The Right to Work: Towards Full Employment
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THE RIGHT TO WORK AND THE LIMITS OF LAW

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1. Work as a right

A "right to work", in some form, has become a standard feature of most of the world's 160 or so constitutions, as well as of United Nations human rights documents. The formulation in the U.N.'s 1948 Universal Declaration of Human Rights is fairly typical: "Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment".[1] The right belongs to a cluster of "social and economic rights" that began to be widely recognized, alongside traditional political and civil liberties, in the new constitutions and international human rights instruments that proliferated after World War II.[2] From their inception, the new social and economic rights were in tension with the older liberties, for the former presuppose an especially active governmental apparatus, while the latter are primarily meant to limit the power of the state.

Though the trend to make work the subject of a constitutional right did not become pervasive until the era of constitution-making that began in the late 1940s, the idea that the polity has an obligation to provide work to able-bodied citizens goes back at least to early modern times when emerging nation states began to take over social functions that had previously been performed by feudal lords or religious groups. Obligations on the part of the state to provide food, work, and financial relief to persons in need were acknowledged in several eighteenth- and nineteenth-century continental European constitutions and codes — often along with a

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[1] UNDHR Article 23 (1).

[2] Three-quarters of the world's single-document constitutions have been adopted since 1965. L. Wiehl (1990), "Constitution, Anyone? A New Cottage Industry", *The New York Times*, 2 February 1990, B6.

reciprocal duty to work.[3] Tocqueville described these ideas as "half borrowed from the Middle Ages, half bordering on socialism".[4]

In the first half of the twentieth century, a scattered group of countries embodied these notions in new constitutions, and framed them in the modern language of rights. The underlying philosophies of the Weimar Constitution of 1919, the Soviet Constitution of 1936, and the Irish Constitution of 1937, were, to say the least, quite diverse. But each in its way gave modern expression to the idea of a state with affirmative responsibilities for the basic needs of its citizens. It was also in this period that the International Labor Organization was founded and began its efforts to promote improvements in working conditions. This confluence of social democratic, Christian, Marxist, and paternalistic thinking helped to prepare the way for a much wider acceptance of social and economic rights in the wave of constitution-making and international human rights activity that followed World War II.

The United Nations commission that drafted the 1948 Universal Declaration of Human Rights, found a varied range of support for the idea that several social and economic rights, including the right to work, should be among the freedoms proclaimed to be fundamental and universal.[5] That proposition was backed not only by the socialist representatives, but by the Commission's Chair, Eleanor Roosevelt (whose husband had urged a "second bill of rights" — including the right to a job — for the United States),[6] and by Jacques Maritain (whose inspiration derived in part from

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[3] See G. Casper (1989), Changing Concepts of Constitutionalism: 18th to 20th Century, 1989, Sup. Ct. Rev. 311, 312, 319, 321. The language used regarding these matters in early constitutions is the language of obligation rather than rights, e.g., "It is incumbent on the authorities of the State to create conditions which make it possible for every person who is able to work to earn his living by his work". Norwegian Constitution of 1814, s. 110, G. Flanz (1976), "Norway", in A. Blaustein & G. Flanz (eds.), *Constitutions of the Countries of the World*, 8.

[4] de Tocqueville A. (1955) [1856], *The Old Regime and the French Revolution*, New York: Anchor Books, p. 230.

[5] The Commission's Rapporteur, Charles Malik, wrote at the time that, by including social and economic rights, the Universal Declaration "reflects the concern of the modern world with poverty and insecurity. It conceives man as born not only with certain inalienable rights and liberties which society may not encroach upon, but also with certain inherent claims on society itself which society must fulfill". Charles Malik (Dec. 1949), "The Challenge of Human Rights", *Behind the Headlines*, 9(6), p. 1.

[6] The "second bill of rights" urged in Roosevelt's 1944 State of the Union message included:

> The right to a useful and remunerative job in the industries or shops or farms or mines of the Nation;
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> The right to earn enough to provide adequate food and clothing and recreation;

Rerum novarum and *Quadragesimo anno*).[7] Thus, the right to work became ensconced in the document that is generally recognized as the "constitution" of the international human rights movement.

The Universal Declaration in turn added impetus to the tendency to cast social and economic concerns in the language of rights in the post-World-War II period, when several countries adopted bills of rights for the first time, and established courts with varying degrees of power to review the constitutionality of legislative and administrative action. In that process, several "new" rights found their way into the constitutions of many liberal democracies, side by side with traditional political and civil liberties.[8] Social and economic rights were also prominent features of the East European socialist constitutions, and of constitutions in the many former colonies that achieved independence in the postwar years. In some of these documents, the right to work is combined with a duty to work.[9]

The countries that have not explicitly recognized a constitutional right to work remain a sizeable group that includes England (one of the few remaining nations without a single-document constitution) and the United States (where the Supreme Court has repeatedly declined to interpret the 18th century Constitution and its amendments in such a way as to "constitutionalize" social and economic rights).[10] Germany is a special case because its statutory right to work gains a certain constitutional aura from Basic Law Article 20 providing that Germany is *ein demokratischer und sozialer Bundesstaat* (a democratic and social federal state).

Yet even countries without a *constitutional* right to work have recognized the right to work as a universal *human* right by virtue of having

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> The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment; ...

The full text is set forth in C. Sunstein (1987), "Constitutionalism After the New Deal", 101 *Harvard Law Review*, 421, pp. 423-24.

[7] See J. Maritain (1943), *The Rights of Man and Natural Law*, New York: Scribner's Sons.

[8] E.g., the Italian, Portuguese, and Spanish Constitutions, and the 1958 French Constitution which incorporates the 1789 Rights of Man and the Citizen along with the social and economic rights listed in the Preamble to the 1946 Constitution. For an overview, see L. Favoreu (1988), "La protection des droits economiques et sociaux dans les constitutions", in *Conflict and Integration: Comparative Law in the World Today*, pp. 691-92).

[9] E.g., Preamble to the French Constitution of 1946, incorporated by reference into the Constitution of 1958: "Everyone has the duty to work and the right to obtain gainful employment".

[10] E.g., most recently in *De Shaney v. Winnebago County Department of Social Services*, 109 S. Ct. 998, 1003 (1989), where Chief Justice Rehnquist wrote that the Constitution cannot be interpreted to provide a "guarantee of certain minimal levels of safety and security".

signed United Nations instruments.[11] In sum, then, virtually every nation on earth is committed to the idea of a "right to work", at least as a "common standard of achievement".[12]

That apparent consensus, however, is paper thin. For there is no consensus on what it means to have a right, much less on what this particular right or obligation means. Nor is there a common understanding of the relation of the right to work to other rights that can be in tension with it — such as property rights, or rights to freely pursue a trade or occupation. Nor does anyone have a clear idea of how a right which depends so heavily on economic conditions can be implemented.

2. The limits of law

How can governments guarantee a right to work, when the job supply depends upon conditions that law and government have limited ability to affect? The approach of the Soviet Constitution of 1936 to this problem represented a high-water mark of legal hubris. Today, Article 118 on the right to work has a hollow sound:

"Citizens of the USSR have the right to work, that is, the right to guaranteed employment and payment for their work in accordance with its quality and quantity. The right to work is ensured by the socialist organization of the national economy, the steady growth of the productive forces of Soviet society, the elimination of the possibility of economic crises, and the abolition of unemployment".

The legally sophisticated draftsmen of postwar constitutions in the liberal democracies grappled more forthrightly with the difficulties. They well understood that rights to work, shelter, and so on could not be "guaranteed" in the same way as, say, freedom of speech and assembly. Social and economic rights, such as the right to work, are what legal theorists call *positive* rights to emphasize that their implementation requires a rather extensive, affirmatively acting official apparatus.[13] Traditional political and civil liberties, by contrast, are primarily *negative* rights, requiring little more than that the state refrain from interfering with whatever is being protected — speech, the free exercise of religion, the precincts of the home, and so on.

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[11] E.g., the 1948 Universal Declaration, the 1966 Covenant on Economic, Social and Cultural Rights (signed but not ratified by the U.S.), and the 1993 Vienna Human Rights Convention (adopted by consensus).

[12] Preamble, U.N. Universal Declaration of Human Rights, 1948.

[13] See D. Currie, Positive and Negative Constitutional Rights, 53 U. Chi. L. Rev. 864 (1986).

This positive-negative distinction, like most other legal distinctions, is not air-tight. Traditional political and civil liberties, do, of course, require an apparatus for holding elections and the administration of justice. But that apparatus does not exist for their sake alone. What sets the social and economic rights apart is the exceptional demands they make on the state and society, as well as their heavy dependence on economic conditions.

Positive rights are thus destined from the outset to be in an uneasy relationship with negative rights.[14] Consider, for example, the tension between the right to work and the commonly protected cluster of rights that includes private property, personal liberty, and the freedom to freely pursue a trade or occupation. The right to work implies that someone — the state or society — is obliged to provide work, or at least actively to foster conditions designed to promote the supply of jobs. The similar-sounding negative right to freely pursue a trade or occupation implies that the state must interfere as little as possible with economic initiative and entrepreneurial activity. (States in practice often affirmatively foster entrepreneurial activity, but not as a matter of right or obligation).

To some philosophers, tensions among competing rights doom the ambitious modern human rights project to incoherence. The more values that are cast as rights, the more weighty that criticism becomes. But the decision by the United Nations and many countries to recognize a limited group of potentially conflicting rights implies a judgment that, as Maritain put it, "the antagonism between the 'old' and the 'new' rights of man ... which many contemporary writers take pleasure in magnifying, is not insuperable".[15] And indeed that judgment is borne out by the legal experience of constitutional democracies such as Germany where judges regularly employ the interpretive method of pragmatic reconciliation (*praktische Konkordanz*) to resolve tensions among various rights — in the light of their relation to one another, and to the design and purpose of the Constitution as a whole. The aim of this method is to give as much scope as possible to each right without undermining the others.

Many observers would even say that rights which are in tension may nevertheless be mutually reinforcing, perhaps even necessary to one another — like the elements of a geodesic dome. For example, the U.N. Committee on Economic, Social, and Cultural Rights recently stated, "Democracy,

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[14] Especially in countries within the orbit of the Anglo-American common law where, traditionally, mistrust of government played an important role in shaping the legal systems.

[15] Maritain, J. (1951), *Man and the State*, Chicago: University of Chicago Press, p. 105. For the view that such conflicts render the human rights corpus incoherent, see Villey, M. (1983), *Le Droit et les Droits de l'Homme*, Paris: Presses Universitaires de France.

stability and peace cannot long survive in conditions of chronic poverty, dispossession and neglect. Political freedom, free markets and pluralism have been embraced with enthusiasm by an ever-increasing number of peoples in recent years, in part because they have seen them as the best prospect of achieving basic economic, social and cultural rights".[16] If that is correct, however, an extraordinary degree of political art and science is required to maintain an optimal balance under constantly shifting conditions, and to keep some rights from becoming master rights to which others are regularly subordinated.

The draftsmen of postwar human rights documents typically signalled their awareness of the special difficulties attending the implementation of positive rights by formulating them differently from negative rights. Unlike negative political and civil liberties which (in most liberal democracies) can be directly enforced by the persons affected, positive rights are typically framed as what lawyers call *programmatic* rights. A programmatic right (or obligation) does not give rise to legal claims that individuals can enforce by going to court (though occasionally a court will censure a government for failing to live up to its programmatic obligations). Rather, it represents an official, high-level commitment to an ideal or goal, in short, to a program, whose implementation depends on ordinary politics and available economic resources.

The entire 1948 Universal Declaration is programmatic in this sense, for its Preamble expressly declares it to be a nonbinding "common standard of achievement". In 1966, however, most of the rights in the Declaration were made the subject of two international covenants, the Covenant on Political and Civil Rights and the Covenant on Economic, Social and Cultural Rights (ICESCR). Once signed and ratified, these covenants become part of the law of the signatory nation. But there are two major differences between the 1966 covenants: the rights in the latter are subject to the availability of resources, and the obligation it imposes is one of incremental realization.[17] Concerning the right to work, Article 6 (2) of the ICESCR provides that "The steps to be taken ... to achieve the full realization of this right shall include technical and vocational guidance and

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[16] Statement to the World Conference on Human Rights (Vienna Conference) by the Committee on Economic, Social and Cultural Rights, UN Doc. E/1993/22, Annex III.

[17] ICESCR Article 2 provides: Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

training programs, policies and techniques to achieve steady economic social, and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual". Even that modest degree of commitment was too much for some nations, including the United States (which has signed, but not ratified the ICESCR).

So far as national constitutions are concerned, the programmatic nature of social and economic rights or obligations reveals itself in various ways. In Germany, for example, the constitutional language creating an affirmatively acting "democratic and social federal state" is so cryptic as to remain meaningless without extensive legislative specification.[18] In countries where social and economic rights are more specifically enumerated in the constitution itself, the special nature of these rights is commonly indicated by presenting them as statements of political principles or goals to guide the organs of government. For example, the Swedish Instrument of Government mentions the right to work in a section titled, "The Basic Principles of the Constitution":

> Art. 2. "... The personal, economic and cultural welfare of the individual shall be fundamental aims of the activities of the community. In particular, it shall be incumbent on the community to secure the right to work, to housing and to education and to promote social care and security as well as a favorable living environment".[19]

Another method is employed in the Spanish and Portuguese Constitutions which expressly provide that the social and economic rights are not enforceable in courts.[20]

In countries where the aspirational character of these rights is not so evident from the constitutional text itself, their programmatic nature appears in other ways. In France, for example, individual claimants do not have access to the Constitutional Council which reviews legislation for conformity to constitutional norms only at the instance of the National Assembly, or a specified proportion of its members. In Japan, shortly after the adoption of the 1947 Constitution (which included much of Roosevelt's

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[18] German Basic Law of 1949, Art. 20. The treaty under which German reunification was accomplished, however, obliges the legislature to consider amending the Basic Law to add a list of affirmative "goals of the state", to the traditional political and civil rights presently enumerated in the Basic Law. See Morrison, F. (1991), "Constitutional Mergers and Acquisitions: The Federal Republic of Germany", 8, *Constitutional Commentary*, 65, 70.

[19] Flanz, G. (1985), "Sweden", A. Blaustein & G. Flanz (eds.), in *Constitutions of the World*, 9-11.

[20] Pereira-Menaut, A. (1988), "Against Positive Rights", 22, *Valparaiso Law Review*, 359, 380.

"second bill of rights"), the Japanese Supreme Court held that social and economic rights "must, in the main, be carried out by the enactment and enforcement of social legislation ... [The] state does not bear such an obligation concretely and materially toward the people as individuals".[21]

Thus, in practice, the legal situation in countries with constitutional rights or obligations regarding work is not very different from that in countries like the United States and England without any such constitutional rights. In both groups of countries, the specific content and limits of the right are basically left up to legislation. In both cases, employment policy emerges from ordinary political processes.

This does not mean, however, that constitutional rights to work have no legal effect at all. One highly important effect of programmatic rights is to endow statutes enacted to carry out the constitutional "program" with a presumption of constitutionality. For example, the German Constitutional Court has upheld labor legislation that would probably be found unconstitutional by the United States Supreme Court.[22]

Constitutional rights to work may also exert an influence on political deliberation, legislative and executive action, budgetary appropriations, and national priorities in countries where they are present. Such an effect is speculative, however, for there is no way of knowing what any given country would have done if its constitution had been different in this respect. Nor does the presence or absence of a constitutional right to work correlate in any simple or obvious way with the vigor or intelligence with which various countries at comparable levels of development pursue policies designed to minimize unemployment and maximize job opportunities. In some countries, the tradition of an affirmatively acting sovereign may have prompted adoption of the constitutional right, rather than vice versa. In others, the wish seems to have been father to the thought — as in poor nations with severe employment problems where constitutional rights to work are very common.

How then should one view this "right" that is not really enforceable, and that bears so little demonstrable connection to labor policy or to the actual state of employment in a given country? Skeptics of positive rights contend that they are not rights at all. If one can't go to court to enforce it, they say, why call it a right?

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[21] The decision is described in Osuka, A. (1990), "Welfare Rights", 53, *Law & Contemporary Problems*, 13, 16-17. According to Osuka, the 1947 Japanese Constitution "substantially incorporated the fruits of the New Deal".

[22] 50 BVerfGE 290 (1979), (upholding "codetermination" legislation giving workers the right to participate in management decisions).

Critics of positive rights go further. They assert that programmatic rights are apt to be economically counterproductive and politically dangerous. In this view, social and economic rights potentially impede the realization of fuller employment by dampening economic growth. At the same time, the argument goes, these rights tend to aggrandize the power of the state and to encourage judges to overstep the bounds of their role.[23] Explaining the traditional U.S. reluctance to recognize positive rights, a prominent federal judge (who is also a leader of the "law and economics" movement) has stated: "The men who wrote the Bill of Rights were not concerned that the federal government might do too little for the people, but that it might do too much to them".[24]

The claims of skeptics and critics of rights to work cannot be lightly dismissed. And yet, just as one can underestimate the limits of law as command, so one can overlook the power of law as persuasion. Law, especially constitutional law and human rights law, is more than the will of the sovereign. It is more than a means of avoiding or settling disputes. It is also a way in which human beings try to make sense of things, to order their lives together, to establish priorities — in other words to envision the kind of society they wish to bring into being.

Thus, it is worthwhile recalling that when we make social justice concerns highly visible in constitutions and international declarations, we are — among other things — making a statement about what kind of people we want to be, and what kind of future we hope to have together on this planet. The post-World-War II drafters understood this very well.

3. The "Risk of Solidarity"

When the framers of modern human rights declarations decided to place rights to work, education and minimum subsistence alongside traditional negative liberties, their hope was to broaden the range of officially recognized social concerns, to heighten their visibility, and to amplify what it means to ground a regime of rights upon the innate dignity and worth of every human being. A UNESCO committee appointed shortly after the founding of the U.N. to study the theoretical foundations of human rights began its report with the words: "An international declaration of human rights must be the expression of a *faith to be maintained* no less

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[23] E.g., Pereira-Menaut, *supra*.

[24] Judge Richard Posner in *Jackson v. City of Joliet*, 715 F. 2d 1200, 1203 (7th Cir. 1983).

than a program of actions to be carried out".[25] Laying the groundwork for the inclusion of social and economic rights in the 1948 Declaration, the committee went on:

"It is this faith, in the opinion of the UNESCO committee, which underlies the solemn obligation of the U.N. to declare ... the rights which have now become the vital ends of human efforts everywhere. These rights must no longer be confined to a few. They are claims which all men and women may legitimately make in their search not only to fulfil themselves at their best, but to be so placed in life that they are capable at their best of becoming in the highest sense citizens of the various communities to which they belong and of the world community".[26]

The drafters of the 1948 Universal Declaration of Human Rights proceeded along that line, but they were under no illusions about the precariousness of their enterprise. Jacques Maritain later recounted that it had been relatively easy to get the representatives of various nations to agree that a certain group of rights should be deemed fundamental — so long as no one asked why.[27] Philosopher Richard McKeon, who had served on the UNESCO Committeee on the Theoretical Bases of Human Rights, wrote, in a similar vein, that the task of the drafters of the Universal Declaration was not to achieve a doctrinal consensus, but to achieve agreement concerning rights which may be justified on highly divergent doctrinal grounds.[28]

Unfortunately, as the Declaration approaches its 50th anniversary, it is apparent that the nations of the world have kept the "faith" in a selective and, all too often, self-interested fashion. Social justice concerns in particular have so regularly been given short shrift that one might describe the social and economic rights (or obligations) as the neglected offspring of the human rights movement. The UN Committee on Economic, Social and Cultural Rights reported in 1993 that in member States, and in the international community as whole, "violations of civil and political rights continue to be treated as though they were far more serious, and more patently intolerable, than massive and direct denials of economic, social and cultural rights".[29]

In the U.N. context, where a "cafeteria" approach to human rights generally prevails, the single most consistent champion of an integrated,

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[25] *Id.* at 39 (Emphasis added).

[26] *Ibid.*

[27] Maritain, J. (1951), *Man and the State*, Chicago: University of Chicago Press, p. 77.

[28] McKeon, R. (1990), *Freedom and History*, Chicago: University of Chicago Press, p. 263.

[29] Statement to the 1993 World Conference on Human Rights.

holistic approach to the Universal Declaration has been the Holy See. The idea that social justice can and must be harmonized with political, civil, and economic liberties has been the touchstone of the Holy See's advocacy in international settings. Indeed, amidst the cacophony of special interests and power politics, the Catholic Church has often been alone in standing clearly, consistently, and unmistakably for human freedom *and* solidarity.

The social encyclicals of John Paul II have stressed that rights under *both* of these headings are grounded in the innate dignity of each and every human being. *Centesimus annus* says of the right to work: "A society in which this right is systematically denied, in which economic policies do not allow workers to reach satisfactory levels of employment, cannot be justified from an ethical point of view, nor can that society attain social peace" (53).

In 1995, Pope John Paul II took the occasion of the 50th anniversary of the founding of the U.N. to stress the essential unity of the U.N.'s human rights corpus. He reminded the nations that the promises they made in the wake of the horrors of World War II were rooted in respect for human dignity. He celebrated the freedoms of which the liberal democracies are justly proud, saying that humanity has been "inspired by the example of all those who have taken the risk of freedom". But then he asked: "Can we not recommit ourselves also to taking the risk of solidarity — and thus the risk of peace?".[30]

That question directly poses the challenge confronting the ambitious modern human rights project: it is nothing less than the challenge of bringing together the two halves of the divided soul of the human rights movement — its commitment to human liberty and its acknowledgment of common responsibility for the poor, the weak, and the vulnerable.

In retrospect, it was perhaps unfortunate that the language of rights has been used so extensively to lift up social justice concerns. Although calling work a right appropriately recognizes the dignity of the worker who "stands before his employer in a relationship of justice, and not as a child or as a servant",[31] it deflects attention from the issue of what kind of people we become, and what kind of world we are bringing into being when we fail to respect the worker's dignity. But, for better or worse, the language of human rights is the main language for cross-national discussions of these vital issues of social justice in the world today. And, for better or worse, the Universal Declaration of Human Rights has become the single most important reference point for those discussions.

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[30] Address of John Paul II to the United Nations, October 5, 1995.

[31] Maritain, J. (1951), *Man and the State*, Chicago: University of Chicago Press, p. 105.

Thus a tentative response to skeptics concerning the right to work might point out that the social and economic rights seem hollow because they haven't been taken sufficiently to heart. That they are honored more in the breach than in the observance, however, does not make them unimportant. To the contrary, as Jean Drèze and Amartya Sen point out:

"For a large part of humanity, about the only substantial asset that a person owns is his or her ability to work, i.e., labour power. If a person fails to secure employment, then that means of acquiring food ... fails. If, in addition to that the laws of the land do not provide any social security arrangements, e.g., unemployment insurance, the person will, under these circumstances, fail to secure the means of subsistence. And that can result in serious deprivation — possibly even starvation death. In seeking a remedy to this problem of terrible vulnerability, it is natural to turn towards a reform of the legal system, so that rights of social security can be made to stand as guarantees of minimal protection and survival".[32]

At a minimum, then, social and economic rights or obligations serve as reminders of the demands of justice and human solidarity.

This brings us back to the limits of law, for law cannot create solidarity. Indeed, it is the other way around: law draws most of its strength, not from the armed might of the sovereign, but from social cohesion. As Tocqueville and Max Weber have taught us, culture is the most important factor in determining whether human beings will enact wise laws and orient their conduct toward a rule of law.

But let us just suppose that the nations of the world could somehow be persuaded to adopt a more holistic approach to human rights. Suppose they decided to take the "risk of solidarity". (The Marshall Plan, whose 50th anniversary we celebrate this year, reminds us that such a thing is not impossible). Suppose they resolved to try harder to promote full employment and to relieve the misery of joblessness. Even if the political will and energy could be mustered, how could such a resolve be carried out?

It is discouraging to read in a leading treatise on international human rights law, that "even the strongest proponents of economic and social rights have rarely put forward concrete proposals for their systematic implementation at either the national or international levels".[33] Meanwhile, critics point to the failures, waste, and corruption that have occurred in the name of solidarity thus far. They predict that increased legal and governmental action would almost certainly make the situation worse — with a kind of perverse "Midas touch".

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[32] Drèze, J. and Sen, A. (1989), *Hunger and Public Action*, Oxford: Clarendon Press, p. 20.

[33] Steiner, H. and Alston, P. (1996), *International Human Rights in Context*, Oxford: Oxford University Press, p. 269.

How, then, can a right to work be realized by democratic means in complex modern economies? As Father Schasching put it to the Academy last year: "[T]his is the very point where the gauntlet, as it were, is thrown down to the social sciences".[34]

Thus, in a world with a billion adults unemployed, it is worth asking: If the right to work is ineffective, as skeptics say, is there a way to make it effective? If that route is fraught with peril, as critics say, is there a way to minimize the danger?

4. Smart solidarity

The fact is that practical and empirical knowledge is rather primitive about what kinds of social justice measures, private or public, do or do not work, and under which circumstances. We know more about what doesn't work, than about what does. Lawyers, policy makers, economists and social scientists know embarrassingly little about side effects, and unintended consequences; about what helps and what hurts. This seems due partly to a shortage of empirical work, partly to the intrinsic difficulty of the subject, and partly to the distraction of a long, sterile debate between the partisans of big government programs on the one hand and advocates of laissez-faire on the other. In an updated version of that argument, both the right and the left are using the rhetoric of "globalization" to portray ordinary politics as defunct: the left with the aim of arousing popular anxiety and unrest; the right to argue that all other values must be subordinated to the need to be "competitive".

The problem of "smart solidarity" thus directly challenges everyone who wishes not only to maintain social justice commitments in the canon of human rights, but to make them more effective. It is a hopeful sign that policy makers all over the world do seem to be thinking in a more nuanced way about the appropriate or optimal roles and relationships among government, markets, and the mediating institutions of civil society. They are beginning to ask better questions and to investigate them empirically: What does each institution do best? At what level? How can the harmful tendencies of each be checked without killing the geese that lay wholesome eggs? Many countries are grappling with a set of problems that are in a general way similar: how to achieve the optimal mix in a mixed economy; how to move forward simultaneously toward a strong economy, a regime of

[34] Schasching, J. (1996), "Catholic Social Teaching and Labor", report prepared for the Pontifical Academy of Social Sciences.

liberty, and a social safety net; how to administer social assistance without undermining personal responsibility. On our increasingly interdependent planet, each of these problems has its international dimensions and analogs.

So far as the law is concerned, this focus on the "how to do it" questions has fostered a healthy realism about the uses and limits of law, an abandonment of the myth that complex problems can be solved simply by "passing a law", and a long-overdue interest in alternatives to direct, top-down regulation. It may well be that an active government acts best by strengthening the rights and responsibilities of other institutions. Of particular interest in this respect is the nascent research on "reflexive law": forms of legal intervention that aim at setting conditions or establishing frameworks, rather than directing outcomes.[35] (An example of this type of law from labor history would be the U.S. labor legislation of 1935 which, in response to the circumstances of the time, promoted a particular type of mediating structure — unions — and tried to foster private ordering through collective bargaining, rather than minutely regulating the terms and conditions of employment as many other nations do).[36] Reflexive law aims to confine the state's role where possible to providing a structural basis for the coordination of interaction among social subsystems, and to shape procedures for participation and communication within and among these structures.

The problem has been well stated by George Weigel: "How can law and culture discipline the boisterousness of the free market, driving its energies toward the pursuit of the common good as well as the creation of wealth and profit?".[37] As for the solution, it will surely merit a Nobel prize!

Thus far, creative alternatives to laissez-faire and dirigisme have received little study in the legal academy. (Most nonlawyers would probably be surprised at how little lawyers know about how law actually works in practice, what it can do well, and what it cannot accomplish at all.). Practically everything remains to be done in investigating such questions as: What are the actual effects of employment policies and programs? How can we find out more about unintended consequences or harmful side effects?

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[35] See especially Teubner, G. (1988), *Autopoietic Law: A New Approach to Law and Society*, Berlin: de Gruyter. See also, Teubner (1983), "Substantive and Reflexive Elements in Modern Law", 17, *Law and Society Review*, 239; Kohler (1993), "Individualism and Communitarianism at Work", *Brigham Young University Law Review*, 727.

[36] See, for an example of the contrast, Glendon, M. (1984), "French Labor Law Reform 1982-1983: The Struggle for Collective Bargaining", 32, *American Journal of Comparative Law*, 449.

[37] Weigel, G. (1995), "Catholicism, Creativity, and Capitalism", *The Pilot*, May 26, p. 13.

How can law help to maintain a beneficial balance in the constantly evolving ecology of state, markets, mediating structures of civil society, and individual rights? How can government regulate without co-opting or injuring what it touches? Progress with these questions will require intensified collaboration among disciplines, and acceptance of the fact that theory and practice are two blades of the same scissors.

The bad news is that the work is at such a primitive stage. Both in difficulty and promise, this sort of social science is comparable to the emerging science of complexity. But the good news is that serious attention to these kinds of questions is increasing, and that there are so many resources to draw upon — including the wisdom and experience contained in the rich storehouse of Catholic social teaching.

Among the ways in which Catholic social thought has already made important contributions to the discussion of the right to work are:

— its integrative approach to parts of the human rights corpus that critics deem incompatible with one another;
— its insistence on the ethical principles of human dignity, solidarity, the common good, the primacy of the person over things, and the dignity of all forms of legitimate work including unpaid labor;
— its emphasis on the importance of the mediating structures of civil society, including workers' associations;
— its articulation of the doctrine of subsidiarity which has already stimulated much creative thinking among policy-makers;
— its demonstration that rights language can be used with an appropriate sense of the way rights limit one another, as well as their links to responsibilities;
— and underlying all the above, its insistence on the importance of a correct understanding of the human person.

All of these themes converge in *Centesimus annus*, where John Paul II exhorts governments to promote "an authentic culture of work". He wisely notes, however, that "the Church has no models to present", since effective models can only arise within the framework of different "historical situations" (43). The Church, he continues, "is not entitled to express preferences for this or that institutional or constitutional solution", the devising of which is a task usually best carried out by people on the spot.

Though the social encyclicals refrain from prescribing solutions, they do offer a general, principled, framework for analyzing and acting on social questions, among which labor has always figured prominently. But as St. Paul told the Corinthians, "the world as we know it is always passing away". Nearly everything we once knew about the organization of human

work now seems to be in flux. Thus, Catholic social teaching is constantly obliged to reflect on the application of its principles "ever old and ever new" to evolving, novel situations. Where work is concerned, one area that seems ripe for further development is the integration of what has recently been written to and about women with the social doctrine concerning the family and the dignity of work.

The task for the Academy then, is both to hear and challenge the various human sciences: to enter into dialogue with them, to assimilate what they have to offer, and to open them up to a broader horizon and to further questions.[38]

Such a daunting assignment calls to mind the following observation of the Jesuit philosopher Bernard Lonergan about intellectual work in turbulent times:

"There will always be a solid right determined to cling to a past that can never be recaptured, and a scattered left following now this, now that new idea. But what will count is a perhaps not numerous center — sufficient numbers of men and women who are knowledgeable enough to be at home in the old as well as the new, imaginative enough to recognize the possibilities in the current situation, and painstaking enough to work out the transitions a step at a time".[39]

[38] Cf. *Centesimus annus* (59): the social doctrine of the Church "enters into dialogue with the various disciplines concerned with man, assimilates what these disciplines have to contribute, and helps them to open themselves up to a broader horizon".

[39] Lonergan, B. (1967), "Dimensions of Meaning", *Collection: Papers by Bernard Lonergan*, F. Crowe (ed.), London and New York: Herder & Herder, 252, 267.