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The Proceduralization of Standards: Putting the Common Good to Test

Jean-Michel Bonvin*

A. Introduction

The expression 'common good' combines two terms that receive a distinctly bad name in today's world. Firstly, the term 'good' evokes moral concepts that are perceived as old-fashioned and belonging to the past. Their abandonment is seen as beneficial for individuals, who are thus left free to seek self-fulfilment without having to obey externally imposed moral constraints. It would be preferable to replace the concept of good, and its all-embracing claims anchored in metaphysical presuppositions incapable of rational proof, by a concept which is both less normatively ambitious and more respectful of freedom and individual rights. A possible alternative would then be to let individuals regulate their choices autonomously, according to the principles of the market. Another alternative could be to replace good and evil with strictly political and procedural notions such as fairness or legality, notions that aim exclusively at the harmonious co-existence of individual liberties without seeking to impose on them a precise definition of what is good or bad. Also the term 'common' contains an oppressive connotation in the reference it makes to a group whose diktats can in all legitimacy – or rather, in all impunity – be imposed on all individual members of this group. From this perspective, when democracy favours the tyranny of the majority it turns into an instrument for oppressing the rights and liberties of minorities in the same way as totalitarian regimes. The worst power abuses can be committed in the name of the people and the formal guarantee provided by elections is not enough to ensure respect for individual rights, as the last two centuries of history amply illustrate.

Taken separately, each of the two terms 'good' and 'common' may represent a serious threat to individual rights. *A fortiori*, their combination would seem to contain the seeds of an even more formidable danger for a person's rights and liberties: indeed, the group can prove to be all the more dangerous when it appoints itself as the guardian and champion of a specific conception of good. Following this diagnosis, the concept of the 'common good' would have to be discarded once and for all if a truly democratic society is to be constructed. The

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rejection of these two terms separately and in combination logically follows from the will to refuse all objective or collective standards and values that are interpreted as limits to individual and subjective rights. Ultimately, this results in an out-of-hand denial of any possibility of reconciling individual and collective goods. In the name of individual freedom and rights, all collective or objective definitions of good are denounced as factors of oppression that the individual needs to be protected against.

Hence, talking of the 'common good' necessarily implies adopting a position concerning the relationship between the collective and the individual as well as the private and the public space. Indeed, there is a risk of the 'common good' imposing itself at the cost of individual rights, but there is also the opposite risk of individual interest imposing itself at the expense of the collective good. Between these two extremes, both of which need guarding against, there is room for a more subtle definition of the common good, striving to reconcile individual welfare with group harmony. The notion of the 'common good' is essential to any sort of social life: far from being a factor of oppression, it is the very precondition for a harmonious coexistence of individual rights and liberties within the same group. However, there is a need to breathe new life into this notion and to paint a less caricatured portrait than that described above which assimilates 'good' with dogmatic metaphysics and 'common' with the necessary oppression of individuals. It is thus important to reach a new definition of the common good that integrates the dynamics of democracy and helps promote respect for the rights and dignity of individual human beings. With this in mind, the following paper is divided into three sections. We begin by looking at the concrete impact of democratic dynamics on the conception and place of law. This overview will highlight the need for improved theorization of the notion of the 'common good.' Against this background, we will set out some of the procedural theories that dominate the current academic debate (Luhmann, Habermas and the upholders of a more radical version of the proceduralization of standards) while noting their shortcomings. The last section will outline a possible alternative, following in the footsteps of Amartya Sen's and Martha Nussbaum's work on the notion of capabilities.

B. Democratic Dynamics and its Impact on the Conception of Law

Any societal system calls for a minimal degree of stability and order, which can be attained in different ways. Douglass North's typology of economic exchanges, which lists the institutions, both informal or formal, which are necessary for the permanence and harmony of economic transactions, provides a useful parallel for our thinking.[1] In his view, institutions are designed as instruments for reducing the uncertainty inherent in all interpersonal relationships,

[1] See D.C. North, Institutions, Institutional Change and Economic Performance 33-35 (1990).

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thus aiming to establish confidence between all the parties involved in the transaction. North starts by describing the case of the *personalised exchange* which characterizes smallscale societies where goods are traded locally. Stability of transactions in this case results from their routine character and the cultural homogeneity of the parties involved. Within this framework, based on the personal acquaintance of trading partners and their adherence to shared values, the transaction costs[2] are limited and confidence of the partners involved is boosted by the informal work environment. In contrast, the *impersonal exchange* cannot operate with mechanisms of this kind and needs to mobilize more formalized institutions, such as codes of conduct and guarantees given in the form of reciprocal assurances (exchanging hostages).

The first trade developments between heterogeneous cultural entities were based on instruments of this kind, anchoring the security of the transaction in institutions developed by the participants themselves. The *impersonal exchange with third party enforcement* marks the development of modern day economies. In a complex and globalized context, the intervention of a third party to ensure the stability of economic transactions proves to be indispensable. The efficacy of the intervention depends, however, on the extent to which the regulations drawn up by the third party are supplemented by the existence of personal relationships based on confidence and by the implementation of deontological mechanisms. Congruence between the three institutional forms identified by North is crucial: in order not to constitute a factor of oppression for the trading parties, the state's actions have to be based on the institutions already existing at the societal level. Indeed, if the state pursues autonomous ends, its intervention risks becoming a source of oppression for the dignity of individuals. As North sees it, the market economy and the state can find common ground, and individual rights and collective action do not have to be antithetical, but can be complementary. The notion of the 'common good' requires the construction of precisely this balance between individual and collective benefit.

The conclusion that North establishes for the economy is still more relevant in the fields of law and politics. In modern nation states, social integration is no longer guaranteed by the cultural homogeneity of citizens or by the frequency of their interpersonal contact. Intervention by more compelling institutions characterized by the presence of a third party thus appears unavoidable; however, this holds the risk of a totalitarian drift for democratic regimes even more than for the economy. As a matter of fact, democratic dynamics have a providential logic that increasingly entrusts the state with the responsibility to ensure more and more individual rights. This implies the extension of individual rights and with it the field of action open to the state increases. The state, in turn, has to be endowed with the necessary powers of intervention to guarantee individual rights. Such an expansion of the field of policy occurs at the expense of more informal regulatory mechanisms. What we are observing then in the field of law and politics is the very movement that North identified within the econ-

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[2] These are costs related to the gathering of information vital to concluding the transaction and costs of the control mechanisms designed to ensure that the terms of the transaction are respected.

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omy: in a context of impersonal relationships, the guarantee of individual rights depends on the intervention of a third party and thus on the setting up of a more encompassing providential democracy. This evolution is abundantly documented by the establishment of welfare states and their impressive development during the second half of the 20th century: indeed, social expenditure in many industrialised countries currently amounts to over 30% of GDP, compared to 2% at the beginning of the last century.

This ever growing significance of law and politics as regulatory tools nowadays coincides with the emergence of increasingly contractualized and individualized standards thus paving the way for actions more suited to individual characteristics and requirements. Standardized and universal instruments such as civil and political rights (cf. T.H. Marshall's classical presentation)[3] are no longer envisaged as adequate, they need to be supplemented by tailor-made social rights that provide formal liberties with a material, i.e. a real basis:

> It appears today that social rights are not in conflict with formal rights, that they are fully in line with their history and logic, that they accomplish the potentialities or consequences of the concept of individual citizenship.[4]

In response to Marx's criticism focusing on its excessive formalism, democracy has turned providential and makes itself increasingly present in each individual's life. Thus, contractualization and individualization of law spawns naturally from the providential logic of democracy.

This twofold and complementary movement towards the materialization and the individualization of rights and standards deeply affects the conception of the state, which is to some extent stripped of its sacred attributes. The increasing weight of concrete reality entering into law and politics tends to invalidate the transcendent points of reference – whether religious (the rule of divine law) or collective (based on the sacredness of the nation) – on which the legitimacy of the state was traditionally founded. *Homo democraticus*, concerned with her daily and immediate well-being, is not inclined to lend credence to the idea of a transcendent and sacred group. The Durkheimian ideal of moral education as the foundation stone for inspiring love for the nation and inculcating a spirit of discipline, is giving way to a far more instrumental concept of public action. Individuals do not wait for the state to provide a precise definition of good – or of the meaning of life. Such concerns are considered to be a private affair. However, although the state tends to give up all claims to impose substantial definitions of the good on its people, this does not exclude the possibility of the 'soft tutorship' denounced by Tocqueville. Indeed, the state's actions are still marked by normative choices, rooted in values such as the ethos of work and efficiency. These values certainly have less far-reaching goals in the contempo-

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[3] *See* T.H. Marshall, Citizenship and Social Rights (1992).

[4] *See* D. Schnapper, Providential Democracy: An Essay of Contemporary Equality (forthcoming). The present quote is taken from the French original, *see* D. Schnapper, La démocratie providentielle, Essai sur l´égalité contemporaine (2002), at 171 – our translation.

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rary context, but they nonetheless have the power to justify interventions disrespectful of individual rights and liberties.

The ambivalence of modern day developments in law has significant repercussions on the notion of the 'common good'. This is happening at a time when the imposition of a substantial concept of good appears inadmissible – since it cannot repose on anything other than the argument from authority – and when the relativism of values purports to be an indisputable horizon, all the same there is an insisting call for collective mechanisms to be set up in order to design and implement standards. This means that the increasing demand for individual rights, and the call for recognition[5] and tolerance, is translated into a demand for a supplement of law, i.e. the enactment of new and explicit regulations. The tension between the collective and the individual, inherent in all societies, here finds an original solution that views the increase in the prerogatives of the state (or any other form of collective authority) as the best guarantee for individual self-fulfilment. The group is called upon to take charge of areas of life previously subject to autonomous individual regulation. A development of this kind clearly marks the ambiguity of the notion of the 'common good' in contemporary societies, where an increased risk of slipping into soft forms of totalitarianism coexists with an ever growing demand for individual autonomy. A brief look at the content and form of social policies will illustrate the equivocal character of these developments.

C. The Emblematic Case of Social Policies

The emergence of social policy in the second half of the 19th century was based on the identification of social risks such as illness, disability and unemployment in society. This new avenue entitled the people affected by social risks to cash benefits paid by the state. This also meant that the occurrence of such predefined risks, associated with compliance to certain eligibility conditions (e.g. adequate contribution record), was a necessary and sufficient condition to provide access to social rights. The focus was then placed on the decommodification objective,[6] which required that all individuals without income earned on the labour market be unconditionally helped to keep up a decent standard of living. In other words, the group takes responsibility for the protection of individual rights by providing the individual with cash benefits without seeking to influence the behaviour of those receiving the benefits, i.e. to impose on them a specific conception of the good. In such a case, the 'common good' strictly corresponds with the respect for individual liberties, but at the same time, it does not provide any instruments other than financial aid for transforming the individuals' living conditions. The oft-expressed criticism about the excessive bureauc-

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[5] *See* N. Fraser & A. Honneth, Redistribution or Recognition? A Political-Philosophical Exchange (2003).

[6] The idea of decommodification is the key notion developed in G. Esping-Andersen, The Three Worlds of Welfare Capitalism (1990).

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ratization of the welfare state is based on this distance from people's concerns: indeed, standardized procedures are enough to check membership to the category of risk, and there is no need of an interpersonal contact between the employees working in the welfare state offices and the people receiving benefits.

The trend towards individualizing and contractualizing social rights, observed in all welfare states since the early 1990s, purports to be a response to this criticism. To develop a better understanding of individual circumstances and thus to establish a higher degree of respect for individual rights, the state is now equipped with tools to design social policies better suited to the specific living conditions of each person. This marks the individual's entry into social policies, and issues that had never before been seen on the agenda of political regulation are now at the heart of social policy debates. This change implies a deep-reaching reform of the welfare state. The following paragraphs explore three features of this reform.

I. The Conditional Nature of Benefits

In line with the core principle of active labour market policies, the benefits paid by the state have become conditional on acceptance of conditions defined in so-called integration contracts. These contracts are, at least in theory, negotiated between the welfare officer and the benefit recipient. In practice, the people receiving the benefits are obliged to comply with the conditions set by the welfare officer, for fear of having their benefits withdrawn.[7] Even the most generous welfare states do not escape this general trend, and tend to adopt conditional measures which call into question the foundational relationship between welfare and citizenship. Assistance recipients may resort to appeal mechanisms, but the independence of these bodies is not assured.[8] Under such conditions, the contractualization of social policies tends to put the burden of responsibility on job seekers, who are held morally liable for their unemployment and are urged to take charge of their own reintegration into the labour market. In a parallel movement, the state is withdrawing from the arena of macroeconomic and monetary policy where Keynesian-style interventionist instruments have been mostly abandoned. In the new context, the state no longer appears as the guarantor of social rights, but as a body in charge of moralizing job seekers. This twofold movement – withdrawal by the central state at the macro level and focus on the job seeker's accountability at the micro level – tends to fuel the tension between individual rights and collective action.

[7] I. Astier, Revenu minimum et souci d'insertion (1997).
[8] I. Lødemel & H. Trickey (Eds.), An Offer You Can't Refuse: Workfare in International Perspective (2001).

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II. The Individualization of Standards

In the province of employment policies, the trend to individualize standards translates into the adoption of tailor-made measures adapted to the needs of the individual and of the local labour market. For many countries during the 1990s, this entailed the necessity to set up decentralized employment services subject to mission contracts which fixed quantitative objectives to be achieved (notably in terms of the number of unemployed to be reintegrated). This first level of contractualization has a considerable impact on the second level, where the job seeker and the employment service officer find themselves meeting face-to-face to define an individual action plan. The established framework imposes specific constraints – in terms of available resources and requisite results – on state employees, who are provided with appropriate means for exerting pressure on the job-seeker, right up to withdrawing unemployment benefits. In short, employment service officers find themselves in a situation where the call on their professional conscience often generates a dilemma between their obligations towards the administrative hierarchy (via the mission contract) and their concern for the job-seekers' legitimate interests (via the integration contract). There is reason to fear that mission contracts, placing as they do the public employment services under considerable pressure by demanding that quantified targets are met, have harmful consequences on the unemployed, who are often constrained to accept precarious short-term jobs.

Thus, what is in theory an egalitarian situation – where the state commits itself to ensure that the interests of both the unemployed and the welfare administration are given equal consideration – is in reality a clearly inegalitarian state of affairs, where employment service officers are allowed to impose their say when they decide on the contents of an action plan. The democratic legitimacy of such integration contracts is doubtful. When state officers are more worried about meeting the quantitative targets that they have been given than about monitoring the quality of programmes, the action plan can easily result in the enforced acceptance of measures, under the pretext of promoting a job seeker's responsibility. This makes the inadequacy of the appeal mechanisms in charge of checking the validity of decisions and, if necessary, calling them into question, all the more problematic. In the absence of a reliable mechanism, state employees responsible for implementing active labour market policies can grant themselves quasi-legislative powers.

By contrast, welfare officers have very limited means of action towards private companies or other people recruiting job-seekers (and receiving hiring subsidies to this purpose). The interface that public employment services are required to set up between the people or companies supplying work and those demanding jobs is distorted by this imbalance. Since the state does not mobilize its economic policy instruments or exerts pressure on players in the primary labour market, all the pressure tends to fall on individual job-seekers.

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III. The Multiplication of Normative Orders

The co-existence of normative decisions inspired by various logics and fluctuating according to the specific characteristics of each negotiation situation is the natural consequence of the contractualization and individualization of standards. The question of the link between individualized social policies and collective standards drawn up at the national or international level is then raised. Indeed, these two levels are disconnected to such an extent that employment policies usually have their own regulatory, disciplinary and appeal bodies. We can thus witness the co-existence of various sources of juridical legitimacy – democratic and administrative – which are purported to have equal validity. Under these circumstances, the link between traditional democratic action and integration contracts is often tenuous and there is reason to fear the emergence of a parallel administrative law that could escape the control mechanisms and sanctions of 'normal' administrative law. As such, employment policies may represent a threat of parallel normative territories emerging within the state itself and to a large extent eluding national state jurisdiction.

The multiplication of normative orders is part and parcel of the law's increased flexibility:

> This new normative trend is leading us not only into the terrain of flexibility, but also of contigency […]. Standards are losing their substance, they are instantly seen as eminently substitutable, adaptable, revisable.[9]

If not accompanied by a compelling reminder of the need to respect human dignity, this kind of normative malleability risks flouting the citizenship rights and guarantees offered to the most destitute members of society. When employment and labour market standards are drawn up exhaustively by the partners concerned, thereby excluding any exterior intervention – whether from third parties or from governing principles – there is nothing to prevent fundamental social rights from being challenged. If every solution is acceptable, provided it is based on negotiation, the door is opened to every sort of regulatory experiment. In the absence of a substantial framework serving as a reminder that human dignity is not an object for negotiation and that flexibility can only be deployed against the intangible horizon of human rights, all practices may be seen as equally legitimate due to their supposedly negotiated character.

This brief look at the main contemporary changes in social policies illustrates the difficulties encountered when aiming to reconcile individual rights with collective action in the field of social and labour market policies. The confidence placed in partnership-based negotiations alone is as problematic as blind faith in market forces. If we wish to prevent fundamental social rights from being challenged by negotiated agreements or contracts, a certain number of conditions –

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[9] J.-L. Genard, Les dérèglements du droit, Entre attentes sociales et impuissance morale 49 (2000). (Our translation). In the quoted passage, the author is summing up Niklas Luhmann's point of view.

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both substantial and procedural – are required. This is notably the recognition of non-negotiable principles. By contrast, recent developments in social policies illustrate the potential deficiencies of the democratization process in terms of respecting individual rights. Indeed, the secularized state has lost none of its capacity to oppress individuals and impose moral requirements on them, even if these requirements no longer fall within the province of a dogmatic conception of 'good' but rather within a meritocratic ethos of work and efficiency. This situation illustrates the need to rethink the relationship between individual rights and collective action. To that purpose several solutions may be advocated, which can be grouped together into two categories that are not mutually exclusive: those which focus on the need to proceduralize the law in order to increase the involvement of actors (by demanding the direct participation of the parties concerned or the delegation of their cases to more competent actors) and those which stress the necessity to guarantee substantial fundamental rights (seen as an indispensable buttress for individual rights threatened by the emergence of contracts escaping the boundaries of law). Let us now move on to a discussion of these two types of theories.

D. Procedure as the Guarantee of Individual Rights

When the will to design collective standards is maintained, it is often achieved via a procedural theory of standards. In such an approach, the way to construct something 'common' is at the centre of the analysis: what is at stake is how free individuals can constitute a well-ordered group, i.e. a group not threatened by anarchy. In contrast, the conception of the 'good' remains indeterminate. This is evident as the legitimacy of a standard or value does not spring from its objective characteristics, but from the intersubjective consensus or agreement established on its behalf. At best, objectivity, truth and justice are seen as empty ideals, whose only function harks back to that of a regulatory ideal.[10] In the wake of Kant's criticism, the abandoning of all metaphysics is renouncing any attempt to define any kind of objective truth and justice.

The current changes in modes of governance seem to confirm the validity of this proceduralization hypothesis. The inadequacy of the old 'command and control' model, or the centralized top-down regulation, has been abundantly documented. Its main pitfall is the lack of knowledge and consideration of contextual realities. Consequently, the solutions generally proposed entail setting up regulation modes that are closer to the local level and the main parties concerned. The options put forward can be grouped into two categories. Firstly there is the systemic self-regulation advocated by Luhmann, who leaves the 'actors' concerned free to self-regulate their field of action and reject any intervention by a supervisor.[11] Then there is the ethics of discussion propounded by

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[10] A Berten & J. Lenoble, Dire la norme, Droit, politique, enunciation (1990).
[11] *See* N. Luhmann, Politique et complexité (1998).

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Habermas and Apel. They believe that all citizens enjoy the necessary communicative rationality to participate fruitfully in political and legal debate.[12]

I. Systemic Self-regulation

Luhmann underlines the irreducible contingency of social life. A situation of this kind risks paralyzing action, and it is therefore important to reduce the radical uncertainty fostered by such complexity. This is the mission of the Luhmannian social system, which selects among the inextricable mass of social facts only those pertinent to its action. Each social system is thus able to reduce the complexity of social data in a purely self-referential way, i.e. without the intervention of a third party or recourse to a so-called objective and externally imposed criterion. All social systems have the capacity to classify social phenomena thanks to their own binary code. Hence, the economic system succeeds in guiding itself through reality by means of the paid/unpaid binary code, whilst the political system uses the government/opposition categories and the legal system employs the legal/illegal divide. Furthermore, the increased complexity brought about by globalization is being reduced through the setting up of new social systems using specific binary codes. Such a differentiation process (i.e. the on-going creation of social systems) allows the tackling of the growing complexity of the contemporary world.

Thanks to such processes, operated via strictly procedural instruments (the only constraints imposed on the selection process is provided by the binary code, which does not impose any substantial check), the complexity of social life is reduced and no longer inhibits social action. This means that every system can respond and adjust swiftly to the incessant changes in its environment. The complexity of social life is not denied, but its inhibiting effects are neutralized by the growing differentiation of society by means of the multiplication of systems. The legitimacy and efficiency of systemic self-regulation is guaranteed by the respect of the procedures established by each social system. In short, if all systems work along their binary code, society will be well-ordered.

As Luhmann sees it, self-regulation via social systems is not subject to any supervisory authority (politics is conceived like any other system, and does not aim at controlling or monitoring other systems). The relationship between the different systems is purely instrumental, in line with the market model. In Luhmann's mind, this implies that the totalitarian danger of a specific social system imposing its views on other systems or on individuals is averted. Indeed, each social system enjoys an inbuilt autonomy in very much the same way as each individual. Luhmann identifies this autonomy with that of a psychic system enjoying exactly the same degree of freedom as all social systems.[13] The self-referential nature that underpins the liberty of all social and psychic systems prohibits any sort of managerial approach. Within this context, any notion

[12] *See* J. Habermas, The Theory of Communicative Action (1984).

[13] According to Luhmann, social systems are not composed of individuals but of communications. This enables, he claims, to preserve the individuals' freedom.

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of a universal 'common good' loses all meaning and the co-existence of an irreducible plurality of common goods specific to each system features as the very condition of a well-ordered society.

Let us now look at the consequences of this model on the juridical system. Luhmann insists that the complexity of reality cannot be reduced by a central authority which would claim to define the good in the name of all members of the group. This complexity requires the use of more decentralized forms of law that allow for real time adaptation to contextual changes (with the help of the legal/illegal binary code characteristic of the juridical system). Luhmann's approach identifies two crucial developments in contemporary law: the increased power of the judge, who is no longer entrusted with the sole duty of simply applying the law but also with laying it down; and the decentralized implementation of legal provisions which confers more autonomy on local bodies. Within this context, the presence of a global social system supervising all other systems could only impede the legal system's efficiency and capacity to take action. However, Luhmann's theory shows a number of serious flaws. Firstly, it falls into the trap of legal formalism when it insists on the normative homogeneity of each social system. Indeed, the working of the system is *de facto* subject to a predetermined binary code shaping its internal communications. Objective external values are replaced by the self-referential systemic logic, but such a development can prove just as restrictive for the actors in the system. For example, the financial system that functions according to the profitable/unprofitable code produces schizophrenic tendencies amongst the operators, who are compelled to forget their ethical values and adopt the systemic code if they want to flourish in this system. Indeed, the smooth functioning of the system requires that all the extraneous aspects not encapsulated in the binary code be left out. In the case of the juridical system, this leads to a strictly positivist vision of law with very little connection with the multi-dimensional reality of social life. The Luhmannian system does accomplish the task of reducing uncertainty that North assigns to institutions, but it is at the cost of significant reductionisms that have scant respect for individual rights. A second flaw lies in the inability to guarantee the integration of social systems. Communication between systems is purely instrumental, operating on market lines and insufficient to establish long-lasting social bonds. This incapacity to rebuild a 'common good' shared by all social systems places the individuals at the mercy of the systemic principles: indeed, the self-referential capacity of psychic systems does not appear to be a sufficient guarantee against possible intrusions by social systems. When individuals are integrated into the social system, they have to comply with the systemic logic and lose all freedom of thought and choice. Hence, the rejection of all supervisory bodies risks to firmly establish the omnipotence of social systems over psychic systems, i.e. individuals.

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II. The Ethics of Discussion

Habermas claims that the problems caused by the Luhmannian strict separation of systems and their normative closure can be solved with the ethics of discussion. This approach involves abandoning the need to call on the most competent and best-equipped actors in order to reduce social complexity (e.g. the judge symbolising legal competence) and instead opening up democratic debate beyond the systemic frontiers to all actors concerned. This should be done without seeking to influence the solutions to be adopted by means of a binary code. Such multiplication in the number of involved actors, all supposedly endowed with the requisite communicative capacity, is meant to resolve the question of the relationship between individual rights and collective action. In Habermas' view, communicative rationality is a distinctive feature of humankind. Therefore, consensus constitutes the normative horizon for all our verbal exchanges. Daily communications, which aim at compromises or strategic alliances, are not congruent with this model, but Habermas considers them as secondary or even pathological situations that do not call into question the fundamental nature of communicative action. In this way, Habermas sets *a priori* the framework for all practical discussion, which is then structured according to the principles of discussion (or Principle D: a standard is valid only if it is accepted by all participants in a practical discussion) and universalization (or Principle U: the validity of a standard depends on the acceptability of its foreseeable consequences to all the concerned partners). Thanks to its strictly procedural character, this framework applies to all cultural contexts and thus withstands the objections linked to cultural relativism.[14]

Habermas does however recognise the necessity of maintaining certain social systems in order to reduce social complexity, notably in the economic and political fields where turning the communicative ideal into reality is more difficult. In his view, the political sphere is distinguished by the presence of two poles: the democratic pole rooted in the public arena and the quest for reasonable consensus, and the pole of bureaucratic domination, where communicative rationality gives way to strategic reasoning focused on acquiring and retaining power. Habermas sees discussion in the public arena as the key element of the democratic vitality of modern societies. At the same time, he makes it very clear that this democratic public arena should not replace the political system but limit itself to exerting a beneficial influence on the administrators of the political system. Thanks to such action, the potential for oppressing institutions and collective action is reduced.

As attractive as this conception may appear, it includes many unconvincing elements. Firstly, it is difficult to meet all the conditions required by the Habermassian approach: the communicative ideal seems to be invalidated by the considerable variations in the capacity to use arguments, as well as by the persistence of power struggles that tend to cloud the objective of communica-

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[14] Habermas, *supra* note 12.

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tive ethics. Beside these classical objections, one should mention Habermas' consistent neglect of the institutions and environment where the discussion takes place. Yet these institutions clearly have an impact on the communicative powers of the partners involved. An unemployed person who is in a legal and institutional environment characterized by the conditional nature of benefits and the absence of impartial appeal mechanisms is not in a position that encourages the establishment of the Habermas-style communication. His conception thus proves to be overly formal in its lack of recognition of the real inequalities in communicative abilities as well as of the inhibiting effects of the institutional environment. Habermas' model defines what is at best a regulatory ideal but by excluding the institutional environment from his analytical framework he deprives himself of the means of implementing it.

III. Proceduralizing Institutions and Contexts

This excess of formalism is denounced by French-speaking sociologists and philosophers, who strive to reintroduce actual individuals and institutional contexts into the process of normative deliberation. In their perspective, institutional contexts ought to be seen not as data that the partners need to accommodate but as elements to be shaped in order to ensure the legitimacy and efficiency of law. Consequently, it is important to proceduralize not only the content of the law (i.e. to submit it to intersubjective agreement) but also the institutional contexts involved in its elaboration and implementation. Such proceduralization has to be continued indefinitely without any objective marker that can control or delimit it. By radicalizing the movement towards eradication of all supposedly objective standards, these theories have the advantage of neutralizing any temptation to give in to the dogmatism of an argument. However, they imply a truncated vision of the 'common good' where the 'common' takes up all the space and the question of the 'good' is simply swept away. Within this context, good is identified with what is common: it is consensus which incessantly creates and recreates values, and not values that generate consensus. Constructivism reigns supreme, up to the point where social construction no longer demands an objective foundation. The act of construction is in itself a sufficient foundation for its own legitimacy, doing away with the need to be anchored in any external reality. Pure self-referentiality becomes the primary criterion for the truth and justice of standards. In other words, the issue of the objective validity of standards no longer affects their content but it is social construction that presides over their elaboration.

Such a radical negation of any form of objectivity also holds for institutions and all contextual data in general. This 'transformation of contexts cannot be performed by a deductive judgement since it is out of reach of formal rules. It is tightly related to the modalities of their implementation'.[15] Indeed, those responsible for the application of a rule have to determine, via negotiation with all

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[15] Berten & Lenoble, *supra* note 10, at 117, our translation.

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partners concerned, the contextual modifications that need to be made. The moment of application thus coincides with a reshaping of the context so that it can guarantee the rule's effectiveness. The legitimacy of implementation does not depend exclusively on conformity to the rule, but also on the social construction of the contexts (or their proceduralization).[16] This in turn implies a permanent adjustment of the content of the legislative provisions. Indeed, there are no givens, everything needs to be constructed and reconstructed in a perpetual movement.

In this perspective, the 'good' is supposed to reside in social hyperconstruction (freed from any form of exterior constraint), or in other words, the hypertrophy of the 'common'. Thus from this point of view, the 'common good' amounts to an empty regulatory ideal, since any substantial content could hamper its mobility. This means that the individual is engaged in a dizzying movement of incessantly rebuilding standards and institutions.

Latour's connectionism emerges as the most radical conception within this framework. His theory implies that not only society but also nature are swept away in the same whirlwind and cannot be considered separately from one another. Sciences that believe they have attained an objective knowledge of nature are overlooking the fact that all reality – whether natural, human or social – is part of one and the same network and needs to be understood from within this network. Thus according to Latour, all forms of objectivity, including objective nature itself as it is conceived by scientists, need to be shaken off.[17] This results in the elimination of all fixed points of reference. A solution of this kind, proceduralizing as it does to an extreme degree collective rights, institutions and ultimately all reality, leaves individuals in a very uncertain situation bereft of all feelings of ontological security.

In such theories, the proceduralization of standards takes an extreme turn, where procedure is no longer subject to external, formal or substantial criteria, but suffices unto itself. The desire to eliminate all residuals of objectivity underpins the supreme and undisputed sovereignty of the intersubjective agreement, i.e. of politics, in the construction of society and nature. By contrast, Habermas' and Luhmann's positions provide more solid reference points, based on the use of the binary code for the latter and the two principles of discussion and universalization for the former. In their perspective, contingency is subject to an organizing principle acting as a functional equivalent to North's institutions. One can legitimately fear that the instability and lability of the solutions proposed by the upholders of the radical proceduralization of standards (in line with Bruno Latour's connectionism) will not prove equally efficient to reduce uncertainty. Their extreme vision of proceduralization risks favouring the intellectual, economic and political elite who are more likely to adapt to and take advantage of such a degree of malleability.

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[16] *See* J. Lenoble, *La procéduralisation contextuelle du droit*, *in* Ph. Coppens & J. Lenoble (Eds.), Démocratie et procéduralisation du droit 97-124 (2000).
[17] B. Latour, Politics of Nature - How to Bring the Sciences into Democracy (2004).

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In the end, the absence of any substantial content in the 'common good' emerges as a factor threatening to worsen the insecurity and precariousness of society's most vulnerable members. In upholding formal elements such as the binary code or the D and U principles, Luhmann and Habermas respectively demonstrate their will to keep control of the normative processes. But they demonstrate in no way their desire to have an impact on the content of the adopted standards, which also carries within it potential threats to individual rights and liberties. Rather than taking the path of a radical proceduralization of standards and contexts as propounded by Lenoble and Latour, it may be better to find other formulae combining substantial and procedural dimensions. However, it is crucial that these substantial rights are defined in such a manner as to avoid the pitfalls of dogmatic metaphysics.

E. Beyond Procedure: Unconditional Capabilities

Following the concept of capabilities developed by Amartya Sen and Martha Nussbaum, we will sketch here a substantialist alternative carefully keeping away from any temptation to reach the argument from a position of authority. This means, first and foremost, not seeking to impose a specific conception of 'good'. As Rawls underlined with his theory of justice and concept of overlapping consensus,[18] the goal of democratic politics and law is not to say what is good and evil but to ensure the harmonious co-existence of individuals via the elaboration and implementation of rules endowed with recognized legitimacy. Such a conception is opposed to the pure and simple eradication of the 'good' as recommended by the extreme versions of the proceduralization of standards while taking care not to reactivate the totalitarian tendencies run by certain overly essentialist definitions of the 'common good'. A minimal version of what is good or right is being proposed, concentrating exclusively on the aspects that are necessary to social harmony and leaving individuals free to elaborate their own standards in other areas.

A very valuable concept within this perspective is that of 'informational basis of judgement in justice' as proposed by Amartya Sen.[19] History has shown that highly specific definitions of good based on a single dimension of reality can result in particularly brutal phenomena: the proclaimed primacy of the economic, racial, religious or political over all other aspects of human life. This scenario holds considerable risks for individual rights. By contrast, if the informational basis used to define what is good or right broadens to encompass each of these aspects as well as further dimensions, the oppressive potential of collective bodies and actions is significantly reduced. When practical judgements fixate on a single criterion or value this may lead to regrettable drifts, as Weber illustrated in his developments on the ethics of conviction. This means that the definition of the 'common good' should include a multiplicity of dimensions.

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[18] J. Rawls, Political Liberalism (1993).

[19] A. Sen, Development as Freedom (1999).

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A further essential feature – to be found in the works of Rawls, Sen and Nussbaum, though under different forms – deals with the actual content of collective action. When we look at the primary rights as defined under the 'veil of ignorance' in Rawls' writings or at Sen's and Nussbaum's 'theory of capabilities', the same objective prevails: the aim is not to tell individuals how to behave, but to endow them with the resources and/or capabilities necessary for them to make and follow their own choices in life. These authors are not seeking to impose what Sen calls 'functionings', i.e. attitudes that conform to a predetermined concept of good, but to put all individuals in a position where they can turn their own concept of a good life into reality. Hence, the above mentioned theorists advocate the emergence of a new form of substantial rights which creates a link between liberal formal rights (where the individual is declared to be free without adequate concern being given to the means of making that freedom a reality) and socio-democratic social rights (where individuals run the risk of abdicating their power of initiative to the state). Through these new rights which could be labelled 'capability' or 'autonomy-rights', collective institutions and individuals no longer have an antagonist but a complementary relationship. Individuals are not envisaged as passive recipients of social benefits but they share the responsibility to put the resources and capabilities made available to them to good use. As for the state, it is charged with providing an empowering environment in order to enable the good and beneficial employment of resources and capabilities. Its action here is clearly distinguished from current versions of the competitive state that puts all the weight of social reintegration on the shoulders of the individuals receiving social benefits. The juxtaposition of these two responsibilities – that of the state and of the individuals receiving benefits – is aptly captured by Nussbaum's notion of *combined capabilities*, which stresses the necessity to combine individual and collective capabilities in order to effectively implement the "capability" or "autonomy-rights".[20]

These substantialist theories claim to be out of the reach of the objections raised by cultural relativists. Indeed, Sen and Nussbaum are keen to demonstrate that the legitimacy of capabilities does not depend on a specific cultural context but applies equally to all contexts. Their approach is not meant to be decontextualized, as in Rawls' work where the primary rights are laid down under the 'veil of ignorance', but transcontextual. The values expressed by the capabilities do not therefore spring from a specific Western viewpoint but are

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[20] *See* M.C. Nussbaum, Women and Human Development, The Capabilities Approach (2000). Of course, the capability approach does not imply that all individuals have the right to become very rich or practice a prestigious profession such as become a doctor or a lawyer (since it does not aim to guarantee functionings). But it maintains that no one should be excluded from such a perspective due to lack of resources or capabilities. It is then the responsibility of each individual to put the available resources to the best possible concrete use. However, the number of lawyers or doctors produced by this system risks to be too high, and the institutions would then be called upon to exercise a more traditional regulatory function. The legitimacy of adopting such standards (determining, for example, a quota of doctors) cannot be resolved by recourse to capabilities alone and should rely on strictly procedural grounds.

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universally shared.[21] Adopting the same approach, Nussbaum underlines that the supposed self-evidence of certain cultural idiosyncrasies should be challenged: the oppression of certain sections of populations, especially women, cannot thus find legitimacy in recourse to culturalist arguments. These arguments are at best pretexts used by the most powerful members of these cultures to establish their arbitrary domination.[22] The rejection of cultural relativism does not however entail advocating uniform implementation of the capability-rights. Indeed, this version of the 'common good' does not aim to impose a specific vision of good on all local actors. On the contrary, it strives to find the best combination between universal principles and the local environment.

F. Conclusion: the Common Good as the Prerequisite for the Respect of Individual Rights

The 'theory of capabilities' opens the door to a new conception of the relationship between individual rights and collective action. On the one hand, it seeks to guarantee the concrete effectiveness of individual rights by taking into account institutional contexts and their necessary transformation, marking out the enabling function of the state which needs to provide certain conditions and context for giving capabilities a concrete form. On the other hand, by excluding the imposition of functionings on individuals, it prevents the state's interventions from becoming a factor of oppression for individuals who are thus called upon to exercise their responsibility. In this perspective, the members of the group are perceived both as recipients and actors in the common good process. A quick look at social and labour market policies from this perspective will illustrate the changes that could result from the adoption of a capability approach. In such a conception, unemployed would have to become effective actors in the process of professional and social reintegration and not simply passive recipients of interventions and benefits defined by others. Achieving this goal requires promoting the job seekers' ability to narrate their personal history in a convincing way,[23] i.e. able to generate a real partnership with the welfare officers responsible for their job placement. A capability of this kind largely depends on the institutional context in which the integration contract is concluded. The conditional nature of the benefits defines an instrument for applying penalties whose use must be rigorously managed by the intervention of an independent appeal body (which is still rarely the case); job seekers do not necessarily possess the capabilities required to speak in public; therefore, it would be useful to set up competent bodies, e.g. unions or other organizations to represent them. The time spent on interviews and the environment in which these interviews are carried out also play an important part. An approach based on the enhancement of ca-

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[21] Sen, *supra* note 19.
[22] *See* Nussbaum, *supra* note 21.
[23] *See* Astier, *supra* note 7.

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pabilities would thus require not only improvement of human capital by means of training programmes but also establishment of an appropriate institutional environment.

In the contemporary context, the tension between individual rights and collective action needs complete rethinking. This is not to deny the relevance of collective institutions but to provide them with means of action more respectful of individual rights. At the heart of this question is the need to construct the public deliberative arena as the place where standards are elaborated, implemented and assessed. It seems to us that the promulgation of a new type of substantial rights – i.e. capability – or autonomy-rights – would constitute a significant first step towards an original conception of the 'common good' that would not be envisaged as antagonistic to the individual good but as its necessary counterpart.

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