonetheless, it does not seem to us that the analyses of specific social processes warrant such optimism. Instead, like Marcel Gauchet,<sup>42</sup> we believe that the postmodern individual has enormous difficulty assimilating the public, dimension. In the new social reality, the struggle for equality is replaced by the struggle for difference; individuals no longer try to build a socially inclusive utopia, and inequality is only relevant in relation to one’s own group, rather than society as a whole. What is more, the very idea of a socially unifying secular utopia has lost currency as it is presupposes a degree of trust in universal truths and/or values and a destination point in a common future that is no longer sought.

Individualization destroys unconditional affiliations and loyalties to absolute ideologies. Agreements around specific issues no longer lead to all-embracing visions of the most diverse problems of society. Each individual reserves the right to adopt (or change) a position on a particular issue and does not accept that any position can be reduced to a single interpretative framework. Those who adopt

---

<sup>39</sup> Danilo Martuccelli, *Grammaires de l’individu*.

<sup>40</sup> I am grateful to Joel Edelstein for his comments and ideas in this chapter.

<sup>41</sup> In particular, Ulrich Beck, *What is Globalization?*.

<sup>42</sup> Marcel Gauchet, *Op. Cit.*

frameworks based on an external authority, equipped with predetermined explanations and responses, emigrate toward religious fundamentalism. In its most moderate or light manifestations, the loss of firm reference points, uncertainty and the sense of a lack of transcendental values and meanings have increased demand for “mystical products,” ranging from yoga “light” or other Oriental disciplines to the rediscovery of one’s own religious tradition.

Individualism and egalitarianism breed growing distrust toward large bureaucracies, whose opacity and impersonal nature clash with values of transparency and the emphasis on individual needs. The main victims of this new social *malaise* are the government and political parties, although large corporations may also become the target of public distrust.

In the contemporary world, the transition from the individual to the social can be observed through two seemingly contradictory constructs that exemplify the new condition of the modern individual. For some, the main point of reference is *human rights discourse* which, because of its highly abstract and general nature, offers a platform upon which particular demands can be anchored and transmitted.<sup>43</sup> There are others who, once the vision of society organized around the State and the political system has been lost, turn to religion in search of the material to build collective identities, eschewing the uncertainty of everyday society and history.

The new universe of collective identities is no longer based on the socioeconomic ties and historical processes that have become fragile and are in constant flux. These identities seek certainties that will shelter them from social transformations and from individualism itself; they develop through either short-term identification with affinity groups associated with specific issues (neighborhood life, the school), or—and this is truly a new phenomenon—around entities that are (experienced as) natural or transcendental.<sup>44</sup> Hence, gender, sexual preference, physical characteristics, ethnic group, religion, regionalism, and nature are some of

---

<sup>43</sup> Regarding the role of human rights discourse see Marcel Gauchet, “*Quand les droits de l’homme deviennent une politique*”

<sup>44</sup> Modern Nazism and racism were precursors to this way of constructing identity..

the values upon which the new collective actors currently are building their identities.<sup>45</sup>

The new identities operate as filters that delimit the relativizing effects and uncertainties of reflexive individualism; they offer a menu of what is true and false, as well as the potential to identify an external enemy upon which to unload at least some of the responsibility for personal destiny. But these identities are not immune to the influence of contemporary individualism; particularly for the elites among these new social actors, they also represent individual negotiating strategies to obtain positions of power in the political system and resources to ensure upward mobility.

Despite the differences observed among the new identities, they share at least some of the following traits, which distinguish them profoundly from the working world and, in a way, place them in conflict with the latter's claims and demands.

- 1) Groups that portray themselves as victims of the system, or descendents of victims, for which they must be compensated, although those responsible for the suffering (i.e., slavery, persecution, expulsion from their lands) are hard to identify in the present.<sup>46</sup>
- 2) Groups do not seek similarity. They assert their differences or uniqueness, are anti-universalists or see universalism as a means of domination. This critique is situated in a complex relationship with human rights discourse, which is redefined as the acknowledgment of the right to be different, a right that amplifies the internal antinomies of human rights and legal systems organized around national cultural communities.

---

<sup>45</sup> Michael J. Piore draws attention to the fact that in North American society, with its individualism and its difficulties to live with ambiguities, it is harder to create collective identities except through innate or natural traits (race, gender, physical features, etc.). Piore's analysis, which does not include religion or ecology, is applied today, with the necessary adaptations, to all modern societies. See *Beyond Individualism*.

<sup>46</sup> In this regard, Michael Walzer comments: "In multicultural politics it is an advantage to be injured. Every injury, every act of discrimination or disrespect, every heedless, invidious, or malicious word is a kind of political entitlement, if not reparation then at least recognition." P. 89  
" Cf. *"Multiculturalism and the Politics of Interest"*.

- 3) Since the new collective identities are built upon the foundations of “transcendental,” permanent qualities, they often seek permanent discrimination, rather than a leveling of the playing field. Parallel to affirmative action policies seeking equal opportunity, the elites of new identity groups advocate positive discrimination policies to consolidate and strengthen particular identities and subcultures.
- 4) The new collective identities stress the symbolic aspects of domination and oppression, even when advocating financial compensation. They are not organized within the economic or productive context, and therefore lack objective parameters to define “their fair share” in the economic world.<sup>47</sup>
- 5) Their social make-up cuts across class lines, although in practice these identities may be primarily composed mainly of members of a given socioeconomic group.
- 6) The new identities are defined outside of the classic right/left parameters and cut across party lines.

As we stated at the beginning of this book, modern citizenship simultaneously incorporated the notion of free and equal individuals and the idea of national community. The growing symbolic fragmentation—caused by the invasion of the public sphere by matters previously associated with “private life” and by the importance placed on ethnic and/or religious cultures that regard their particular loyalties and values as priority and nonnegotiable—jeopardizes the republican notion of public space and the common good.

---

<sup>47</sup> According to Michael J. Piore, “...and because the groupings are defined independently of the economic structure there is no straightforward way for them or their members to comprehend how economic resources constrain the satisfaction of their demands.” Piore, *Op. Cit.* pag. 22.

While these dynamics have sparked an ideological, intellectual, and political reaction, particularly in Europe, in defense of “national” or republican values, from left to right, it is hard to believe that a return to the past is possible. We are living in a very different world than that of the labor and socialist tradition. Instead of a common societal value, i.e. work, we have the assertion of values that are diverse and incommensurate with respect to each other; instead of a radicalization of similarity or equality, we have a radicalization of differences; instead of exploitation, symbolic domination and victimization; instead of universal utopia individual utopias; instead of trust in human activity, the future, and history, uncertainty and distrust of politics.

The building of bridges between private and public life, promoted in particular by feminism, played a significant liberating role in that it introduced into the public debate certain aspects of social life which, in the name of the intimacy of private life, were shielding systems of domination and oppression. But the creation of a *continuum* between the public and the private eliminates the dynamic tension between the individual, the group, and national society—a tension that fueled the production of utopias whose horizon necessarily had to extend beyond one’s own navel. While the separation between public and private life allowed for certain forms of domination that should be criticized and surmounted, it also represents the main bulwark against authoritarian and totalitarian tendencies, whether on the part of the State or society itself, and is critical to the defense of individual liberty.

As groups seeking symbolic recognition, the new identities have the effect of democratizing value systems and cultural life. But once they are dissociated from the struggle against inequality in society as a whole, they have only limited impact on wealth distribution. In the best case scenario, the result is a change in the relative position of identity groups within a system of social wealth distribution that remains largely unaffected.<sup>48</sup> These identities have the potential to normalize the class structure within the identity group, facilitating the upward mobility of certain layers:

---

<sup>48</sup> Nancy Fraser discusses the limitations of the distributive capacity of new social movements organized around identity recognition, based on the assumption that a synthesis between the old forms of struggle against economic exploitation is possible. This is an appeal to principle that does not show any evidence of sociological viability. See *¿De la distribución al reconocimiento?. Dilemas de la justicia en la era pos-socialista*.

they act as springboards for new elites who use identity politics as a negotiating tool to access better positions in the labor market and public resources, which are distributed unequally within the group.

In this way, emergent social struggles influence the relative position of new collective actors in the market or in the share of public resources allocated to them, while not necessarily having any effect on inequitable wealth distribution in society as a whole. Social inequity today is experienced at many levels and social demands are no longer levied against the owner-employer classes, but rather against public policy and labor market regulations for specific groups. These new identities have a contradictory impact on the democratization of social relations. On the one hand, they reinvigorate democratic life by giving expression to social groups oppressed during the construction of the modern State (women, sexual minorities, ethnic groups). On the other hand, however, not only is their impact on wealth distribution limited, but they also deflect the debate over social equity away from society as a whole, since they generally are associated with the discourse and institutional practices of impermeable interest groups.

In the same way that demands for social rights that disregarded the values of respect for individuality and freedom developed into totalitarianism, the new social demands associated with “identity politics” and multiculturalism could emerge as new forms of postmodern racism, as demonstrated by recent examples from the ideology of the new right in Holland and Denmark and from fundamentalist groups. In the name of differences, identified in this example with national culture, access to citizenship is denied those who do not share the same values or belief system.

The new wave of what are generally referred to as “symbolic” rights, gives rise to a contradiction between democratization and democracy that is not easily resolved. To the extent that the democratization of social rights involves the affirmation of identities that erode the sense of community—in other words the sense of being part of the same world, of shared problems, values and institutions—a core premise of citizenship is, to a certain degree, destroyed: the sense of belonging to a world of “equals.”

Collective identities based on differences greatly reduce the possibility of developing a uniform sociological framework for the study of social inequity, a concept that increasingly refers to the relative position of specific groups within society (women, African Americans, Latinos, immigrants, homosexuals, the list is never-ending). This type of understanding of social inequity dismembers the sense of “society,” which is no longer regarded and experienced as a group of equal citizens. Similarly, the matter of distribution comes to be viewed as the “piece of the pie” that “my group” receives. When the demand for rights under the purview of the new collective identities is associated with distributive social demands, there is a risk that the public sphere will become depoliticized and eroded. This is the case because these identities reject politics as the production of an all-embracing utopia and transform the representative system into a process of aggregating the interests of diverse social fragments, an image that is exemplified quite clearly in the United States.<sup>49</sup>

The notion of social inequality becomes multilayered, so that a specific individual may be inserted into it in different positions, depending on the reference group. So, from the standpoint of employment or income, for example, one might be at the top of the pyramid, while one’s identification with a particular racial, ethnic, or gender group might entail an inferior position. The multiplicity of inequalities has eroded notions of social class as the basis for creating solid social identities.

The increasingly globalized vision of social stratification radicalizes the perception of multiple social inequalities as they relate to expectations of access to a globalized pattern of consumption defined by the richer countries. While consumption patterns and expectations are increasingly global, national societies continue to be the main *locus* for the production and distribution of goods.

---

49 In this regard, Jürgen’s Habermas’ analysis of public space is premised on individuals devoid of an instrumental relationship. See *The Theory of the Communicative Action*. On the relation between collective identities and their intersection with law, see Jürgen Habermas, “*Struggles for Recognition in the Democratic Constitutional State*.”

The proliferation of rights—particularly the expansion of the democratic program to include not only the values of freedom and equality, but also those associated with “alterity” —brings enormous pressure to bear on social systems in which democracy continues to be weak due to historically pervasive social inequalities. To incorporate the “right to differ” in societies that still have a hard time assimilating the “classic” values of equality and liberty poses additional risks of social fragmentation and separatism.

The development of policies that recognize different ethnic identities and that seek the *empowerment* of ethnic minority groups could either strengthen democracy or accelerate the disintegration of national societies.<sup>50</sup> The reconstruction of oppressed identities could adopt an approach that recognizes differences and a discourse in which the key to reconstructing identity involves a sense of shared values with the rest of society; conversely, it could be based on a narrative which, in the name of the oppression suffered by the group, ends up fostering a trend toward growing isolation and rupture with society.

It would appear that the second approach has prevailed in several European countries, but it does not represent a serious threat to social cohesion, given that the continent appears to be moving toward some form of federalism, pursuant to which certain government functions already have been transferred to a supranational entity, the European Union. In several cases, separatist tendencies are promoted by affluent regions and their demands express, to some degree, a collective egotism, a “de-solidarization” with other, more impoverished regions.

In Latin America, where democratic institutions and social integration mechanisms are much more fragile, the acritical “importation” of the North American experience, historically based on the affirmation of ethnic diversity and accompanied by international assistance for oppressed groups, has promoted, in some cases irresponsibly, support for indigenous groups’ demands for legal

---

<sup>50</sup> See Cristian Gros, *Políticas de la etnicidad: identidad, estado y modernidad*, Bogotá; Oliver Corten and Patricio Nolasco, “*Pluralism culturel, pluralism juridique et démocratie: les ambiguïtés du discours identitaire zapatiste.*”

pluralism. As if social inequality could be offset by symbolic mechanisms for legal autonomy which frequently represent a regression toward practices that do not respect human rights and ultimately strengthen male oligarchies within “native” communities.

Today's individual feels increasingly abandoned, uncertain, and unprotected.<sup>51</sup> Traditionally, protection was guaranteed by systems of domination or of subordination to political-religious contrivances designed to provide symbolic compensation and resignation in the face of suffering and the arbitrariness and uncertainty of earthly existence. In contemporary societies, the protective images and practices were transformed by three interrelated processes: a) the erosion of religious guideposts and the attendant dilution of the absolute values underlying the main modern ideologies, which weakened the sense of ontological security; b) growing individualization, linked to the crisis of traditional systems of domination which ensured security through oppressive mechanisms (such as male-dominated family systems, employer-patronage labor relations) ; and c) technological changes and the globalization of social processes that intensify the sense of impotence and uncertainty with respect to the future.

While the social system has become increasingly complex, the feeling at the individual level is one of increasing entropy. In the social and existential vacuum created by contemporary modernity, individuals feel condemned to uncertainty and existential defenselessness in spite of the enormous and effective advances in science and technology. Even though people can always weave new ties of solidarity—in friendship, family, or love (the personal utopia and modern chimera through which one hopes to attain absolute certainties, the transcendence that comes from merging identities, the enchantment of the world, and practical protection)—they may try to earn more money, experiment new religions, or seek help from specialists (the vast array of mental health professionals) they still need the State to ensure a modicum of security against a precarious job market, old age, rising health and education costs, the power of giant corporations, urban chaos, and environmental degradation. Even

---

<sup>51</sup> The chasm between the isolated individual and an increasingly powerful state is the subject of an enormous bibliography, beginning with research on the origins of totalitarianism. See in this regard, Erich Fromm's classic work, *Escape from Freedom*.

violence--a problem over which according to the media the peripheral countries seemed to have almost a monopoly--figures prominently on the political agenda of central countries.

In modern societies people become individualized and society more complex, as individual and social destinies become increasingly intertwined. The basic liberal platform that confined State action to the protection of individual liberties was always a chimera and is not relevant today given the deepening complexities of modern societies. Currency protection and economic control policy, public service supply and regulation, quality control, technical standard-setting, and supporting scientific research are just some of the activities in the modern State's repertoire that contemporary political ideologies do not dispute. What is a matter of debate is what should and should not be protected or regulated and how. Each national society has its own citizen protection systems, shaped by its unique characteristics and history. Yet as we already have pointed out, the crisis of the welfare state has not diminished the State's protagonism in the modern societies of the new millennium.

### ***The crisis of political representation and the role of the Judiciary***

The history of changes in citizenship rights in democratic capitalist societies can be interpreted as the changing relationships between the Legislature, the Judiciary, and the Executive Branch. In simplified terms, the golden age of the Legislative Branch might correspond to the era of access to suffrage, while the expansion of social rights strengthened the Executive Branch. Finally, the Judiciary is playing a central role in the current period.

The shifting positions of the three branches of government is not simply a rearrangement of each branch's influence in the public sphere and of its ability to act as arbiter or even impose its will on the others; instead, it is mostly associated with

changes in the social representation of politics and with societal transformations that have influenced the role and organization of each branch.

This is evident, in retrospect, in the framework of the welfare state, a period that marked the peak of the Executive Branch, the expansion of the government apparatus and technocracy, and the systematic inclusion of new areas under its aegis (from health to education, from science and technology to infrastructure); all this in function of establishing that branch of government's primacy, not just over the other branches, but also over society from whence its initial impetus had come. As we have seen, these transformations also had an effect on the Judiciary, which was confronted with the task of integrating new subjects and expanding its jurisdiction so as to bring the law into step with the demands for substantive rights emanating from specific groups.

According to Marcel Gauchet's hypothesis,<sup>52</sup> the Judiciary's expanding authority in this new phase corresponds to several factors: the desacralization and secularization of the world; the demise of social utopias based on a belief in the meaningfulness of history; the drying up of the welfare state associated with increasing limitations on governmental discretion which, in turn, were a response to the exigencies of international economic insertion; and finally, the development of a new individualism that no longer responded to political ideologies or identification with the public sphere. These changes contributed to the debilitation and declining popularity of party politics and political power in both the Executive and Legislative branches.

These processes shifted the representation of politics toward *human rights discourse*. Social actors would adopt this language to express their aspirations with the result that politics would no longer be able to find its expression in the language of party politics. While the discourse of party politics requires choices and presumes that there will be different, conflictive stances, as well as negotiations and a certain degree of pragmatism, human rights discourse is inclusive and develops in a world of absolute moral values.

---

<sup>52</sup> See Marcel Gauchet, "Quand les droits de l'homme deviennent une politique".

The Judiciary's position shifted because its role in society had changed as political representation moved toward a human rights discourse. Parallel to this change was the transformation of the Judiciary itself due to the increasing constitutionalization of the political system coupled with the judicialization of social conflict. The constitutionalization of the political system means that Executive and Legislative action is subject to the jurisdiction of the constitutional courts. The constitutionalization of law reflected a certain confluence between the continental tradition disseminated by the Napoleonic Code and the Anglo-Saxon common law tradition inasmuch as increasingly frequent references to constitutional issues and the growing importance of the Judiciary in social life shifted the judge's traditional role from applying the law to actively interpreting it. The internal changes brought about by the establishment or strengthening of the Judiciary's role as defender of citizenship transformed it into a key political actor.

The judicialization of social conflicts shifts expectations concerning the resolution of demands and social conflicts to the Judiciary as the sole guarantor of peaceful coexistence and the only trustworthy authority. The judicialization of social relations transforms politics and the social actors on the political stage. This is evident in the decline of different forms of participation in party politics and in the fragmentation of social representation.

Ironically, the judicialization of the social sphere weakened the law in two ways: 1) at the institutional level, since all new legislation is viewed in light of its constitutional foundations based on human rights, and 2) at the level of everyday interpersonal relationships, to the extent that it fosters the growing contractualization of social relationships. This is particularly true of labor relations, although it is also the case with family relationships and the social security, education, and health systems.

The constitutionalization and contractualization of social relations and expectations diminishes the the perception of the law both as a collectively shared convention and a compulsory system switching conflict resolutions to individualized

agreements and arbitrations and basic expectations of justice to a universal system of human rights. In both instances, it erodes the ability of the Executive and Legislative Branches to develop solutions to conflictive situations.

The *contractualization* of social relations makes it possible to reinstate, in the name of the autonomy of the parties, relations of power and oppression in the workplace, while *constitutionalization* distances the citizen from the political decisions and commitments made by democratically elected governments. Both trends have positive aspects: the first is an expression of the growing individualization of social relations and the search for personal solutions, while the second is tantamount to the citizen's defense against what is regarded as the arbitrary power of the State. But these trends also entail enormous risks for the consolidation of democratic life, first by forging a social connection tangential to society as if it were a private business. Second, they fail to take into account that political life requires compromise and community members must be willing to distribute the benefits as well as the costs. Both cases are the expression of the contemporary individual's lack of identification with a vision of social relations that requires acquiescing to common standards and, to a certain degree, sacrificing personal interests in favor of the collective interest.

New forms of collective representation together with the loss of faith in party politics and social change ideologies, or their replacement with human rights discourse, weakened the ideological and functional role of the State as the designer of strategies capable of controlling and regulating the process of social change.

The fragmentation of interests, as we have seen, placed the struggle for human rights squarely at the center of public life and strengthened the role of the Judiciary. Behind the back of the Executive and Legislative branches, the judicialization of social conflict and the development of collective identities pose new problems for governance in modern societies. Decades ago, Samuel Huntington described the challenge of governance in developing countries as being one of (mal) adjustment between the pace of expanding social demands to the capacity of the

political system and the resources made available by the State to process them. <sup>53</sup>  
The present-day institutional dynamics cause social demands to be rerouted; they are either directed toward the Judiciary or expressed tangentially to the political system, often behind the State's back. Previously, the danger emanated from an imploding democratic system due to the State's inability to absorb the range of social demands. Today, however, the danger lies in the moral abandonment of the governmental sphere due to the lack of identification with the political system organized around the State.

---

<sup>53</sup> Cf. Samuel Huntington, *Political Order in Changing Societies*.