

SOLIDARITY IN THE LEGAL FRAMES¹

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Abstract. The purpose of this paper is to explore the meaning of solidarity and its proper position in the legal frames, with particular focus on health care. Solidarity is often identified with welfare arrangements and social guarantees. In this institutional version, it tends to humiliate citizens and restrict their entrepreneurship. Moreover, administrative solidarity is unable to recognize the actual needs of the most vulnerable members of society, which should be one of its primary concerns. Solidarity, in its original meaning, understood as supportive cooperation of fellow citizens, links their rights and freedoms with mutual duties and responsibilities. Hence, an alternative framework for solidarity should be provided. This framework, committed to the idea of decency, introduces the distinction between the minimum and maximum content of solidarity enforceable by legal means, which should be translated into certain health care practices.

Keywords: solidarity, health care, responsibility, welfare state, legal framing, decent care, R. Ter Meulen, A. Margalit. H. Frankfurt.

I. Preliminary remarks

Perhaps the sole universally acknowledged truth about solidarity is the lack of consensus regarding its meaning. K. Bayertz² accurately described this as the common fate of many prime terms in political and social theory, such as “justice,” “equality” and “liberty;” contrary to these, however, the ambiguity about solidarity does not result from an abundance of theories. Solidarity, very popular as a slogan or a catchword, has been widely neglected in social theory.

Even if indeterminacy can be an asset sometimes, this is not the case for solidarity. Its ambiguity is used to justify contradictory theses (for example, so-called constitutive solidarity serves as an argument justifying the usage of genetic information in actuarial calculations, while communal solidarity stands for an argument against it).³ Presumably, it is no accident that the controversies about this idea go along with a general crisis of solidarity in Western societies. As words

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² Bayertz [1999] p. 3.

³ Cf. Husted [1999].

have their performative (or in the language of I. Kant – “regulative”) power, the restoration of solidarity in the social and political realms should begin with a reflection on its meaning.

The main goal of this paper is, therefore, to explore the meaning of solidarity. In order to indicate the semantic boundaries of this concept, I will use a common language analysis and examine the most interesting accounts of solidarity in contemporary philosophy. As it is not possible to understand solidarity outside the legal and political context, I will then discuss its appropriate role within the state. This cannot be accomplished without reflecting on the relation between solidarity and other fundamental concepts of social theory: decency and justice. All these reflections are accompanied by an underlying conviction that solidarity is connected not only with rights and claims, but also with the dimension of duty and possibility.

II. What is solidarity?

The Oxford Dictionaries define solidarity as “unity or agreement of feeling or action, especially among individuals with a common interest; mutual support within a group.”⁴ The second entry, and at the same time a suggestive historical illustration of the given meaning, provides another definition: “an independent trade union movement in Poland which developed into a mass campaign for political change and inspired popular opposition to Communist regimes across eastern Europe.”⁵ Indeed, the context of a trade union and its struggle for decent treatment seems most illustrative in understanding solidarity. It exposes its intrinsic relation with freedom and decency, as well as its private-public character – solidarity is a form of a bottom-up organization (in Aristotle’s words, a form of civic friendship) which must gain expression within the frames of state. As such, it encompasses two dimensions: affective “communality of feelings” and readiness to support,⁶ as well as a “community of responsibilities and interests.”

1. SOLIDARITY AND THE PUBLIC SPHERE

The Oxford Dictionaries derive the word from 18th-century French *solidarité*. It is beyond doubt that we owe to the French Revolution the unfailing popularity of the slogan “liberty, equality, fraternity” and, therefore, the prominence of the concept of solidarity. Not searching further for the origin of this concept would however be short-sighted.

⁴ Oxford dictionaries: <http://www.oxforddictionary.com/definition/english/solidarity>.

⁵ Ibidem.

⁶ Dictionary.com: <http://dictionary.reference.com/browse/solidarity>.

This revolutionary context seems so obvious that we tend to forget about the roots of solidarity which are deeper and qualitatively different – not political and romantic, but strictly legal. In Roman law, a “solidary” obligation, from “solidus” (solid) referred to the firmest form of cooperation. *Obligatio in solidum* meant joint liability – a form of partnership where everyone was responsible for the entire obligation: in the case of insolvency of one partner, the other partners were obligated to pay the whole debt (all for one, one for all); free riding was thus ruled out by legal means.

What is needed for us to assume such a great responsibility? All dictionary definitions mention two necessary elements: the cognitive element (community of interest) and the affective element (community of feelings). Neither of them should be overestimated. It is obvious that all fiduciary relations require mutual trust (*fides*), which in the case of *obligatio in solidum* must be particularly deep. This kind of absolute trust may imply relations closer than only professional, resembling family bonds or ties of friendship (after all, it is not accidental that “fraternity” is a synonym of solidarity). However, this family context (and, therefore, the affective element of solidarity) should not be extended too far. Solidarity is a relationship qualitatively different from friendship or familiarity, as it functions in the public sphere. We do not need to reflect on the necessary conditions of solidarity of strangers (as J. Dean⁷ and many others do) because solidarity as civic friendship is *ex definitione* a relation of unity and agreement despite diversity and, as such, it presupposes a certain amount of distance and formality. Private rhetoric, which tends to stress only the affective dimension of solidarity, contributes to the transformation of the formal idea of supportive cooperation, which lies at the heart of solidarity, into a moral call for charity.

2. SOLIDARITY AS SUPPORTIVE COOPERATION

For sure, reducing solidarity to charity violates the original symmetry between the members of a solidary association. The most important objection to charity is its asymmetrical nature: the beneficiary bears the burden of pity, while the benefactor reaches the heights of virtue (and pride). This distorted, Nietzschean account of charity is well-known and widely repeated, but not necessarily true. It can be argued that the emotional basis of charity is not asymmetrically conceived pity, but symmetrical compassion: do I feel uncomfortable facing your suffering or, rather, do I suffer with you? In Kant’s purely rational terms, we would say that observing an abuse of dignity of another human being abuses hu-

⁷ Dean [1996].

man dignity in oneself. In terms of contemporary neurobiology, we would refer to mirror neurons which reflect the suffering of the other as if the observer suffered himself.⁸ Obviously, this does not eliminate a certain asymmetry involved in the situation of helping someone who is weak by someone who is powerful enough to do it, nor does it prevent the feeling of indebtedness (even if it is “only” a debt of gratitude). It does, however, mitigate discomfort of this asymmetry and refute “resentment objection.”

The act of thus-conceived compassionate assistance is a part of a solidary enterprise. The dictionary definition quoted above mentions “mutual support within a group” and we know from our experience that such support was provided among solidary workers and partners in a joint venture. We also appeal to solidarity in the event of human drama – pandemics, natural disasters and wars.⁹ However, this does not mean that solidarity, as it is often done, can be reduced to humanitarian help: readiness to support is a part, not the essence, of solidary *engagement*. The duty to provide assistance is secondary to the dimension of cooperation and civic friendship. The authors of the NCoB report expressed it succinctly: solidarity is “the idea that we are all ‘fellow travellers’ and that we have duties to support and help each other.”¹⁰ Suffering is an inevitable human predicament and a fellow traveller often happens to be a fellow sufferer, hence the authors of the report add far-sightedly that this mutual help should particularly concern “those who cannot readily support themselves.” However, this kind of support settled within the frames of cooperation is not provided for its own sake, but for the sake of restoring the original symmetry and maintaining social fellowship. “One for all, all for one” can mean acting side-by-side or lending a helping hand, according to the nature of the social relation and actual capabilities of our partner.

Cooperation and compassionate support are thus two twin (though differing) dimensions of the same concern for social fellowship. Such an account corresponds to that of R. Jaeggi¹¹ who depicts solidarity as non-instrumental cooperation. This non-instrumentality has a double sense. Firstly, it expresses a wider concept of the good that reaches beyond self-interest and is produced in the course of cooperation. However, this common good should not be understood in the communal way, but in a creative way – it should not annihilate but transcend its

⁸ Rizzolatti et al. [2004].

⁹ Cf. Dawson, Verweij [2012].

¹⁰ NCoB [2011] p. XXIV.

¹¹ Jaeggi [2001].

self-interest. R. Titmuss¹² and the theorists of social capital prove not only that it is possible, but, more importantly, that such a non-instrumental commitment that is not oriented at individual material gains can bring surprisingly abundant material (and immaterial) outcomes for everyone. Furthermore, it expresses the intrinsic value of the process of cooperation. Thus, acting together, sharing ideas, caring for each other can be rewarding in itself in the same way as is, for example, playing sports or making music in a group. Once again, this qualitative and irreducible “joy” of acting together should not be understood as a mechanism of “communalization” and a deterrent to individual action. Solidarity, as supportive cooperation, is not a concession for undifferentiated commonality, but an obligation to seek civic fellowship despite all the differences, divisions and dispersions – accepting this challenge requires a strong sense of personhood and individual responsibility.

III. Solidarity and the welfare state

Solidarity, emerging originally from the Roman institution of *obligatio in solidum*, is inherently connected with legal institutions. The authors of the “Justice and solidarity in priority setting in health care” report write:

Solidarity can be understood as the willingness of people to give governments powers in developing and organizing welfare programmes of all kinds. As such, it is a government-oriented approach, rather than a market-driven perspective on healthcare.¹³

This way of thinking about solidarity is not uncommon. Is solidarity indeed “state-given?” Historically, as K. Bayertz interestingly notices, the Bismarck legislation, which introduced the world’s first welfare state, was rather “a concession which had to be made in the interest of stabilizing society”¹⁴ than a commitment to solidarity, risk-sharing or charity. Does such a contingent relation justify the reduction of solidarity to welfare state arrangements?

1. PARADOXES OF SOLIDARISM

“Solidarism” can be understood as a synonym of welfarism. Its main problems are parallel to those of the classic welfare state: expanded bureaucracy, a demanding attitude of citizens and general social inertia, whereas its *differentia speci-*

¹² Titmuss [1970].

¹³ Bogaert et al. [2013] p. 89.

¹⁴ Bayertz [1999] p. 24.

fica is the post-communist ideology of “acquired rights” in terms of welfare and state protection. Much has been written on the destructive consequences of welfare/solidarism so far, therefore I would like to cast some light on their paradoxes. These are not “paradoxes” in the sense of logic, but rather psychology: they result from the maladjustment of social institutions to human reality, rendering solidary efforts Sisyphean.

First and foremost, there is the paradox of humiliation. The welfare state originates, *inter alia*, from the noble idea of curtailing the embarrassment of private benevolence. The anonymous help of state officials seemed less humiliating than that offered face-to-face, which tends to invoke the master-slave emotions of pity and dependency. However, the anonymity of support, which was supposed to prevent humiliation, deepened it instead. The essence of humiliation, according to A. Margalit,¹⁵ consists in treating human beings as nonhumans – one of the modern ways of doing this is treating them as numbers, application forms or cases, which, obviously, is a common practice of welfare bureaucracy. It is worth noticing that this “dehumanization,” intended to reduce negative emotions, does disservice, since feelings, also the unpleasant ones, are the most powerful catalyst of change.

The second paradox can be called a “Hobbesian” one. It is a paradox of anthropological pessimism, which leads to the devastating asymmetry between citizens and the government. The classic counterargument is *quis custodiet ipsos custodes?* (Who will guard the guards themselves?) This succinct question reveals the shortages of radical anthropological pessimism, as it has either to presuppose that state officials are a superior race, which is counterfactual, or create a mechanism of meta-control, which continues *ad infinitum*.¹⁶ In both cases, this fuels an excessive expansion of Leviathan and thus not only widens the gap between the beneficiaries (ordinary people) and the benefactors (a powerful state), but also infantilizes the former by not allowing them to take responsibility for their own lives. A recent rhetoric of empowerment¹⁷ does not change much in that respect, as it may be regarded as another paternalistic transfer, effected at the government’s will, instead of a sovereign, civic space where freedom (and thus solidarity) could flourish.

Over two thousand years ago, Aristotle noticed the paradoxical nature of virtue: it is neither natural nor learnt. It is impossible to capture the moment of its naissance as it originates from a phenomenon highly questioned nowadays: free

¹⁵ Margalit [1996].

¹⁶ Buchanan [1975].

¹⁷ Cf. Alsop et al. [2006].

will. This ancient truth reveals the third paradox: virtue cannot appear under duress, which means that enforced charity, instead of liberating, enslaves. B. Frey is right in stating that “constitutions for knaves crowd out civic virtues.”¹⁸ Regarding citizens as immature, idle and corrupted creatures is a self-fulfilling prophecy. To make matters worse, empirical research proves that the phenomenon of crowding out refers not only to the ability of self-help (via inducing learned helplessness¹⁹ and breeding a culture of complaints) but also to the help provided by others in the form of private, voluntary benevolence.²⁰ The phenomenon of crowding out has far-reaching social and economic consequences: cross-cultural studies by D. Fetchenhauer and R. Wittek showed the following rule: the fewer people in a given country adhere to the patriarchal educational style (which strongly focuses on authority and obedience), the more honest and solidary the inhabitants of this country are, which leads to a greater economic prosperity, economic equality and a higher level of urbanization.²¹

K. Schuyt made an interesting observation: solidarism, described by him suggestively as “administrative solidarity,”²² is unable to distinguish the individuals who really need support from those who dishonestly overuse it. The same problem had already been experienced by 18th-century officials implementing the English Poor Laws. They ‘resolved’ it by resorting to humiliation: help was provided under such dehumanizing conditions that, as it was wrongly assumed, only people in the worst misery (the so-called *rouge poor*) could stoop to ask for it.²³ Such ungrateful practices not only reinforce the aforementioned paradox of humiliation, but also create a new one – the paradox of blindness. Solidarity arising from ‘civic friendship’, like every form of friendship, should remain sensitive to the personal position. However, its welfarist version, being reduced to an administrative system of resources transition, makes itself unable to fulfil this role. Distinguishing those who really need social assistance from those who can do without it requires a lot of personal attention, wisdom and experience that cannot be obtained through a complex system of application forms.

In conclusion, one may say that solidarism turns out to be futile on both levels. On the primary, “cooperative” level, it crowds out entrepreneurship and

¹⁸ Frey [1997].

¹⁹ Dixon, Frolova [2011].

²⁰ Pepall et al. [2006].

²¹ Fetchenhauer, Wittek [2006].

²² Schuyt [1998] p. 300–301.

²³ A suggestive illustration of these practices can be found in Tocqueville’s “Memoir on pauperism” – Tocqueville [1997].

destroys spontaneous fellowship by constant and systematic humiliation and state-dependency; on the second, “supportive” level, it is doomed to fail from the very beginning due to administrative insensitivity to individual needs and problems.

IV. Solidarity in the legal framework

The conclusions from the previous section do not seem very optimistic. They can be treated as another argument in favour of privatization of solidarity: If the state’s mediation crowds out solidarity, should it not be left in the shadows of the personal sphere, latent in an expectancy of a miracle of social cohesion, emerging spontaneously out of individual moral decisions? Such a conclusion is based on two assumptions: 1) reduction of solidarity to charity, 2) consent to implementation of solidarity by the state. However, solidarity, as it has already been said, cannot be identified with mere charity, and *a fortiori* with its enforced state version described as solidarism. Therefore, the critics of the latter do not prejudge the discrepancy between solidarity and law. It should rather be treated as an admonition against excessive and too strict legalism and an invitation to the quest for legal arrangements more subtle than the welfarist ones. To clarify the concept and the role of solidarity within the legal frames, solidarity must be confronted with other social concepts: decency, justice, freedom and equality (to mention only the principal ones). In the following section, I will focus on the first two of these notions.

1. THE CONCEPT OF DECENCY AND THE LIMITS OF THE STATE

The concept of decency should be treated as a touchstone for the adequacy of legal arrangements. First of all, it was paternalism and coerciveness of the state that rendered solidarism futile. Decency, in the understanding of A. Margalit,²⁴ is the most fundamental social concept, which refers precisely to this problematic issue – the way institutions treat people – and obligates the state to leave a vast spectrum for individual freedom. As such, it can serve as a means of protection against the expansion of Leviathan.

Decency is the most fundamental concept because it expresses the ultimate value of self-respect. According to Margalit, self-respect stands in the most intimate relation with our humanity. Self-respect does not refer to our achievements, deeds and other external efforts (these fall under the concept of self-esteem), but to our intrinsic value as humans, to our human dignity. As such, it is a precondition of personal development and good life. All coercive (from authoritarian to totali-

²⁴ Margalit [1996].

tarian) societies that treat individuals as anonymous, insignificant elements of a faceless mass, as “cogs in the machine,” violate this irreducible value of human individuality and the mystery of their personal freedom. Therefore, rational people who want to create a just society must avoid creating humiliating institutions and social conditions.

Humiliation must be avoided as a contradiction of decency. Margalit operationalizes this concept on three levels: humiliation consists in 1) treating human beings as if they were not humans – as beasts, machines or sub-humans; 2) performing actions that manifest or lead to loss of basic control; 3) rejecting a human being from the “Family of Man.” Solidarity practices indecency on each of these levels: 1) it downgrades human beings to application forms and cases; 2) it trades freedom and enterprise for the *panem et circenses* of welfare arrangements; 3) it treats state officials as a more powerful ‘superior race’ and is marked by a substantial mistrust of citizens’ free and sovereign action. This last point is worth emphasizing. Human dignity (which can be treated as a synonym of self-respect) is expressed in free action (it is not by accident that the Polish and German Constitutions proclaim that human dignity is a source of human rights and freedoms). Therefore, as Margalit states, the spectrum of free human action must be carefully protected and thus, on the political level, freedom from interference gains prevalence over freedom to achieve a good life. Freedom from interference, as seen by Margalit, protects us from subjugating our decisions to the illegitimate will (even if goodwill) of another and as such protects us from humiliation.²⁵

The concepts of decency and solidarity are intertwined. This correlation is a historical fact: from the lofty French slogan to the Polish anti-communist revolution, solidarity has always been emerging in a common struggle for freedom from oppression and humane, decent treatment. The common point for both of these concepts is the passion for human freedom, which can be presented on the example of Rorty’s²⁶ concept of solidarity. His dedication to freedom gives rise to the concept of “negative solidarity.” Traditionally, solidarity has been based on the recognition of sameness. As a postmodernist, committed to contingency, nominalism and radical difference, Rorty denies the possibility of finding a basis for universal sameness based on pure reason, language or “core self,” as well as all the particular concepts of sameness (race, nationality, gender etc.), which are potential tools for exclusion (“a Greek like ourselves”). His way of thinking is overwhelmed by a liberal fear of cruelty (appearing also in the disguise of paternalism)

²⁵ Margalit [1997].

²⁶ Rorty [1989].

and thus he founds his account of solidarity on a negative premise, that is, on the protest against physical and mental cruelty, with the latter consisting in the pain of humiliation. In his opinion, solidarity does not require a complex theory of sameness, but the most basic, human sensitivity for others' pain.

Rorty's account of solidarity is abridged and so modest that it turns out to be the same idea that Margalit understands under the notion of "decency." Both concepts express a fundamental commitment to respect and sensitivity for other human beings, which is Kantian in its provenience. They are thoroughly liberal concepts, negative in their consequences: aimed against cruelty, humiliation and coercion, they demand one vast spectrum of freedom for another. In its full-blooded version, solidarity is intrinsically a positive notion. Although it can emerge in the course of a common struggle for decency, its definition includes much more than mere sensitivity and compassion. Decency guarantees due respect of our differences and a decent margin of freedom for one another; while solidarity goes further and invites us to treat these differences in a creative, more cooperative way. However, it does not mean that it abandons its passion for freedom. Liberal warnings against cruelty have to be treated most seriously. Without the core of decency, "solidary" groupings easily change into mafia, terrorist, or even totalitarian organizations²⁷ or – in the best case – into welfare arrangements, which admittedly have noble goals, but attempt to achieve them with less noble means. A solidary organization which does not respect the core of a liberal state – its commitment to decency – must in the long run prove to be destructive, as it violates the most primary good: self-respect. It is decency and potential inclusiveness of solidary association that determine its moral quality. On a state scale, decency is a guard of the liberal limits of state.

2. SOLIDARITY AND JUSTICE

The relation between solidarity and justice is even closer than that between solidarity and decency. On the one hand, both notions are often described as contradictory. It is said that justice belongs to the domain of rights and duties, while solidarity refers rather to the personal sphere. Solidarity and justice do conflict. Justice demands acting under the veil of ignorance, while solidarity must remain sensitive to the complexities of personal position. More than a rule, solidarity is a moral and social attitude. The traditional image of blindfolded justice, when contrasted with vulnerable solidarity, is very illustrative. The same idea is expressed through many subtle distinctions – the Hegelian conflict between *Moralität* and

²⁷ Cf. Banfield [1958].

Sittlichkeit (as evoked by R. ter Meulen), F. Tönnies' famous distinction between *Gesellschaft* and *Gemeinschaft* (used by Weber in his theory of associative relationship – *Vergesellschaftung*) versus communal relationship – *Vergemeinschaftung* and many parallel ones. The fundamental idea behind all these images is that justice refers to abstract (“cold”) rights and duties, while solidarity refers to the personal relations of mutual commitment, responsibility and recognition (e.g. A. Honneth²⁸ identifies solidarity with the last of these concepts).

On the other hand, however, solidarity and justice are said to be two sides of the same coin.²⁹ J. Waldron offers an interesting variation of the Good Samaritan story: what would happen, he asks, if the injured man, instead of being helped by the Samaritan, was vigorous enough to find his way to a log cabin privately owned by the priest or the Levite and warmed his hands by the fire?³⁰ Would we take it for trespassing and prohibit it, or, to the contrary, would we obligate the merciless owners to provide this passive, low-cost support? A similar question arises from the writings of a Polish philosopher, Z. Stawrowski:³¹ do we, in the classical biblical story, consider the priest and the Levite, despite their lack of solidarity, still just, or do they prove their injustice through their cold-heartedness? Obviously, solidarity cannot be reduced to charity, but these reflections prove that the borders between the two realms, described above as contrasting (the realm of personal commitment versus that of abstract rules), are in fact flexible and movable. A valuable contribution to this debate was made by A. Buchanan.³² He analysed traditional distinctions between the duties of justice and the duties of charity (the former, unlike the latter, being: 1) exclusively negative, 2) enforceable, 3) perfect and 4) a matter of rights) and described their flexible and mutually influential nature, which led to the far-reaching institutionalization of the duties of charity. Maybe Saint Thomas was right and charity is a superior form of justice? What should lawyers think of it?

In the quest for determination of the mutual relations between different social concepts, once again, a very illustrative lesson has been given by A. Margalit. He distinguishes two levels of social bonds: personal and institutional. On the personal level, a counterpart of the idea of decency is the concept of a “civilized” society. Decency is originally a macro-ethical, social concept, though still a very ba-

²⁸ Honneth [1996].

²⁹ Habermas [1985].

³⁰ Waldron [1993].

³¹ Stawrowski [2014].

³² Buchanan [1987].

sic, pre-modern one. As Margalit (controversially) assumes, a decent society does not require a clear concept of rights. In his opinion, the duty-based society of 18th-century Prussia could be a decent society as long as it forbade humiliation (it is worth noticing that this could serve as another interesting contribution to the criticism of welfare and its hypertrophy of social guarantees). Despite its pre-modern nature, decency arises on the verge between the private and the public spheres and it refers to the relation between institutions and citizens, whereas a civilized society describes the way people treat one another. For example, in the view of the author, the Czech (respectively: Polish) society under the communist regime was indecent, but still could be (and in many aspects indeed was) a civilized society. On the institutional level, Margalit, in addition to a decent society, introduces the additional concepts of a “bridled” society and a just society. A society whose institutions do not torture its citizens is a bridled society, a society whose institutions do not humiliate its citizens is a decent society, and, finally, a society whose institutions deploy a fair pattern and procedure of distribution of primary goods is a just society. The relation between these three types of societies is inclusive – a just society must also be a decent one and a decent society must also be a bridled one, but not the other way round.

On a graphic spectrum of societal development, a solidary society is further than a merely just one. Decency is concerned with the most primary good of self-respect, which is inherent to every human being, justice – with the distribution of all the divisible (material as well as immaterial) goods, and solidarity expresses a moral and social attitude towards achieving and providing these goods: it treats these processes (as well as their outcomes) as parts of a common enterprise (common good). Solidarity as civic friendship goes further than decency with its obligation to respect the most basic quality of social relations (between individuals described as merely “civilized”) and further than justice with its commitment to fair and, in a more or less sublime sense, equal relations: solidary care about the quality of social bonds reaches extremes in the metaphor of fraternity. A solidary society would attain the highest level of social development – one where people, in respect of their and other humans’ dignity and personal freedom, reserving due distance, not only share resources fairly, but also take up the challenge of mutual responsibility (“one for all, all for one”) and, if necessary, are willing to sacrifice a part of their fair share for the sake of others. Like in Margalit’s schema, the relation between these “ideal types” of societies is inclusive: a just society cannot be built without due respect to the primary Kantian concern for human dignity, and a solidary society – without its due commitment to both justice and decency.

Furthermore, solidarity has two dimensions: personal and institutional. At the personal level, it is aimed at achieving the highest quality of social relations, which should be based on cooperation, responsibility, mutual support and trust, and thus promote social cohesion and operative unity (“acting together as one” as opposed to “fluidarity”³³). At the institutional level, due to its close connection with justice, solidarity affects patterns and procedures of distribution: as regards material dimension of justice, solidarity means a concession to “social” correction of the abstract rules; regarding the procedural aspect, it expresses a commitment to the most cooperative (or “deliberative” in Habermasian terms) way of doing it. Briefly speaking, at the institutional level, solidarity can be understood as a form of social justice. This sociality, however, cannot be extended too far. The commitment to the idea of decency obligates us to keep the state within rational limits. Therefore, a distinction should be made between the two contents of solidarity: the minimum and the maximum one, of which only the former can be institutionalized and enforced by the means of coercion.

a) Minimum content of solidarity – social justice

Undoubtedly, the concept of solidarity as a form of social justice is not new. The *novum* of this decent version, however, is its commitment to restricted limits of state – the aforementioned “minimality.” Social “solidary” justice cannot lead to welfarist arrangements. Traditionally, in the special sphere of justice – justice in health care – solidarity has been identified with an imperative to “help the suffering, the troubled and the disadvantaged”³⁴ and as such has had three traditional dimensions: 1) income solidarity, 2) age solidarity and 3) risk solidarity. This reveals the logic of solidarity, which consists in breaching the perfect ignorance of justice for the sake of improvement of the situation of particular (worst-off) subjects or groups of subjects. Solidarity as a mechanism of introducing exceptions has to reflect the criteria of justice, otherwise the support provided to the worst-off may become a bottomless pit.

We cannot thus follow the vast path traced by B. Prainsack and A. Buyx.³⁵ The authors proposed a very interesting account of solidarity, which captures its interpersonal-institutional dynamic. In its bare-bones version, it depicts solidarity as a “manifestation of the willingness to carry costs to assist others with whom a person recognises sameness or similarity in at least one relevant respect”³⁶ which

³³ Cf. Lukes [1999].

³⁴ Kornai et al. [2001] p. 17.

³⁵ Buyx, Prainsack [2011].

³⁶ *Ibidem*, p. 47.

is then re-forged into norms of “good group conduct” and legal arrangements. Despite many assets of this promising theory (including a suggestive description of the process of “institutionalization” of solidarity), it is – wrongly – used to outweigh the value of individual responsibility.³⁷ The core of the problem concerns the process of recognizing similarity as a derivative of the context of the practices one engages oneself in. As such, it is contingent and arbitrary, which is additionally reinforced in the appeal to “imaginary” communities.³⁸ For example, according to the authors, the lack of such “imaginary” recognition is the main reason for refusing support to “the imprudent” (smokers, people who overuse alcohol or fatty foods, etc.), raised by “the prudent” in the discussion concerning the so-called lifestyle diseases (which entails the deeper question of “fairness” of rationing health care resources by individual responsibility). Although it cannot be denied that imagination (operating through powerful media images) plays a huge role in creating communities of risk, the above distinction between “the prudent and the imprudent” results from criteria deeper than only imagination-related. It reflects our basic moral intuition referring to the essence of justice, which more or less directly deploys the category of desert (e.g. as in Dworkin’s opposition between brute luck and option luck³⁹). As the authors of “Justice and solidarity in priority setting in healthcare” argue convincingly:

People do tend to feel and think differently about [...] the smoker having a heart attack who is seriously overweight and the 60-year-old man who has always taken excellent care of himself and is suddenly stricken by leukaemia. Furthermore, cases like the one of the leukaemia patient who has always taken excellent care of himself raise reactions such as: “This is undeserved!”⁴⁰

In conclusion, it may be said that solidarity in its minimum version must respect two principles: 1) if it is not to be confused with potentially endless humanitarian aid, it must reflect rational criteria of justice; 2) solidarity cannot be understood in opposition to individual responsibility – on the contrary, both individual and social versions of responsibility are two integral dimensions of the same moral and social attitude towards oneself and other people. Not accidentally, these two concepts – solidarity and individual responsibility (*Solidarität und Eigenverantwortung*) – are taken together in the fundamental § 1 of the German Sozial-

³⁷ Buyx [2008]; Prainsack [2013].

³⁸ Anderson [1991].

³⁹ Dworkin [2000].

⁴⁰ Bogaert et al. [2013] p. 101.

gesetzbuch (V). Responsibility can be understood as a logical extension of an individual's free action, and as such it sets the limits for social assistance, establishing priority for those who are unable to undertake such an action (the so-called underservedly deprived⁴¹), as well as the goals of such an assistance, which should be provided not for the sake of arbitrary charity but for the sake of social inclusion and cooperation (as far as possible). The account of social justice that respects individual freedom and responsibility allows for the keeping of potentially endless support and thus the frames of state within the rational (decent) limits.

b) The maximum content of solidarity – a regulative ideal

The maximum content of solidarity, which is aimed at promoting trustful, cooperative relations between individuals, cannot be enforced with the use of coercive power. It does not mean, however, that it must be left totally outside the legal frames. Law not only deters and coerces, but, most importantly, coordinates and educates. According to I. Bohnet,⁴² the latter is more significant than the former. This can be achieved indirectly, and through a different kind of law, the “soft law,” i.e. legal means that provide for no or for very small sanctions and include general clauses or wide-ranging directions. The asset of imperfect regulations is that they allow for extensive interpretation and leave a vast margin of freedom.

The best explanation of the value of this imperfect, soft legislation will probably be the classic Kantian one. In his view, perfect and imperfect duties express logical and, respectively, pragmatic impossibility to generalize contrary principles. The “inner morality of legislation,” its intrinsic “dignity”⁴³ consists in a movement of generalization which expresses a general concern for others, a moral attempt to compromise different, and frequently conflicting, interests of individuals. One of the most prominent examples of this expressive (or in Kantian terms: regulative) function of law may be the dignity clause in the Polish Constitution (modelled on the German Constitution), as already mentioned above. Although both of these legal acts proclaim that human dignity “shall be inviolable” and declare “the duty of all state authority” to protect it, none of them predicts any sanctions for possible violations. Despite that, the dignity clause serves as a *tertium comparationis* for conflicting human rights or as a meta-principle of interpretation and its significant influence on the legal order remains undeniable.

A solidary society in its maximum version should be treated precisely as such a regulative ideal. This ideal can be approached in various manners, begin-

⁴¹ Brock [2002].

⁴² Bohnet [2003].

⁴³ Waldron [1990].

ning from fostering, promoting and facilitating a culture of responsibility for one another (it is worth noticing here that, despite all the national differences with respect to the extent of Samaritan help that could be legally demanded, it can never be denied when a prior relation of responsibility exists⁴⁴). R. ter Meulen's *oeuvre* indicates the directions of development of solidarity-inducing practice in health care. One example of such practices is family care⁴⁵ (caregiving for a family member who has become dependent because of disease or illness), which gives rise to informal solidarity based on personal relations and free choice. Undoubtedly, the provision of such informal care can be facilitated by legal arrangements and fostered by financial incentives.⁴⁶ As such, it contributes not only to the reduction of welfare institutions, but, primarily, to the creation of a culture of cooperation and responsibility.

Nevertheless, the scheme presented above is only a general one, its main concern was to expose the value of legal framing, which can channel spontaneous human action and direct it on the way to a solidary society. The catalogue of "solidary practices" is yet to be found and elaborated on.

V. Conclusions

Perhaps the main conclusion lies in Aristotle's view of moderation as the highest virtue, which turns out to be valid also in the legal world. Reflective equilibrium between the principles and strategies emerging from different realms of social life must therefore be sought in the most modest (decent) way. Since the quest for a solidary society arises from the passion for human freedom and an effort to construe a public sphere that will not be a reservoir of oppression, such a research should begin with a solid reflection on human nature. Only "human-tailored" law can prevent pragmatic "paradoxes" which, via moralistic fallacy and prescriptive inflation, render legal means ineffective. A solidary society cannot demand heroism or enforce charity, and thereby it expresses its fundamental commitment to individual self-respect and freedom. Rights, however, can still be treated seriously and their creative, "regulative" potential can be used with (and for the sake of) decent care.

⁴⁴ Smits [2000].

⁴⁵ ter Meulen, Wright [2012].

⁴⁶ Cf. Triantafillou et al. [2010].

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