

Suffering from Vulnerability

On the Relation Between Law, Contingency and Solidarity*

Benno Zabel

“You can hold yourself back from the sufferings of the world, that is something you are free to do and it accords with your nature, but perhaps this very holding back is the one suffering you could avoid.” – Franz Kafka

When observing the developments of modern societies in the context of the pandemic crisis, one sees the fragility of social structures and political agency. One notices especially an ambivalence of legal action, made plain by the conflicting goals of liberal communities. One thinks of the handling of medical resources or the settling of ethical questions. But one also thinks of restrictions to individual and social life, to rights of freedom and assembly and the right to demonstrate, or of the conflicts that result from the sharing of economic burdens. Without doubt the COVID-19 crisis has reinforced if not brought forth disruptive processes in societies, or at least pushed them within people’s perceptual horizon. In this article I argue that we can understand the significance of the COVID-19 crisis only when we relate it to the *vulnerability* of forms of life today and the *awareness of vulnerability* of whole societies. The language of vulnerability is an expression of a reality of freedom that has internalized the contingent conditions of its becoming and persisting. In this sense, as a guarantor of order, law guarantees reliable co-existence in society. Yet at the same time, law is the result of this co-existence, which means it is related to the historical dimension and profound experiences of human culture. The legal order is at once necessary and contingent.

According to the thesis of this article, the COVID-19 crisis merely shows in an especially striking manner how difficult it is for today’s liberal societies to grasp necessity and contingency as reciprocally conditioning structural moments of freedom. Put bluntly, liberal guarantees of freedom do not eliminate vulnerability but rather promote it. Law, in turn, is an integral part of this dynamic and thus falls into a crisis. But it is also necessary to respond to this crisis of legitimation of law with a new conception of social freedom. Freedom is an achievement that we have to care for collectively, also by legal means. This involves learning to understand anew the social role of solidarity. Upon closer examination, the handling of vulnerability and the experiences of vulnerability point to an overlapping communication and interlacing of diverse spheres of freedom, which must find recognition in the various forms of legal action. Law’s function is oriented not only to delimitation but also to *inclusion*. For this reason, too, the crisis of law can be overcome only if there is, in addition to an idea of a protective freedom, the idea of an inclusive

* Translated from German by Aaron Shoichet.

freedom. Being a subject in a legal order highlights the insight that spheres of freedom must be understood as two-dimensional, as one's own and at the same time mediated through others. Such a conception of freedom by no means aims to subject rights to a rigid regime of duties or to moralize law. Rather, it is about lending reality to the dialectic of the social rule of law and political self-government in free societies. Plural societies do not simply stumble upon processes of inclusion; rather, these processes must be generated in participative action and placed on a stable footing. A critical conception of freedom thus articulates the double-edged power of law that is crystallized in the practices of subjectivization, and it insists on revealing the *suffering from vulnerability* and the *need for inclusion* of open societies.

This thesis and its consequences will be elucidated from three intertwined perspectives. We will begin by reconstructing liberalism's concept of law as part of an encompassing *care regime*. Then we will seek to show that law responds to liberal societies' awareness of vulnerability and thereby brings forth vulnerability. The change of perspective in the final part seeks to reflexively flip modern societies' knowledge of vulnerability by introducing solidarity as a *legal* concept of inclusion. We will then be able to see that the practices of solidarity do not deny the demand of order of liberal legal systems. Instead they point to the fact that the crisis of law and society can be overcome only by recognizing the social *dependence* of individual expectations of freedom and security.

I. Law and the political anthropology of modern societies

1. *The ambivalence of the promise of law*

Especially in times of crisis and structural change, we notice that a reliable common life, an open society, is hardly obtainable without the infrastructure of the legal order, without the promise of universal equality and political participation. The promise of law is a promise of social spaces of action, for individual rights are only worth something if they can be inserted in social communication and can in this way guarantee self-realization. Securing rights is the badge of enlightened, normative orders, of a state that restricts its power.¹ This applies to the consideration of diverse individual interests, needs and capacities, but equally to the containment of existential fears and insecurities, of scenarios of crises and catastrophes. Now there is no doubt that, following today's understanding of democracy, only the social and political understanding decides what may claim legitimacy as protected positions of right.² But this understanding cannot ignore the liberal idea of rights, for the significance of rights consists precisely in that, according to Ronald Dworkin, 'an individual is entitled to protection against the majority even at the cost of the general interest'. In this respect, subjective rights would offer, in Dworkin's words, 'a trump over general utilitarian justification.'³ In recognizing

1 Philip Pettit, *Just Freedom: A Moral Compass for a Complex World* (New York: Norton & Company, 2014).

2 Jürgen Habermas, *Faktizität und Geltung* (Frankfurt am Main: Suhrkamp, 1992).

3 Ronald Dworkin, *Taking Rights Seriously* (London: Bloomsbury, 2013), 180, 431.

Benno Zabel

subjective rights as human rights, basic rights etc., one accordingly articulates the insight that there are individual expectations of freedom that have a legal quality because a subject is entitled to them.⁴ In this way, a conception of self-empowerment is mobilized that enables effective individual agency. One need think merely of the numerous forms of action linked to legal claims.

On the other hand, the idea of subjective rights has never been understood in such a way that the individual determines the range of legal positions solely from his or her particular perspective. It is clear not only in the political theory of the *Ancien Regime* but right up to the present liberal constitutional theory that individual spaces for action must be restricted if we are to maintain long-term, universally acceptable legal relations. Rights are not simply available. According to the common account, only in the context of an ordered community with a functioning monopoly of power are they realizable and worth protecting in the case of conflict. This interpretation is by no means new. It was clear already for Thomas Hobbes that rights, natural freedom, could be effectively claimed only by someone who subjected him- or herself to the civil laws. It is the rule of law that draws attention to the legal subject in the first place and generates a lasting trust in the social order. With his contract model, Hobbes is one of the first to conceive of the vulnerability of the individual *politically*⁵ and thus to abandon the metaphysical foundations of the tradition. For an enlightened modernity, this link between subjugation, protection and peace is as attractive as it is problematic. This model is attractive because it reconstructs state authority as a socially legitimised and thus recognized entity for securing rights: *auctoritas non veritas facit legem*. For, according to Hobbes:

The Office of the sovereign, (be it a monarch or an assembly,) consisteth in the end, for which he was trusted with the sovereign power, namely the procuration of *the safety of the people*; to which he is obliged by the law of nature, and to render an account thereof to God, the author of that law, and to none but him. But by safety here, is not meant a bare preservation, but also all other contentments of life, which every man by lawful industry, without danger, or hurt to the commonwealth, shall acquire to himself.⁶

Strictly speaking, Hobbes drafts a *care regime* of the state that encompasses the entire life in society. Care, *cura*, and thus *securitas*, becomes the distinguishing feature of an authority that relies on its own capacity for order. We will come back to this later. The problem that Hobbes's view poses for the concept of a democratic legal order is that he conceives of the link between subjugation, protection and peace in terms of an individual duty of obedience. Thus, in contrast to the modern understanding of freedom, duty is not the reflection of law; on the contrary, law is the reflection of a duty. This duty is determined and asserted through the power of legislation and coercion of state authority. Only then, in turn, does it appear at all

4 John Locke, *Two Treatises of Government and A Letter Concerning Toleration* (New Haven: Yale University Press, 2003), 2nd treatise, § 44.

5 Thomas Hobbes, *Leviathan*, ed. C.A. Gaskin (Oxford: Oxford University Press, 1996), chap. 13.

6 Hobbes, *Leviathan*, ch. 30, 222.

possible to reliably overcome anxiety and achieve a stable state of peace. Yet we should not overlook that one is thereby exposed to a rigid imperative of security (safety) without oneself having been involved in the grounding of the normative principles essential for this imperative of security. For Hobbes, natural freedom is indeed worthy of protection. But it is also a legal risk that must be constantly constrained. The legalization of the need for security, *i.e.* of a social awareness of vulnerability, leaves behind a precarious subjective status in a positively paradoxical turn. In other words, it is the result of a thoroughly *liberal-authoritarian concept of rights and the security of the legal order*.

At least that is how modern legal theory and political theory see it.⁷ The critique expressed against Hobbes from the perspective of democracy is more or less understandable. Individual freedom cannot exhaust itself in the justification of imperatives of security. Rather, freedom has an intrinsic value that must be spelled out politically and legally. Yet Hobbes's insight also remains that the securing of rights and freedoms must be accompanied by legal powers, which ought to harmonize facts and norms, including diverse social interests, with the idea of a stable and secure community. Democratic concepts of law and freedom must succeed, then, in achieving something specific: they must implement a network of intervention mechanisms yet designate it at the same time as an act of *self-government*. For Jürgen Habermas this does not represent a fundamental philosophical problem: 'In the legal mode of validity, the facticity of the *enforcement* of law is intertwined with the legitimacy of a *genesis* of law that claims to be rational because it guarantees liberty.'⁸ In this regard, law must not only mediate the interplay of autonomy and authority, freedom and subjugation; rather, law is also a medium that normatively processes the empirical impulses and needs, the lifeworld perspectives of the subjects. That is, law is an integrating factor. As a legitimate order that has become reflexive, it belongs, according to Habermas,

to the societal component of the lifeworld. Just as this reproduces itself only together with culture and personality structures through the flow of communicative actions, so legal actions, too, constitute the medium through which institutions of law simultaneously reproduce themselves along with intersubjectively shared legal traditions and individual competences for interpreting and observing legal rules.⁹

The regulating power of law – the monopoly of violence – is thus legitimized in two ways: on the one hand, through the function of political and social order, and on the other, through the democratic process. This understanding of democracy and society is noteworthy especially because it seeks to reconstruct law as a neutral moderator of the most diverse interests, needs and expectations, as an uncontested medium of normative orientation. But the matter is less clear than it initially

7 Franz Neumann, *Die Herrschaft des Gesetzes* (Frankfurt am Main: Suhrkamp, 1980), 128 ff.

8 Jürgen Habermas, *Between Facts and Norms*, transl. William Rehg. (Cambridge, MA: MIT Press, 1996), 28.

9 Habermas, *Between Facts and Norms*, 80-81.

Benno Zabel

appears. With the verve with which modernity's project of freedom is positioned against Hobbes and the anti-Enlightenment tradition, it is perhaps overlooked that this project of freedom was itself the result of political and social struggles, and still is.¹⁰ This does not mean in any way that one could forego the project of freedom – quite the contrary. And yet it is necessary to examine more clearly the context and the dynamic of securing liberal freedoms and rights. Thus the legal order and the state are tied to a concept of society that understands itself as *value-pluralistic* and *secure from contingencies*. Constitutional appeal to values fills the vacuum that the demise of traditional resources of legitimation such as religion and morality left behind. Whether related to security and solidarity, equality or education, values ensure normative orientation. They have the task of asserting literally what is essential and valuable in the 'needs and conditions of the immediate spiritual life'.¹¹ This applies to dealing with fears and uncertainties just as much as it does to concern for one's existence in general: *no values, no normative compass*. For this reason it is hardly surprising that there is talk everywhere of communities of values, of a defence of democratic values or of a value-oriented constitutional patriotism (Jan-Werner Müller).¹²

One can see why it is important to mention the significance of values and the semantics of values in how the reproduction of democratic communities takes place. The legal order and politics in the shape of legislation and the application of law not only moderate the diverse conceptions of value of a society; rather, according to Isaiah Berlin, existing life circumstances are continually re-ordered, changed or re-assessed.¹³ *Societies long for the coherence of values through law*. The legal power that thereby arises unifies a multitude of regulating techniques employed by administration, the judiciary or the police. Thus democratic securing of law contrasts clearly with pre-modern conceptions. But one can also see that law depends on normative and psychic steering effects and that it must respond to different demands – in the field of economics, security or health policy. Legal norms should guarantee and enforce social conceptions of value. It is these effect mechanisms, this insertion of normality and normative trust against which the legitimacy of the political order is measured.

Yet the conflicting goals of securing rights can thereby hardly be overlooked: conditions of life and freedom can be stabilized only through permanent intervention and regulation. And this is not a one-sided affair, for intervention and regulation fulfil their purpose only insofar as they are matched to the needs and expectations of society. Yet in this way they become dependent on individual and collective interests. To put it plainly: observance of norms in exchange for security. Replacement of traditional resources of legitimation such as religion, morality or ethicality has certainly led to an emancipation of the modern individual. Yet accompanying

10 Christoph Menke, *Kritik der Rechte* (Berlin: Suhrkamp, 2015).

11 Hermann Lotze, *Metaphysik* (Leipzig: Weidmann'sche Buchhandlung, 1879), 324.

12 Jan-Werner Müller, *Verfassungspatriotismus* (Berlin: Suhrkamp, 2010).

13 Isaiah Berlin, 'Two concepts of liberty', in *Four Essays on Liberty* (Oxford: Oxford University Press, 1969).

the hegemony of law is a *colonisation of the lifeworld* (Jürgen Habermas),¹⁴ which pushes practices of inclusion and solidarity to the margins, or at least neglects them, while at the same time reinforcing experiences of vulnerability.

II. The fragmented legal subject

To better understand the relation between law and lifeworld, freedom and vulnerability, it seems sensible to ‘flip’ the perspective. How does autonomy, so highly esteemed in liberal legal systems since the Enlightenment, relate to the individual’s experiences of vulnerability? Let us begin with the common paradigm. It states that all political decisions can be justified only in relation to the individual subjugated to law.¹⁵ Individual interests restrict or mobilize sovereign action. In short: *facilitating autonomy creates legitimation*. Now we have already seen, however, that facilitating autonomy frequently occurs more dynamically than is generally assumed in present-day theories of the constitutional state and democracy. But what is at issue in this dynamic? We find an answer to this question if we bring to mind the starting point for constitutional states in securing freedom. Then we will see that in securing freedom, the individual and society are always *presupposed*, that is, conceived by the state and the constitution as *pre-existing*. This means, on the one hand, that the individual and society do not perform a function for the sake of the state or the constitution, but rather that law and the state act and shape for the sake of the individual and society. That this acting and shaping is essentially tied to instruments of intervention and regulation has already been mentioned. On the other hand, it says very little about the *how* of this securing of freedom, about the *content* of the regulation of interests. If law and state employ their ordering power for the sake of individual freedom, then this must be reflected in the handling of interests and conditions of society. Michel Foucault points precisely to this when he emphasizes that a liberal legal system does not simply accept freedom: ‘Liberalism is not what accepts freedom. Rather, liberalism proposes to manufacture it in each instance, to arouse it and to produce it.’ Law, Foucault continues, thus relates to a subject that appears ‘as subject of individual choices that are at once neither reducible nor transmittable.’¹⁶ Legal relations are the result of a regulated freedom. The idea of liberal legal systems rests on making the pre-existing conditions of society into the *ground* of securing freedom. This means that the legal system orients itself to the social, economic and political facts, and from there it orders the variety of legal relationships. That is hardly surprising in a liberal world as we know it. Yet one should not underestimate the explosive power of this conviction that is widely shared today, for when individual autonomy is seen through the lens of pre-existing societal conditions, then all mechanisms *facilitating* autonomy must be systematically oriented towards it. But if that is the case, then the facilitating of autonomy

14 Jürgen Habermas, *Theorie des kommunikativen Handelns*, Vol. 2 (Frankfurt am Main: Suhrkamp, 1981), 366.

15 John Rawls, *A Theory of Justice* (Cambridge, Mass: Harvard University Press, 1971).

16 Michel Foucault, *Naissance de la biopolitique. Cours au Collège de France (1978-1979)* (Paris: Seuil, 2004), 66, 276.

Benno Zabel

is influenced not merely by the differentiation of functions of liberal societies, but also to the same extent by unstable relations that exist between the diverse functional areas, for instance, the economy, culture, religion or private life – areas that the individual has a share in intermittently, temporarily or permanently. The negative liberty that the legal order ought to confer is no longer primarily ethically grounded – as was the case still with Kant and Hegel – but rather the expression of a network of interests. Yet in this sense it is itself unstable and fragile.

This perspective makes clear that the high esteem of the individual results in a series of political and legal consequences (see section II above). Most visible are the interferences of the securing of legal order. Protection, and this means regulation, is not only dependent on the interests being protected. The regulation of law unfolds its dynamic character also in relation to a legal subject who is conscious of his or her fragmentation precisely *through* the promise of autonomy. The legal order justifies the subject's power and powerlessness, but with it also *social disembodiedness* and vulnerability. But the paradox consists in the fact that the liberal project of freedom first generates disembodiedness and vulnerability and then seeks to curb them by means of the constitutional state. This paradox has consequences for the internal architecture of the legal order, for the implementation of individual self-realization marks at the same time the switch to a legal *regime of care*. Care as a function of law replaces the traditional ethics and marks a flexible infrastructure of regulation.

III. Suffering from vulnerability: *cura and securitas*

1. *Freedom and anxiety*

Mobilizing the idea of care as a paradigm for politics and law has been discussed many times. It has been pointed out that even Hobbes knew of such a care regime and vehemently defended it. Meanwhile the decisive question is *how* a liberal community employs a care regime of law and *what* exactly it ought to achieve. Looking back at the preceding analysis, we can see that the Janus-faced character of individual autonomy and the ambivalence of legal protection mechanisms have concretely emerged. The problem of this conception of law and autonomy is that, while it takes into account that factual interests (needs and preferences) justify rights, it insufficiently reflects the internal shifts in these factual interests. Increased talk of internal shifts goes hand in hand with an increase in importance of experiencing and overcoming contingency, which influences, in turn, our awareness of vulnerability. For this reason it is not at all surprising that the techniques for realizing freedom by legal means are increasingly linked to the *real* conditions of society.¹⁷ Not eternal life but rather finite and natural life is what governs the universal horizon of expectation (which is also discernible in the current debate concerning contingent human dignity¹⁸). That is also why freedom appears in the first instance

17 Niklas Luhmann, 'Kontingenz als Eigenwert der modernen Gesellschaft,' in *Beobachtungen der Moderne* (Opladen: VS Verlag für Sozialwissenschaften, 1992), 93.

18 Avishai Margalit, *The Decent Society* (Cambridge, MA: Harvard University Press, 1996).

as a question of immanence. Yet this freedom of vulnerable forms of life has a further effect that is often underestimated, namely, that *freedom itself generates anxiety*. In this dialectic of freedom and anxiety, suffering from vulnerability becomes undeniable.

Now anxiety as an individual and collective phenomenon is not a novelty of modernity: it has been known in every era.¹⁹ Pre-modern eras had developed a comprehensive arsenal of semantics of anxiety and techniques for processing it. Experiences of anxiety and, its backside, experiences of fear are indicators of sites of existential threat or, at least, perceptions of threat. In the philosophical discourse, fear is associated with a directed response, with a concrete event, while anxiety is associated with an existential state of mind that supersedes every other inner orientation.²⁰ In the bodies of knowledge on society from the most diverse eras, this analytical distinction has hardly been reflected upon. Under the title of anxiety, we can see instead a conflation of the semantics of fear and the semantics of anxiety. Sigmund Freud, with his theory of anxiety, became especially important and influential by combining together diverse phenomena related to affects and insecurity and thereby preparing the way for a broader understanding.²¹ Yet what is new about anxiety in its relation to modernity may be that secular societies have entirely different ways of addressing it. They refer to the experiences of contingency and normative expectations, which are concentrated in the guarantees of the legal order and which – precisely because these societies do not accept a metaphysics of fate – must be spelled out in a semantics of security appropriate to freedom.

Resources for the legitimation of law, state and constitution are visible in the processing of anxiety, but so is the potential for a loss of legitimation and trust. It is this precarious dynamic that we recognize in the COVID-19 pandemic. The pandemic brings about a collective crisis of trust (which in any case could also be observed with the first modern epidemic, the cholera epidemic of 1831/1832). In addition, the spread of bacterial or viral diseases occurs through transmission and infection, yet this invisible and imperceptible infection seems manageable only to a limited extent. Last but not least, there are existential anxieties – social, economic or political – that are reinforced through the media, and there are threatening scenarios that can grow into social hysterias, resentments and excessive irrationality, for instance, if the pandemic is associated with anti-Semitic ideas or the most diverse conspiracy theories.

At the same time, experiences of anxiety are embedded in the cultural memory and standards of rationality of liberal societies and thereby also challenge the model of the legal order. Upon closer examination, the language of anxiety develops its own irresistible force. It is part of public communication and thereby acts very disrupt-

19 Jean Delumeau, *La Peur en Occident (xive-xviiiè siècles). Une cité assiégée* (Paris: Fayard, 1978).

20 Søren Kierkegaard *The Concept of Anxiety*, ed. and transl. Reidar Thomte (Princeton, NJ: Princeton University Press, 1980); Martin Heidegger, *Sein und Zeit* (Tübingen: Max Niemeyer Verlag, 1993), §§ 39-42.

21 Sigmund Freud, *Hemmung, Symptom und Angst. Gesammelte Werke*, Vol. XIV (Frankfurt am Main: S. Fischer Verlag, 1986), 111-205, here: 120 ff.

Benno Zabel

tively (which is clearly discernible in the current pandemic crisis). ‘Anxiety,’ according to the sociologist Niklas Luhmann, ‘resists any kind of critique of pure reason. It is the modern apriorism – not empirical but transcendental; the principle that never fails when all others do.’²² This means that anxiety as a form of individual or collective self-assurance – and self-preservation – cannot be ignored, but neither can it simply be tolerated as a competing principle. Law would forfeit its normative orienting function and the liberal model of order would implode. Phenomena of anxiety, according to the common discourse, must instead be deconstructed in the *normative grammar of right* and they must be permanently contained. What we can see, however, (more clearly even than did Hobbes) is that the deconstruction and containment of anxiety and vulnerability drives the normative grammar beyond itself.

The handling of phenomena of anxiety and vulnerability reproduces the conflicting goals of modern law. In this respect, constitutional theory and political anthropology highlight the epistemic field and likewise the lines of conflict in practice. Recall Foucault’s suggestion that liberalism does not simply accept freedom but must instead continually produce it and regulate it.²³ Law accordingly designates relations of power and authority that are operative in societies. The popular perspective, according to which relations of power and authority can be thought of only hierarchically and as exercised only in a vertical form, does not adequately acknowledge the heterarchical, network-like regulation in modern societies. There is no above and below, inside and outside for relations of power and authority. Without doubt they are invoked by the constitutional state, but they are also acted out in society. Thus, overcoming experiences of anxiety and being aware of the fragility of human existence makes especially clear how fragile and far from obvious civil liberties are. Here we see not only the strong *dependence of reason on experience*, but also how the idea of security becomes increasingly important in the shadow of the liberal guarantee of freedom. Security enters as a resource of meaning in a *disenchanted world* (Max Weber) in an indissoluble competition with freedom. Whether and how normativity asserts itself against nature and factual evidence are questions that depend on how one defines the relation between freedom and authority, between the subject and regulation. This tension between subject and regulation is played out in the care regime of law, where the right to freedom from anxiety and injury is affirmed.

2. *The care regime of law*

What is designated here as the care regime is the answer to the production of anxiety and the all-present insecurity of liberal societies. The care regime, as political, legal and social care, as prevention etc. makes dealing with anxiety and insecurity into a task that *spans society*. To the extent that law replaces morality and religion as hegemonic agencies of meaning, it itself must now unfold *forces of cohesion* to prevent a crisis-induced disintegration of free communities. It is common to illus-

22 Niklas Luhmann, *Ecological Communication* (Chicago: University of Chicago Press, 1989), 128.

23 Foucault, *Naissance de la biopolitique*.

trate the unique character of the care regime in light of practices of the police as an institution. The police force is considered a prime example of a state-mediated approach to averting danger and of a universal communication of security.²⁴ The related power to intervene consolidates practices of (self-)discipline, of individual protection and the optimization of freedom.²⁵ In the constitutional interpretation, the contradicting interests that emerge are thereby attenuated, so that the executive power of the state is connected directly with the principle of legality. This means that the application of law is tied to current laws through the constitution, which ought to enable the realization of stable legal relationships. Yet this interpretation describes the concept of a state under the rule of law for which the functionally differentiated society and the actual relationships are only *another sphere*, which one shapes from *outside* and *into* which one governs or intervenes. Factoring in the preceding analysis of society and crisis, we can see that the constitutional state, society and individuals, though assigned to separate areas of organization, interact with each other and are dependent on each other in manifold ways. This applies to the diverse structures of authority within a community, but also to how interests in a normatively shaped society depend on concrete interests in security. We must not ignore how the supposition of security, which is based on experiences of crisis and vulnerability, comes into open competition with the guarantee of freedom. Once again, a sociological view is helpful, for precisely with this supposition of security, according to Foucault, the liberal community is forced

to determine exactly to what extent and to what point the individual interest, the different interests, which are individual in terms of diverging from one another and possibly opposing one another, do not constitute a danger for the interest of all. The problem of security: to protect the collective interest against individual interests. Conversely the situation is the same: It will be necessary to protect individual interests against everything that could appear in relation to them as an encroachment coming from the collective interest.²⁶

Now the handling and weighing of interests is the daily business of jurists: no one is better versed in this *métier*. Techniques for weighing interests and determining proportionality make it possible to deal with colliding interests in a flexible manner and thereby guarantee, or so it is thought, an optimization of freedom that is close to life.²⁷ Yet the demand to permanently work out interests, rights etc. has numerous thrusts that one must see in order to be able to classify correctly the dynamics of action. In order to confront concrete insecurities – the fear of survival, of existence and of losing one’s status – and to confront social and economic crises, it is not enough to have available a comprehensive arsenal of steering and regulating measures. Rather, law and politics must also ensure that the plans for control, surveillance and protection also *work* effectively, and this means that they are pub-

24 Friedrich Balke, ‘Zwischen Polizei und Politik’, in *Das Politische und die Politik*, ed. Thomas Bedorf and Kurt Röttgers (Berlin: Suhrkamp, 2010), 207-234.

25 Pettit, *Just Freedom*.

26 Foucault, *Naissance de la biopolitique*, 66-67.

27 On this, see Bernhard Schlink, *Abwägung im Verfassungsrecht* (Berlin: Duncker & Humblot, 1976).

Benno Zabel

licly *perceptible* to all members of the society. The modern political and legal approach to dealing with crises (and not only crises) is increasingly dependent on an expressive and diversified culture of responsibility. This means that responsibilities are justified not merely in terms of events and catastrophes that have transpired, but instead merely through the possibility of the exertion of influence (through the state). Natural catastrophes, for instance, are no longer *mere* natural events if they can be avoided, or even mitigated, through political and legal action. That this may entail substantial costs on the other side is obvious. It applies to diverse forms of state intervention, to intervention in the private sphere and also in freedoms of action or freedoms of profession. It is undeniable that, in exceptional conditions and conditions of repression, we can study the turning points of freely functioning orders precisely by reference to the police and police intervention management. And yet the situation is more complex. Two factors may be decisive: on the one hand, the pronounced *desire* for security and intervention of liberal societies, and, on the other hand, the idea of a universally enforceable orientation to *consequences*. We should briefly consider both.

Let us first consider the desire for security and intervention. This desire must be understood as the consequence of the liberal understanding of freedom. Living circumstances are regarded as fields of interests, superordinate to the legal system and the state, that constantly need to be secured anew. A supposition of security is thus not something that exists or can be formulated abstractly. It arises and changes to the degree that demands of freedom – for instance, through society – are asserted and recognized as being *in need of regulation*. At issue is a process in which demands of freedom, in addressing the legal order and the state, change to duties to guarantee these freedoms. Consequently, fears, threats and insecurities are communicated to the legal order and the state. In return, the communication of the legal order and the state is directed at least also at a *society of fear* (Heinz Bude).²⁸ And then *laws of fear* (Cass Sunstein)²⁹ ought to maintain the security of individual freedom and the order of society.

This reciprocal referentiality of rights and duties, of the desire for protection and taking on responsibility, leads to the second factor, the idea of a comprehensive orientation to consequences. Orientation to consequences through law is necessarily tied to relations of intervention and power: without the power of regulation, there are no consequences. Such an initiated increase of significance of psycho-cultural forms of influence points to a network of patterns of language and action that ascribe great importance to the *future* of societies and life circumstances. In the orientation to consequences, we must not ignore the fact that the care regime is a principle that spans society. The aim is clear: normative orientation by *mastering* the future. At the same time, the care regime makes the relatively static concept of responsibility dynamic. In addition to precaution in the classical sense, that is, preventing the violation of legal interests of every kind, it is increasingly about han-

28 Heinz Bude, *Gesellschaft der Angst* (Hamburg: Hamburger Edition, 2014).

29 Cass Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (Cambridge: Cambridge University Press, 2009).

dling *crises expected in the future*, damage and other destabilising effects. In this way, a whole field of care practices is opened up for the legal order, starting with the general concern for one's existence such as securing a source of livelihood, up to health care, protection from danger and care for crime victims. As the foundation of liberal values should be reflected in the legal system, the care regime takes up the awareness of a fragile existence, promising in return a stable screening of various potential sources of anxiety and insecurity. At stake are the expectations of freedom of the individual and society.

We can easily see the effects of the care regime in the actual legal context. It is about harmonizing the concept of autonomy related to dignity, the person as an end in itself (Kant), with a consequentialist calculus. The interrelation of rights and duties thus designates at the same time a precarious relation. Rights and duties are constantly being redefined, which means that individuals, society, law and state are constantly confronted with changing requirements of behaviour. So if the long-range securing of interests, goods and values – of life, property, subsistence or the public order – is the declared aim and the state's duty, then threats to the legal order and freedom are to be avoided absolutely. Yet violations of the legal order and freedom can be effectively avoided only so long as the practices of care are constantly optimized through laws, and the suppositions of security are matched to the fears, insecurities and, consequently, the expectations of normality of societies. In return, one is *reminded of one's duty*. The state's concern for the individual's existence is tied to clear behavioural requirements, which is why the person concerned must reckon with severe disciplinary measures in the case of violations. Above all, protection from danger sensitizes one to how practices of care may intervene in the cultural memory of liberal societies, for they demand the willingness of *all* to restrict the power of disposal with respect to the private sphere. The effects of coherence that practices of care aim at thus replace traditional legal policy and symbolic politics.

The validity of the preceding analysis can be seen in light of the COVID-19 crisis. First it is critical that individual or negative freedom is grasped as the point of departure of every modern social and legal order. Techniques of self-protection, for instance, one's own protection from infection, are thus supplemented with political demands to match individual behaviour, for instance, social distancing, to concrete crisis situations. Administrative action, by the police etc., thus expands to ubiquitous techniques of care when severe exceptional and emergency regulations – precisely also with a view to the individual's need for security – come into effect and are enforced. One need only think of the lockdowns, the contact bans, the quarantine ordinances or, in Germany, the amendment to the Infection Protection Act, which grants far-reaching competencies of intervention to the government and health care system in the fight against infection. The point here is not about judging these measures in terms of their appropriateness, but rather about emphasizing the importance of not losing sight of the fact that – in the interplay of individual fear of infection, protection of the population and preservation of security and public order – a differentiated care regime is establishing itself that is supposed to channel and curb dangers. We need not discuss here whether the result is

Benno Zabel

a state of emergency that encompasses all areas of society, executed with power through politics and administration, as the Italian philosopher Giorgio Agamben believes.³⁰ Much speaks against Agamben's interpretation. But even if it were correct, we could still recognize that a state of emergency may be linked to various needs in dealing with crises and is not solely based on the logic of a power-obsessed politics or government. (The fact that such motivations exist is just as indisputable as the fact that states of emergency can be deliberately employed to undermine democracy.) Nonetheless, it is not necessary to refer to a state of emergency to uncover the field of forces and the conflicting goals in the guarantee of rights. This is because the legal esteem of the free subject brings with it the most diverse forms of intervention, and thus of vulnerability and fragility.

The analysis sketched here of society and crisis was necessary in order to reconstruct the ambivalence of the liberal promise of a legal order and to clear the way for a different view. What came to light was a concept of freedom that hinders itself over and over again. A central reason for this self-hindrance is the expansion of tasks of the legal system in liberal societies. The legal system ought to secure the negative freedom of individuals, yet at the same time compensate for the disembedding and accompanying fears and insecurities. The care regime of law is an expression of this expansion of tasks. Meanwhile, this tailoring of tasks also shows that the logic of care leads to paradoxes. In its full variety, *care as a function of law* – as can be observed in the handling of the pandemic – not only appears to promote security and social embedding, but also to be repressive, authoritarian and excluding. By the same token, this is not about identifying an authoritarian logic in the liberal understanding of law, for a liberal legal order as such is not repressive and excluding. Rather, the preceding reconstruction has sought to highlight the conflicting goals and turning points generated specifically by a liberal conception of law. But if the conflicting goals and the turning points are the problem, then the solution must come down to connecting suffering from vulnerability with law in a different way.

IV. Law and solidarity

1. *Thinking inclusion*

A starting point can be derived from the idea and practices of *legal inclusion*. This entails a notion of law that actively relates to the precarious nature of the modern experience of the world and the associated crises of trust and destabilisation. Inclusive law exhibits law's dual role – its inner schism – in belonging both to society and to a constitutional order. This gives rise to something like an emancipatory agenda: inclusive law recognizes the need for social participation and with it the urgent need to re-calibrate the power and authority relations between the legal system and society. Inclusive law does not merely passively regulate the experiences of anxiety and vulnerability, the practices of inequality and attempts at exclusion. Rather, it grasps itself as part of a process of understanding in which the

30 Giorgio Agamben, *A che punto siamo? L'epidemia come politica* (Macerata: Quodlibet, 2020).

dangers of authoritarian power are articulated and not veiled as practices of care. Inclusive law thus recognizes its responsibility towards the ubiquitous crises that were also promoted by the government of free communities. Inclusive law engages with a society that is plural, fragile, and also divided. But most importantly, it understands emancipation, political participation and freedom as practices of recognition and reciprocal critique that span society. How, though, does this work?

Let us return once again to a central insight. It is clear that autonomy, contingency and experiences of vulnerability – as they recently became visible once again in the pandemic crisis – influence liberal societies. Social subjects are defined by vulnerability and the need for protection, and expectations of happiness and of a fulfilling life. Every social medium must take this basic configuration seriously and process it in the appropriate manner. This applies especially to the notion of the legal order with its expansive system for applying norms and laws. Norms and the application of norms are an expression of reliable knowledge derived from life experience, of knowledge about what is *human and all-too human*. In contrast to traditional conceptions, it is suggested here that we should not understand the basic configuration of our forms of life as a naturally given condition for the consciousness of freedom.

Yet something very close is claimed: natural interests and general knowledge of freedom form two sides of the same coin – with respect to individual life and social life. This is not meant to undermine the status of the individual and his or her rights. Quite the contrary: Right and life can be grasped only in their precarious unity and difference. Being free does not mean merely asserting the normative order of our common culture (of education, art, religion etc.) in the face of contingent influences of the environment. Freedom is not a social aggregate state that we can simply manage or defend. Rather, freedom is a praxis that we must produce and in which we all participate, but which we must also fight for and shape over and over again. We can experience freedom as a theoretical and practical happening, experience power and powerlessness; we can reinvent ourselves. We may call this the *power of freedom*.

It is this power of freedom that we, as a community, mobilize in judging. Specifically in our practices of judgement, we can see an interplay of freedom and life, of reason and experience, which ought to open up the possibility of a thinking and acting *according to reasons*. Experiences, of whatever kind, represent the natural element of human life. In these experiences, we experience ourselves as immediately subjective. We speak as affected, vulnerable individuals, perhaps as victims or as individuals revolting against the conditions of society. It nonetheless remains a particular position, which, should it have a social impact, must be opened up discursively through free judgement.³¹

31 Immanuel Kant, *Kritik der reinen Vernunft*, Akademieausgabe (AA) Vol. IV (Berlin: de Gruyter, 1968), 171; *Kritik der Urteilskraft*, AA V (Berlin: de Gruyter, 1971), 179; Hannah Arendt, *Das Urteilen. Texte zu Kants politischer Philosophie* (Munich: Piper Verlag, 1985), 94; *Was ist Politik? Fragmente aus dem Nachlass* (Munich: Piper, 1993), 20.

Benno Zabel

2. *The right of others*

This idea of *communal judgement* can also guide our legal action in all areas of society. As legal subjects, we perceive our freedom in profoundly different ways: performatively through a daily confirmation of knowledge and rules; in the form of the professional application of law; and in the fact that we experience injustice or hardships and also for this reason fight for our rights. We do not simply confront law, but also embody it. As beings that are vulnerable and thus sensual, we speak the language of law. Law has effects and we want it to be effective. But we must make sure that we are not entirely at the mercy of our naturalness, the household of feelings and experience. *Being a subject in a legal order* means instead being able to flip reflexively the field of sense and sensuality, of norms and nature. How else could the notion of right be universal? This does not mean that the awareness of vulnerability ought to play only a subordinate role in liberal societies. A notion of right that makes reference to the free power of judgement and comes to its own in an overarching community of judgement does not cause the contingencies of life, the suffering from vulnerability, to disappear. Quite the contrary: a notion of right that takes subjects seriously also adjusts its normative standards to the knowledge of vulnerability and the related experiences. And this is possible because every concept of freedom appropriate for humans *lends a voice to suffering* and objectifies the concrete responsibility of society.³²

Now the reference to judgement has always been familiar to the notion of right and especially the application of law. Right (law) is a medium of judgement, if not *the* medium of judgement. At issue here is the accentuation of the political and critical dimension of judgement. Such a perspectivity of judgement does not repudiate legal competences. That there is need for juridical capacities is beyond question, even if we disagree in the practical employment of these capacities. However, the perspectivity of judgement takes seriously law's demand of inclusion. Judgement in this sense does not simply regulate and intervene in society from outside. It is not the higher or greater reason. Rather, according to Hegel, it is the reason of subjects that 'must accommodate humans in right'.³³ Precisely through this *dialogicity of reason*, law confers dignity to life and also a power to shape politics in the crisis. Understood in this way, the notion of right is not only instrumental, but also participatory. It is recognized insofar as the right of the individual is also the right of the other. This thought can be spelled out, in turn, in three ideas: the idea of maturity, the idea of trust and the idea of solidarity.

3. *The idea of maturity*

Maturity is knowledge of the emancipatory power of one's own reasons and inter-subjective reasons for action. This means at least two things: on the one hand, the capacity to actively shape forms of life, to critically question them or to simply hold

32 Theodor W. Adorno, *Negative Dialektik*, GS, Vol. 6 (Frankfurt am Main: Suhrkamp, 2006), 29, 51, 202 f.

33 Georg Wilhelm Friedrich Hegel, *Vorlesungen über Rechtsphilosophie*, in *Philosophie des Rechts. Vorlesungsnachschrift Hotho 1822/1823*, ed. Karl-Heinz Ilting (Stuttgart-Bad Cannstatt: Frommann-Holzboog, 1973), 96.

them open to change. The idea of maturity takes up the thought that we, as legal subjects, are principally able and willing to make rational judgements about the significance and the consequences of goals that we ourselves selected. This self-reflexivity of social action and judgement does not guarantee the success of any particular project of freedom. Maturity is not a state that is achieved and that exhausts itself in conserving individual civil liberties, but rather a process that proves itself insofar as the legal order can be put in motion or made pervious to social needs. In this regard, in inclusive law the practice of filing suits forms, to a greater extent than has hitherto been the case, the point of intersection between politics and society. That is also why, on the other hand, maturity reflects the insight into not only the *capacity* but also the *necessity for transformation* of social infrastructures, of relations of power and authority. Maturity gives expression to an awareness of vulnerability, which is based on learning processes, both individual and social. For this reason, this kind of maturity situates itself in a history of solving legal problems, but it also knows about the conflicts and the susceptibility to regression of every society. Inclusive law does not veil aporias of freedom but rather addresses and resolves them.

4. *The idea of trust*

It is precisely because inclusive law demands the maturity of the legal subject that a reciprocal relation of trust is possible in general. Trust as trust in the legal order articulates individual and collective expectations of reliable normative orientation and the protection of freedom through institutions. Trust in the legal order consolidates distinct perspectives: the social perspective of legal subjects and the perspective of right as reflexive order (Jürgen Habermas). The perspective of legal subjects encompasses not only, as the traditional liberal position advocates, the expectation of securing right. Rather, legal subjects who enable inclusive law possess and 'invest' a social *tolerance for ambiguity*. This tolerance points to the capacity to essentially accept the processes of alienation that right brings forth through laws, sanctions and processes, and at the same time to foster a *willingness for recognition* (also of constitutions in crises). Such a willingness for recognition knows about the stabilizing and protecting functions of institutions. Moreover, it knows that law cannot exist detached from society's expectations of freedom. Institutions are relay stations of common knowledge and storages of trust in guiding action.

In relation especially to institutions, one can also see, however, the internal tensions that characterize inclusive law and which must be articulated time and again by law. Institutions establish for the long term routines for the administration of justice. Yet it is often forgotten (or even repressed) that, as establishments of solidified praxis in which power accumulates and reproduces itself, institutions rest on human and collective decisions. In this respect, roles in which we navigate in society and in the legal system are a necessary part of the liberal organisation of freedom for the individual and likewise for society as a whole. But they can themselves become instruments of power, instruments for violating the legal order and which acquire an ideological life of their own. Perhaps we see the turning points discussed here most clearly in the current debate concerning the *violence of law*. The perspective and the interest of law must be aimed expressly at restricting the institutional

Benno Zabel

accrual of power, at making the double-sidedness of violence into a societal affair and at promoting structures of democratic influence.³⁴ It follows from this that the care regime of law is justified so long as it does not manage the interests in freedom and the protection of rights of individuals in an authoritarian manner. In contrast to an orthodox critique of law, modern societies are hardly conceivable without forms for effectively intervening in conflicts and crises. The solution does not lie in the celebration of the anarchist. Instead we should insist on the insight that law can serve as a medium for securing freedom. By the same token, law can be regarded as reflexive and trustworthy only if it faces its own authoritarian experiences, the existing claims of power and hegemony. Contrary to the self-immunizing forces of legal science, a notion of right and emancipatory thought should become visible that knows of the contingency of orders that are factually given and made – that considers it not only possible but unavoidable to transgress an order-upholding positivism. In performative legal action we see the necessity and the limits of every legality. Ultimately it amounts to the insight that there cannot be a just legal order without a *willingness to transgress order*.

5. *The idea of solidarity*

Inclusive law can be effective only if it, together with society, productively implements the aporias of freedom and the expectations of justice. This means that inclusive law has an interest in stability and change; it is at once political and apolitical. But it reflects this difference *in itself* rather than delegating it to something external, to administrative policies, to the economy and the ‘market’ or religion. This results in what one may call the *culture of normative conflict*. Law, which is often asserted as homogeneous and self-referential, is in conflict with itself. This does not mean a violent battle for law, but rather the confrontation of legal and *non-legal* forces, and the urgency for change that this confrontation generates. This is supposed to highlight how legal subjects, by participating in the community of free democratic judgement, can themselves bring forth the forces for shaping policy within a society. At no point are they merely self-sufficient political sceptics. Rather, they reproduce, albeit in very different ways, differences within the legal system and society by combining ethical, social and cultural forms of life or relating them to each other, or simply by integrating them into everyday life.

This shows, then, two things. First, in the language game of law, the legal subject is not merely an abstract person or addressee of law; instead, in the language game of law the interests of society solidify into a shifting *praxis* of legal judgement. This praxis of judgement can be found in everyday social life (through which the basic rules of social action are made possible and criticisable in the first place). But it can also be found in the diverse forms of the application of law, in the form of conflict resolution, in the act of punishment etc. Second, a concept of juridical freedom is mobilized, which does not pit the *alienations* through the legal system against emancipatory rights, but rather realizes law and order in their dual roles – that is, law and order function not only imperatively (*i.e.*, in the form of ‘You should!’), but

34 Christoph Menke, *Recht und Gewalt* (Berlin: Suhrkamp, 2011).

are at the same time embedded in the normality of interpersonal sociality in the sense of practical and symbolic participation. In this way, a freedom is guaranteed that *happens* to us and which we must nevertheless *choose*.

Law's capacity for inclusion is especially visible in the fact that it recognises *solidarity as a marker of inclusion* of modern coexistence. Why solidarity? Today we are familiar with solidarity as a medium of cohesion, as the glue of society. It is most often understood in a moral or political sense,³⁵ because liberal law allows it little or no room given its drift towards possessive individualism. For inclusive law, such a view is not necessary, not because inclusive law would misunderstand individual civil liberties, nor because it wants to transform into morality or politics. Rather, inclusive law insists on a different motivating basis for the acting subject, upon which law, society and solidarity – unlike traditional projects – are situated in a common collective praxis. The solidary component is not merely presupposed – how could it be? – but rather arises as subjects articulate the interests and needs they deem indispensable in the course of the realization of life circumstances fit for human beings. Yet this means above all that subjects and the praxis of freedom *produce each other reciprocally*, change and engage with each other.

In inclusive law, this solidarity component becomes effective by highlighting the entanglement, the dependences among civil liberties. Being a subject and person in a legal order means understanding rights as dichotomous – they are one's own but they are also mediated by others. Equality, for instance, is not a demand that I can assert only for myself and a particular group. Asserting equality means observing one's own level of freedom from the perspective of *all* members of society, which may entail having to reassess one's own legal positions or deferring them in the face of others. This, too, is not about subjecting rights to a rigid regime of duties. Quite the contrary, it aims at enabling us to articulate the provisional nature of what has been achieved, what is aporetic and scandalous, and also the interest in change – that is, it aims at making us aware once again of existential questions, of questions suitable for human beings in our society.³⁶

For instance, the recognition in law of the *Ethics of Care* and *Care Work* could give rise to new forms of individual and social action.³⁷ Especially during the COVID-19 crisis, the debate concerning the ethics of care and care work has sensitized us to the fact that, in liberal societies, we are dependent on the most diverse practices of care, whether at the beginning or at the end of life, in daily life at home or at work. Yet this dependence in liberal societies remains problematic, is even misunderstood when it is regarded merely as sacrifice (especially by women), as 'invisible' work, which is taken for granted or remunerated with below-average pay. Not only societies but political communities as wholes – if they want to remain faithful to

35 Richard Rorty, *Contingency, irony and solidarity* (Cambridge: Cambridge University Press, 1989), 189 ff.

36 Wendy Brown, 'Suffering the Paradoxes of Rights', in *Left Legalism/Left Critique*, ed. Wendy Brown and Janet Halley (Durham: Duke University Press, 2002), 420-435.

37 The *locus classicus* is Carol Gilligan, *In a different Voice* (Cambridge, MA: Harvard University Press, 1982).

Benno Zabel

their own standards – must insist that freedom and equal participation can be realized in such constellations of work and life. Recognition in law means that liberal communities should be willing to grant a secure status to these precarious moral positions. In other words, we not only declare our solidarity in the form of empathy or respect towards single individuals or groups (which we ought to do anyway), but rather understand that equal participation in the generated resources must be a universal demand of free communities, which, most importantly, requires protection in the form of rights. This applies not only to the large area of care work, but to the enabling of subsistence fit for humans in general.

In this regard, the handling of fears and insecurities is linked with a culture of (self-)care in which suffering is given a voice and political and legal emancipation converge. Of course we know that the legal order has limits in facilitating solidarity, and must have these limits. In the legal system, spaces for freedom solidify into guarantees that *can be claimed*. Nonetheless, we can see (not only in pandemic crises) that the component of solidarity addresses very generally the integrative achievement of law – especially when we are prepared to understand human dignity for its part as a concept of legal inclusion or, as Hannah Arendt states, a *right to have rights*.³⁸ With Arendt we can insist that legal relationships have their own political energy. There are legal relationships fit for human dignity only insofar as subjects constantly evaluate existing legal forms, are able to decrypt them as ideological constructions that are antagonistic to freedom. The present-day fight against racism and discrimination and the struggle for diversity and recognition of vulnerability shows how the interest in critique and change does not enter law from outside, but rather works within and through the current order.³⁹ Inclusive law sees no danger in this, for rights and law are nothing other than institutions guiding judgement. They are always already there, sometimes obstructing the way, defending our subjectivity, but they are also made (by us), and for this reason they can be changed at any time. Precisely here, in this mutability, lies the chance to leave behind ideologies of law without forgetting the aporias.

Here it is again, then, knowledge of the power of freedom and traces of contingency, which procure validity in the mature subject, in communal judgement, and which prevent us from playing out emancipation against law. It is this insight that truly makes law into liberal law.

38 Hannah Arendt, *Ursprünge und Elemente totaler Herrschaft*, 18. ed. (Munich: Piper, 2015), 618.

39 Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine', *The University of Chicago Legal Forum* (1989): 139-167.