

Alain Supiot

## Poverty through the Prism of the Law

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## C- Poverty through the Prism of the Law

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*Above all things, good policy is to be used,  
that the treasures and monies in a State  
be not gathered into few hands.  
For otherwise, a State may have a great stock,  
and yet starve; and money is like muck,  
not good except it be spread*

FRANCIS BACON  
*The Essays or Counsels,  
Civil and Moral* [3<sup>rd</sup> ed. 1625]

**Abstract.** *The normative dimension of the notion of poverty, and its embedding in the long history of cultures, is largely overlooked in contemporary political discourse. Legal analysis shows, however, that two opposing conceptions of poverty continue to do battle: one sees poverty as a social scourge, whose effects—but not its causes—can be counteracted; the other sees it as the manifestation of a social injustice which must be tackled at the root.*

**Keywords.** Poverty, solidarity, globalization, social law, religion.

In the political vocabulary of “globalization”, “poverty” has become an impoverished notion, one that does more to obscure than to illuminate the question of social justice. In fact, it probably owes part of its remarkable success to its weakness as a concept. It has been stripped of its history and geography, and carefully washed clean of the soil of injustice in which its roots are steeped.

Stripped of its geography, reduced to an indicator expressed in dollars, “poverty” is seen as a statistical datum, capable of being apprehended in the same way wherever it occurs on the surface of the earth, like epidemics or natural disasters. Defining extreme poverty as living on less than a dollar a day—as the United Nations does in its Millennium Development Goals—only blinds us to all those aspects of the standard of living, of the quality of life, that are not amenable to monetary evaluation, because they derive meaning from their social and cultural context. It ignores the normative tendency, which—as the leading historians of statistics and practice have shown—is inherent to socio-economic categories. In his seminal work, Alain Desrosières demonstrated that, unlike the use of quantification in the natural sciences, economic and social statistics does not measure a pre-existing reality; it constructs a new reality by treating heterogeneous entities and forces as equivalent. Like constitutions in the legal domain, statistical information is by its very essence normative, and is used to

construct a public space. When this statistical representation of society is developed in a national setting, it can be questioned by parliamentary or trade union representatives; its normativity remains under democratic control. But when this numerical representation of social reality seeks to transcend the other forms of representation and lay claim to worldwide validity, those checks and balances melt away. There is then a risk of enclosing oneself—and enclosing whole peoples—inside the self-referential loops of a technocratic discourse that overwrites the realities of human life instead of representing them. Even local research capacities are caught up in just such a self-referential loop. They are mobilized not to *design* “anti-poverty action plans”, but to *implement* them. Instead of asking indigenous researchers to formulate the questions raised by the reality of their compatriots’ living conditions, we ask them to fill in questionnaires designed in advance by international organizations. The situation is not all that different in France. France’s “poor” (unlike the rich) are certainly the objects of unrelenting analysis by the social sciences, just as they are the *objects* of legal mechanisms to combat poverty, but it is extremely unusual for them to be treated as *subjects* and invited to share their experience of poverty.

Deprived of its local signification, the notion of “poverty” is also robbed of its history and of the contradictory meanings that it has always conveyed. For centuries, even in the West,

many saw it as an ideal: the straight and narrow path between misery and wealth, on which man could enjoy the basic minimum of resources necessary to advance freely, without being weighed down by his material possessions. Generations of monks followed this path by taking the vow of poverty, and by a strange irony of history, it is this prohibition on wealth that led the Franciscans to invent the first legal instruments of capitalism: foremost among them, the trust. The Franciscans, who did not themselves view poverty as a “third way”—as a golden mean between the extremes of opulence or destitution—saw the fate of the poor as inextricably bound up with that of the rich. But in so doing they adopted two diametrically opposed interpretations, which continue to permeate our ways of thinking, and which shed light on differences of national legal culture with regard to poverty.

For some, poverty is the manifestation of a transcendent justice, the mark—and the punishment—of vice, while wealth is a sign of virtue and talent. Present in the Old Testament tradition, which promises wealth and wellbeing on Earth to God’s chosen, this interpretation resurfaces in Protestantism: “God”, wrote Calvin, “gives abundantly to his own people the means to aid others, but the wicked are always so ravenous that their want leads them to have recourse to fraud and rapine”. According to Max Weber’s famous thesis, the “spirit of capitalism” is heir to this tradition, in which wealth is evidence of divine election and poverty tends to be assimilated with sin. Over the last thirty years, numerous policy initiatives have given that idea renewed legal vitality. One of the key causes of unemployment is alleged to be laziness, encouraged by over-generous welfare handouts, which should therefore be reduced or made subject to the unconditional acceptance of insecurity, deskilling and “flexibility”.

The other, opposing, tradition sees poverty, not wealth, as the sign of divine election. Behind its modern façade, its religious roots also go back a long way. This is the tradition that sings the *Internationale*, calling the “prisoners of starvation” to revolt: “The earth shall rise on new foundations: We have been naught, we shall be all!” The wretched of the capitalist earth are destined to become the chosen ones of the communist paradise. But this inversion of worldly values was already present in Bossuet, when he observed in his sermon “On the Eminent Dignity of the Poor”, that the “admirable reversal”, by which “the last will be first and the first will be last” (Matt. 20:16) has already begun in this life: “Since the poor are the last in the world they are the first in the Church. The rich imagine that everything in the world belongs to them, and thus they trample the poor underfoot. Yet their only reason for being in the Church is in order to serve the poor.” According to Saint Augustine, “the burden of the poor is not having what they need, while the burden of the rich is having more than they need”. Bossuet deduced that alms were not an act of grace that the rich bestow upon the poor, but a service that the poor render to the rich, by allowing them to unload part of the burden of their wealth and thereby earn a legitimate place among the community of the faithful.

The idea of solidarity is already at work in this way of thinking which, contrary to economic liberalism, does not see poverty as part of the natural order of things, to which the law should conform: “For we ought not to desire”, wrote Saint

Augustine, “that there be wretched persons in order that we may be able to perform works of mercy. You give bread to a hungry person, but it would be better were no one hungry, and you could give it to no one (...) Because you rendered service, you seem greater, as it were, than he to whom service was rendered. Wish him an equal, so that you may both be under the One to whom no service can be rendered”. Coming from a quite different direction, that of political realism, Sir Francis Bacon arrived at the same conclusion. His experience of government in 17<sup>th</sup>-century England led him to believe that “money is like muck, not good except it be spread”, so much so that to accrue wealth, instead of redistributing it, was to plant the seeds of trouble and sedition.

The opposition between these two interpretations of poverty continues to be seen in the mirror of contemporary law. They have merely been stripped of their religious references. On one side, the view that sees poverty as a *scourge of nature*: one can try, certainly, to mitigate its effects, but, like droughts or earthquakes, it is in the order of things, part of man’s lot, which it would be vain and even dangerous to try and change. On the other, the view that sees poverty as a *social injustice*, whose causes can and should be counteracted.

In the aftermath of the war, the social injustice interpretation initially came to predominate, and with it, the idea of solidarity between rich and poor. This was expressed as early as 1944 in the Declaration of Philadelphia, which stated that “Poverty anywhere constitutes a danger to prosperity everywhere”. This Declaration inaugurated that brief period during which people strove to build an international legal order that would make social justice and the eradication of poverty the goal of all governments, their economic and financial structures being mere instruments in the fulfillment of that goal. This was the stance taken by the Havana Charter, signed in 1948, the same year as the proclamation of economic and social rights in the Universal Declaration of Human Rights. The Charter—which was never ratified—provided for the creation of an International Trade Organization (ITO), one of its missions being to realize the goals of full employment and higher living standards set out in the United Nations Charter. Its statutes directed it to fight against both surpluses and deficits in the balance of payments, to favor economic cooperation instead of competition between states, to promote compliance with international labor standards, to control movements of capital, to help stabilize basic commodity prices... In short, its agenda was almost the exact opposite of that assigned to the World Trade Organization (WTO) when it was created in 1994. By condemning public surpluses as well as deficits, it made the balanced distribution of wealth the cornerstone of the fight against poverty, thereby extending Francis Bacon’s political maxim into the field of international relations. And by providing for legal instruments dedicated to maintaining the stability of basic commodity prices, it set out to create the conditions of economic security for all. From this legal perspective, poverty is seen not as an individual status, generating an entitlement to assistance, but as the consequence of a systemic economic imbalance.

The failure of this international social project did not prevent the profusion, in domestic law, of systems of solidarity that embodied economic and social rights, and allowed

unprecedented advances against poverty. But already it heralded the overturn of the hierarchy that placed human ends above material and financial means, and a return to a naturalistic conception of the economic order and distribution of wealth. In the 1970s, with the neoliberal revolution, the idea once again took hold that poverty stems not from human injustice, but from an immanent order whose laws must be obeyed. For many American neoconservatives, the belief in this order has preserved its religious–protestant or Old Testament–basis. At the international level, however, it lays claim to the authority of science. Friedrich Hayek, one of the founding fathers of ultra-liberalism, explains that it is ignorance of the rules that underpin the market economy that makes its results seem irrational and immoral. Therefore, he claims, “*their demand for a just distribution in which organized power is to be used to allocate to each what he deserves, is thus strictly an atavism, based on primordial emotions*”. All institutions founded on the notion of solidarity derive from this “*atavistic conception of distributive justice*” and can only lead to the ruin of the “*spontaneous order of the market*”, based on “true prices” and the quest for personal gain. They must therefore be dismantled. Of course one can help the poor, but such help is a moral duty rather than a legal obligation. So it is that the rolling back of economic and social rights today goes hand-in-hand with the promise of advances in “ethics” and “corporate social responsibility”. They are two sides of the same coin, which the European Council embossed in 2005 with a pithy formula: “*the European Union must [...] make its regulatory environment more business-friendly, while business must in turn develop its sense of social responsibility*”.

At the national level, the return of this interpretation of poverty as a social *scourge* places the poor back in the gray area between social law and criminal law. On the one hand there is a proliferation of public charity mechanisms, designed to mitigate the effects of poverty. Most recently in France, the *Revenu de solidarité active*, which accords the poor a “right to support”, along the same lines as that provided for disabled persons and outpatients. On the other hand, the systems of repression have been reinforced, to curb the public insecurity engendered by the rise in economic and social insecurity. The fight is no longer against poverty. It is against the “*wicked [whose] want leads them to have recourse to fraud and rapine*”, that Calvin stigmatized so long ago.

At the international level, the ultra-liberal revolution has resulted in the adoption of trade rules in every respect contrary to those proposed by the Havana Charter in 1948. They aim to sweep away all “regulatory barriers” to the circulation of goods and capital and to “true market prices”, and seek to engage every country in the world in a competition based on their respective “comparative advantages”. But this international commercial law has been adopted without rescinding the economic and social rights proclaimed in the UDHR, and without abolishing the institutions tasked with their implementation, foremost among them the International Labor Organization. The upshot is a schizophrenic international legal order, with its trade hemisphere inciting countries not to ratify, or not to apply, the standards that its social hemisphere proclaims as necessary and universal. And so we have the

World Bank on the one hand supporting “anti-poverty plans” that strive to guarantee a universal income greater than one dollar a day, while on the other hand inciting states to abolish the rules that stipulate a minimum salary of more than 20 dollars a month. This last recommendation can be found, along with others of the same ilk, in its report *Doing Business in 2005*. Designed for use in benchmarking national laws, indicators of this type are aimed at international investors—helping them find the “regulatory environments” most conducive to making large profits—and at states, engaging them in a competition to increase these profits across the board. These indicators are symptomatic of the more general belief that national laws are “legislative products” competing in a global market of standards, and that we should therefore facilitate “law shopping” by economic operators. The aim is to progressively eliminate the legal systems that are least well adapted to meeting the expectations of the financial markets.

But behind the pseudo-scientific trappings of this “normative Darwinism” it is not hard to discern its religious underpinnings, its belief in an immanent order that destines some for prosperity and others for perdition; an order that must not be traversed by positive laws, rather, it must be facilitated by making the quest for personal enrichment the *Grundnorm* of the legal order. “*In fact*”, insists Hayek, “*we generally are doing most good by pursuing gain*”—an idea that was still seen as scandalous when it was first put forward by Bernard Mandeville in 1714, but which has since become something of a cliché: private virtue leads to public virtue. This political philosophy, which makes other people the means to personal enrichment, is no more compatible with the principle of human dignity than law shopping is compatible with the rule of law. It is therefore doubtful whether it is sustainable in the long term, and its critique must not serve as a pretext for evading the problems raised by the erosion of the national solidarity systems put in place after the Second World War. These systems contributed hugely to a historically unprecedented reduction in poverty in the West. But, as Robert Reich so lucidly pointed out as early as 1992, their strength was undermined by the opening of borders to trade, allowing the richest members of society to evade the taxes and contributions through which national solidarity is funded. These external destabilizing factors were compounded by an internal factor. The enrolment of men and women into anonymous national support networks, guaranteeing everyone a degree of economic security, freed them from the burden of family and local solidarity, thus helping to sustain the illusion of the self-sufficient individual. The state—having become a universal debtor—engenders a nation of creditors who no longer recognize any mutual duty of solidarity, and social demand eventually spirals out of the government’s control.

We cannot hope to fight poverty effectively by allocating individual rights—totally disconnected from solidarity networks—to the poor. However laudable the intentions behind the case law of the European Court of Human Rights, for example, which assimilates social security entitlements to property rights, the worry is that this legal palliative will infect social law with the belief that all debts can somehow be metamorphosed into payment orders, regardless of the nature of the debtor. This confusion between entitlement and

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property—whose destructive power was demonstrated by the financial meltdown of 2008—overlooks the fact that the value of a debt is always conditional on the debtor meeting his obligations. The same applies to economic and social rights, which are debts whose value depends on the ability to enforce the corresponding obligations, namely the requirement to pay taxes and social security contributions. There is no right to solidarity without a duty of solidarity, and everyone covered by a solidarity-based system is at once a creditor and a debtor of the system. From this viewpoint, it is not poverty that creates the right to assistance, but membership of a solidarity network in which everyone can alternately be a debtor and a creditor, according to their needs and resources. It is this that distinguishes modern social law from charitable institutions and makes it an instrument for the equality of dignity of all people. This arrangement is threatened every time we give in to the temptation to return to charity, by reducing the scope of its beneficiaries to the poor. But it is also jeopardized when we permit the rule of law to give way to law shopping, allowing economic operators to relocate to the “fiscal and regulatory environment” of their choice, and thus avoid funding the solidarity systems from which they benefit in the countries where they do business.

Spurning the wise counsels of Francis Bacon, the financialization of the economy today leads us to pile money up rather than spread it around to fertilize human activity. The general downward pressure on costs, above all on labor costs, favors a dizzying accumulation of financial profits, which, no longer finding an outlet in wealth creation, feed a stock-market casino frenzy in which even basic foodstuffs become the objects of speculative betting. At the same time, it leads to a disconnect between pay and productivity, the pauperization of states (engaged in a Dutch auction over social and tax contributions), an overall reduction in the scope of solidarity, and the over-exploitation of natural resources. The answer to these difficulties does not lie in the myth of a global society made up of self-sufficient individuals freed from all bonds of solidarity. Nor does it lie in the self-isolation of national solidarity systems: they are the backbone of our societies and must therefore evolve with them. The only way to deal with the destabilization of these systems is by harnessing the social state to the other circles of solidarity that are being traced out, in practice, within and beyond the national context.