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**Recovering Social Rights**

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## Recovering Social Rights

Nehal Bhuta

*But there is an alternative way of thinking about the relations between past and present. This stems from the fact that, in the case of some of our most important normative concepts, the way in which they used to be understood differs greatly from our current way of thinking about them ... We need to explore the possibility that some of the ways in which we used to think about our moral and political concepts may be more fruitful, and more helpful to our current purposes, than the way we are currently thinking about them.*<sup>1</sup>

### I. Introduction

This paper responds to a fundamental challenge made against social rights: that they are an inadequate legal and political language to address widening income and wealth inequality. In the opening sections of this chapter, I set out the terms of this challenge and situate it within wider critiques of the law and practice of human rights. These critiques, which have intensified and accelerated over the last fifteen years, collocate several different streams of remonstrance against human rights: that they are beholden to a neo-liberal political economy; that they are excessively legalist and thus inadequate for deeper, transformative, social change; and that, in any event, social rights in particular were never more than *emanations* of changing socio-economic dynamics driven by other social forces – and therefore inapt to drive such changes in their own right. Growing economic inequality within states, even as the juridification and constitutionalization of social rights has flourished since 1990, appears to provide a summative example of the validity of these criticisms.

I argue that these claims reflect a great deal of truth about the present of social rights, but do not accurately characterize their past. In the latter sections of the paper, I recover a different register of social

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<sup>1</sup> Quentin Skinner, in Bialy, 'Freedom, Silent Power and the Role of an Historian in the Digital Age – Interview with Quentin Skinner', 48/7 *History of European Ideas* (2022) 871. I thank the following for their feedback on a first draft of this chapter: Dan Edelstein, Benjamin Straumann, Anthony Pagden, Gráinne de Búrca, Philip Alston, Samuel Moyn, Doreen Lustig, Julian Sempill, Colm O'Conneide, Joseph Weiler, Benedict Kingsbury, the Florence Reading Group, Jan Klabbers and Philipp Dann. Thanks also to Dr Francesca Iurlaro for stellar editorial work.

rights thinking that has faded from our collective memories – a register which infused the discussions of social rights in the drafting of the Universal Declaration of Human Rights. I call these “natural social rights” or “collective natural rights,” and trace their lineages through English Radical thought, French Physiocratic thought, Jacobin and Neo-Jacobin thinking, to early twentieth century state theories and constitutional social rights. The essential insight gained from recovering these repertoires of social rights is the surprising extent to which social rights ideas laid the conceptual foundations for the social state. Rather than understanding social rights as nothing more than the weak offspring of a social welfare state brought into being by social conflict, we can see them as a historically -powerful political-ethical discourse that helped *articulate and motivate* the concept of the state as a public power that must *organize* the economy in order to ensure a “society of equals.”<sup>2</sup> At the heart of 19<sup>th</sup> century ideas of social right was the demand for the creation of equal social citizens and the construction of social democracy, through the creation of a social democratic state. Recovering these ideas helps us better understand the ways that social rights *could be* a germane response to the challenge of inequality in the present.

## II. The Challenge of Inequality

Contemporary human rights law, and the specific modalities and repertoires of political thought and action which have formed around it over the last 40 years,<sup>3</sup> have never been free of critics or controversy. From early repudiations of the claim to universality which have dogged human rights ideas since their 20<sup>th</sup> century formulation in international declarations and treaties,<sup>4</sup> to the consistent complaint that such legal norms are mere ciphers for power politics and hegemonic (liberal, neo-liberal, imperial) agendas, criticism readily paints those who embrace the demands of international human rights law as either useful innocents in the service of

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<sup>2</sup> See the rich history of the concept of political and economic equality recounted in Pierre Rosanvallon, *The Society of Equals* (2013, trans. Goldhammer).

<sup>3</sup> De Burca’s 2020 book provides a sympathetic and accurate snapshot of the modes of political action and languages of legal politics which are presently articulated to international human rights legal norms (G. De Burca, *Reframing Human Rights in a Turbulent Era* (2021). Sally Merry’s *Human Rights and Gender Violence* (2008) remains an essential study for understanding the complex world-making and knowledge-making entailed in the practices of human rights as a global legal politics.

<sup>4</sup> The well-known ‘cultural relativism’ controversy initiated by the 1947 statement of the American Anthropological Association.

more powerful economic, social and political forces, or marginal professionalised cadres of specialists whose stirring legal formulae cannot challenge the deep structures of power, privilege and inequality that striate global society. At best, palliative and modestly ameliorative,<sup>5</sup> at worst, distracting from and counterproductive to real social change,<sup>6</sup> the bill of particulars against human rights has waxed and waned over several decades, but seems to have gathered momentum in the years since the 2008 global financial crisis – the latter often indexed as the apogee and nadir of post-Cold War liberal politics and neo-liberal economics.<sup>7</sup> Novelist and critic Pankaj Mishra rehearsed familiar claims of human rights as a naïve *and* cynical ‘anti-politics,’ irremediably hitched to a neo-liberal political economy, when he wrote that, ‘framed as indivisible from the spread of free markets and other good things necessary to the design of Pax Americana ... It also helped that human rights at the end of history offered a seductive “anti-politics,” which ... misled a generation of young activists into believing that ... they should forsake political organisation for single-issue, non-governmental groups unsullied by compromise.’<sup>8</sup> He looked forward to the prospect that “the days when young people transposed their political idealism into the vernacular of liberal internationalism seem to be behind us.’

The association of the flourishing of human rights law – its ‘breakthrough’<sup>9</sup> as a lingua franca of global political contestation and vernacular for ideas for social and political change – with the 1980s and 1990s ascendancy of liberal internationalism and neo-liberal economics led many to grasp contemporary human rights law and politics as inextricably bound up with both: either as direct instruments of a ‘morality of markets,’<sup>10</sup> or as fellow travellers and all-too-willing companions to fateful projects of Western democracy promotion, trade and capital liberalisation, constraint of non-Western developmental states’ economic

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<sup>5</sup> Most trenchantly argued by S. Moyn, *Not Enough: Human Rights in An Unequal World* (2018).

<sup>6</sup> Koskenniemi, ‘Rocking the Human Rights Boat: Reflections by a Fellow Passenger’, in N. Bhuta et al. (eds), *The Struggle for Human Rights: Essays in Honour of Philip Alston* (2021) 51.

<sup>7</sup> A. J. Bacevich, *The Age of Illusion: How America Squandered its Cold War Victory* (2020); A. Tooze, *Crashed: How a Decade of Financial Crisis Changed the World* (2018).

<sup>8</sup> Mishra, ‘The Mask It Wears: The Wrong Human Rights,’ 40/12 *London Review of Books* (2018), citing in part T. Judt, *Ill Fares the Land* (2010), quotation marks omitted.

<sup>9</sup> S. Moyn and J. Eckel (eds), *The Breakthrough: Human Rights in the 1970s* (2014), for a collection of valuable essays. For one of the earlier histories of the place of human rights law and argumentation in international politics between 1945 and 1960, see A. W. B. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (2001).

<sup>10</sup> J. Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (2019).

policies, and the galloping concentration of wealth and income since 1989.<sup>11</sup> Indeed, the post-Cold War rise of a concept of Civil Society as the locus of associational issue-based mobilisation, and as a vector of an effervescent critical political morality of state action in the name of universal values and international expertise,<sup>12</sup> provided an influential model – and funding source – for the proliferation of non-government organisations in human rights, development and beyond.<sup>13</sup> Human rights law and politics, and its ever-expanding ‘mainstreaming’ in international organisations and development agencies,<sup>14</sup> seemed bound up with the 20 years in which ‘liberalism fell in love with itself and lost its way ... [and in which] ... The expectation that others should adopt Western-style liberal democratic institutions and norms seemed as natural as the sun.’<sup>15</sup> For those sceptical of this arc of progress, and critical of its consequences (and the professional cadre of human rights lawyers and human rights activists were very rarely among such critics),<sup>16</sup> the response was

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<sup>11</sup> See for example Marks, ‘Human Rights and Root Causes,’ 74/1 *Modern Law Review* (2011) 57.

<sup>12</sup> The theoretical origins of this reinvention of the concept of civil society are unclear but one locus classicus – influenced both by critical theory and engagement with Communist bloc dissident movements, was A. Arato and J. Cohen, *Civil Society and Political Theory* (2<sup>nd</sup> ed., 1994) 29-82.

<sup>13</sup> Carothers, with characteristically acerbic insight, observed in 1999 that ‘at the core of much of the current enthusiasm about civil society is a fascination with nongovernmental organizations, especially advocacy groups devoted to public interest causes – the environment, human rights, women’s issues, election monitoring, anticorruption, and other ‘good things’ ... In many countries, however, NGOs are outweighed by more traditional parts of civil society. Religious organizations, labour unions, and other groups often have a genuine base in the population and secure domestic sources of funding, features that advocacy groups usually lack, especially the scores of new NGOs in democratising countries. The burgeoning NGO sectors in such countries are often dominated by elite-run groups that have only tenuous ties to the citizens on whose behalf they claim to act, and they depend on international funders for budgets they cannot nourish from domestic sources.’ Thomas Carothers, ‘Civil Society,’ 117 *Foreign Policy* (1999-2000) 18-24. Among many critical anthropological inquiries into the nature of such ‘civil society’ politics in the developing world, see: H. Englund, *Prisoners of Freedom: Human Rights and the African Poor* (2006) and J. Elyachar, *Markets of Dispossession: NGOs, Economic Development and the State in Cairo* (2005). On the role of US-based foundations in exporting the NGO model of ‘public interest advocacy’ in relation to various kinds of causes, see B. Garth and Y. Dezalay, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (2002).

<sup>14</sup> Koskenniemi, ‘Human Rights Mainstreaming as a Strategy for Institutional Power,’ 1 *Humanity Journal* (2010) 47-58.

<sup>15</sup> S. Holmes and I. Krastev, *The Light that Failed: A Reckoning* (2019), at 204.

<sup>16</sup> See Alston’s (himself one of the rare exceptions) wider reflection on international lawyers as handmaidens of globalisation: Alston, ‘The Myopia of the Handmaidens: International Lawyers and Globalization,’ 3 *EJIL* (1997) 435. Perhaps the most notable concentration of critics of *one* face of liberal internationalism and economic liberalisation in the form of austerity and structural adjustment, was found among development economists who infused a language of economic and social rights into their advocacy for a global economic policy which rejected capital account liberalisation, structural adjustment and public sector retrenchment, in favour of an approach emphasising the realisation of human capabilities and fulfilment of human needs as the true benchmark of economic development: Amartya Sen, Mahbub Ul Haq, Jean Dreze, Sakiko Fukuda Parr, Frances Stewart. This circle influentially pioneered the UNDP’s annual human development reports, which in

discouraging: ‘To reject globalized neoliberalism was to be labelled either a socialist or an economic Neanderthal.’<sup>17</sup>

The 2008 global financial crisis, and the waves of recession and austerity that swept the advanced capitalist world for almost a decade, punctuated this optimistic vision of globalised economic and political progress. It also exposed the extent to which it had never been a shared experience of progress, but rested instead on a thirty-year unwinding of an earlier political and economic settlement in the industrialised world.<sup>18</sup> The ‘golden age’ of capitalist expansion, the so-called *trente glorieuses* of 1945 to 1975, had multiple sources,<sup>19</sup> but rested on four pillars: ‘strong trade unions, mass education, high taxes, and large government transfers.’<sup>20</sup> The post-war varieties of social democracy in the industrialised world were several,<sup>21</sup> and all succeeded in diminishing intra-societal wealth and income inequality and increasing social mobility to an unprecedented degree<sup>22</sup> (even as advanced capitalist states remained ‘highly hierarchical ... in economic and monetary terms’).<sup>23</sup> But the unravelling of this political and economic settlement from the 1970s, accelerating rapidly during the 1990s, is now understood as closely associated with the return to late nineteenth century levels of wealth and income inequality, stagnating or declining real incomes for all but the top decile of income

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the 1990s became a focal point for critique of the so-called ‘Washington Consensus’ in economic development policy. Alston campaigned persistently to have key Bretton Woods Institutions such as the World Bank adopt human rights law as a legal and policy framework for their programming and decision making.

During the high tide of the ‘NGOisation’ of human rights law and practice in the 1990s, two entrants notably focused on the advocacy of economic and social rights, leading them into more or less direct confrontation with the consequences of various kinds of economic liberalisation: The Centre for Economic and Social Rights (founded 1995) and the Centre on Housing Rights and Evictions (founded 1991 and ceased operations, 2014). In states where economic and social rights had been constitutionalised as part of a regime transition, domestic NGOs also began using economic and social rights as means of contesting the consequences of specific government policies (some, but not all, deriving from austerity plans): most visibly, South Africa in the 1990s, but also Colombia, India, and Brazil.

<sup>17</sup> Bacevich (n. 6) 198.

<sup>18</sup> A. Glyn, *Capitalism Unleashed: Finance, Globalization and Welfare* (2007).

<sup>19</sup> S. A. Marglin and J. B. Schor (eds), *The Golden Age of Capitalism: Reinterpreting the Postwar Experience* (1992); T. Piketty, *Capital and Ideology* (2020) chapters 10 and 11.

<sup>20</sup> B. Milanovic, *Capitalism, Alone: The Future of the System That Rules the World* (2019) 42; broadly consistent with this is Piketty (n. 18) chapters 11 and 13.

<sup>21</sup> See Piketty (n. 18) chapter 11; E. N. Wolff, *A Century of Wealth in America* (2017); T. Piketty, *Capital in the Twenty First Century* (2014).

<sup>22</sup> See Milanovic (n. 19) 1-34; R. D. Putnam, *The Upswing: How America Came Together A Century Ago and How We Can Do It Again* (2021).

<sup>23</sup> Piketty (n. 18) 493.

earners, and declining measures of social mobility.<sup>24</sup> Summarising the American context, economic historian Adam Tooze concludes that since 1976, the average American ‘shared only to a small degree in national economic growth as measured by GDP ... Almost all the benefits of growth were being monopolized by the highest paid and those wealthy enough to own significant portfolios of financial assets. The financial crisis revealed how in extremis national economic policy was subordinated to the needs of a cluster of giant transnational banks ... Between 1977 and 2014 the share of national income going to the top 1 percent before taxes and benefits had risen by 88.8 percent ... Nor did the tax and welfare state prevent the share of the bottom 50% from declining from 25.6% to 19.4 percent.’<sup>25</sup>

The declining power of organised labour,<sup>26</sup> increased financialisation<sup>27</sup> (in the sense of the growing importance of financial markets as a source of profits in the economy and in driving economic policy-making)<sup>28</sup> and transformations of corporate governance models through strident demands for shareholder

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<sup>24</sup> See 2 alarmed reports from the OECD: OECD, *A Broken Social Elevator? How to Promote Social Mobility*, 15 June 2018 and OECD, *Under Pressure: The Squeezed Middle Class*, 1 May 2019.

<sup>25</sup> Tooze (n. 6) 458.

<sup>26</sup> Stansbury and Summers, ‘The Declining Worker Power Hypothesis: An Explanation of the Recent Evolution of the American Economy’, *Brookings Papers on Economic Activity* (Spring 2020) 1-96, <https://www.brookings.edu/wp-content/uploads/2020/12/StansburySummers-Final-web.pdf> (last visited 22 February 2023). The paper observes that ‘since the early 1980s in the United States, the shares of income going to labour have fallen, measures of corporate valuations like Tobin’s q have risen, average profitability has risen even as interest rates have declined, and measured markups have risen.’ (at 1) The authors argue that this fall in the labour share of income (ergo, income not derived from capital ownership) is best explained by a decline in worker power in the sense of the ability of workers to extract a share of profits generated by companies operating in imperfectly competitive markets (which the authors term, ‘labour rents’) through unionisation or the threat of unionisation (at 3). They conclude that the evidence in their paper ‘suggests that the American economy has become more ruthless, as declining unionization, increasingly demanding and empowered shareholders, decreasing real minimum wages, reduced worker protections, and the increases in outsourcing domestically and abroad have disempowered workers ...’ (at 63).

<sup>27</sup> Brian Nolan et al, *Inequality and Prosperity in the Industrialized World: A Growing Challenge*, Citi GPS and Oxford Martin School Report, September 2017, 122, available at [https://www.oxfordmartin.ox.ac.uk/downloads/Citi\\_GPS\\_Inequality.pdf](https://www.oxfordmartin.ox.ac.uk/downloads/Citi_GPS_Inequality.pdf) (last visited 13 March 2023), 18, 93; Huber, Petrova and Stephens, ‘Financialization, Labor Market Institutions and Inequality,’ 29/2 *Review of International Political Economy* (2020) 425, <https://doi.org/10.1080/09692290.2020.1808046>; Greenwald, Lettau and Ludvigson, ‘How the Wealth was Won: Factors Shares as Market Fundamentals,’ *NBER Working Paper* 25769 (2019) [https://www.nber.org/system/files/working\\_papers/w25769/w25769.pdf](https://www.nber.org/system/files/working_papers/w25769/w25769.pdf) (last visited 22 February 2023).

<sup>28</sup> Greta Krippner, *Capitalizing on Crisis: The Political Origins of the Rise of Finance* (2012) 27; G. F. Davis, *Managed by the Market: How Finance Re-Shaped America* (2009); G. Dumenil and D. Levy, *Capital Resurgent: Roots of the Neoliberal Revolution* (2004).



value and lean production,<sup>29</sup> have all contributed to the widespread sense that rising inequality is a ‘core concern across the industrialized world’<sup>30</sup>, and is undermining social cohesion, trust in governance, and perceptions of declining opportunity<sup>31</sup> (Citibank 21). The normative and social consequences of rising inequality are ‘trickling up’ and reshaping all dimensions of ‘normal politics.’<sup>32</sup> Social segregation is rigidifying such that the rich are ‘unlikely to sit the same doctors’ waiting rooms, have their children attend the same schools, or travel in the same train compartments as the bottom quintile of society. The current levels of inequality in many countries mean that the rich and poor live in different worlds.<sup>33</sup> Entrenched and deepening *material* inequality consolidates and raises the salience of *status* inequality: that sense of societally-conferred value and esteem which pervades social life, and which deeply shapes ‘people’s expectations for themselves and others and their consequent actions in social contexts.’<sup>34</sup> Unsurprisingly, for those experiencing stagnant or steadily diminishing incomes and reduced expectations of acquiring even modest amounts of wealth, the sense of having ‘fallen backwards’ or ‘slipped downwards’ in status relative to previous comparable generations (that of their parents or grandparents), creates bewilderment, resentment, anxiety and anger:

For those at the bottom of the pile, none of this was news. Opinion polls, especially those commissioned by the right wing, had for a long time been recording the profound resentment among the American population at the way that both the economy and the political system seemed to be engineered to their disadvantage ... But if one stepped back from the poisonous language and crude logic, the assumptions that inequality was ‘systemic’ and that ‘the system’ was rigged against ordinary working class Americans were not paranoid but simply realistic. ... In many ways, the liberal centrists were the last to know.<sup>35</sup>

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<sup>29</sup> See the compelling story told by N. Lemann, *Transaction Man: The Rise of The Deal and the Decline of the American Dream* (2019). See also Benkler, ‘A Political Economy of Oligarchy: Winner-Take-all Ideology, Superstar Norms and the Rise of the 1%’, Working Paper (2017) <http://www.benkler.org/Political%20economy%20of%20oligarchy%2001.pdf> (last visited 22 February 2023).

<sup>30</sup> Nolan et al (n. 27) 122.

<sup>31</sup> *Ibid* 21.

<sup>32</sup> J. Hopkins, *Anti-System Politics: The Crisis of Market Liberalism in Rich Democracies* (2020), chapters 1 and 2; W. Davies, *This is No Normal: The Collapse of Liberal Britain* (2020) 216-230.

<sup>33</sup> Satz and White, ‘What is Wrong with Inequality?’, *Institute for Fiscal Studies* (2022) 1-29, at 15 <https://ifs.org.uk/inequality/wp-content/uploads/2021/09/What-is-wrong-with-inequality.pdf> (last visited 22 February 2023).

<sup>34</sup> Ridgeway, ‘Why Status Matters for Inequality,’ 79 *American Sociological Review* (2014) 1-16, at 3.

<sup>35</sup> Tooze (n. 6) 459. In an interview in 2020, former US President Barack Obama reflected on the strength of the liberal centrist consensus through the 1990s and 2000s: ‘And what’s a fair criticism is the fact that through Clinton and even through how I thought about these issues when I first came into office, I think there was a

Inequality not only creates conflict between those at the top and those at the bottom; it also ‘creates conflict at every step of the societal ladder’ by elongating the social distance between the poles of the hierarchy and increasing status competition for all.<sup>36</sup> Status anxiety - the sense that one’s *previously recognised* social value and esteem is being driven down before one’s eyes due to de-industrialisation, capital flight, economic austerity, stagnant or declining life possibilities<sup>37</sup> - has been both theoretically<sup>38</sup> and empirically<sup>39</sup> linked with support for radical ‘anti-system’ political movements. Cohen summarises these connections when she writes,

The sources of social honour and social security ... [in society] ... the forms of life, associational connections, organizations, modes of cooperation, and social capital that emerge around labour, occupation, neighbourhood and region – are as important to social identity and self-respect as material income. Indeed, anxiety about declining social status in economic society and disrespected sociocultural forms of life in civil society that once gathered social honour is intimately related to doubts about society-wide social solidarity and about the representativeness, receptivity, and responsiveness of political (and other) elites to the needs and concerns of ordinary people.<sup>40</sup>

### III. Human Rights, Legalism, and the Problem of Social Justice

When Philip Alston lamented in 2015 that extreme inequality and its consequences ‘should ... be seen as a cause for shame’ on the part of the international human rights movement, and that ‘questions of resources and redistribution can no longer be ignored as part of human rights advocacy,’<sup>41</sup> he was sounding a canary-like alarm that the atmosphere in which the close filiation between human rights advocacy and various strands of liberal centrism, liberal progressivism, and liberal internationalism had thrived, was deoxygenating rapidly. The ‘class cluelessness’ of much human rights talk had long been a source of castigation by Marxist and

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residual willingness to accept the political constraints we’d inherited from the post-Reagan era – that you had to be careful about being too bold on some of these issues. And probably there was an embrace of market solutions to a whole host of problems that wasn’t entirely justified.’ Chait, ‘In Conversation with Barack Obama’ *New York Magazine*, 9 December 2020.

<sup>36</sup> Bang Petersen, Osmundsen and Bor, ‘Beyond Populism: The Psychology of Status-Seeking and Extreme Political Discontent,’ in J. Forgas, B. Crano and K. Fiedler (eds), *The Psychology of Populism: The Tribal Challenge to Liberal Democracy* (2021) 62.

<sup>37</sup> See for example, F. Stockman, *American Made: What Happens to People When Work Disappears* (2021).

<sup>38</sup> Gidron and Hall, ‘Populism as a Problem of Social Integration,’ 53 *Comparative Political Studies* (2020) 1027.

<sup>39</sup> Antonucci et al., ‘The Malaise of the Squeezed Middle: Challenging the Narrative of The “Left Behind” Brexiter,’ 21 *Competition and Change* (2017) 211.

<sup>40</sup> Cohen, ‘Populism and the Politics of Resentment,’ 1 *Jus Cogens* (2019) 5, at 9.

<sup>41</sup> Alston, ‘Extreme Inequality as the Antithesis of Human Rights,’ *Open Democracy*, 27 October 2015, <https://www.opendemocracy.net/en/openglobalrights-openpage/extreme-inequality-as-antithesis-of-human-rights/> (last visited 2 March 2023).

Socialist writers.<sup>42</sup> South African anti-apartheid activist and former Communist Party member Mark Heywood reminisces that ‘Movements [in the 1970s] that were mobilizing mass anger against racism, notably the Anti-Apartheid movement in England, did not particularly do so on the basis of human rights ... We stigmatized campaigns for human rights as liberal “reformism” ... Call for reform was also seen as legitimizing the capitalist state and thus postponing its final crisis.’<sup>43</sup> Heywood notes with chagrin, however, that the hoped-for final crisis of capitalism and liberal democracy did not take place, and the predicted agents of systemic change did not deliver either: ‘Strikes and uprisings were regarded as the only legitimate forms of struggle along the pathway to “revolutionary consciousness.” In this schema Marxists saw systems of law as intrinsically biased against the poor and working class and part of the superstructure of “capital” – not an effective instrument in the quest for equality ... I adopted these beliefs and, whilst in England, spent my student and post student years supporting great but ultimately unsuccessful struggles such as those of the British mine workers, car workers and printers.’<sup>44</sup>

Human rights ideas carried with them no such sociological, economic- or political-theoretical baggage. Precisely because of their apparent compatibility with a range of economic and political systems from the vantage-point of a late-Cold War battle of ideological attrition, among their most visible advocates and proponents from the 1970s were a range of social movements in the West and East that deliberately sought to bend the limits of institutionalised politics in both the ‘empire of liberty’ and the ‘empire of justice,’<sup>45</sup> and their many proxy regimes. In a story which has now been told in many variations,<sup>46</sup> human rights law and activism became a compelling oppositional language precisely by placing itself *beyond*

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<sup>42</sup> Fudge and Glasbeek, ‘The Politics of Rights: A Politics of Little Class’ 1/1 *Social and Legal Studies* (1992) 45. See Kolakowski, ‘Marxism and Human Rights,’ 112/4 *Daedalus* (1983) 81, for a reflection which rehearses the longstanding Marxist critiques of rights.

<sup>43</sup> Heywood, ‘South Africa’s Journey from Socialism to Human Rights,’ 11/2 *Journal of Human Rights Practice* (2019) 305.

<sup>44</sup> *Ibid.* 308.

<sup>45</sup> To borrow Odd Arne Westad’s stylisation of the ideological claims of West and East in his *Global Cold War: Third World Interventions and The Making of Our Time* (2005).

<sup>46</sup> S. Hopgood, *Keepers of the Flame: Understanding Amnesty International* (2006); S. Moyn, *The Last Utopia: Human Rights in History* (2010); Slezkine, ‘From Helsinki to Human Rights Watch: How an American Cold War Monitoring Group Became an International Human Rights Institution,’ 5/3 *Humanity Journal* (2014) 345; N. Richardson Little, *The Human Rights Dictatorship: Socialism, Global Solidarity and Revolution in East Germany* (2020); essays collected in Eckel and Moyn (n. 8).

ideological and system-theoretic accounts of law, politics and economics<sup>47</sup> – including, inevitably, a language of class that was strongly tethered to repertoires of scientific socialism, critiques of bourgeois society and claims about the likely course of historical change.<sup>48</sup> Human rights were, in Samuel Moyn’s evocative phrase, a last utopia because they articulated ideals which seemed compatible with the desiderata of most utopian end-states, but could frame normative responses to concrete political injustices in the present: torture, arbitrary imprisonment, political repression and authoritarianism, and even severe deprivation. Any number of nascent social movements defined by opposition to racial, sexual, religious and political oppression, could make common cause with human rights ideas and rhetorics,<sup>49</sup> gaining an Esperanto of denunciation without much commitment to common social, political and economic diagnoses of ‘root causes’ or necessary tactics and methods. The politics and practices that assembled under the banner of human rights from the 1970s onwards were always diverse – some explicitly neo-liberal,<sup>50</sup> and others merely sceptical of the institutional and economic sclerosis besetting advanced capitalist governments and business.<sup>51</sup> For still others, particular

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<sup>47</sup> At some point, this argument was also used by the Carter administration: see Guillhot, ‘Limiting Sovereignty or Producing Governmentality? Two Human Rights Regimes in US Political Discourse,’ 15/4 *Constellations* (2008) 502.

<sup>48</sup> See T. Judt, *Post War: A History of Europe Since 1945* (2005) 560ff.

<sup>49</sup> See the helpful survey by Eckel, ‘The Rebirth of Politics from the Spirit of Morality: Explaining the Human Rights Revolution of the 1970s,’ in Eckel and Moyn (n. 8) 226.

<sup>50</sup> Whyte (n. 9); Q. Slobodian, *The Globalists: The End of Empire and The Birth of Neoliberalism* (2018); the French ‘new philosophers’ discussed in Judt, *Post War* (n. 45) 562-563, were part of a wider critique of the state as at once inadequate to the emancipatory ideals of the Left, and irremediably captured by established political power players and organised interests, whether from the Left or Right. The declension of this sceptical ethos was a disillusionment with the state as an instrument of *both* welfare *and* freedom, and the rise of a critical political morality preoccupied with the limits of what the state could achieve, or the pathologies arising from attempts to exceed those limits. The claims themselves were hardly new (as Judt put it, ‘in condemning the distortions of radical utopianism, the young Parisian ‘new philosophers’ of the mid-Seventies like André Glucksmann or Bernard-Henri Lévy were in most respects unoriginal,’ 562) But, ‘timing was all ... In light of twentieth century history the state was beginning to look less like the solution than the problem, and not only or even primarily for economic reasons.’ (560). Luhmann slyly observed as early as 1981 that the disenchantment of the 68ers led directly to a new individualism: N. Luhmann, *Political Theory in the Welfare State* (1981) 219.

<sup>51</sup> Sabin’s account of Ralph Nader’s assault on big government and big business as a complicitous cartel of special interests acting against the basic interests of ordinary people and their consumer well-being, shows well the *anti-establishment* flavour of political mobilisation which was common to the New Left and the New Right, and spawned an influential model of ‘public interest’ political activism which was highly congenial to the emerging human rights profession. P. Sabin, *Public Citizen: The Attack on Big Government and the Remaking of American Liberalism* (2021). See also Hamilton, ‘The Populist Appeal of Deregulation: Independent Truckers and the Politics of Free Enterprise, 1935-1980,’ 10/1 *Enterprise and Society* (2009) 137; E. Popp Berman, *Thinking Like an Economist: How Efficiency Replaced Equality in U.S. Public Policy* (2022) chapters 6-8.

human rights treaty norms could be invoked in newly activated international expert bodies to form a tissue of condemnation and criticism of government violence in the Southern Cone and elsewhere.<sup>52</sup> Around the same period, the momentum of a global vision of a post-colonial, state-led developmentalism, buttressed and coordinated by a New International Economic Order orchestrated through international institutions, had been effectively slowed by Western diplomatic and economic resistance (and armed intervention, in some cases).<sup>53</sup> It would soon be further eviscerated by petro-dollar-fuelled debt expansion and Volker-shock induced interest rate rises. But in the face of a severe crisis of the theory and practice of state-led development itself, economic and social rights seemed to offer a vocabulary for maintaining the priority of certain human-welfare-related *goals* for development.<sup>54</sup> Exactly how such rights were to be made real was hotly contested, and the debates tracked radically different agendas of what a just global settlement between the advanced capitalist (colonial) and developing (post-colonial) states might possibly mean.<sup>55</sup> For the most part, the invocation of economic and social rights was paired with a (real or feigned) agnosticism in relation to grand programs of social and economic change – even as one such program, neo-liberalism, was sweeping the globe from Chile to Christchurch in more or less radical variations.<sup>56</sup>

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<sup>52</sup> Kelly, “‘Magic Words’”: The Advent of Transnational Human Rights Activism in Latin America’s Southern Cone in the Long 1970s,’ in Eckel and Moyn (n. 8) 88.

<sup>53</sup> See essays in *Humanity* special issue on NIEO, 6/1 *Humanity* (2015); see also, on SUNFED, D. van den Meerssche, *The World Bank’s Lawyers: The Life of International Law as Institutional Practice* (2022); C. R. W. Dietrich, *Oil Revolution: Anticolonial Elites, Sovereign Rights, and the Economic Culture of Decolonization* (2017); J. Friedmann, *Ripe for Revolution: Building Socialism in the Third World* (2022).

<sup>54</sup> Dehm, ‘Highlighting Inequalities in the Histories of Human Rights: Contestations over Justice, Needs and Rights in the 1970s,’ 31/4 *Leiden Journal of International Law* (2018) 871; Dehm, ‘Righting Inequality: Human Rights Responses to Economic Inequality in the United Nations,’ 10/3 *Humanity Journal* (2019) 443.

<sup>55</sup> D. Bell (ed), *Empire, Race and Global Justice* (2019); Moyn (n. 4), chapters on Shue and Beitz.

<sup>56</sup> The coherence of neo-liberalism as a theory, ideology and practice, should not be overstated. See for example the bitter divide between Milton Friedman and Henry Hazlitt over the merits of guaranteed minimum income from the state (which Friedman advocated and Hazlitt opposed): Coleman, ‘Getting Tough or Rolling Back the State? Why Neoliberals Disagreed on a Guaranteed Minimum Income,’ *Modern Intellectual History* (2022) 1, DOI: <https://doi.org/10.1017/S1479244322000257>. See also S. L. Collier, *Post-Soviet Social: Neoliberalism, Social Modernity, Biopolitics* (2011); Collier, ‘Neoliberalism as Big Leviathan, or ...? A Response to Wacquant and Hilgers,’ 20/2 *Social Anthropology* (2012) 186; Mudge, ‘What is Neoliberalism?’, 6/4 *Socio-economic Review* (2008) 703. Nonetheless, a 2016 note from IMF staff economists helpfully synthesises what the family of neo-liberal economic policies have in common: ‘The first is increased competition – achieved through the opening up of domestic markets, including financial markets, to foreign competition. The second is a smaller role for the state, achieved through privatization and limits on the ability of governments to run fiscal deficits and accumulate debt ...’ Ostry, Loungani and Furceri, ‘Neoliberalism:

While much has been written recently about the rise of human rights *politics* after 1970, much less attention has been paid to the distinctively legalistic complexion it developed. The absence of a comprehensive political and economic vision – or indeed a common philosophical foundation – for human rights belies somewhat the extent to which late 20<sup>th</sup> century human rights practice became united through their *juristic* qualities. Despite the diverse movements and actors that enrolled the language of human rights in their cause, a distinctive characteristic of human rights as a repertoire of claim-making, criticism and increasingly-professionalised activism was its reliance upon international legal norms. Like much of international law, these norms were only ever partially judicialised in regional arrangements (such as the European Court of Human Rights or the Inter-American Court of Human Rights) and some domestic constitutions, but court-driven enforcement was far from the whole story:<sup>57</sup> human rights law’s ‘theory of change’ was profoundly *juridical* and in the last instance, *statist*. Taking the state, its laws and institutions as the object of reform, human rights activism combined various kinds of fact-finding and critical exposé (‘naming and shaming’) with demands for the revision of the state’s legal and political order to enable the realisation of the claimed rights (or, at the very least, desist from their violation).<sup>58</sup> At the heart of the enterprise was the cautious refinement and elaboration of the juridical concepts embedded in human rights legal instruments (mostly treaties), by a network of expert bodies to which interpretive authority was loosely delegated, and the international lawyers that were appointed to these bodies or interacted with them.

Thus, essential to the unruly constellation of agents and actors assembled under the banner of an ‘international human rights movement,’<sup>59</sup> was the politics of law and legal expertise, sitting alongside and

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Oversold?’, *Finance and Development*, (June 2016) 38,

<https://www.imf.org/external/pubs/ft/fandd/2016/06/pdf/ostry.pdf> (last visited on 3 March 2023).

<sup>57</sup> See most insightfully, Merry (n. 2), and De Burca, ‘*Human Rights Experimentalism*,’ 111/2 *American Journal of International Law* (2017) 277. In an increasingly condescending mode, but still perceptive, see Kennedy, ‘Spring Break,’ 63/8 *Texas Law Review* (1985) 1377; Kennedy, ‘Autumn Weekends: An Essay on Law and Everyday Life,’ in A. Sarat and T. R. Kearns (ed), *Law in Everyday Life* (1993) 191, and Kennedy, ‘The International Human Rights Movement: Part of the Problem?’, 15 *Harvard Human Rights Journal* (2002) 101.

<sup>58</sup> See Buchanan, *The Heart of Human Rights* (2013), for the clearest attempt to articulate the fundamentally statist presuppositions of international human rights law.

<sup>59</sup> A ‘movement,’ notably, with no secretariat, no published platform, and no stable membership criteria, and no electoral agenda. Compare Simmons, ‘The Future of the Human Rights Movement,’ 28/2 *Ethics and International Affairs* (2014) 183. Simmons works assiduously to show some of the empirical regularities in the contours of who or what claims to be a human rights organisation, and rightly criticises those who limit this

articulated (in varying degrees) to diverse social movement politics. Some members of the cadre of self-professed human rights lawyers came to increasingly believe in the autonomous power of the relevant legal concepts to become a focal point for political and social change<sup>60</sup> – a belief often notable for its unawareness of the many puzzles, problems and paradoxes of seeking social change through law (studied ad infinitum in law and society scholarship, but also in law and economics).<sup>61</sup> This inclination towards legalism was reinforced by the increasing judicialisation of human rights norms,<sup>62</sup> and also by some notable judicial victories in the late 1990s and early 2002.<sup>63</sup> But this evolution joined forces with another one: the triumphant liberal vision of political and legal isomorphism (including, for example, the constitutional entrenchment of

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term to a handful of Northern-based NGOs. But she is unable to identify much concrete evidence that we had and used the idea of a human rights organisation – let alone a human rights movement – before the mid-1960s. Most of her non-Western examples (which are very vaguely specified) track the rise of the concerted efforts to export and reproduce the civil society/NGO model of issue-centric political activism, from West/North to East/South, from the 1990s. See, for example, Moyn's persuasive argument that decolonisation was not a 'human rights movement' in the contemporary sense: Moyn, *The Last Utopia* (n. 43).

<sup>60</sup> This belief was not a fantasy. Developments in the early and mid-1990s in established liberal democracies did show that the right combination of a politically-persuadable government and energetic human rights advocacy by NGOs, could, together with a decision or view of a human rights expert-body finding a human rights law violation, engender important legislative reforms ending discriminatory legal regimes. This dynamic was often associated with successful mobilisation of public opinion around the specific issue, with the framing of human rights (in conjunction with the other abovementioned factors) helping to shift perceptions about the legitimacy of discriminatory or abusive treatment. See for example the discussion of the change to Hong Kong inheritance laws in Merry (n. 2) and the case study of torture norms in B. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (2009). These developments occasionally promoted more ambitious efforts to theorise the impact of the normative mobilisation of human rights 'scripts' on the perceived legitimacy of the state: see for example, R. Goodman and D. Jinks, *Socializing States: Promoting Human Rights through International Law* (2013).

Ultimately the question of the empirical *efficacy* of human rights law in bringing about human rights-realising states of affairs in politics and economics, became an academic cottage industry which generated more heat than light: see, with diverse degrees of polemicism and empiricism for and against: E. Posner, *The Twilight of Human Rights Law* (2014); E. Hafner-Burton, *Making Human Rights a Reality* (2015); K. Tsutsui, *Rights Make Might: Global Human Rights and Minority Social Movements in Japan* (2018); K. Sikkink, *Evidence for Hope: Making Human Rights Work in the 21<sup>st</sup> Century* (2017); B. Simmons, *Mobilizing for Human Rights*.

<sup>61</sup> An example of this naivety is J. Kozma, M. Nowak and M. Scheinin, *A World Court of Human Rights: Consolidated Statute and Commentary* (2010).

<sup>62</sup> Notable uptick in activity by the European Court of Human Rights and the Inter-American Court of Human Rights (discussed in K. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (2014)), which ought to be placed in a wider context of the proliferation and increased ambition of international organisations' governance and adjudication functions – whether as courts and tribunals, or as administrative bodies. As Zürn points out, this trend towards the delegation of certain competences to international bodies is a secular one, but accelerates from the late 1980s and becomes the subject of various express theorisations after 2000: M. Zürn, *A Theory of Global Governance* (2018).

<sup>63</sup> *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* (2002) (10) BCLR 1033 (CC) (5 July 2002).

rights guarantees) which was promoted through 20 years of rule of law reform,<sup>64</sup> economic restructuring,<sup>65</sup> post-conflict state-building and constitution-making<sup>66</sup> and, indeed, ‘rights-based’ development programming.<sup>67</sup> The powerful legacy of this strong gravitational attraction between the contemporary politics of human rights and a politics of legalism is reflected in the strenuous difficulty of giving *any* common concrete content to a human rights concept or claim, *except by recourse* to juridical concepts (refined, elaborated upon, contested, explained etc by possessors of legal expertise and bodies endowed with legal authority).

In reflecting on the contemporary challenges posed to the practice of human rights politics, self-declared ‘human rights practitioners’ observe that this legalism and its associated repertoires have become a source of paralysis. Sharp laments that the ‘legalistic referee model’ of human rights activism ‘remains fundamentally top-down and legal-institutional, with a core focus on the press and political elite.’<sup>68</sup> The ‘limited idiom of the legalistic referee simply does not resonate very well outside of elite circles’ and lacks a programmatic repertoire to do much more than condemn economic inequality and its consequences. In a sense, Human Rights Watch’s Executive Director Ken Roth showed a sincere fidelity to *this modus operandi* when he argued that addressing distributive justice in the (contemporary legal) language of human rights would be mere ‘sloganeering.’<sup>69</sup> A ‘grass roots’ human rights campaigner in the UK suggests that *avoiding* polarised national debates about specific legal decisions has been an effective means to shift attention to ‘everyday concerns’ such as education, health and social care, housing, an adequate standard of living – ‘especially socioeconomic rights ... of particular importance in the current austerity-dominated context.’<sup>70</sup>

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<sup>64</sup> S. Pahuja, *Development, Economic Growth and the Politics of Universality* (2011); S. Humphreys, *Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice* (2010); Bhuta, ‘Against State Building,’ 15/4 *Constellations* (2009) 517. Rajah, ‘Rule of Law as Transnational Legal Order,’ in T. C. Halliday and G. Shaffer (eds), *Transnational Legal Orders* (2015) 340.

<sup>65</sup> See G. Shaffer (ed), *Transnational Legal Ordering and State Change* (2012) and Halliday and Shaffer (n. 61); T. C. Halliday and B. G. Carruthers, *Bankrupt: Global Lawmaking and Systemic Financial Crisis* (2009).

<sup>66</sup> See the recent V. Sripathi, *Constitution-Making under UN Auspices* (2020).

<sup>67</sup> See for example, OECD and World Bank, *Integrating Human Rights into Development: Donor Approaches, Experiences and Challenges*, 3<sup>rd</sup> ed. (2016).

<sup>68</sup> Sharp, ‘Through a Glass, Darkly: Three Important Conversations for Human Rights Professionals,’ 11/2 *Journal of Human Rights Practice* (2019) 296, at 300-301.

<sup>69</sup> Roth, ‘Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization,’ 26/1 *Human Rights Quarterly* (2004) 63.

<sup>70</sup> Gready, ‘Reflections on a Human Rights Decade, Near and Far,’ (2019) 11/2 *Journal of Human Rights Practice* 422-437, at 430.



Rodriguez-Garavito, in a wide ranging reflection, observes that among the ‘blind spots and accumulated liabilities’ of the politics of human rights practice is its reliance on legal language and an elite constituency in the Global North,<sup>71</sup> which ‘have failed to engage with and appeal to large sectors of the population...’<sup>72</sup>

This sense of anxiety about the adequacy of contemporary human rights practice and its legalism among committed, self-reflective human rights activists, refracts a wider sense that we are in the midst of an epochal transition: a conjuncture of multiple crises and upheavals, some with deep and slow-moving causes, and others evolving rapidly over relatively short time-scales. Can the human rights enterprise adapt and survive?<sup>73</sup> *Should* they? Long-standing critiques of human rights practice, as well as more recent ones, seem to have gathered an immediacy and currency that has led some critics to hope that human rights are losing, and will continue to lose, ‘their imaginative near monopoly as a framework for reform.’<sup>74</sup> But a careful anthropological scholar of human rights practice can equally conclude that human rights remain a pervasive language- and thought-practice for articulating social justice demands, ‘which occupies an important place among global social movements and has consequences for local people and their experiences of injustice around the world.’<sup>75</sup>

To paraphrase Gramsci’s well-worn dictum, an old order is dying, but a new one has not yet taken shape; we look for intimations of the future in our present and near-past. Will human rights become, for the second time in one hundred years, an enterprise ‘sponsored by marginal figures – by a few international jurists without political experience or professional philanthropists supported by the uncertain sentiments of professional idealists?’<sup>76</sup> Or, will they renew themselves as a political-ethical language which energises and authorises a vision and ideal for human society adequate to the present?<sup>77</sup> Stedman-Jones, reflecting on the

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<sup>71</sup> Garavito, ‘Human Rights 2030: Existential Challenges and a New Paradigm for the Human Rights Field,’ in Bhuta (n. 5) 334.

<sup>72</sup> *Ibid.* 334.

<sup>73</sup> *Ibid.*

<sup>74</sup> Moyn, ‘Human Rights Have Lost Their Monopoly as a Framework for Reform,’ *Global Open Rights*, 19 May 2021. See also S. Hopgood, *The Endtimes of Human Rights* (2015); Posner (n. 57); Mishra (n. 7); Koskenniemi, (n. 5).

<sup>75</sup> Merry, ‘The State of Human Rights Consciousness: Not Yet End Times,’ in Bhuta (n. 5) 62, at 69.

<sup>76</sup> H. Arendt, *The Origins of Totalitarianism* (1951/2017), 382.

<sup>77</sup> Sen’s 2004 paper also embodies a dissatisfaction with human rights as legalism, when he sought to argue that the ‘Human rights can be seen as primarily ethical demands. They are not principally “legal,” “proto-

rise and fall of a 19<sup>th</sup> century movement for political and social justice,<sup>78</sup> astutely observed ‘[the existence of a political movement] is distinguished by a shared conviction articulating a political solution to distress and a political solution to its causes. A particular political vocabulary must convey a practicable hope of a general alternative and a believable means of realizing it, such that potential recruits can think within its terms.’<sup>79</sup>

A diversity of proposals and ideas<sup>80</sup> have emerged, but the challenge of economic and social inequality remains persistent: can human rights articulate a political solution, and a believable means of realising it? Human rights law and practice have excelled in labelling the harms of inequality as denials of guaranteed rights,<sup>81</sup> bringing with them at times powerful critiques of particular dimensions of contemporary economic and social policy. But this has led directly to the criticism that contemporary human-rights-based critiques of inequality focus on tangible harms and their impact on human dignity, but are consistently unable to articulate a structural account of causes and solutions. Indeed, in light of human rights law and practice’s *success* as a kind of legalism that bracketed any strong commitments to system-theoretic diagnoses (or even stable alliances with such diagnoses emerging from other domains of knowledge), this limitation appears baked in to a certain (dominant) modality of the politics of human rights. The result is a significant vulnerability to the criticism most sharply put by Moyn: that contemporary human rights law and its practice modalities are

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legal” or “ideal-legal” commands. ... The effectiveness of the human rights perspective does not rest on seeing them invariably as putative proposals for legislation ... [We should see human rights] as pronouncements in social ethics, sustainable by open public reasoning.’ Sen, ‘Elements of a Theory of Human Rights’ 32/4 *Philosophy and Public Affairs* (2004) 315, at 319, 345, 355-6.

<sup>78</sup> Stedman Jones, ‘The Language of Chartism,’ in J. Epstein and D. Thompson (eds), *The Chartist Experience: Studies in Working Class Radicalism and Culture, 1830-1860* (1982) 3, at 7.

<sup>79</sup> Ibid. Sassoon points out that the global success of Marxist socialism in becoming a political movement and political vocabulary attracting millions of committed adherents, reflected its ability to ‘comprehend the most varied issues: short-term demands such as an improvement in working conditions; national reforms such as pension schemes; comprehensive schemes such as economic planning and a new legal system; major political changes such as the expansion of the suffrage; utopian projects such as the abolition of the state, etc.’ In the end, all major movements for social change must ‘be able to define the contending parties, name them and thus establish where the barricades should go up, or where the trenches should be dug ...’. D. Sassoon, *A Hundred Years of Socialism: The West European Left in the Twentieth Century* (1996) 7.

<sup>80</sup> Compare for example: De Burca (n. 2), J. Snyder, *Human Rights for Pragmatists: Social Power in Modern Times* (2022), Garavito (n. 68).

<sup>81</sup> See, much more trenchantly than most, Alston, Special Rapporteur Reports on: Privatization (2018), Marginalization of Human Rights (2016), Universal Basic Income (2017), The Enjoyment of Civil and Political Rights by Persons Living in Poverty (2017). <https://www.ohchr.org/en/special-procedures/sr-poverty/annual-reports> (last visited 3 March 2023).

*unthreatening* to increasing levels of inequality because it *accommodates*, rather than directly challenges, the dominant political economy of the age.<sup>82</sup> Moyn's controversial criticism of economic and social human rights as having cashed out as a claim to 'sufficiency' of provision, rather than confronting the widening gap between rich and poor, has attracted much attention and ire. Some have sought to contest it empirically, although exactly what is being measured and what such data allows us to conclude about the distributive effects of strategies (usually litigious) to enforce economic and social rights, remains contradictory and unclear.<sup>83</sup>

#### IV. The Post-1945 Welfare State and Human Rights

There is a deeper point and puzzle raised by Moyn's argument, however, which is historical and conceptual: Moyn's fundamental claim is not that economic and social rights claims are always and at all times demands for sufficiency. Rather, it is that social and economic rights are janus-faced and chameleon-like concepts, the concrete content of which depends on the wider political and economic ecology of the given moment in history that surrounds them.<sup>84</sup> Thus, within a mid-century global embrace of the state as an interventionist agent of economic management, provider of public goods and supplier of services from telecommunications to health care, economic and social rights represented a kind of short-hand summary of the expected outcomes of an ambitious project of egalitarian national citizenship. This project rested on a theory of national states as robust and effective collective agents that not only mitigated the effects of national and global market capitalism, but re-made and contained it in order to achieve create and maintain a stable political and economic order – one which aimed to manage, if not permanently resolve, the critical

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<sup>82</sup> Moyn, *Not Enough* (n. 4). See also Ragnarsson, 'Humanising not Transformative? The UN Committee on Economic, Social and Cultural Rights and Economic Inequality in OECD countries 2008-19,' 8/2 *London Review of International Law* (2020) 261; Ragnarsson, 'Conceptions of Equality and the Distribution of Wealth in Human Rights Adjudication,' 68 *Scandinavian Studies in Law* (2022) 13.

<sup>83</sup> See for example Versteeg, 'Can Rights Combat Inequality?,' 133 *Harvard Law Review* (2018) 2017; compare Versteeg and Chilton, 'Rights without Resources: The Impact of Constitutional Rights on Social Spending,' 60/4 *Journal of Law and Economics* (2017) 713; Social, Amon and Biehl, 'Right to Medicines Litigation and Universal Health Coverage: Institutional Determinants of the Judicialization of Health in Brazil,' 22/1 *Health and Human Rights* (2020) 221.

<sup>84</sup> Moyn's arguments can at times be hard to narrow down, as they are wide ranging. But I suggest that what I present here is an indispensable pillar of them, and a reading which gives them the greatest coherence. See *Not Enough* (n. 4), especially chapters 1 and 2.

contradictions inherited from capitalism's 'anxious triumph'<sup>85</sup> in the 19<sup>th</sup> century;<sup>86</sup> between the rising tide of mass democracy and egalitarian demands, and social and political order in societies characterised by substantial continuing inequalities of property and income;<sup>87</sup> between decentralised market decision-making and price-setting, and the purposive public allocation of resources to provide social goods, raise living standards and prevent immiseration; between capital owners and wage-earners over income shares; and between the restraint of the oligopolistic and monopolistic tendencies of unconstrained competition and business cycles, and the corporatist coordination of 'big business, big government and big labour' to achieve planned outcomes.<sup>88</sup>

In this telling, the codification of economic and social rights in the Universal Declaration on Human Rights, and in the International Covenant on Economic and Social Rights, were *emanations* and *emendations* of a political-economic context, and this context provided the essential presuppositions for what we might expect the rights-concepts to denote and index. While the rights could be read alone as mere guarantees of sufficiency, they were in this context refractions of a moderately egalitarian enterprise in which achievement of these guarantees rested on the theory of a strong state with redistributive and 'levelling-up' ambitions and

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<sup>85</sup> D. Sassoon, *Anxious Triumph: A Global History of Capitalism, 1860-1914* (2019).

<sup>86</sup> As Conway points out, from the vantage point of 1945 Europe, liberal democracy had largely failed to resolve these contradictions, and thus if it were to be renewed after the fascist defeat, it required a re-founding that strengthened its capacity to broker political and economic compromises while enhancing a technical problem-solving ability within the state itself. See M. Conway, *Western Europe's Democratic Age: 1945-1968* (2020). The result was an expansion of state finances, state management and state provision which was unprecedented. The strong presumption that national economies would be planned economies, even if private property and markets remained, is evident in G. Myrdal, *Beyond the Welfare State: Economic Planning and Its International Implications* (1960). In his recent book, Wilkinson also re-reads European integration as a project to revive a liberal state backstopped by an elite-led, managerial, representative democracy: M. Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (2021). This reading largely confirms the positive assessment given by Aron in 1961, when he drily remarked that 'it is the disappearance or scarcity of revolutionaries that sanctions the legitimacy of a democratic regime (or, as I prefer to it, constitutional-pluralistic regime ... Partial planning and partial state ownership of property have strengthened rather than weakened democracy by helping to win the working class over to the regime.' Aron, 'The Situation of Democracy: Western Political Institutions in the Twentieth Century,' 90/2 *Daedalus* (1961) 350; Steinmetz-Jenkins, 'Raymond Aron, Friedrich Hayek, and the "Third World": An Alternative History of the End of Ideology Debate,' 12/3 *Humanity Journal* (2022) 241.

<sup>87</sup> See J. W. Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (2013).

<sup>88</sup> The explicit corporatism of the *trente glorieuses* in various national approaches to prices, wages, competition and finance has been extensively excavated. In many respects, the collective agency of the state rested on having other collective agents (such as concentrated, vertically integrated industrial conglomerates, and sector-wide labour unions) as interlocutors and collaborators in a national economic management.

programs. To use a contemporary term anachronistically, the historical state-concept presupposed by economic and social rights in the context of their codification, was a ‘market-shaping’<sup>89</sup> state concerned with creating public values, such as ‘deproletarianization’ and expansive public education programs.<sup>90</sup> The denouement of this story is that the juridification of economic and social rights is *symptomatic* of a political, economic and social matrix of forces which lies elsewhere; the independent agency of the rights concepts and rights language as a framework of thought and action, is limited and marginal. Critically, in Moyn’s argument, the concepts of rights are unable to bring into being the presuppositions of their egalitarian possibilities; as those presuppositions are eviscerated from the 1970s onwards – as our state theories and state concepts are reworked under a different constellation of economic forces, political agents and social movements from left and right – social and economic rights lose their connection with the political economy upon which they leaned. Stripped of this concrete historical relationship, we are left with juridical concepts to which elaborate *juristic* content can be given, but where the *political-ethical* foundation of those concepts in a deeper, historically evanescent political and economic movement, recedes from public and private recollection. Instead, the juridical concepts are mobilised by those best equipped to articulate them, and directed towards those institutions most adept at hearing them: lawyers and jurists, international expert committees and courts. Once such concepts become principally juristic in their mode of determination and activation, they can (like any

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<sup>89</sup> See Mazzucato and Collins, ‘Putting Value Creation Back into “Public Value”: From Market-Fixing to Market-Shaping,’ 25/4 *Journal of Economic Policy Reform* (2022) 345.

<sup>90</sup> As is well-known, the strong state theory was common to several varieties of inter-war and post-World War II schools of economic thought, from German historical school-inspired US institutional economists and New Deal planners, to Austrian Ordoliberals (sometimes called neo-liberals in early accounts). The theoretical divergences lay in the drawing of the boundaries and limits of the state’s market-shaping role, the extent of bureaucratic power, and the relative priority given to the protection of property rights, to the function of the price-mechanism, and to the role of courts as policing (and constructing) the boundary between state and market, and between state and ‘life world.’ One might surmise the distinction as between ‘strong state, planned economy’ and ‘strong state, free economy.’ See, inter alia: Nedergaard, ‘I Ain’t Gonna Work on Maggie’s Farm No More’: The Five Ordoliberal Critiques of Capitalism,’ 43/4 *Policy Studies* (2020) 759; Jessop, ‘Ordoliberalism and Neoliberalization: Governing through Order or Disorder,’ 45/7-8 *Critical Sociology* (2019) 967; Friedrich, ‘The Political Thought of Neo-Liberalism,’ 49/2 *American Political Science Review* (1955) 509, discussing ordoliberals as ‘neoliberals,’ as does Foucault, in his *Birth of Biopolitics* (1979), where he sharpens the distinction between the statism of the ordoliberals, and the statism of the planners. On the strong statism of the US ‘social economists,’ see: S. Fine, *Laissez-Faire and the General-Welfare State: A Study of Conflict in American Thought, 1865-1901* (1956) chapters 7-9; D. Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (2000); Kirat and Marty, ‘The Late Emerging Consensus Among American Economists on Antitrust Laws In the 2<sup>nd</sup> New Deal (1935-1941),’ 29 *History of Economic Ideas* (2021) 11.

positive juridical concept) be positioned as boundary concepts for the *legality* of this or that program or policy, but appear largely untethered from a programmatic structural commitment which is inscribed in the *purpose* of the state as a juridical *and* material order.<sup>91</sup> Hence, Moyn ultimately dismisses the contemporary possibilities of economic and social rights as playing a ‘defensive minor role in pushing back against the new political economy [of neoliberalism].’<sup>92</sup>

As a claim about the possibility of juridical rights to *bring about* epochal and tectonic shifts in political and economic ordering, Moyn’s claim seems realistic. It also sounds an echo of an earlier generation of socialist theorists’ scepticism about the relationship between legal forms and social and economic substance. When invited in March 1947 by UNESCO to give their views about the proposal for an international bill of rights, leading communist sympathisers and socialists in Western Europe replied that ‘expressing abstract ethical principles in a political and social vacuum’ would be ineffective unless there was an underlying commitment to ‘the physical and material conditions that may make the emergence of these rights in practice a real possibility.’<sup>93</sup> Communist organiser and BCP founding member R Palme Dutt hewed closely to the then-Party line when he responded with a lengthy exposition of a historical materialist theory of history, maintaining that civil and political rights reflected ‘eighteenth and early nineteenth century conceptions of liberty and human rights ... [which] ... did not clearly see the new forms of class domination which were arising and paid less attention to the problems of economic and social inequality and domination.’ By contrast, the 1936 Soviet Constitution, with its extensive enumeration of economic and social rights, reflects the reality that such rights can be achieved ‘only through a socialist organization of society.’<sup>94</sup> Belgian socialist Luc Somerhausen was sceptical of rights declarations to the extent that they did not reflect a reality of a ‘social organization which will make it possible for man to protect himself against exploitation.’<sup>95</sup> The

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<sup>91</sup> A notable effort to explicate a logic of structural commitment in the purpose of the state is Alston’s Recognition – Institutionalization – Accountability framework in his 2016 report on the marginalisation of economic and social rights.

<sup>92</sup> Moyn, *Not Enough* (n. 4) 176.

<sup>93</sup> Hyman Levy, Dean of the Royal College of Science at Imperial College London, and Communist Party member since 1931, Letter in reply to the UNESCO Human Rights Survey, in M. Goodale (ed), *Letters to the Contrary: A Curated History of the UNESCO Human Rights Survey* (2018) 169.

<sup>94</sup> R. Palme Dutt, in Goodale (n. 90), 175, 176.

<sup>95</sup> L. Somerhausen, in Goodale (n. 90), 167, 168.

common thread in this critique of rights is that the value and consequence of social and economic rights ‘could not be considered independently from a wider theory of historical change and justice within which these rights might, or might not, play a role.’<sup>96</sup>

The sceptical attitude of socialists reflected the pervasive influence of the mid-nineteenth century critique of bourgeois right pioneered by Proudhon<sup>97</sup> and embraced by Marx,<sup>98</sup> in which the very language of natural right itself was powerfully depicted as consecrating the legal order of market society: the sacredness of property and contract *über alles*, regularizing and legitimating a regime of what would later (anachronistically) be labelled ‘possessive individualism.’<sup>99</sup> And indeed, such a polemical understanding of natural right in 1840 was not entirely a straw person: the first half of the nineteenth century saw the flourishing of strong claims that found the purpose and limits of the state in the protection of property and contract, as the essence of the exercise of *libertas* and as the condition sine qua non of the progressive development of manners and civilisation.<sup>100</sup> The regime of *propriétarisme*,<sup>101</sup> as Piketty has labelled it, had strong roots in *one lineage* of natural rights thinking that was active before<sup>102</sup> and during the French Revolution, and which was amplified by the Girondin constitution and the Napoleonic Code.<sup>103</sup> In this lineage, which was to form the core of nineteenth century economic liberalism,<sup>104</sup> the foundation of justice and economic progress was that right which a man

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<sup>96</sup> Goodale, ‘From Human Welfare to Human Rights: Considering Socio-economic Rights through the 1947-1948 UNESCO Human Rights Survey,’ in S. L. B. Jensen and C. Walton (eds), *Social Rights and the Politics of Obligation in History* (2022).

<sup>97</sup> P.J- Proudhon, *What is Property?* (1840).

<sup>98</sup> K. Marx, *On the Jewish Question* (1843/1844). Marx claimed in 1844 that Proudhon’s *What is Property?* had the same significance for modern political economy as Abbé Sieyès 1789 text, *What is the Third Estate?* had for modern politics: Engels and Marx, ‘The Holy Family or Critique of Critical Criticism,’ in *Marx and Engels Collected Works*, vol 4 (1975) 31, cited in Stedman Jones, ‘Rights and Socialism, 1750-1880,’ in D. Edelstein and J. Pitts (eds), *The Cambridge History of Rights*, vol. 4 (2023) forthcoming.

<sup>99</sup> C. B. MacPherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (1962).

<sup>100</sup> For a survey of the American discourse, see Fine (n. 87); for France and UK, see Todd, ‘Economic Liberalism and Rights in the Nineteenth Century,’ in Edelstein and Pitts (n. 95) forthcoming. See also Sassoon, *Anxious Triumph* (n. 82) chapter 5.

<sup>101</sup> Piketty (n. 18) chapters 3-5.

<sup>102</sup> See Bourke, ‘Rights, Property and Politics: Hume to Hegel,’ in Edelstein and Pitts (n. 95) forthcoming.

<sup>103</sup> Piketty (n. 18) 122: ‘More generally, reference to property rights in various declarations of rights and constitutions were often used in the nineteenth and twentieth centuries to impose drastic legal limits on any possibility of a peaceful, legal redefinition of the property regime, and that continues to be the case today.’

<sup>104</sup> G. de Ruggiero, *The History of European Liberalism*, trans. Collingwood (1927) 128-9.

had to his own: his own person and will, and his own property as a product of his labour.<sup>105</sup> To the European social democrats amongst whom the Marxian critique of natural right gained currency after 1860,<sup>106</sup> rights language seemed beholden to this individualist ideology, and were thus an unpromising vehicle through which to motivate the historical forces that would, in any event, create a just social, economic and political order. Social and economic rights should await the transformation of social and economic relationships, but could not be expected to play much of a role in bringing about such a transformation. Moyn's deflationary sketch of economic and social rights circa 1948, as adding little but an indirect justification for welfare states which were already *in statu nascendi*,<sup>107</sup> evinces a close kinship with this influential sceptical story, leading him to conclude that there is little need for a history of economic and social rights distinct from a history of the welfare state itself.<sup>108</sup> Economic and social rights are latecomers to the party, an effort to update 'a language forged in one age for the sake of another'<sup>109</sup> in a possibly quixotic attempt to save rights 'from their libertarian associations with nineteenth century political economy to serve the purposes of social reconstruction.'<sup>110</sup>

## V. The Grammar of Social Rights – 1945-1917

But it remains an open question whether social rights were ever, or could ever be, more than mere summations of what we expected an extant welfare state to do for us. The immediate drafting history of the Universal Declaration of Human Rights goes some way towards confirming Moyn's claims, but also points to deeper roots and longer histories behind the use of rights language to frame the nature of the state and its relationship with the economic order.

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<sup>105</sup> Pocock, 'Virtues, Rights and Manners: A Model for Historians of Political Thought,' in J. G. A., *Virtues, Commerce and History: Essays on Political Thought and History* (1985): 'Social first and political after, the civil and common law define individuals as possessors by investing them with right and property in things, and ultimately (as in Locke) in themselves.' (45).

<sup>106</sup> Spengler, 'The Right to Work: A Backward Glance,' 28/2 *The Journal of Economic History* (1968) 171, at 189. For the official adoption of Marxist thought by European social democratic parties after 1860, see S. L. Mudge, *Leftism Reinvented: Western Parties from Socialism to Neoliberalism* (2018).

<sup>107</sup> Moyn, *Not Enough* (n. 4) 45, 59.

<sup>108</sup> Ibid. 12-13.

<sup>109</sup> Ibid. 53

<sup>110</sup> Ibid. 62.



The final text of the UDHR's 'social rights' provisions was adopted with widespread support from drafting member states, and was indeed drawn from constitutions and social welfare legislation 'common in Latin America, socialist states, western Europe, Scandinavia, the UK, the US, Canada and Australia.'<sup>111</sup> The precise terminology of 'welfare state' is not readily found in discussions surrounding the UN Secretariat's draft of the Universal Declaration, nor in influential preparatory reports submitted by the American Law Institute<sup>112</sup> or the Latin American state-backed Inter-American Juridical Committee.<sup>113</sup> This should be no surprise, as a discreet concept of 'welfare state' was not much in use until after 1947, and even then its meanings were far from uniform.<sup>114</sup> Rather than a clearly articulated state concept and state theory, what formative discussions surrounding the social rights provisions of the UDHR show is an incompletely theorised common *topos* of ideas which coalesce around the broad notion of a positive state which *structures and shapes* national economies in order to bring about the enjoyment of social rights;<sup>115</sup> the social rights themselves did not express any singular vision of state and economy, but were a 'placeholder' for stronger and weaker versions of a positive state. In a March 1947 UN Economic and Social Council (ECOSOC) discussion of an early report from the Commission on Human Rights concerning a draft bill of rights, the US delegate (Stinebower) urged that the 'bill of rights should be as bold and as broad as possible and ... it should embrace social rights such as those of employment, social security and equal opportunity as well as minimum standards of economic, cultural and social well-being.'<sup>116</sup> A few months later, in the Commission on Human

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<sup>111</sup> Saul, 'Introduction: The Drafting of the International Covenant on Economic, Social and Cultural Rights, 1948-1966,' *Sydney Law School Legal Studies Research Paper No.15/79* (2015) 1, at 18, 20.

<sup>112</sup> Committee of Advisers on Essential Human Rights, American Law Institute, 'Statement of Essential Rights,' 243 *The Annals of the American Academy of Political and Social Science* (1946) 18, Arts 11-15.

<sup>113</sup> Pan-American Union, Inter-American Juridical Committee, 'Draft Declaration of the International Rights and Duties of Man and Accompanying Report, 31 December 1945,' 40/3 *American Journal of International Law* (1946) 93. The committee consisted of Francisco Campos, F. Nieto del Rio, Charles G Fenwick, and A. Gómez Robledo.

<sup>114</sup> Garland, 'The Emergence of the Idea of "The Welfare State" in British Political Discourse,' 35/1 *History of the Human Sciences* (2021) 1.

<sup>115</sup> The Polanyian concept of 'embeddedness' comes to mind, although the term had only been recently coined to capture the movement of thought from laissez faire state to positive state – a movement the arc of which can be traced to beginning of the 19<sup>th</sup> century.

<sup>116</sup> Economic and Social Council Summary Record, 14 March 1947, in W. J. Schabas, *The Universal Declaration of Human Rights: The Travaux Préparatoires* (2013) 332, at 246.

Rights,<sup>117</sup> the US delegate (Roosevelt) clarified that a right to employment did not entail a duty on the state to provide work but rather the creation of conditions affording a 'fair and equal opportunity to work.' In the US's redraft suggestions of June 1947, the right to a fair and equal opportunity to work was nonetheless embedded within a general right to economic security of expansive scope, which proposed a right to 'a decent standard of living ... to wages and hours and conditions of work calculated to insure *a just share of the benefits of progress to all*; ... It is the duty of the state to undertake measures that will promote full employment and good working conditions ... and assure adequate food, housing, and community services necessary to the well-being of the people.'<sup>118</sup>

The Chilean delegate to both ECOSOC and the Commission on Human Rights (Santa Cruz) observed in the March meeting that 'in the opinion of his government the State should intervene in guiding the internal economy of a country, supplying what private initiative was not able to give and ensuring that production and distribution of goods was adjusted to the general welfare of the population ... [This was] a way of transforming the political democracy of the nineteenth century into an economic democracy.'<sup>119</sup> In June, the French delegate (Cassin) explained that 'in two wars, the State had demanded the maximum from millions of men and ... had taken over the control of the entire economy ... He admitted that unemployment cannot be overcome immediately but he felt that the Declaration should establish fundamental rights, such as the right to work, for the future.'<sup>120</sup>

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<sup>117</sup> Commission on Human Rights Summary Record, 23 June 1947, in Schabas, *ibid*, 873.

<sup>118</sup> US Suggestions for Redrafts of Certain Articles in the Draft Outline, 11 June 1947, Art 38, in Schabas (n. 116) 716.

<sup>119</sup> Economic and Social Council Summary Record, in Schabas (n. 116) 246. In a similar vein, Walter Nash, future Prime Minister of New Zealand, stated that he 'felt that the right to live healthily for the maximum period of time with the availability of all essentials for cultural, spiritual and mental progress transcended all others ... Individual rights could not be enjoyed unless the requisite materials and facilities were provided by collective organization and work.' (*Ibid* 248).

<sup>120</sup> Cassin, Commission on Human Rights Summary Record, 23 June 1947, in Schabas (n. 116) 873. Cassin was repeating here a common sense of the politicians and policy makers deeply influenced by the Beveridge Report of 1942 and his book on Full Employment of 1944: see Timothy B Smith, 'Renegotiating the social contract: Western Europe, Great Britain, Europe and North America' in Michael Geyer and Adam Tooze, eds, *The Cambridge History of the Second World War: Volume III, Total War: Economy, Society and Culture* (2015), 553-574.

The American Law Institute Statement of Essential Human Rights, finalised in December 1945 and published with commentary in the *Annals of the American Academy of Political and Social Science*,<sup>121</sup> enumerated five social rights: work, fair labour conditions, social security, education, food and housing. One of the committee members, C. Wilfried Jenks – already prominent in the drafting of the ILO’s 1944 Philadelphia Declaration – concisely summarised what he took to be the common expectations concerning state action underlying the right to work: ‘its general acceptance by almost all shades of political and economic thought is attributable to a world depression sandwiched between periods of full employment resulting from two world wars. It now *holds the central place among the social claims which the common man expects the social system to satisfy*.’<sup>122</sup> In order to meet this ‘social claim,’ and the other social rights in the Statement, Jenks outlines an extensive program of state coordination, state financing, state regulation and state production: the right to work (as full employment) was a ‘basic social objective in the light of which economic and financial policy must be determined.’ The right to food anticipated not only food safety regulation, but price controls for essential foods, school meals, large scale crop planning; the right to housing implied large scale public investment in building housing, as well as ‘control of the mortgage business.’ Nothing less than ‘a high degree of cooperation among private agencies under supervision of government and in the framework of a government plan can make adequate housing available to modern urban man.’<sup>123</sup> Ellingston, commenting on the Right to Work, explained at length why ‘people living in an industrial society have discovered that without [economic] rights they can no longer be free.’<sup>124</sup>

The people of the world, shaken by two world wars and ruinous depression within a short twenty-five years, have discovered that neither peace nor freedom is possible to man in an industrial society without economic security ... To leave social and economic rights out of a modern bill of rights would be to stage Hamlet without the Dane.

... The modern individual has become the tooth on a gear of a gigantic economic machine. He depends for employment, shelter, and nearly all the other necessities and amenities of life no longer solely on his own efforts but on the efforts and good will of many other men, working through an intricate economic system.

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<sup>121</sup> The Committee appointed by the Institute to draft the statement was composed of 25 men, including William Draper Lewis, Percy Corbett, Manley Hudson, Wilfred Jenks, and Karl Loewenstein.

<sup>122</sup> Jenks, ‘The Five Economic and Social Rights,’ 243 *Annals of the American Academy of Political and Social Science* (1946) 40, at 41.

<sup>123</sup> *Ibid.* 44-45.

<sup>124</sup> Ellingston, ‘The Right to Work,’ 243 *Annals of the American Academy of Political and Social Science* (1946) 27, at 27.

... Our interdependent industrial economy simply cannot operate successfully unless every member of our society, the sharecropper and the street cleaner as well as the banker and the skilled tool maker, enjoys a high standard of living. The more we increase our productive capacity, as we have during the war, the higher we must raise the level of consumption and the standard of living for everybody. This is not a matter about which business – or government or labor – is any longer free to make a choice.

... A fully developed industrial economy introduces a new law to control the material relations among men – the law of compulsory abundance ... All this means that in a completely industrial economy, full employment with attendant full consumption is vital to everybody ... Protection of the right to work is a basic condition of the stability of our industrial society.<sup>125</sup>

Ellingston reflects pointedly on the function of rights language in relation to this expansive social economic vision, insisting that ‘capacity for immediate enforcement is not the test of a right ... A bill of rights is ... a directive to the whole society and a guide to legislators and executives in the framing of laws and regulations that will gradually make rights effective.’<sup>126</sup> He takes as an exemplar of this the French Declaration of the Rights of Man on 1789, the exhortatory natural rights grammar of which served to ‘raise the beacon around which public opinion can mobilize, by which the controlling ideas and values of society can be mobilized, and by which the acts of legislatures and executives can be guided and judged.’<sup>127</sup>

The relationship between state and economy imagined as the necessary implication of social rights is also found in the Inter-American Juridical Committee’s explanation of its Draft Declaration. Drafted at the behest of the Inter-American Conference on War and Peace,<sup>128</sup> the Juridical Committee explained the inclusion of social rights (work, education, and social security) as reflecting both a new theory of the state, and a new conception of democracy. The state was to be understood as ‘a cooperative commonwealth’ in which ‘the resources of the community must be used to raise the standard of living and to provide a decent subsistence for all its members.’<sup>129</sup> Modern industrial society required not ‘the earlier doctrines of extreme individualism’ but ‘the organization of the economic life of the state’ in order to ‘secure equality of opportunity for all and to *bring the rewards of labour more into conformity with the contribution of labour to the national*

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<sup>125</sup> Ibid. 32.

<sup>126</sup> Ibid. 34.

<sup>127</sup> Ibid. 34.

<sup>128</sup> Composed of 19 Latin American States and the United States, meeting at Chapultepec between 21 February and 8 March, 1945.

<sup>129</sup> ‘Inter-American Juridical Committee Draft Declaration and Accompanying Report,’ (n. 110) 102.

*welfare*.<sup>130</sup> The new conception of democracy accompanying the new theory of the state emphasised the full development of the individual and ‘his full moral stature,’ which cannot be realised ‘under conditions of malnutrition, disease, bad housing and sanitation.’<sup>131</sup> The ‘newer body of economic and social rights’ was underlain by ‘the broad principle of distributive justice’:

A generation or more ago states had but a limited understanding of the obligations of the community to promote the welfare of its individual citizens. The rights of the individual were rights against the interference of the state, not rights to the active assistance of the state. But within more recent years it has come to be understood that the individual can not always by his own efforts attain the standard of living adequate to the development of his human personality. The complicated economic life of modern states has made the old doctrine of *laissez faire* no longer adequate. *At the same time the concept of the democratic state as a cooperative commonwealth whose objective is the general welfare of its members has come to be more clearly understood.*<sup>132</sup>

These contemporary rationalisations of social rights go some way to confirming Moyn’s observation that social rights circa 1945 depended upon ‘a much larger consensus concerning the purposes of the state and even its role in planning the economy.’<sup>133</sup> But what they also show is that while these presuppositions were not *written in* to the UDHR, they were clearly articulated by those justifying the inclusion of social rights within that document and others. There was a striking consistency in explaining social rights in terms of their necessity *in light of the expected role of the state in a post-war economic order*, and with reference to the need to create a ‘moral’ or ‘social’ economy as the true medium for the realisation of such rights. The grammar of rights in these discussions exceeds the function of an indirect justification for what would come to be called the welfare state; Ellingston’s extrapolation of the value of a declaration intimates an affinity between revolutionary natural rights declarations and social rights language: the statement of rights *recalls us to an order of which they are an objective property and foundation*, even if we can understand certain dimensions of that order as simultaneously oriented towards subjective needs fulfilment (‘the development of human personality’).

The logic of social rights is that of an *ordo* not a *ius*. Rather than a positivistic commitment awaiting juristic refinement, social rights are the *dogmatic*<sup>134</sup> of a socio-economic order to be brought about through a

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<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

<sup>132</sup> Ibid. 108 (my emphasis).

<sup>133</sup> Moyn, *Not Enough* (n. 4) 67.

<sup>134</sup> E. Christodoulios, *The Redress of Law: Globalisation, Constitutionalism and Market Capture* (2021), chapter 2.3. A dogma in this account is an axiom for the intelligibility of the nature and purpose of the legal

decisive collective agent, the state, which does far more than set boundaries for private economic decision making or guarantee the conditions for virtuous competition. The strong state envisaged by social rights circa 1945 fundamentally shapes private economic activity by directing its purposes, replacing it altogether in some domains, or enveloping it within thinner or thicker layers of constraining and facilitative public administration – dynamics accelerated by two World Wars, which demanded extensive public control over national economies and made concrete the organisation of economic planning.<sup>135</sup>

The logic of social rights in this iteration can perhaps be most accurately described as an *aide-memoire* for a *material or economic constitution*.<sup>136</sup> This was more than symbolism. The social rights declarations, whether international or constitutional, rehearsed the social and political objectives of the state's (extensive) economic agency. They re-described an immanent *topos* of ideas and arguments about the telos of the state's relationship to the economic, and at the same time rearticulated the purpose and meaning of the state's agency in terms of the realisation of social rights. The concept and theory of the state was reshaped in this image, to the extent that political and social forces continued to grasp the state as *the* principal means to these declared ends.<sup>137</sup>

In his recent reconstruction of the 'grammar of constitutionalism' in India's 1947 Constitution, Khosla unpacks the logic of its declaration of economic and social rights as unenforceable and non-justiciable 'directive principles': 'The codification of the constitutional text [on, inter alia, socioeconomic rights] was seen as crucial to the creation of a common meaning because the ambit of understanding that a people come to form shares a relationship to the language that people employ. The vocabulary that is put into use has a

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order: 'The dogmatic is set in place pre-interpretatively, setting in place the conditions of interpretation. It is in that profound sense axiomatic and heteronomous ... The *non-negotiability* of the fundamental values of reciprocity, solidarity and community that underlie what it means to *belong* in a world are installed and enshrined at the level of the dogmatic as the mainsprings of human association.' (235).

<sup>135</sup> Engerman, 'The Rise and Fall of Central Planning,' in M. Geyer and A. Tooze (eds), *The Cambridge History of the Second World War: Volume III, Total War: Economy, Society and Culture* (2015) 575-598.

<sup>136</sup> For a synthesis of various accounts of a material constitution, see Wilkinson and Goldoni, 'The Material Constitution,' 81/4 *Modern Law Review* (2018) 567.

<sup>137</sup> In this sense, social rights circa 1945 – and the various historical and conceptual claims which are made to explain and authorise them – follow a similar dynamic to other kinds of state theory: 'The creation of the modern state in Europe was accompanied by a political theory that ... reflected its development, reacted to its problems and offered solutions of a legal and institutional kind. This kind of political reflection is quickly absorbed by politics itself and becomes an aspect of the object on which it reflects. It descends, so to say, from the heights of pure theory into the murky atmosphere of reality and in this way is deflected, exploited, reified and thus becomes an aspect of whatever a new theory tries to discover.' Luhmann (n. 47) 25.

constitutive relationship to the social reality that comes into being. ... Codification was employed to give the exercise of state power a normative direction, making it clear that certain commitments and conditions were necessary for such power to hold legitimacy.<sup>138</sup> Codifying socioeconomic rights in the Indian Constitution was not merely an outgrowth of a political common ground among drafters, reduced to a legalistic register; it was a means through which the agency of the state in relation to private economic ordering was sought to be asserted, authorised, and inscribed within the purposes of the new Indian state.<sup>139</sup>

Mexico's 1917 revolutionary constitution<sup>140</sup> inspired a wider trend across Latin America to constitutionalise social rights and the broader economic purposes of the state.<sup>141</sup> The 1917 Constitution codified labour's right to organise,<sup>142</sup> enumerated an extensive catalogue of labour, health and welfare rights,<sup>143</sup> guaranteed universal secular education,<sup>144</sup> and firmly asserted the authority of the state over the Catholic Church. It also comprehensively asserted the state's authority to regulate, redistribute, curtail and expropriate private property, encoding the theory that all private property rights (including to the subsoil and territorial waters) were a privilege created by the Nation that could be governed for the common good.<sup>145</sup> The result was 'the world's first fully conceived social democratic charter'<sup>146</sup> and the principal model for the uniform inclusion of social rights in Latin American constitutions – a uniformity that would be influentially registered through the survey of national constitutions undertaken by the UN Secretariat as a preliminary guide to the drafting of the Universal Declaration on Human Rights.<sup>147</sup>

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<sup>138</sup> M. Khosla, *India's Founding Moment: The Constitution of a Most Surprising Democracy* (2020) 29-30.

<sup>139</sup> *Ibid.* 44-55.

<sup>140</sup> Branch and Rowe, 'The Mexican Constitution of 1917 Compared with The Constitution of 1857,' 71 *Annals of the American Academy of Political and Social Science* (1917)1.

<sup>141</sup> Grandin, 'The Liberal Tradition in the Americas: Rights, Sovereignty, and the Origins of Liberal Multilateralism,' 117/1 *American Historical Review* (2012) 68; Thornton, "'Our Balkan Peninsula: The Mexican Question in the League of Nations Debate,' 46/2 *Diplomatic History* (2022) 237; R. Gargarella, *Latin American Constitutionalism, 1810 – 2010: The Engine Room of the Constitution* (2013) 92-107.

<sup>142</sup> Art 28, in Branch and Rowe (n. 137) 25.

<sup>143</sup> Art 123, in Branch and Rowe (n. 137) 93.

<sup>144</sup> Art 3, in Branch and Rowe (n. 137) 2.

<sup>145</sup> Art 27, in Branch and Rowe (n. 137).

<sup>146</sup> Grandin (n. 138) 75.

<sup>147</sup> E/CN.4/AC.1/3/Add.1, 11 June 1947, in Schabas (n. 116) 332 at 594-665.

The demand to include social rights *and* the ‘right of the nation’ over public property in the 1917 constitution reflected a logic of constitutionalisation that was not a straightforward positivistic encapsulation of an already-existing welfare state (which, in fact, did not exist in Mexico at that time), but was closer to that evinced in the drafting of the Indian constitution. The constitutional text aimed to firmly and clearly assert the function of the state in resolving ‘the social question’ – by integrating ‘deep political and social reforms into the juridical structure of the country.’<sup>148</sup> The self-declared ‘Jacobin’ wing of the Constituent Congress demanded a ‘very broad system of democratic safeguards and legal backup mechanisms’ which would not only ‘express in the Constitution a system of workers’ rights and safeguards ... which liberal constitutions never mention’ but also ‘gave a legal basis for the later push toward nationalization of basic industries and development of the economy through the state sector.’<sup>149</sup> The key message in the rejection of the traditional liberal constitution proposed by Carranza, was the *centrality of ‘the social question’ to the legal and political organisation of the new order.*<sup>150</sup> Despite ominous threats of U.S. intervention to protect its corporations’ property rights in Mexico,<sup>151</sup> and efforts by the domestic liberal factions to limit the reach of workers’ rights by legislation, the 1917 constitution ‘offered a new and original version of the social compact by integrating some renewed social demands in the basis of the traditional liberal-conservative agreement.’<sup>152</sup> It became ‘the main mirror where Latin American critical movements within the region wanted to look’ but also offered a re-articulation of the social foundations of the state which led ‘liberal-conservative’ leaders to recognise ‘that the new Constitutions had to accommodate social demands.’<sup>153</sup>

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<sup>148</sup> A. Gilly, *The Mexican Revolution* (2005) 232.

<sup>149</sup> *Ibid.* 233.

<sup>150</sup> Gargarella (n. 138) 103-105. See F. Tannenbaum, *Peace by Revolution: Mexico After 1910* (1966) 166-167: ‘The Constitution was written by the *soldiers* of the Revolution, not by the lawyers, who were there, but were generally in the opposition. On all critical issues the lawyers voted against the majority of the Convention. The majority was in the hands of the soldiers – generals, colonels, majors – men who had marched and counter-marched across the Republic and had fought its battles. The ideas of the Constitutional Convention, as they developed, came from scattered sources. The soldiers wanted, as General Múgica said to me, to socialize property. But they were frightened – afraid of their won courage, of their own ideas. They found all of the learned men in the Convention opposed to them. Article 27 was a compromise.’

<sup>151</sup> See Grandin (n. 138); Thornton (n. 138).

<sup>152</sup> Gargarella (n. 138) 106.

<sup>153</sup> Gargarella (n. 138) 92, 106.



The *constitutionalisation of the social question* was thus an important precursor and context for the presence of social rights in the Universal Declaration and beyond. The ambition of constitutionalising social rights in the early twentieth century was to articulate and somehow entrench in politics and law the fundamental purpose of the state as a collective political *and* economic agent charged with realising a vision not only of social provisioning, but of constructing the material, political, and legal bases of democratic egalitarian citizenship. This was a wider and deeper project than the construction of welfare states, and entails the state's role in economic planning and the anti-oligarchical function of redistributing resources and taming economic monopolies.<sup>154</sup>

The constitutionalisation of social right preceded any coherent concept of the welfare state, but nonetheless connoted a horizon of expectation about what the state is for and how it should be made to be this way in reality. In this grammar, the state makes social rights, but social rights also make the state by functioning as constitutive power-authorising concepts, alongside the limitative power-constraining concepts of traditional bourgeois rights. Social rights are *structuring* political-legal concepts, bearers of the dogmatic ideal of an economic order which is firmly and consistently bounded by basic axioms of political and legal value: labour solidarity, fair shares for all, social provisioning, anti-oligarchy and constraint on concentrations of economic power.<sup>155</sup> It is in this sense that we can fully understand the Inter-American Juridical Committee's terse observation that social rights rest on 'the broad principle of distributive justice' in which was embedded the idea of 'the democratic state as a cooperative commonwealth whose objective is the general welfare of its members.'<sup>156</sup>

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<sup>154</sup> This is provided for in Art 28 of the Mexican Constitution, and was also raised by Jenks, Ellingston and the Inter American Juridical Committee in their various commentaries on draft social rights provisions.

<sup>155</sup> Fishkin and Forbath have recently traced the lineages of these ideas in 19<sup>th</sup> and 20<sup>th</sup> century debates about the US Constitution: J. Fishkin and W. E. Forbath, *The Anti-Oligarchy Constitution: Reconstructing the Economic Foundations of American Democracy* (2022).

<sup>156</sup> Above (n. 110).

## VI. Fair Shares and Vital Minima – *Topoi* of Social Rights in the Eighteenth and Nineteenth Centuries

We thus grasp early- to mid-twentieth century social rights *topoi* as one generative political language for a hoped-for political-economic order, which united ‘the social question’ with the political question of egalitarian democratic citizenship, within a language of right that is as much political-ethical as it was legal.

This understanding provides a vantage point which makes antecedent family resemblances visible. The constitutionalisation of the social question ought to be understood not so much as the beginning, but simply one terminus of, an extended and iterated argument about the relationship between state and economy traversing the 19<sup>th</sup> century. In these polemics, rights-languages and rights-concepts (or their repudiation) were part of the innovation of powerful political languages, and crucial to the way that these languages disputed the proper, just or true relationship between key terms such as commercial society, government, sovereign power and legislation.<sup>157</sup> While Marxist social democrats in the second half of the 19<sup>th</sup> century turned their faces against rights language as epiphenomenal abstractions of class relations – lagging and not leading social and economic change - we can observe across that century a range of rights discourses which framed, articulated and motivated programmatic visions for a different economic order.

It is important to note that late 18<sup>th</sup> and 19<sup>th</sup> century rights discourses did not constitute a singular tradition or lineage of political and legal thought. There were several *topoi*,<sup>158</sup> descending from (or reacting to) different strands of early modern and medieval natural jurisprudence thinking.<sup>159</sup> Christoph Menke has observed that in European rights discourses, the relationship between ‘right’ and ‘justice’ was shaped by the twin inheritances of Athens and Rome. The epoch-making medieval receptions of Aristotle’s political and ethical theories, and Roman law’s rediscovery and appropriation,<sup>160</sup> endowed European political *and* legal thought with two distinct vocabularies through which to understand what it means to give someone their due:

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<sup>157</sup> See for example R. Walter, *Before Methods and Models: The Political Economy of Malthus and Ricardo* (2021), chapter 1. See also M. Sonenscher, *Capitalism: The Story Behind the Word* (2022).

<sup>158</sup> See E. R. Curtius, *European Literature and the Early Middle Ages* (1973) for the notion of *topoi* of rhetorics and arguments.

<sup>159</sup> On the complex structure of early modern natural law and natural right, see M. Scattola, *Das Naturrecht von dem Naturrecht. Zur geschichte des >ius naturae< im 16. Jahrhundert* (1999); D. Edelstein, *On the Spirit of Rights* (2018) 4-5.

<sup>160</sup> Q. Skinner, *Foundations of Modern Political Thought*, vol. 1 (1978); vol. 2 (1979).

an Aristotelian language of *fair shares*, in which citizens ‘receive in exchange for their own work ... a share in another’s work that is proportionately commensurate to the politically determined significance of their respective work and activity for the community.’<sup>161</sup> And, the Roman jurisprudential preoccupation with defining through legal rules the boundaries of that which is one’s own and hence what is constitutive of one’s rightful entitlement. The distinctively juridical quality of the relationship between self and others developed in Roman law,<sup>162</sup> which used the term *ius* to qualify the legal order’s recognition of powers over things and persons, was key to the utterly *jurisprudential* register in which European political thought unfolded.<sup>163</sup> Early modern natural right discourses exemplified this jurisprudential register by mobilising neo-Roman concepts and categories to recast the foundations of political and economic order in terms of relations grounded in *ius* that conferred power and authority over that which is one’s own (*sui*). What was one’s own was not only property (made in an originary sense by mixing one’s will with it through labour, and then transferred and allocated by further acts of will such as contracts and gifts), but also one’s liberty, in the sense of not being subjected to the will of another except by an exercise of one’s own will.<sup>164</sup> Selves, wills, and property were the natural-legal building blocks of artificial legal and political orders, but the question of what happened to natural rights once such orders were created became one of the fundamental problematics of rights-thinking from 1600 to 1850.<sup>165</sup>

The language of natural right was never categorically divorced from the Athenian register of justice as fair shares; the latter returned in the form of radical demands for a right to one’s share of political authority as popular sovereignty, and as a correlative demand for a share of the economic whole made possible by pooling

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<sup>161</sup> C. Menke, *Critique of Rights* (2020) 37. Menke goes on to say: ‘right as one’s own is what is commensurate or corresponds to each person as he is. Just as arithmetical equality of rectification presupposes that distribution disrupted by loss was rectified, so the proportional equality of exchange consists in the realization of goods and rendering of services according to their relative significance in the life of the community – in the satisfaction of needs whose regulation is the state’s political responsibility.’ (29).

<sup>162</sup> See A. Schiavone, *The Invention of Law in the West* (2012); A. Schiavone, *The Pursuit of Equality in the West* (2022).

<sup>163</sup> See for a recent example, Skinner, ‘On Neo-Roman Liberty: A Response and a Reassessment,’ in H. Dawson and A. de Dijn (eds), *Rethinking Liberty before Liberalism* (2022) 233.

<sup>164</sup> See Skinner, ‘Rethinking Liberty in the English Revolution,’ in Q. Skinner, *From Humanism to Hobbes* (2018) 139, at 156-7; Edelstein (n. 156); Bourke (n. 99).

<sup>165</sup> Edelstein (n. 156) chapter 1.

one's natural rights to create society and polity. It is this grammar of collective natural right that I excavate below, and argue to be a critical and powerful antecedent to the constitutionalisation of social rights explicated above.

### A. Collective Natural Right in English Radicalism and French Jacobinism

The radical thought of the English revolution combined the natural right of self-proprietorship (ownership over one's self as the condition sine qua non of liberty) with a natural jurisprudence of common endowment, which challenged the justice of enclosure and concentration of agricultural lands – and the legitimacy of unconstrained private property accumulation more generally.<sup>166</sup> This articulation of sovereignty as an emanation of the Body of the People also brought with it a correlative supposition: that equal shares of political authority implied fair shares of material resources essential to livelihoods.<sup>167</sup> Political justice implied the means to not be subjected to the arbitrary will of those with vastly superior means, lest radical unfreedom return through the backdoor of the polity in the form of concentrations of land and livelihood in the hands of a select few.

This lineage of natural right was decidedly collective: individuals together exercise natural rights as a People, in order to found a non-tyrannical political order but also to restore or recover a rightful portion of the whole that may have been usurped or excessively appropriated under unjust or corrupted political arrangements. Part and parcel of this collective natural right *topos* is a problematic of distribution, especially of land, as a critical litmus test for conformity with requirements of natural justice. Spence, Price and Paine would elaborate, in different ways, some of these themes, and the distinction between the right to live (in these sense of subsistence) and the right to a just share of the whole was not sharply drawn.<sup>168</sup> The last

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<sup>166</sup> S. Marks, *A False Tree of Liberty: Human Rights in Radical Thought* (2019) 92-3.

<sup>167</sup> See Susan Marks' reconstruction of the Putney debates and Levellers' pamphlets on this point, highlighting the criticism of the reduction of independent farmers to wage-labour, understood as a form of servitude precisely because of the subjection to the arbitrary will of another it entailed: *ibid.* chapter 4.

<sup>168</sup> Marks (n. 163) chapters 6-8. Paine's *Agrarian Justice* can be construed as a kind of sufficientarianism, but it seems to me this reading must be balanced with his strong insistence on originary (not historical) rights as rights held immediately of God and only overlain later by historical rights such as property, which can well be acquired unjustly due to failing to give a fair price to labour: 'All accumulation, therefore, of personal property, beyond what a man's own hands produce, is derived to him by living in society; and he owes on every principle of justice, of gratitude, and of civilization, a part of that accumulation back again to society from whence

quarter of the 18<sup>th</sup> century saw the emergence of radicalism as a coherent political program, and under the star of French Revolutionary ferment, radicalism ‘became a vehicle of plebeian political aspirations from the 1790s.’<sup>169</sup> Mixing a diagnosis of economic ills with a critique of political exclusion, radicalism became ‘a critique of corrupting effects of the concentration of political power and its corrosive influence upon a society deprived of proper means of political representation.’<sup>170</sup> The French Revolutionary terror ‘led to a general retreat from the language of rights on the part of moderate Whigs and the adoption of a language of “commerce, manners and civilisation”’<sup>171</sup> and nineteenth British political thought was notable for its turn from natural right to utility.<sup>172</sup> The ‘natural rights constitutionalism’ spawned by the English civil war, which had been so influential in the New England colonies over the 18<sup>th</sup> century,<sup>173</sup> would wane. But languages of collective natural rights – inspired both by English radical thought and by the Jacobin constitution in France – would re-emerge in the first part of the nineteenth century among nascent working class and popular movements associated with Chartism.<sup>174</sup>

On the other side of the Channel, a different but compatible idea of collective natural right was emerging from 1700, one that through the nineteenth century would deeply shape the terms through which a nascent market society would be contested. Edelstein has recently highlighted the emergence of *social naturalism* in 18<sup>th</sup> century France, which combined the jurisprudential language of natural right with arguments about their immanent realisation within a well-constituted social order. He observes that ‘beginning sporadically in the 1750s, then accelerating in the 1760s, French authors such as Diderot, Helvétius,

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*the whole came.* This is putting the matter on a general principle, and perhaps it is best to do so; for if we examine the case minutely it will be found that the accumulation of personal property is, in many instances, the effect of paying too little for the labour that produced it.’ T. Paine, *Agrarian Justice Opposed to Agrarian Law and to Agrarian Monopoly; being a plan for Meliorating the Condition of Man by Creating in Every Nation a National Fund* (1796, 1819 edition) 16.

<sup>169</sup> Stedman Jones, ‘The Language of Chartism,’ in *The Chartist Experience: Studies in Working-Class Radicalism and Culture, 1830-60* (1982) 3, at 12. E. Royle, *Chartism* (1996, 3<sup>rd</sup> ed.) 8-9.

<sup>170</sup> Stedman Jones (n. 166) 12.

<sup>171</sup> G. Stedman Jones, *An End to Poverty? A Historical Debate* (2008) 106-7.

<sup>172</sup> Conti, ‘On the Nadir of Natural Rights Theory in Nineteenth-Century Britain,’ in Edelstein and Pitts (n. 95) forthcoming; Foucault (n. 87) 41.

<sup>173</sup> Edelstein (n. 156) 145-147.

<sup>174</sup> Stedman Jones, ‘The Language of Chartism’ (n. 166); Stedman Jones, *An End to Poverty?* (n. 168) 106-7. Royle (n. 166).

d'Holbach, Raynal, Condorcet, and even future revolutionary leader Mirabeau ... maintained that “society is just, good, worthy of our love, when it fulfils the physical needs of its members, and guarantees their safety, freedom and possession of their natural rights.”<sup>175</sup> On this account, the creation of society and political order did not transfer natural rights to the sovereign, but maintained them as part of an immanent *ordre naturel* that positive sovereign law should strive to realise. Society, including political and commercial society, became the ‘ultimate preserve of natural rights.’<sup>176</sup>

This social naturalism had a curious double aspect: on the one hand, it underwrote Physiocratic arguments that, in respect of the natural laws of commercial society, positive law should govern as little as necessary (*laissez faire*), and natural order was epitomised by the emergence of self-organising dynamics attributed to commerce and trade.<sup>177</sup> On the other hand, the notion of society as a natural order also brought with it an objective standard of justice, determined by natural laws and the realisation of natural right within society. Pre-Physiocratic Jansenist theologian and Roman lawyer, Jean Domat, argued that civil laws of contract and property approximated the requirements of a natural social and legal order; but also part of this order was the duty placed on all members of society to impart ‘to those who have Nothing’ a ‘Share of those Goods which they have a right to...’<sup>178</sup> Leading Physiocrat, Quesnay, concluded that even within a sovereign order, ‘the portion granted to every man will belong to him by natural and legitimate right [...]’<sup>179</sup> This portion was the fair share of goods guaranteed to every man by the necessarily just natural order. In Quesnay’s and other Physiocratic theories, the natural right to a fair share did not imply social equality – those who make a ‘bad use of our liberty’ have only themselves to blame, and to eliminate inequality would thus contradict the order of society as it emerged by permitting use of natural liberty. But, the just natural order in society did entail collective duties towards members of society who are unable to work through no

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<sup>175</sup> Edelstein (n. 156) 74, footnote to quotation from Burlamaqui omitted.

<sup>176</sup> Edelstein (n. 156) 79.

<sup>177</sup> M. Foucault, *Society Must be Defended* (2003); Foucault, *Birth of Biopolitics* (n. 87); A. Funkenstein, *Theology and the Scientific Imagination From The Middle Ages to the Seventeenth Century* (1986); J. Sheehan and D. Wahrman, *Invisible Hands. Self-Organization and the Eighteenth Century* (2015).

<sup>178</sup> J. Domat, *The Civil Law in its Natural Order: Together with the Public Law* (1722), cited in Edelstein (n. 156) 125.

<sup>179</sup> Cited in Edelstein (n. 156) 76.

fault of their own.<sup>180</sup> Later Physiocrats, including Quesnay's pupil Pierre Paul Le Mercier de la Riviere, finance minister (*contrôleur générale de finance*) Anne-Robert Jacques Turgot, and Pierre Samuel Dupont de Nemours, would all mention a right to assistance or public welfare for individuals incapable of working. Turgot would argue that 'the poor have unquestionable rights on the abundance of the rich,'<sup>181</sup> while Dupont du Nemours would argue for an article guaranteeing the right to public assistance in the 1789 Declaration of Rights of Man and Citizen.<sup>182</sup>

The right to a fair share required by natural law was a gloss on Ulpian's definition of justice as 'the obligation to render to each person what belongs to him'" (*Iustitia est constans et perpetua voluntas ius suum cuique tribuens*) – a legal maxim that became a political dictum by which to frame the requirements of justice in a natural social order. The social naturalist theories of the Physiocrats understood the meaning of fair shares as amounting to a right to assistance to achieve a vital minimum necessary for livelihoods, not as a claim to egalitarianism. But, perhaps despite themselves and the natural order of commerce they wished to canonise, the transposition of *the social* as the bearer and guarantor of natural right and natural law, lent itself readily to a powerful transformation in the idea of what justice really demanded and who might demand it. Condorcet argued that the realisation of natural rights in society was the duty of Government, and that duty was owed *to the nation* on behalf of all its members.<sup>183</sup> An older corporatist vernacular of 'les droit nationaux' ascribed to *each* Estate became, in anticipation of the calling of the Estates General, *les droits de la nation* that vested in a collective body which represented the people. Crucially, the task of such a body would be 'to establish the rights of the nation on a firm basis, by founding them on the natural rights of every human society.'<sup>184</sup> And one such natural right was the right to a fair share, the meaning of which would be subjected to a different understanding by the eruption of the democratic political egalitarianism of Jacobinism.

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<sup>180</sup> F. Quesnay, *Essai Physique sur l'oeconomie animale* (1736), cited in Edelstein (n. 156) 80.

<sup>181</sup> Cited in Edelstein, 'Public Welfare and the Natural Order: On the Theological and Free-Market Sources of Socio-economic Rights,' in Jensen and Walton (n. 93) 47, at 55.

<sup>182</sup> In the *Cabier de doléances* that he authored for Dupont de Nemours, he demanded that 'Anyone in a state of infancy, impotence, invalidity, or disability, has a right to free assistance from other men.' Edelstein (n. 156) 83.

<sup>183</sup> Edelstein (n. 156) 83.

<sup>184</sup> Comte d'Antraigues, *Mémoire sur les Etats Généraux* (1788), in Edelstein (n. 156) 94.

Proposals for the inclusion of social rights – such as education, work, and subsistence – circulated widely during the drafting of the 1789 Declaration of the Rights of Man.<sup>185</sup> Walton notes that the language of such model declarations ‘were often coupled with duties and expressed in highly egalitarian language.’<sup>186</sup> Early in the Revolution, social rights declarations expressed a range of different inspirations: Physiocratic, as we have seen, but also religious and sentimental. The Physiocratic model of social provisioning, embedded as it was in the embrace of commercial society, was criticised by Jacobins as resting on a hierarchical ideal of charity by the wealthy towards the poor and thus replicating the ‘insolent generosity of [the people’s] former tyrants.’<sup>187</sup> Walton, in a recent revisiting of the 1789 and 1793 debates, concludes that social rights were not included in the first Declaration because the National Assembly was bitterly divided on the possibility of financing them through taxes, and because many believed that (following Physiocratic theories, which were expounded at length in Assembly debates) economic liberalisation would be the vehicle for achieving social rights. Demands to address indigency, poverty and mendicancy grew, and numerous proposals were put to the Assembly’s committees to recognise social assistance as a fundamental right, but the principle of voluntary assistance held sway until the multiple crises of 1793. With the execution of the King in January, food riots in Paris from February, and civil and foreign wars underway, Revolutionaries ‘largely agreed that [social rights] should be included in the republican constitution ... but remained sharply divided over financing them.’<sup>188</sup> Debates about the 1793 constitution reconstructed by Walton show a deeper debate about whether a liberal economy would effectively ensure the natural right to assistance, or whether the National Assembly should declare limits to property rights in order to tax wealth and set prices as a means of promoting social assistance and greater social equality.<sup>189</sup> The final draft of 26 April 1793 contained social rights as well as guarantees of private property and free markets, reflecting a ‘concession to the sans-culottes

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<sup>185</sup> Gauchet counted 13 model declarations including social rights, while Walton counts 14: M. Gauchet, *La Révolution des droits de l’homme* (1989), 96; Walton, ‘Who Pays? Social Rights and the French Revolution’ in Jensen and Walton (n. 93) 63, at 64 n 6.

<sup>186</sup> Walton, ‘Who Pays’ (n. 182) 65.

<sup>187</sup> Director of the Bureau d’Esprit Public, François-Xavier Lanthenas, September 1792, cited in Walton ‘Who Pays’ (n. 182) 68.

<sup>188</sup> *Ibid.* 73.

<sup>189</sup> *Ibid.* 74.



and a pragmatic means to win public support for a regime desperately in need of soldiers.<sup>190</sup> The effectiveness of Jacobin social assistance in relieving the economic crises faced by the poor in Revolutionary France was weak;<sup>191</sup> but what does appear to have flourished was an articulation of social right which is distinct from charity and voluntary assistance, and in which the notion of a ‘fair share’ as the foundation of the duty to guarantee such rights, played a more significant role: “The 1793 Declaration of Rights is both the consecration of “bourgeois individualism,” frowned on by Karl Marx but praised by Alexis de Tocqueville, and the validation of “social justice,” frowned on by Tocqueville but preached by Jean Jaurés.”<sup>192</sup>

Confronted by war-induced scarcity and a heavy reliance on roving deputies acting as Commissioners to govern in the absence of a consolidated post-revolutionary state apparatus, Jacobin commitments to social assistance, land reform and progressive taxation were only ever very incompletely implemented. But the agenda was articulated in ways which became totemic for 19<sup>th</sup> century debates about the connection between social reform and a just political order.<sup>193</sup> An important contributor to the text of the 1793 Declaration, Gilbert Romme (mathematician and leading Jacobin member of the *Comité d’instruction publique*) explained the logic of social rights which expressed clearly the natural-rights-ist grammar of fair shares: ‘Men, in joining together in society, pool all their natural rights, in order to wage a common and successful struggle against the various obstacles which stand in the way of their well-being. Social rights are the share each man gets from the common pool.’<sup>194</sup> This right to a fair share reflected the first ‘social law’ which overrode all others, according to Robespierre, by everything which was essential to preserve life was a ‘property common to society as a whole.’<sup>195</sup> The distinction between subsistence and social equality remained blurry in Jacobin discourses,<sup>196</sup> but critical for our purposes is the rigorous logic of fair shares – a right of the whole, not of the

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<sup>190</sup> Ibid. 75.

<sup>191</sup> Ibid. 78.

<sup>192</sup> J. P. Gross, *Fair Shares for All: Jacob Egalitarianism in Practice* (1996) 45.

<sup>193</sup> See especially the sweeping review in Moyn, *Not Enough* (n. 4), chapter 1, and the more detailed dissection of the Jacobin legacy for the language of nineteenth century political thought in: Chambost, ‘Socialist Visions of Direct Democracy: The Mid-Century Crisis of Popular Sovereignty and the Constitutional Legacy of the Jacobins,’ in D. Moggach and G. Stedman Jones (eds), *The 1848 Revolutions and European Political Thought* (2018) 94.

<sup>194</sup> Preamble to Romme’s draft declaration 1793, cited in Gross (n. 189) 55.

<sup>195</sup> Ibid. 69-70.

<sup>196</sup> As stressed by Moyn, *Not Enough* (n. 4) chapter 1.

individual – as taking priority over the individual right of property and the self-organisation of the market. The ambition was not necessarily equal material conditions, but an equality of common livelihoods through the opportunity to receive the fruits of one’s own labour. Nonetheless man’s right to a fair share of his work entailed, on this understanding, the collective duty to ensure that work was available and even to supply the means of work where tools were in scarce supply.<sup>197</sup> Jacobin representatives imagined, and in some cases realised, public works such as highway repairs and bridge building, financed by progressive taxes levied on the wealthy. Rejecting a comparison with the hated *corvée*, Jacobin commissioners maintained that such public works provide a wage covering basic needs and even access to a provident fund in case of illness, accident or incapacity. Underpinning the provision of work was not only protection from immiseration, but also claim to a necessary base line for political equality. Physician Jean-Baptiste Bo explained to provincial audiences that just as no citizen could be allowed to ‘buy another,’ no poor man could be obliged to ‘sell himself.’ ‘It is high time to erase this demarcation between the citizen who enjoys and he who labours: the Constitution endows them with the same political existence and we are bound by morality to do so.’<sup>198</sup> As Gross summarises, the notion of a right to work here went beyond subsistence and

opened up a new vista of systematic job creation and the possibility of a labor market which would not be exclusively determined by the law of supply and demand. The affirmation of the right to work imposed on the state the ominous contractual obligation to provide it, and the notion of a contract of employment between equals generated recognition of a fair salary for services rendered ... A sense of collective responsibility was beginning to permeate economic and social relationships ...<sup>199</sup>

The Thermidorean reaction would sweep away the structures by which the Jacobin had sought to govern France,<sup>200</sup> ending – eventually – the Terror, and abolishing universal suffrage in its Constitution of Year III (1795). A property qualification for electoral participation was re-introduced, and an ‘aristocracy of wealth’ re-consecrated: ‘Society in France, as elsewhere in Europe, was now set on a competitive and confrontational course, breeding further inequalities and class distinctions, and blurring the legitimacy of communal obligations.’<sup>201</sup>

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<sup>197</sup> Gross (n. 189) 149.

<sup>198</sup> Speech cited in Gross (n. 189) 152.

<sup>199</sup> Gross (n. 189) 153.

<sup>200</sup> A. Cobban, *A History of Modern France*, vol. 1, 1715-1799 (1965) 250.

<sup>201</sup> Gross (n. 189) 204.

## **B. Into the Nineteenth Century – The Right to Work, the Right to the Whole Produce of Labour, and Social Democracy**

The topoi of collective natural right linked several diverse kinds of claims together around a core notion of shares in a political and economic whole. To not be at the mercy of another individual for the basic requirements of subsistence was necessary to avoid a condition similar to slavery: common livelihood required protection to avoid subjection to the arbitrary will of another who would otherwise control the conditions of such livelihood. This is an extension of the logic of self-proprietty as liberty. But one's right to a fair share of the whole was also iterated as part of the idea of a right to work and receive a fair reward for the fruits of labour, where labour was the foundation of the common wealth of a society. The idea that productive uses of labour were indispensable to increasing wealth was common to both classical political economy ('the labour theory of value' accepted by Smith, Ricardo and Marx alike) and political thought. Ideas of collective provision (of work, means of work, subsistence and so on) rested on an implied claim and right by a collective agent *to the whole* product of this labour (Romme's 'common pool' for example) in order to guarantee its fair distribution: the duty to preserve natural right *within* the social correlates with a right *of* the social to ensure a fair share for all.

The nineteenth century Chartist movement in England, Wales and Scotland would return to the language of natural right to make collective claims for political and social fair shares.<sup>202</sup> They challenged the uninterrupted exclusion of the property-less from political franchise in Britain, maintaining that the transition to political society preserved those natural rights which conduced to a cooperative and democratic society of equals.<sup>203</sup> A political order which did not protect those rights failed to meet the requirements of natural jurisprudence. Cardinal among them was the right to vote for all, and the right to a means of livelihood which did not compel members of society to subject themselves to the tyrannical power of those who controlled the means by which labour could earn a decent living. The proposal to abolish the Poor Laws in 1834 provoked a

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<sup>202</sup> Gibson, 'Natural Right and the Intellectual Context of Early Chartist Thought,' 84 *History Workshop Journal* (2017) 194.

<sup>203</sup> *Ibid.* 197.

‘great popular movement,’<sup>204</sup> engendering a unity of purpose among nascent working men’s associations, factory movements, artisan guilds, journeymen, printers and newsagents, shopkeepers and tradesmen, that came together under the Chartist banner.<sup>205</sup>

The Chartists’ ‘natural rights constitutionalism’<sup>206</sup> appealed to a wide cross-section of working people directly affected by the adolescence of the market economy taking root in Britain and across Europe. Its message was that the litany of social and economic grievances of a generation – ‘overworked or unemployed, ill-paid, badly housed, de-skilled, exploited and suffering from what were seen as the effects of the Whig “class” legislation of the 1830s’<sup>207</sup> – was the direct result of the corrupting effects of the concentration of political power through a violation of the natural right of suffrage<sup>208</sup>. The unnatural monopoly of political power enabled the unnatural concentration of economic means, with the latter resulting in a deprivation of labour’s natural right to the fruits of its work.<sup>209</sup> The political despotism of the propertied classes, on this narrative, led directly to an economic despotism that destroyed the livelihoods of working people and rendered them unable to exercise the self-proprietorship necessary for natural liberty. The ‘combination and tyranny of capitalists’<sup>210</sup> could not be tamed because ‘until the proletarian classes are fully and faithfully represented, justice in legislation will never be rendered unto them.’<sup>211</sup> The transformation of political institutions expected to be brought about by universal suffrage, would also transform the economic domination that the unenfranchised suffered at the hands of the enfranchised. Restoring the natural right of suffrage would reverse the subjection of labour to the tyranny of the ‘millocrat,’ ‘cotton lord,’ ‘steam aristocracy’ and others who, because of their proprietorship of land and money, had taken ‘unlimited control

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<sup>204</sup> Royle (n. 166) 22. Gatherings at Chartist which leaders spoke in Hartshead Moor, Glasgow and Birmingham attracted between 100,000 and 250,000 people in 1837-1838, and in 1839 7000 colliers attempted, unsuccessfully, to seize the town of Newport and declare a republic.

<sup>205</sup> Royle (n. 166) chapter 10.

<sup>206</sup> Gibson (n. 199); Edelstein (n. 156) chapter 6.

<sup>207</sup> Royle (n. 166) 93.

<sup>208</sup> See Stedman Jones, ‘Elusive Signifiers: 1848 and the Language of Class Struggle,’ in Moggach and Stedman Jones (n. 190) 452, at 435.

<sup>209</sup> Stedman Jones, ‘The Language of Chartism’ (n. 166) 17, citing Cobbett (1817): ‘Whatever the pride of rank or riches or of scholarship may have induced some men to believe, or affect to believe, the real strength and all the resources of the country, have ever sprung and ever must spring from the labour of its people.’

<sup>210</sup> Objects of the London Democratic Association, April 1838.

<sup>211</sup> Ibid.

over the productive power of the country. Under this system, the producer [worker] receives not what he earns ... not the value of his produce in money or other produce, but what the parties choose to give him.<sup>212</sup>

The key demand of the People's Charter, proposed by Chartists as a draft Parliamentary Bill was what we would call a political right – the right to vote – but within the context of natural rights constitutionalism, it was inextricably linked to a demand for a fair share of the political *and social* whole: to end the possessing classes' monopoly on legislation was to turn legislation in to a means of restoring to the unenfranchised what was due to them as a matter of justice, not just fair wages but also 'abridgment of the hours of labour in factories and workshops ... the total abolition of infant labour ... [and] the destruction of inequality, and the establishment of general happiness.'<sup>213</sup> The editor of the *Poor Man's Guardian* (an underground paper which sold 16,000 copies a week at its peak), declared: 'Knaves will tell you, that it is because you have no property that you are unrepresented. I tell you, on the contrary, it is because you are unrepresented that you have no property.'<sup>214</sup> At the 1838 Kersal Moor meeting, which reportedly attracted over a 100,000 people to elect a Convention that would press the Parliament to adopt the Charter, popular Northern minister JR Stephens declared the right to vote to be a 'knife and fork issue after all.' He articulated the right to vote as essentially *entailing* a right to a parity of decent livelihood among working people – more, certainly, than mere subsistence, and approximating a kind of common standard of living owed to all who work:

This question of Universal Suffrage was a knife and fork question after all; this question was a bread and cheese question ...; and if any man ask him (Stephens) what he meant by Universal Suffrage, he would answer, that every working man in the land had a right to have a good coat to his back, a comfortable abode in which to shelter himself and his family, a good dinner upon his table, and no more work than was necessary for keeping him in health, and as much wages for that work as would keep him in plenty, and afford him the enjoyment of all the blessings of life which a reasonable man could desire.<sup>215</sup>

The political fortunes of Chartism waned after 1840, in no small part because it had been a 'hunger movement, the outcome of intolerable and widespread distress. As conditions improved with the rapid

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<sup>212</sup> *Poor Man's Guardian*, 1835, quoted in Stedman Jones, 'The Language of Chartism' (n. 166) 20.

<sup>213</sup> Objects of the London Democratic Association.

<sup>214</sup> Bornterre O'Brien, quoted in Royle (n. 166) 92-3.

<sup>215</sup> *Northern Star*, 29 September 1838, document 2 extracted in Royle (n. 166) 96-7.

growth of British world trade, the repressiveness both of the Government and of the employers was relaxed.<sup>216</sup> Rising wages, declining unemployment and piece meal legislative reform of working hours and conditions (such as the Ten Hours Act of 1947), ‘seemed to give the lie to the Chartist contention that without the Charter nothing could be done to improve the condition of the people.’<sup>217</sup> Eclipsed by trade unionism, Fabianism and Christian ethical movements from the second half of the 19<sup>th</sup> century, natural rights constitutionalism as a register for articulating and demanding what we would now call social rights also declined in the British context – abetted no doubt by the Whig, Tory and middle-class aversion to natural rights talk under the combined influence of Burke and Bentham.<sup>218</sup>

But for our purposes what is interesting is the framing of a critique of the social and economic consequences of capitalism within a language of natural right that can be understood as collective and constitutional, and which imperatively unites the achievement of democratic egalitarian citizenship – and the protection of natural liberty - with the taming of monopolies of political and economic power. Particular kinds of entitlements and demands (food, housing, education, a certain level of comfort, leisure) are expressions of a natural social law that must be guaranteed and reproduced through the conscious political and economic decisions of an authorised collective agent (or group of them). For the Chartists, this agent was the Parliament, an institution of political society which, for its legitimacy and continued conformity with natural legality, had to ensure the full and faithful representation of the People through Universal Suffrage, *in order to be able* to deliver justice to them in respect of the social harms flowing from the concentration of money and property in the hands of a few. The latter implied a reorganisation of economic authority and a redistribution of the fruits of labour, which had accumulated unjustly to those monopolising political power. The resulting grammar of social right is a kind of natural jurisprudence for the dispossessed and non-possessing classes, which demanded both liberty (in the sense of self-proprietty) and justice (in the sense of giving each their due as part of the whole). The *sum cuique* of each political equal implies an injunction against permitting the *sum* of the proprietors of money and land from entailing a *cuique* which defied or even

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<sup>216</sup> G. D. H. Cole, *British Working Class Politics 1832-1914* (1941) 22.

<sup>217</sup> Ibid.

<sup>218</sup> Conti (n. 169).

destroyed the nature of public power as a common, collective agent capable of representing and acting on behalf of the whole. A right to one's own becomes a right to a fair share, in order to protect against the real risk in market society that one's own becomes so disproportionately engrossed, and another's so drastically diminished, that public power ceases to be so and becomes the arbitrary private will of individuals – the classical definition of corruption itself.<sup>219</sup>

In France after 1799, the grammar of social rights as collective natural right would have an enduring influence in republican and proto-socialist responses to the 'social question,' and to the liberal concern with limiting universal suffrage. This influence would not be in the form of the direct enumeration of rights as legal entitlements. Instead – and more powerfully – a renewed appropriation of Jacobin rhetorics of natural social right and republicanism combined with a critique of the observed dynamics of market society, to outline a concept of the democratic-social state *as governor and regulator of private property and private economic right*.

In place of the protective restrictions of the corporatist structures (such as guilds) swept away by the Revolution, and after the brief Jacobin interregnum, France by the early 1800s had adopted a rigorous regime of *propriétarianisme* and liberal political economy.<sup>220</sup> Popular sovereignty, in the form of universal suffrage, was blamed for the excesses of Jacobinism and the Terror by ultra-royalists and liberals alike; the former declared popular sovereignty a 'juridical monster,' while the latter insisted that a property-based franchise was needed to ensure that popular sovereignty's pathologies could be tamed by the superior reasoning capacities of 'French society's most accomplished and wealthy property-owning members.'<sup>221</sup> While the Jacobins of the 1790s 'overwhelmingly sought to legitimate the principle of private property and generally favoured moral and legal over genuine social equality,'<sup>222</sup> the 1793 constitution continued to inspire French radicals' and socialists' visions of a 'more fully emancipated post-revolutionary society based on the restructuring of the division of labour.'<sup>223</sup>

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<sup>219</sup> Pocock (n.105), 42.

<sup>220</sup> Piketty (n. 18) 120-125.

<sup>221</sup> Chambost (n. 190) 98. These were the so-called *capacitaires* to whom voting rights were limited. Stedman Jones, 'Elusive Signifiers' (n. 205) 440.

<sup>222</sup> Chambost (n. 190) 96 n.8.

<sup>223</sup> Ibid. 96.

Early socialism (derided later as Utopian socialism by Engels<sup>224</sup>) had little interest in natural rights language. It was a quasi-religious and spiritual idea, preoccupied with creating the basis for the political and economic unity of society through scientific knowledge of human psychology and physiology. It responded to the moral and spiritual disorder and crisis of 25 years of revolution, foreign and civil war, and the rapid creation of a market order.<sup>225</sup> The common ambition of early socialist figures such as Owen, Saint-Simon and Fourier, despite very different theories and plans for a new world, was to ‘make it possible for mankind to turn away from sterile philosophical controversy and from the destructive arena of politics and to resolve, in scientific fashion, the problem of social harmony.’<sup>226</sup> The social and economic upheavals attendant upon commercial and industrial revolution would come to be labelled ‘the social question’ for the first time, in 1831.<sup>227</sup> The social truth of an economically liberal market order appeared to its critics and diagnosticians as the antithesis of both community and harmony. Instead, it seemed to sow only conflict, through relentless competition and by deepening the immiseration and precarity of those who, in the last instance, were considered to be the source of the production of all wealth in society – the labouring population.

Swiss political economist Jean Charles Léonard de Sismondi observed in 1824 the tendency towards overproduction and underconsumption in European markets, precipitating crises of profitability that unpredictably imperilled the manufacturing workforce.<sup>228</sup> Human labour, reduced increasingly to operating machines, was at the mercy of a small group of rich manufacturers, who owned the machines: ‘today, a manufacturer, having summoned to himself numerous families, abandons them suddenly without

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<sup>224</sup> F. Engels, ‘Socialism: Utopian and Scientific,’ *Revue Socialiste* (1880), in *Marx and Engels Selected Works*, vol. 3 (1970) 95.

<sup>225</sup> Beecher, ‘Early European Socialism,’ in G. Klosko (ed), *The Oxford Handbook of the History of Political Philosophy* (2011) 369, at 370: ‘the first socialists ... were writing out of a broader sense of social and moral disintegration. They were looking for order and authority in a world torn apart by revolution, and their ideas were presented as a remedy for the collapse of community rather than any specific economic problem.’ See also Stedman Jones, ‘European Socialism from the 1790s to the 1890s,’ in W. Breckman and P. E. Gordon (eds), *The Cambridge History of Modern European Thought*, vol 1. The Nineteenth Century (2019) 196; Rosenblatt, ‘On the need for a Protestant Reformation: Constant, Sismondi, Guizot and Laboulaye,’ in R. Geenens and H. Rosenblatt (eds), *French Liberalism from Montesquieu to the Present Day* (2012) 115, at 127.

<sup>226</sup> Beecher (n. 222) 373.

<sup>227</sup> H. Case, ‘The “Social Question,” 1820-1920,’ *13/3 Modern Intellectual History* (2016) 747, at 756.

<sup>228</sup> Sismondi, ‘De la balance des consommations et des productions,’ *22 Revue Encyclopédique* (1824); Sismondi, ‘Political Economy,’ *Brewster’s Edinburgh Encyclopedia* (1815), cited in Stedman Jones, *An End to Poverty?* (n. 168), 147.



employment, because he has discovered that a steam engine can perform all their work.<sup>229</sup> The stark polarisation between rich and poor – between those who owned the means by which labour could be employed for wages, and those who owned no property and could only sell their labour (called the proletariat by de Sismondi) – was a product not of mere bad luck or a lack of frugality, but of the new reality that ‘a caprice, a rumour on the stock exchange, some distant event happening at the other end of the world can put machines out of action and with them thousands of hands.’<sup>230</sup> French readers of de Sismondi in the 1820s and 1830s concluded that Sismondi had revealed that ‘the battlefield is no longer on the plains, but in the workshops ... This is a true war, where the combatants employ ingenious and powerful machines which on the terrain of pauperism leave millions of workers gasping for breath, men and women, without concern for old age or infancy. It is a serious conflict between different classes of workers ... France appears to oppose England, but capital struggles far more deeply against the worker.’<sup>231</sup>

There were deemed to be two principal pathologies of this ‘great social sore which is termed commerce.’<sup>232</sup> The first was its relentless and destructive competition between producers, which in turn pushed wages to starvation levels and below: ‘who would be blind enough not to see that under the reign of competition the continuous decline of wages necessarily becomes a general law ...? A machine is invented ... one thousand workmen, whom the new machine displaces in the workshops, will knock at the door of the next one and will force down the wages of their fellow workers ... It is nothing but an industrial process by means of which the proletarians are forced to exterminate each other.’<sup>233</sup> The second pathology was the rapid accumulation of wealth by the owners of the machines, now called capitalists, despite the terrible consequences of competition for labour and the continuing downward pressure on wages as the apparent

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<sup>229</sup> J. C. L. Sismondi, *Nouveaux principes d'économie politique*, vol. 1 (1819), cited in Stedman Jones, *An End to Poverty?* (n. 168) 154.

<sup>230</sup> E. Buret, *De la misère des classes laborieuses en Angleterre et en France* (1842), cited in Stedman Jones, *An End to Poverty?* (n. 168) 169.

<sup>231</sup> J. Blanqui, *Histoire de l'économie politique* (1842), cited in Stedman Jones, *An End to Poverty?* (n. 168) 169.

<sup>232</sup> L. Blanc, *Organization of Labor* ([1840] 1848 trans.), 85. Available at [https://www.google.co.uk/books/edition/The\\_Organization\\_of\\_Labor\\_Translated\\_fr/pPn9ie3knDYC?hl=en&gbpv=1&pg=PP8&printsec=frontcover](https://www.google.co.uk/books/edition/The_Organization_of_Labor_Translated_fr/pPn9ie3knDYC?hl=en&gbpv=1&pg=PP8&printsec=frontcover) (last accessed 13 March 2023).

<sup>233</sup> Blanc, *ibid*, 15. For de Sismondi's direct influence on Blanc, see L. A. Loubère, *Louis Blanc: His Life and His Contribution to the Rise of French Jacobin-Socialism* (1961) 32-33.

origin of this wealth. The latter phenomenon added a strong sense of injustice to the injury of labour's immiseration. It remained the common view among political economists and lay people that wealth produced in society was a result of human labour not inanimate objects, and that unearned income grossly disproportionate to applied labour was a pure rent, seized from those who worked by means of a legal order which expansively protected capitalists' property rights.<sup>234</sup> A vast imbalance in property and income was not *only* a problem of guaranteeing subsistence to those who might otherwise starve or be homeless; it was also, within this theory, a question of who or what was entitled to the value of the whole produce of labour *and in what proportion*: 'the condition of the worker has become something sacred and precious ... and henceforth, the progress of wealth will not be considered as truly useful, except to the extent that its benefits will spread out to include those who will take part. The principle has been posed, it is for systems of legislation to draw out the consequences.'<sup>235</sup>

This diagnosis of market society had immediate political and institutional implications. The resolution of the social question became directly tied to the emancipation of labour from the risks of immiseration through relentless competition, *and* from a legal order which enabled *too much* of the whole product of labour to be seized by those owning capital and real property. *How much* of a fair share of the whole product amounted to the just share, varied according to the relative radicalism of different visions of a new political and legal order, from reformist to revolutionary. But common to these developing democratic and social discourses was the idea that some collective agent or set of them (associations or cooperatives of workers, or, a democratic state constituted through universal suffrage), would need to act in order to claim a right over the whole product of labour, if not to confiscate it entirely, then certainly in order to temper, improve or correct its distribution. Reflecting in 1886 on almost a century of socialist thought, Austrian jurist Anton Menger concluded that 'these two conceptions of natural rights – the right to the whole produce of labour and the right to subsistence' both implied an 'organic modification of traditional forms of property.'<sup>236</sup>

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<sup>234</sup> See the review of various theories of injustice derived from the labour theory of value in A. Menger, *The Right to the Whole Produce of Labor* ([1886] 1899), especially at 54.

<sup>235</sup> Blanqui (1842) 10, in Stedman Jones, *An End to Poverty?* (n. 168) 165.

<sup>236</sup> Menger (n. 231) 177.

The Society of the Rights of Man, a Parisian political club founded in 1833 to revive Jacobin political ideas, drew in Fourierists and Saint-Simonians, but also a new generation of radicals for whom ‘the labour question’ was *the* political question of the epoch.<sup>237</sup> The demand to regulate and govern the destructive competition of market society, and assure to labour a just share of the value of the product of labour, was articulated by neo-Jacobin writers such as Blanc and Considérant in terms of a *right to work*. This was not a positive legal right claimed against the state. It was an idea of right which expressed an order of political, social and economic relations that amended or replaced the ruthless dynamics of competition in a market society. In Considérant’s articulation (following Fourier), the ‘right to work’ was a natural right preserved within society that reflected the right of man to benefit from the common pool of wealth made possible by the creation of society and produced through labour.<sup>238</sup> The right to work entailed *both* the right to subsistence by restraining the ruthless competition and profiteering considered responsible for the immiseration of labour, *and* the right to a just share of the whole by regulating the conditions under which labour was performed and rewarded – including by reorganising the structure of production in to labour associations and cooperatives under the supervision of the state.<sup>239</sup>

The neo-Jacobins went on to have a decisive influence on the political discourses surrounding the 1848 revolutions in France, and beyond. Their ideas retained the fundamental structure of what I have called ‘collective natural rights’ thinking, in so far as they anticipated the realisation of natural rights *within* society through the creation and intervention of a unified public power. The fundamental purpose and nature of this power was reflected in its democratic constitution as a republic, through universal suffrage. The democratic constitution of the republican state within this collective natural rights grammar entailed the right, and need, to reorganise social and economic relations through legislative power, in order to end the exploitation of labour and prevent the destruction of social solidarity through excessive wealth accumulation.<sup>240</sup> Blanc, for

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<sup>237</sup> Loubère (n. 230) and Loubère, ‘Intellectual Origins of Neo-Jacobinism,’ 4/3 *International Review of Social History* (1959) 415.

<sup>238</sup> Menger on Considérant, (n. 231) 19.

<sup>239</sup> See Gerçek, ‘The “Social Question” as a Democratic Question: Louis Blanc’s *Organization of Labor*,’ *Modern Intellectual History* (2022) 1, <https://doi.org/10.1017/S1479244322000270>.

<sup>240</sup> Loubère, ‘Intellectual Origins’ (n. 234) 420-423, 425; Loubère, *Louis Blanc* (n. 230), 26, 56.

example, argued that ‘men could have no other goal when forming societies than to mutually protect themselves against the undertakings of the most cunning, the most audacious and the strongest. In this way, the idea of the state is born precisely from the need to protect against tyranny.’<sup>241</sup> Included in Blanc’s typology of tyranny was ‘the tyranny of property over non-proprietors ... [which is] worse than that of the ancient regime despots since it is polymorphous and invisible, holds no one to account, evolves in a framework of legal equality, and dons the mask of liberty, allowing each of society’s members to enjoy what he or she has required.’<sup>242</sup> The democratic state must be placed above such individual tyrannies in order to constitute the real path to liberty, its social power being ‘necessary for the development of an authentic individualism, one that enables each person to design and shape his or her existence without succumbing to the will of others, thus using the intellectual (knowledge) and material (social security, right to credit and to work) means that only a democratic state can guarantee for all.’<sup>243</sup>

The demand for a ‘right to work’ was framed in the vernacular of a natural constitutional right, but is better grasped as a synecdoche for the construction and authorisation of a collective agent, in the form of a democratic social state, which would solve the social question through a wide range of interventions in and management of economic and social relationships.<sup>244</sup> In 1843, Blanc glossed ‘the right to work’ as a collection of correlative duties: to the healthy citizen, the state owed work; to the old and infirm, it owed aid and protection; to the young, it owed free and obligatory education.<sup>245</sup> In February 1848, as a member of the

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<sup>241</sup> Louis Blanc, ‘L’Etat dans la démocratie’ (1849), cited in Spitz, ‘The ‘Illiberalism’ of French Liberalism: The Individual and the State in the Thought of Blanc, Dupont-White and Durkheim,’ in Geenens and Rosenblatt (n. 222) 252.

<sup>242</sup> Ibid. 256-7.

<sup>243</sup> Ibid. 257.

<sup>244</sup> Blanc’s friend François Vidal maintained that ‘the right to work, whether we know it or not, necessarily maintains the organization of work; and the organization of work implies the economic transformation of society,’ quoted in P. Rosanvallon, *The New Social Question* (2000) 76. Marx, in his brilliant polemic, *The class struggles in France, 1848 to 1850* (1852) declared the right to work to be ‘the first clumsy formula wherein the revolutionary demands of the proletariat are summarized ... The right to work is, in the bourgeois sense, an absurdity, a miserable, pious wish. But behind the right to work stands the power over capital, the appropriation of the means of production, their subjection to the associated working class, and therefore the abolition of wage labor, of capital and of their mutual relations.’ Karl Marx, *The Class Struggles in France- Part II*, available at <https://www.marxists.org/archive/marx/works/1850/class-struggles-france/ch02.htm> (last visited 13 March 2023).

<sup>245</sup> Loubère, *Louis Blanc* (n. 230) 57, citing the Jacobin-socialist daily newspaper, *Reformé*, 11, 18 September; 18, 22, 27, 28, 30 October; 1, 5 November 1843.

Provisional Government of the Second Republic, Blanc would respond to the Parisian workers' militant demand for the immediate creation of a 'right to work' by the Republic, with a proclamation which pledged 'to guarantee the existence of the worker by labour; it pledges itself to guarantee work to all citizens; it recognizes that workers should associate among themselves to enjoy the legitimate profits of their labor ...'<sup>246</sup> Feminist and Fourierist Jean Deroin argued in the short-lived *Opinion des Femmes* (January to August 1849) that the basic right to life entailed the right to develop one's capacities through 'equal education for all ... the right to work; access to all social functions.'<sup>247</sup> Society itself was based on three principles: the right to consume, 'through the redistribution of the fruits of labour of all according to the needs of each and the necessities of her/his trade;' the right to work, 'through the distribution of the instruments of labour needed to produce, to each according to his trade, in proportion to the means of consumption;' and the right to make sovereign decisions, 'through the equal contribution of all, without sex distinctions ... regarding the means and the fruits of labour.'<sup>248</sup>

The actual right to work created by the Second Republic's proclamation was short-lived, although for 4 months over 100,000 unemployed workers were engaged in the cooperative ateliers created by the provisional government.<sup>249</sup> The shuttering of the national workshops at the initiative of the liberal and conservative members of the government in June 1848 provoked an uprising which was bloodily suppressed, and the final Constitution of the Second Republic would refer only in its preamble to the Republic's duty 'through brotherly help' to 'guarantee the existence of citizens in need, either by offering them a job within the limits of its resources, or distributing assistance to those who cannot work, should their family be unable to do so.'<sup>250</sup> But despite the dramatic political defeats suffered by the neo-Jacobin and social democratic forces in France between June 1848 and December 1851, their ideas and rhetoric had an enduring effect on

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<sup>246</sup> Proclamation of 25 February 1848, quoted in Loubère, *Louis Blanc* (n. 230) 75.

<sup>247</sup> *L'Opinion des femmes*, 28 January 1849, cited by Bouchet, 'Socialist Vicissitudes on the Right to Work in France, 1848-1851,' 33/4 *French History* (2019) 572, at 582.

<sup>248</sup> *L'Opinion des femmes*, August 1849, cited in *ibid.* 582.

<sup>249</sup> Loubère maintains that it cost much less to run the ateliers than it did to suppress the uprising provoked by their abolition: Loubère, *Louis Blanc* (n. 230) 134-135.

<sup>250</sup> Preamble, article VII. Article 13 guaranteed 'the freedom of labour and of industry' and stated that society 'favors and encourages the development of labor' through, *inter alia*, 'the establishment by the State, the departments and the communes, of public works proper for the employment of unoccupied laborers.'

democratic political culture in France and beyond, in the second half of the nineteenth century.<sup>251</sup> Jones notes that after the events of 1848, those ‘committed to republican institutions and social reform ... took the hybrid name *democrats-socialistes*, or *démoc-socs*...’<sup>252</sup> The *démoc-socs* agenda after 1849 rehearsed many of the demands associated with the right to work and its implications:

The *démoc-socs* sought to build a sturdy republican citizenry by alleviating immediate poverty and creating long-term conditions for workers’ and peasants’ independent prosperity ... Labour would be created through public works, particularly on France’s railways, canals, and mines, all of which would be nationalised, and forests and common lands would be opened for grazing, fishing, and the collection of firewood. Long-term economic independence would be fostered by workers’ cooperatives, state-provided cheap credit, and gratuitous primary education. State-run agricultural bazaars would guarantee equitable prices for farmers and a rational distribution of France’s food supply.<sup>253</sup>

*Démoc-socs* failed to win democratic control of the Second Republic, despite attracting a large following among urban workers. But even as the French, German, Hungarian, Austrian revolutions of 1848 all ended in ‘failure, marginalisation, exile, imprisonment, even death’ for many of their protagonists, Christopher Clark reminds us that the political and ideological consequences of these political and social revolutions were felt ‘like a seismic wave [through] European administrations, changing structures and ideas, bringing new priorities into government or reorganizing old ones, reframing political debates ... Many radicals and conservatives moved inwards from the fringes to affiliate with centrist groups close to state authority, bringing with them new ideas about what the state was for.’<sup>254</sup>

## VII. From Natural Social Rights to the Social State

Perhaps one of the most powerful new ideas brought to the centre of politics by the mid-century unrest was one indebted to the radical collective natural rights idea observed, in comparable ways, in the political languages of both English Chartism and neo-Jacobin republican socialism. Both languages invoked a notion of collective right as an expression of an immanent order of justice to be imperatively realized within society,

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<sup>251</sup> Spitz (n. 238) 254.

<sup>252</sup> Jones, ‘French Republicanism after 1848,’ in Moggach and Stedman Jones (n. 190) 70, at 76.

<sup>253</sup> Ibid. 76.

<sup>254</sup> Clark, ‘Why Should We Think About the Revolutions of 1848 Now?’, 41/5 *London Review of Books* (2019); see also Clark, ‘After 1848: The European Revolution in Government,’ 22 *Transactions of the Royal Historical Society* (2012) 171.

and at the same time, as a principle subtending the authority and legitimacy of the collective agent duty-bound to realize that order: the state, or Government.<sup>255</sup> And common to both languages was another critical implication: that democratic political equality required the rigorous restraint of economic inequality, entailing the ‘suppression of the frontier between the political (as the reign of the collective will) and the economic (as the realm of the uncoordinated pursuit of individual interests).’<sup>256</sup>

But who would be the bearer of this collective will? For Blanc, it was the democratic republican state; for mutualists such as Proudhon and those workers’ organisations distrustful of the state’s capture by other classes, it was the workers’ associations themselves, who needed to extend their direct control over the means of production.<sup>257</sup> For another contemporary observer, German state theorist Lorenz von Stein, a strong representative state headed by a unifying monarch, would be the most plausible means through which a public power representing the social whole could create and maintain a stable solution to the social problem. The logic of natural constitutional right disclosed the necessity and inevitability of such a public power, but in order to effectively ameliorate the conflict between labour and capital, it was now necessary to create an administrative power to organise the management of the economic and the social.

Trained in law, von Stein rose to fame in the German Confederation in his early thirties, with his first book entitled *The Socialism and Communism of Contemporary France* (1842).<sup>258</sup> Based on his sojourn in France between 1841 and 1842, von Stein drew on his friendships and associations with leading democratic republican and socialist figures (including Considerant, Blanc, Cabet and Reynaud) to explain to a German audience the nature of the new concept of ‘socialism.’<sup>259</sup> The book was a runaway success, and was ‘fervently

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<sup>255</sup> It is important to register that an influential discourse in mid-19<sup>th</sup> century French socialism looked to a different agent to realise this order of justice: that of workers’ associations themselves: see Hayat, ‘Working-Class Socialism in 1848 in France,’ Moggach and Stedman Jones (n. 190) 120; and Castleton, ‘The Many Revolutions of Pierre-Joseph Proudhon,’ in Moggach and Stedman Jones (n. 190) 39.

<sup>256</sup> Hayat (n. 252) 138.

<sup>257</sup> Proudhon initially supported the idea of organisation of labour and of credit by the state in 1848, including a proposal to nationalise banks. He ultimately repudiated these positions and became a supporter of various kinds of decentralisation, federalism and communalisation; faced with a choice between Bonapartist Caesarism and ‘Anarchy’ in 1851, he preferred the latter, but in later life developed a radical anti-statism: Castleton (n. 252).

<sup>258</sup> L. von Stein, *Der Sozialismus und Communismus des heutigen Frankreichs* (1842).

<sup>259</sup> D. Siclovan, ‘Lorenz von Stein and German Socialism, 1835-1872,’ (2014) (PhD Thesis, Kings College Cambridge).

discussed' among both 'state scientists' and radical Left Hegelians.<sup>260</sup> Von Stein explicitly linked the growth of socialist ideas with the rise of a property-less class, the proletariat, and warned his German readership that the conflict between those who owned property and those who did not, and could not acquire it because of their immiseration, would only intensify and lead to open revolt.<sup>261</sup> His prognosis proved prescient in 1848, and he followed the course of the political and social revolution closely from Kiel, where he had taken up a professorship. In a 3-volume analysis of France's revolutions published in 1850, von Stein argued that the 'social question' was in essence a class conflict, in which one class (the propertied, capitalist class) attained freedom at the expense of the social unfreedom of the other, unpropertied, class (the proletariat).<sup>262</sup> For von Stein, the reversal of this relationship would not create social freedom, but merely invert the hierarchy by replacing the dictatorship of the propertied with the dictatorship of the property-less.<sup>263</sup> Instead, the negative equality promised by natural rights of liberty – which legalised the domination of the propertied over the property-less – required the achievement of the positive equality demanded by the un-propertied through their agitation for universal suffrage and the right to work. The implication of the *démoc-socs* demand for positive equality, according to von Stein, was the equal possibility of 'personal independence' and 'the realization of the idea of personal fulfilment' and 'self-determination' for all.<sup>264</sup> For von Stein, this necessarily entailed a state constituted by universal suffrage, as the *démoc-socs* demanded, but also the *administrative capacity* on the part of that state to overcome the 'the inequality of among men [which] is the result of circumstances, predominantly of property and education.'<sup>265</sup>

The principle of social democracy encompasses universal suffrage in the constitutional realm and the abolition of the social dependence of the working class in the realm of administration. In a social democracy the constitution is the democratic [element] and the administration is the social element ... It is the last stage in the movement of the lower class fighting against its social dependence.<sup>266</sup>

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<sup>260</sup> Ibid. 80. It is highly likely that among the Left Hegelians who read, and was influenced by, Stein's work, was a young Karl Marx: See Mengelberg, 'Lorenz von Stein, His Life and Work,' in L. von Stein, *The History of the Social Movement in France, 1789-1850*, trans. and ed. Mengelberg ([1850] 1964) 25-33.

<sup>261</sup> Siclovan (n. 256) chapter 1.

<sup>262</sup> Von Stein, *The History of the Social Movement in France* (n. 257) 81-83, 88-90.

<sup>263</sup> 'The really successful revolution, therefore, always leads to dictatorship ...' (ibid. 90).

<sup>264</sup> Von Stein, *The History of the Social Movement in France* (n. 257) 90-92.

<sup>265</sup> Von Stein, *The History of the Social Movement in France* (n. 257) 140.

<sup>266</sup> Von Stein, *The History of the Social Movement in France* (n. 257) 88.



In Blanc's and other *démoc-socs'* demand for the right to work, von Stein saw exactly such a movement against social dependence. The realisation of this demand required, *first*, the embrace of social right *through* the constitution of the state (*Verfassung*); and in its *second* necessary moment, a turn to state administration (*Verwaltung*) in order to ensure provision of social goods. The state would thus become not only 'the highest administrative power' but also the 'greatest capitalist.'

Of what use was it to preach love to the proletariat, as did the adherents of Saint-Simon, or to hold out the hope of a future harmony, as did the adherents of Fourier, or to admonish them to follow the commandments of God, as did the religious communists, or to promise them political freedom, as did the democrats? ... But now a practical solution had been presented. The state suddenly appeared in a different light. The state was no longer only the highest administrative power, but also the greatest capitalist. And since, according to the idea of liberty, each individual has equal political rights, each individual was now also entitled to share the capital owned by the state and whatever this capital procured...

This is the main influence of the theory of Louis Blanc ... [I]t taught the proletariat to think of government *not only in terms of the state constitution ... but also in terms of state administration*. From the demand that the state should use its revenues in order to provide better living conditions for the workers originated the aspiration of the proletariat to obtain control of the state in the name and in the spirit of the working class. The social element was here for the first time placed side by side with the political element in the struggle against pseudo-constitutionalism. ... The theory of Louis Blanc about the organization of work marks the beginning of social democracy.<sup>267</sup>

Von Stein discerned a close link between the necessary and demanded role of the state in creating positive equality, and the older (German) traditions of 'state sciences' and cameralism (*Kameralwissenschaft*), leading ultimately to a prognosis of the active intervention of the state in the social condition of society. Adherents to a mutualist socialism, revolutionary communism and revolutionary socialism vehemently rejected von Stein's vision as failing to grasp the true nature of socialism.<sup>268</sup> But his basic argument that the conflict inherent in industrial society could never be resolved by the dictatorship of one class over the other, and instead required a unifying political and social power to realise the possibilities of social freedom for all,<sup>269</sup> found favour amongst a wide range of non- or anti-revolutionary movements after 1848. In the aftermath of Europe's revolutionary upheavals, it was increasingly accepted that 'governance solely by a price system within a *gesellschaftliche* setting might prove insufficient to assure both enough employment and enough social

<sup>267</sup> Von Stein, *The History of the Social Movement in France* (n. 257) 390-391.

<sup>268</sup> Siclovan (n. 256) 110-111.

<sup>269</sup> Stein argued that a monarchical state was best suited to stabilising society while addressing the sources of social conflict: see *ibid.* 125-128.

assistance against deprivation. Collectivist intervention, some came to believe, was indicated in one form or another, most probably under the auspices of the state. Indeed, should this not be undertaken, increased political instability might greatly impair the capacity of the economy to provide society with goods and services.<sup>270</sup> Different modalities of collective agency were candidates to be the medium and means for such intervention, from a renewed corporatism composed of representatives of different social groups (labour, capital, churches, aristocracy),<sup>271</sup> to the moderated statism of French solidarist theories of cooperation and association under integrative legal institutions.<sup>272</sup> Within this, the language of social right never disappeared; in fact, it proliferated across different visions and articulations of how to remedy the harms and injustices of capitalism and industrialisation, and was salient in some streams of social Catholic and evangelical Protestant thought.<sup>273</sup>

A preoccupation with ‘social economy’ and ‘social politics’ proliferated across diverse networks, institutions and sites of activity, from universities to churches to political parties.<sup>274</sup> The administrative capacity and technical-infrastructure power of the state grew steadily after 1850, with states undertaking public works projects on an unprecedented scale. States also began to develop a ‘more systematic approach to the formulation of economic policy ... [and an] accelerated ... “professionalization” of government through the integration into the policy-making process of groups and organisations representing various forms of

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<sup>270</sup> Spengler (n. 103).

<sup>271</sup> This vision of a reconstructed society of orders characterised an influential stream of Catholic social thought: see Thomas C Behr, ‘The Nineteenth Century Historical and Intellectual Context of Catholic Social Teaching,’ in G. V Bradley and E. C. Brugger (eds), *Catholic Social Teaching* (2019) 34. For an examination of the social rights discourses embedded within this corporatist vision – one which balanced rights and duties to repair social peace - see Walton and Schettini, ‘Social Rights,’ in Edelstein and Pitts (n. 95) forthcoming.

<sup>272</sup> See the comprehensive account of the idea of solidarity in France in J. Hayward, ‘The Idea of Solidarity in French Political and Social Thought in the Nineteenth and Early Twentieth Centuries,’ (1958) (PhD Dissertation, University of London).

<sup>273</sup> For Catholic thought on rights in the 19<sup>th</sup> century, see Greenberg, ‘Catholicism and Rights: Politics, Economics and Sexuality,’ in Edelstein and Pitts (n. 95) forthcoming. For the influence of Protestant social Christianity in the UK and US, especially in relation to ideas of social fellowship, social reform, and the development of personhood, see: T. Rogan, *The Moral Economists: R. H. Tawney, Karl Polanyi, E. P. Thompson, and the Critique of Capitalism* (2017) chapter 1 and 2; Fine (n. 87) chapter 6; Parry, ‘Christian Socialism, Class Collaboration and British Public Life after 1848,’ in Moggach and Stedman Jones (n. 190) 162.

<sup>274</sup> Rodgers (n. 87) chapters 1 and 2.

technical expertise.<sup>275</sup> Much as von Stein seemed to have forecast,<sup>276</sup> the authority and legitimacy of the state appeared increasingly tied to its capacity to shape the capitalist economy in ways that mitigated the social question – whether by stimulating growth through industrial policy and infrastructural development, nationalising certain resources, or state-led social insurance and social provisioning. Attendant on all these activities was an expansion of the administrative capacities of the state, and the concomitant expansion of forms of technical state-knowledge, such as national statistics, as well as a specialised cadre of administrative experts.<sup>277</sup> A collection of German political economists and state scientists who had been careful readers and commentators on von Stein, including Karl Knies, Gustav von Schmoller and Adolph Wagner,<sup>278</sup> would go on to found the *Verein für Sozialpolitik* (VfS). The VfS would become the heart of the network of political economists which would develop the German historical school of economics, and become a byword for the top-down social and economic policy nicknamed ‘the Socialism of the Lectern’ (*Kathedersozialisten*). It conducted a vast number of studies of social problems through the lens of state-led social reform and economic planning, realising in many ways von Stein’s hope for a union of social ideals with the state through a science of society.<sup>279</sup> Members of the VfS also trained an entire generation of American PhD students,<sup>280</sup> who would go on to argue for a positive theory of the state as regulator, economic arbitrator and industrial and agricultural planner, in order to assure positive rights to work, fair working conditions, education and rest.<sup>281</sup> These ‘new’ political economists in the American context influenced the first generation of anti-trust laws, and their students became influential New Deal economists and policy-makers.

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<sup>275</sup> Clark, ‘After 1848,’ (n. 251).

<sup>276</sup> On von Stein’s idea that while history cannot predict specific events, it can forecast the approaching future through a diagnosis of conditions of possibility, see: Koselleck, ‘Historical Prognosis in Lorenz von Stein’s Essay on the Prussian Constitutions,’ in R. Koselleck, *Futures Past: On the Semantics of Historical Time*, trans. K. Tribe (2004) 58.

<sup>277</sup> Clark, ‘After 1848,’ (n. 251) 183-186; Sassoon, *Anxious Triumph* (n. 82) chapter 5.

<sup>278</sup> Siclovan (n. 256) 210.

<sup>279</sup> Siclovan (n. 256) 172.

<sup>280</sup> K. Tribe, *Constructing Economic Science: The Invention of a Discipline, 1850-1950* (2022); Rodgers (n. 87) chapter 3. Key names here are Richard T Ely, Edward Seligson, Henry Adams, John Bates Clark, Edmund James, and Simon Patten.

<sup>281</sup> For the best collection of these statements, see Fine (n. 87); see (unsympathetically and noting also the strong currents of eugenics and racial nationalism professed by some of these economists, especially Ely): Tiffany Jones Miller, ‘Richard T. Ely, The German Historical School of Economics, and the “Socio-Teleological” Aspiration of the New Deal Planners,’ 38/1 *Social Philosophy and Policy* (2021) 52. For the

The socialism of the lectern buttressed the Bismarckian political project of national order and unity, and was an institutional and intellectual response by segments of the bourgeoisie and aristocracy to the precipitous rise of social democratic political parties after 1863.<sup>282</sup> It was opposed to the revolutionary stance of Marxist Socialism, as much as it vigorously criticised and sought to supplant the negative state idea of *laissez-faire* economic liberalism. Bismarck,<sup>283</sup> in his introduction of state-provided sickness insurance and old age pension, explained the legitimacy of such provisions by invoking them as the realisation of the Right to Work, but with a strong emphasis on the productive, order-creating, consequences of realising this idea: “To sum up my position, *give the labourer the right to labour as long as he is in health*, give him work as long as he is in health, *ensure him care when he is ill, and ensure him a provision when he is old*. ... Do not our moral relations demand that the man who says to his fellow citizens, “I am healthy and willing to work but can find no work,” should have the right to say “find me work,” and that the State should be bound to find him work? ... If such a scarcity [of work] should recur, then I hold the state still under the same obligation, and the State is engaged in undertakings of such magnitude that can well fulfil its duty of finding work for those of its citizens who cannot find it for themselves.<sup>284</sup> In its Christian socialist and national socialist versions, the comprehensive order of state and economy was grasped as resting ultimately on a shared religious and national ethos, with a strong current of anti-semitism and racialism articulated through such theories.<sup>285</sup>

But the vision of social reform through and by the state as greatest capitalist and highest administrator nurtured a variety of state theories, economic theories and social theories, within a range of ‘thought collectives’ and political movements, all of which emphasised the potential directive power of state and administration in relation to the economic. A social state ensuring social rights was in some sense the

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argument that the foundational state and law theories of what would become the ‘New Deal’ had already been developed by the late nineteenth century in US political and legal thought, see W. J Novak, *New Democracy: The Creation of the Modern American State* (2022).

<sup>282</sup> A. Kedar, ‘National Socialism Before Nazism: Friedrich Naumann and Theodor Fritsch, 1890 – 1914,’ (2010) (PhD Thesis, UC Berkeley, 2010) 7, 9.

<sup>283</sup> Siclovan suggests that not only the Vfs but also von Stein had a direct influence on Bismarck’s views through his principal adviser on social issues between 1862 and 1873, Hermann Wagener: 231. It is equally likely that German Social Democratic Party founder Ferdinand Lasalle knew von Stein’s work well: Siclovan, (n. 256) 227-8.

<sup>284</sup> Bismarck, speech to Imperial Parliament, 9 May 1884, quoted in Menger (n. 231) 12-13.

<sup>285</sup> See Kedar (n. 279) 9-12.

common currency of radical *and* conservative-ethical criticisms of laissez-faire capitalism at the end of the nineteenth century. The central concept which connected them to each other, was that of a strong and unified public power, authorised and legitimated by some kind of social force which enabled the state to act as an instrument for the construction of the relationship between economy and society. Who or what was the bearer of this social force? This was the decisive question which differentiated opposing political projects.<sup>286</sup>

The experience of ‘war collectivism’ in Europe and the United States during the First World War, in which large sectors of advanced capitalist economies were directly subjected to political control to ensure war production (an experience repeated 25 years later),<sup>287</sup> appeared to many to conclusively demonstrate the potentiality of the state as planner and organiser of the economy. For revolutionary socialists and social reformists alike – and for their liberal and reactionary opponents – the war ‘had demonstrated the immense fiscal, monetary and industrial powers of the state, and accordingly how major redistributive reforms were concrete and viable – much more than conventional economic thinking had allowed.’<sup>288</sup> Mattei, in the British and Italian contexts she examines, rightly recovers the tension between ‘enlightened social reformists’ and radical workers’ movements in the years immediately after the end of the first World War. The former, dubbed ‘reconstructionists,’ believed that the war demonstrated that political agents could ‘change economic conditions through inter-dependence between fiscal, monetary and industrial policy. Progressive taxes and state spending had to go hand in hand with favourable credit policy and especially with industrial harmony achieved through forms of workers’ industrial control or of industrial production.’<sup>289</sup> The radical workers’ movements argued that the path from war collectivism to state socialism would not emancipate workers, but only render them ‘state serfs.’<sup>290</sup> War collectivism radicalised industrial workers, showing them that human collectivities *could* manage the market and that their post-war militancy had achieved substantial

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<sup>286</sup> See Arendt’s observations about state, nation, movement and class in *The Origins of Totalitarianism*, 299-303, 326-348 ((fn. 76).

<sup>287</sup> Rodgers (n. 87) chapter 7; C. Mattei, *The Capitalist Order: How Economists Invented Austerity and Paved the Way to Fascism* (2022) part I; Llanque, ‘Hermann Heller and the Republicanism of the Left in the Weimar Republic,’ 23 *Jus Politicum – Revue de droit politique* (2019) 13, at 19.

<sup>288</sup> Mattei (n. 284) 54.

<sup>289</sup> *Ibid.* 58.

<sup>290</sup> *Ibid.* 101.

improvements in wages and conditions.<sup>291</sup> They pressed for industrial democracy as the means through which the dependence of labour on wage slavery could be brought to an end.<sup>292</sup> The ‘social state’ promised only demobilisation and pacification. But common to both these modalities of confronting capitalism was a language of rights as realised *through and by the new political-economic order* established by collective action:

The working class does not ask, nor intend to ask, for mandatory social insurance for sickness, disability, and old age as a philanthropic solution to the still-unresolved social problems – *but as the expression of rights that have long matured though heretofore in vain*, in the scathing and glorious field of labour and social production.<sup>293</sup>

Bureaucrats working for the Italian Ministry of Military Assistance could similarly conclude that ‘out of [war’s] miseries and catastrophes a luminous path has been traced for the ends of the State ... The state of law that was considered the most elevated form of state before the war ... has suddenly been overtaken and surpassed by the highest of conceptions: the *state of law and social welfare*.’<sup>294</sup>

In a context where it seemed that the possibilities of reorganising economic order through public power had been decisively demonstrated by recent experience, it is not surprising that inter-war democratic constitutions written in the aftermath of political revolution and severe social conflict (Weimar Germany, Mexico) articulated precisely the grammar of social right identified in Part B above. Social right was embedded in, but also authorised and expressed, a social democratic vision of an *economic constitution*.<sup>295</sup> This social-democratic economic constitution established liberal political rights and a sphere of free economic activity, but *encased them in and subjected them to* the redistributive social justice objectives of the public power.<sup>296</sup> While Schmitt notoriously and self-servingly declared the Weimar constitution to be a ‘dilatory formal compromise’<sup>297</sup> between a ‘bourgeois or socialist social order’<sup>298</sup> – paving the way in his theory for the true

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<sup>291</sup> Ibid. 80.

<sup>292</sup> Ibid. chapters 3-4.

<sup>293</sup> Society for Mutual Aid and Cooperatives, ‘Il congresso regionale piemontese per le assicurazioni sociali,’ *L’Avanti*, 8 October 1918, cited in Mattei (n. 284) 61.

<sup>294</sup> Ministero per l’Assistenza Militare e le Pensioni di Guerra (ed), *L’assistenza di Guerra in Italia: assistenza militare, pensioni di Guerra* (1919), cited in Mattei (n. 284) 55.

<sup>295</sup> Grégoire, ‘The Economic Constitution under Weimar: Doctrinal Controversies and Ideological Struggles,’ in G. Grégoire and X. Miny (eds) *The Idea of Economic Constitution in Europe* (2022) 53.

<sup>296</sup> Ibid. 62-66.

<sup>297</sup> *Dilatorische Formelkompromisse*. C. Schmitt, *Constitutional Theory* (2008) 82-3.

<sup>298</sup> Ibid. 83.

character of the Constitution to be resolved by a decision of its Guardian, the President – his contemporary Franz Neumann saw in the Weimar constitution the logical and coherent expression of ‘the idea of the social *Rechtstaat* with its material conception of equality’ expressed *in nuce* by the Jacobins.<sup>299</sup> Citing Lorenz von Stein, Neumann characterised the fundamental purpose of the constitution as the realisation of ‘the social rights of freedom.’<sup>300</sup> The Constitution created the authorising legal framework for the achievement of this purpose by expressly subordinating ‘capitalist rights of freedom’ (property, labour contracts, etc) to ‘the principles of justice, with the objective of guaranteeing to all a humane existence. The economic freedom of the individual is to be secured within the terms of these limitations.’<sup>301</sup> Under this broad *chapeau*, the Constitution went on to guarantee specific rights (such as labour association, social insurance, the right to work),<sup>302</sup> while also creating labour councils to empower ‘workers and employees ... to participate on equal terms in community with entrepreneurs in the regulation of wages and working conditions, and also in the entire economic development of the productive forces.’<sup>303</sup> Article 162 committed the Reich to advocate for ‘the international regulation of the legal relations governing the worker, striving for a common minimum of social rights for the entire working class of mankind.’<sup>304</sup> It is well-known that the expectation that political democracy would realise the state-purposes encoded in the Weimar Constitution was false, and the many dimensions of Weimar’s state failure do not need to be rehearsed here.<sup>305</sup> But writing in 1930 with the hindsight of 11 years since its ratification, Neumann lambasted the conservative judiciary for refusing to give the Constitution’s social-state principles their full state-theoretical consequences.<sup>306</sup> The solution for him was

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<sup>299</sup> Neumann, ‘Die soziale Bedeutung der Grundrechte in der Weimarer Verfassung,’ Jg.7, Heft 9 *Die Arbeit* (1930) 569. Translated by Keith Tribe and republished as Neumann, ‘The Social Significance of the Basic Laws in the Weimar Constitution,’ 10/3 *Economy and Society* (1981) 329-347. Mommsen records that the origins of these social rights provisions lay in the contributions of Christian Socialist and former monarchist, Friedrich Naumann, labour lawyer and social democrat Hugo Sinzheimer, and socialist delegate Simon Katzenstein. H. Mommsen, *The Rise and Fall of Weimar Democracy* (1996) 58-9.

<sup>300</sup> *Ibid.* 339.

<sup>301</sup> Art 151, Weimar Constitution, appended to Neuman, ‘The Social Significance,’ (n. 296) 344.

<sup>302</sup> Arts 159, 160, 161.

<sup>303</sup> Art 165.

<sup>304</sup> Art 162.

<sup>305</sup> See generally Mommsen (n. 296).

<sup>306</sup> Neumann, ‘The Social Significance,’ (n. 296) 342: ‘Constitutional principles, above all those that affect the law on economic organization, have now in state theory and legal practice – especially in the High Court – been turned on their head ... the right of review given to judges must be rejected ...’.

not a rejection of social rights or constitutional provision *per se*. Rather, it was the urgent task of ‘*socialist state theory to develop and concretely present the positive social content of the second part of the Weimar Constitution ... It is the task of socialist politics to realize these principles.*’<sup>307</sup>

### VIII. Coda

The story told in this chapter is not one of singular origins nor straightforward lines of descent. Rather, it is an attempt to grasp the emergence of social right as a repertoire of political and legal thought by excavating some aspects of the grammar of its usages, and by endeavouring to delineate at least some of the contexts of that grammar. What emerges from my account is a sequence of morphologies of what I have called ‘collective natural rights’ (or, ‘natural social rights’) claims. Collective natural rights endowed us with a claim-structure for a *fair share* of political *and* economic order. Specific rights claimed in this register included the right to work, the right to subsistence, and the right to the product of one’s labour. Once braided with an analysis of capitalism and the nature of social conflict between classes, this claim-structure engendered a variety of possible answers. One such possibility, brilliantly articulated in the form of a state-theory and state-concept by Lorenz von Stein, gave us a way of *conceptualising* a social democratic state. Stein’s social-democratic state-concept rested on the concrete historical experience of French socialist movements. It explicated what he took to be the principle to be derived from this experience: that political citizenship did not create social citizens but required their creation, and the social state (as greatest capitalist and highest administrative power) was the means through which such citizens were to be created.<sup>308</sup> The inner determining logic of this concept and its principle produces social right: social right emerges as the manifestation of the successful management of class conflict by the political-economic order of the social state. Social freedom and positive equality are realised by and through positive rights. Notably, in Stein’s account and in the language of others after him, the claim of (natural) right subtended the demand for the organisation of labour and the economy

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See also Mommsen (n. 296) who notes that courts developed a ‘reactionary interpretation’ of property rights, ‘refused’ to implement the constitutional commitment to the social responsibilities of ownership, and ‘robbed of any real legal substance’ the guaranteed social rights (59).

<sup>307</sup> Neumann, ‘The Social Significance,’ (n. 296) 342, emphasis in the original.

<sup>308</sup> Kästner, ‘From the Social Question to the Social State,’ 10/1 *Economy and Society* (1981) 7; Pasquino, ‘Introduction to Lorenz von Stein,’ 10/1 *Economy and Society* (1981) 1.



through state power. The social state made social rights; but natural social right also made the social state, in the sense of being a significant register through which the demand for the positive state and social economy were framed, articulated and motivated.

Koselleck points out that after the French Revolution, political and legal concepts served ‘no longer ... merely to define given states of affairs, but [to] reach into the future.’<sup>309</sup> Concepts sometimes had to be formulated linguistically before it was possible enter or permanently occupy them. The experiential substance of many concepts was thus reduced, *while their claim to realization increased in proportion*. Actual, substantial experience and the space of expectation coincide less and less. It is here that the coining of numerous ‘isms’ belongs, serving to as collective and motivating concepts capable of reordering and mobilizing anew the masses robbed of their place in the older order of estates.<sup>310</sup>

The passage from collective natural right, to the right to work, to social democracy and social right, seems to me to be an instance of sequentially-iterated concepts characterised by a ‘state of expectation [in] which ... [the concepts] claimed to satisfy newly constituted needs.’<sup>311</sup> The ‘kinetic energy’<sup>312</sup> of this array of interconnected concepts was considerable. They did not await the completed reality of the post-1945 welfare state. They prefigured it through a powerful state-concept and state-theory that attracted adherents from both social reformist and social revolutionary movements – and later, among decolonised states searching for a state-concept adequate to their urgent imperative to end their economic dependency on former colonial rulers through planned industrialisation and state-led development. At certain moments, ‘rights’ concepts were largely evacuated. However, they never disappeared and instead lay partially buried beneath layers of state theory, administrative science and economic policy. In democratic or anti-colonial moments of rupture and re-founding, rights-languages returned to the fore, as a means of capturing and articulating a fundamental theorem about what the state was for, and how it ought to be made to be that way in reality by the political and social movements of the time. Such a state was a public power representing the whole of society, which

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<sup>309</sup> Koselleck, ‘*Begriffsgeschichte* and Social History,’ in *Futures Past* (n. 273) 80.

<sup>310</sup> *Ibid.*

<sup>311</sup> *Ibid.* 84.

<sup>312</sup> Straumann, ‘The Energy of Concepts: The Role of Concepts in Long-Term Intellectual History and Social Reality,’ 14/2 *Journal of the Philosophy of History* (2019) 147.

submits economic rationality and the market to a different order of values, by organising it. Inherent in these rights claims was also a notion of what the nature of social freedom within the state amounted to: positive equality enabling the development of the human personality, in solidarity with others as political and social equals.

The challenge for our time is whether this profoundly political-ethical ideal can be renovated and resurrected as *the* animating principle of a social state which realises social rights. If it can be, it holds out some hope of a more effective political-legal language to challenge inequality in the neoliberal state.