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TRANSNATIONAL FORCE OF LAW

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CHAPTER 2

THE STRUGGLE FOR TRANSNATIONAL SOCIAL RIGHTS

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I. THE TRANSNATIONAL SOCIAL QUESTION

Financial crises, food crises, environmental crises, migration crises: world society is facing dramatic challenges. These crises are both interconnected and rife with contradictions. While the Euro zone bailout fund is leveraged with roughly a trillion euro, nobody seems willing to put up the 13 billion dollars which, according to UN calculations, would be necessary to relieve world hunger. *Deutsche Bank*, a German high-street bank, generated a benefit of 4 billion euro in 2014; meanwhile more than 1.3 billion people around the world live in poverty, on less than 1.25 US dollars per day. Refugees find themselves in a particularly precarious situation. In 2014, there were more than 50 million displaced persons, a situation the UN High Commissioner for Refugees attributes to urbanisation, food and water insecurity, as well as shortages of raw materials. These global problems, he says, “are increasingly inter-related, exacerbating conflict and combining in other ways that oblige people to flee their homes”.¹

These trends point to one conclusion: the “social question” is now firmly a *transnational* social question.² Societal conflict lines no longer run primarily along national borders. The global economy, global politics, transnational law, and global scholarship and science all contribute, in their own way, to the formation of zones of social exclusion. The axes of disadvantage can intersect and be exacerbated. The existing transnational power structures are both complex and merciless. Those worst affected do not even have – or are denied – access to the very means for sheer survival. Nation states no longer possess

¹ António Guterres, “Forced Displacement: Responding to the Challenge of the Next Decade, Statement to the Berlin Symposium for Refugee Protection”, June 2011, available at: www.unhcr.org/4c1737c09.html.

² Thomas Faist, “The Transnational Social Question”, (2009) 24 *International Sociology*, p. 7 *et seq.*

adequate solutions to these problems. Nor do they remain the only important players in this field. Sociologists and political scientists accept that the state is just “one of the actors” when it comes to global social policy, and acknowledge that non-state actors such as international organisations and global social movements have now firmly gained entrance to the “contested terrain” of emerging global governance.³ It is on this contested terrain that the debates on the crises facing world society are played out. It is here, for instance, that political scientists are making the link between climate change and global social policy.⁴ The interdisciplinary research group FLOOR (Financial Assistance, Land Policy, and Global Social Rights) explores the possibility of securing a global system of guaranteed basic income.⁵ Philosophers study the requirements of global justice and put forward the charge that “our failure to make a serious effort toward poverty reduction may constitute not merely a lack of beneficence, but our active impoverishing, starving, and killing of millions of innocent people by economic means”.⁶

Law, too, is itself a contributor to this state of affairs. Transnational law paved the way for and enabled the various crises. The global players of industry have long had a hand in shaping transnational law. Transnational corporations operate in global markets, bolstered by international contracts based upon the so-called *lex mercatoria*, the self-regulating law of global commerce. They have developed techniques to ensure that the law remains in their service, and have shaped a world that corresponds to their own vision. Huge international law firms offer the legal know-how required to assert and secure a company’s interests. Judicial forums have been installed at the World Trade Organization (WTO) and at the World Bank, in which the law of free trade and the rights of private investors are both enforced and re-enforced. To leave transnational legal policy to the global players and limit ourselves to mitigating the consequences of globalisation in national welfare states is to address merely the symptoms, while failing to tackle the root of the problem. This is why we need to look for new ways to renew the promise of global social justice. In a bid to establish the relevant necessary steps, we will examine four distinct issues: (1) What are the

³ Bob Deacon, *Global Social Policy and Governance*, (London-Thousand Oaks CA, SAGE Publications, 2007), p. 15.

⁴ Ian Gogh, “Climate Change and Sustainable Welfare: An Argument for the Centrality of Human Needs”, (2014) *NEF Working Paper*.

⁵ Ulrike Davy, “The Rise of the Global Social: Origins and Transformations of Social Rights under UN Human Rights Law”, (2013) 3 *International Journal of Social Quality*, p. 41 *et seq*; Benjamin Davy and Sony Pellissery, “Climate Change and Global Social Policy”, (2011) 11 *Global Social Policy*, p. 106 *et seq*; see, also, the homepage of the research group FLOOR: www.floorgroup.raumplanung.tu-dortmund.de/joomla.

⁶ Thomas Pogge, “Priorities of Global Justice”, in: David Held and Anthony McGrew (eds), *The Global Transformations Reader*, (Cambridge: Polity Press, 2003), p. 548; Simon Caney, “Global Poverty and Human Rights: The Case for Positive Duties”, in: Thomas Pogge (ed), *Freedom from Poverty as a Human Right*, (Oxford: Oxford University Press, 2007), p. 275 *et seq*.

central characteristics of the global crises? (2) What role does transnational law play? Should we turn to the law at all, or is it an instrument of domination with which it is too perfidious even to engage? (3) What is the current state of transnational social rights? Where can they be found? (4) Which concrete legal and political mechanisms can be used in order to challenge the course of neo-liberal globalisation?

A. THE COUNTER-HEGEMONIC AGENDA

Ever since the 1980s, a neo-liberal trend has dominated the development of transnational law. This development can be seen in the international institutions of the global economy, such as the WTO and the International Monetary Fund (IMF). This trend pushes for the liberalisation of the markets and protects the global players – not social rights.⁷ Yet, there are an increasing number of groups that seek to counter neo-liberal norms with an agenda of transnational social rights. Brazilian farm workers invoke social human rights as they call for land reform as a necessary pre-condition for food sovereignty and a life without poverty.⁸ German students have instigated court proceedings against the introduction of university tuition-fees, relying on the obligation contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR) to ensure access to higher education “by every appropriate means, and in particular by the progressive introduction of free education”. Anti-racist networks are demanding social rights for illegalised immigrants. “Nomadic universities”, networks of academics and other temporary university employees, are calling for a charter of social rights, including the right to a basic income, the right to cross-border mobility, and the recognition of common goods such as natural resources or social infrastructure as “Commons” which should not rely on private property rights.⁹ In December 2011, the International University College of Turin launched an initiative towards a “European Charter of the Commons”, with a particular focus on strengthening the global protection of communally-held resources, such as water, through a process of “globalisation from below”.

All of these movements rely on the central idea of human rights: that every human being – regardless of where he or she is from – has the right to rights.¹⁰ The call for “transnational social rights” is increasingly central to the

⁷ David Kennedy, “Law and the Political Economy of the World”, (2013) 26 *Leiden Journal of International Law*, p. 7 *et seq.*

⁸ See, also, Dejo Olowu, “Conceptualising a Rights-based Approach to Poverty Alleviation in Africa”, (2003) 43 *The Indian Journal of International Law*, p. 67 *et seq.*

⁹ See the Universidad Nómada, *Manifiesto of the Commons: Towards a New Charter of Social Rights*, 22 May 2011, available at: www.universidadnomada.net/spip.php?article372.

¹⁰ As discussed by Hannah Arendt in: *The Origins of Totalitarianism*, (New York: Harcourt, Brace and Company, 1951), p. 294.

activities of globalisation critics. They are based upon the understanding that rights must be realised by “fighting for the democratisation of transnational institutions”.¹¹ Thereby, they use the label “transnational social rights”, broadening the traditional understanding of social rights to one which also includes environmental rights, migrant rights and the right to a guaranteed basic income. The framework as a whole can also be seen as a project in which seemingly independent or distinct discussions find a common thread, which serves to offer them a joint foundation and the potential for combined action. This is because these various initiatives are concerned not solely with countering the globalisation of capital, of the markets and of goods with a globalisation of social rights.¹² Transnational social rights, as a whole, are moving towards a counter-hegemonic agenda, one which relies on rights which *already* exist.

The transnational framework is not intended to distract from the political decision-making of national governments or communes. What it does do, however, is shift the perspective. Antonio Negri and Michael Hardt express this best when they write that globalisation is not just one thing, but a collage of disparate processes. Our political task, they argue:

“is not simply to resist these processes but to reorganize them and redirect them towards new ends. The creative forces of the multitude that sustain Empire are also capable of autonomously constructing a counter-Empire, an alternative political organization of global flows and exchanges.”¹³

Based upon the appeal of a “counter-empire”, a transnational legal policy is called for, one which focuses on social and ecological justice, and which explores how the potential of world society could be used to establish alternatives to the existing socio-economic conditions.

B. JURIDICO-POLITICAL STRUGGLES

Following on from the series of questions posed at the beginning of this chapter, we wish to put forward four overarching theses with regard to the transnational constellation.

¹¹ Thomas Seibert, “Globale Soziale Rechte in der Konvergenz von politischer Aktion und Philosophie”, (2008) 41 *Kritische Justiz*, p. 337.

¹² See, for example, the platform available at: www.globale-soziale-rechte.de.

¹³ Michael Hardt and Antonio Negri, *Empire*, (Cambridge MA: Harvard University Press, 2000), p. xv.

1. The social question traverses borders. In other words, it is a transnational social question:

Solving the twenty-first century social question cannot be achieved by addressing only the contradictions within nation states. Even the development of social rights within nation states often relies on factors and institutions outside the control of the political institutions. The causes of the present financial crisis, climate change and the global food crisis all lie within world society. It is at this level that we must tackle them.

2. World society is determined by new contradictions, collisions, and fragmentations. Transnational law forms part of this contradictory system, and is, as such, part of the problem:

Huge corporations have long been operating on transnational terrain, in which transnational law plays a central role. The law provides neo-liberal ideas with a secure legal foundation, corporations with a global playing-field, and investors with the safeguarding of their property. To the state, it offers legitimacy for military action. Moral appeals and non-committal political announcements are not enough to deal with the flagrant dangers inherent to an unfettered global economy, with multi-national corporations, or with fundamental socio-economic conflicts.

3. Transnational social rights can lead to the formation of a counter-law. This counter-law should ensure that the global social order is determined by world society itself, instead of by those who profit, economically and politically, from globalisation.

The social human rights of the UN Covenants together with the European Social Charter and the Core Labour Standards of the International Labour Organization (ILO) already provide a body of transnational social rights. These *can* act as a starting point in the struggle for law. The goal must actually be to redeem the promises of social and ecological security, democratic participation and involvement, which are contained in these documents.

4. There are many juridico-political arenas in which the strengthening of transnational social rights is needed.

Within the state, efforts must be made to ensure that transnational social rights are binding before the courts. This will bolster the monitoring procedure of the UN Covenants and the ILO. In addition, the Social Charter must attain a central role at European level. A European social union must replace the current economically driven European organisation. At transnational level, not only international organisations such as the UN and the WTO, but also non-governmental organisations and transnational corporations, must be obliged to uphold transnational social rights.

II. THE TRANSNATIONAL CONSTELLATION

The word “globalisation” is often invoked to refer to a number of phenomena, such as the growth in transnational economic relations and the increasingly important role of international institutions, as well as the interdependence of nation states. As a result, the debate on globalisation often remains superficial, merely scratching the surface of the issues, without actually addressing the underlying structures that are shaping the transition to a world society. The transnational constellation is not just the manifestation of international state co-operation and world trade. A more far-reaching change of perspective is required in order to understand fully the root causes of globalisation. The increasing connectivity of social relationships around the world in the most diverse sections of society means that the phenomena of globalisation extend far beyond the transborder, capitalist, global economy. Its processes are not limited to business and politics but also exert influence in the fields of religion, art, and education, as well as in technology and risk regulation, transnational public spheres and cyberspace. While the international system of states nonetheless remains important, it no longer enjoys the absolute primacy that it did before. World society is a society both without a head and without a centre. Centralised zones of political decision-making within various similarly structured states are now things of the past. A highest point of decision-making in a unitary nation state no longer exists.

Within this complex world society, the creditworthiness of states is determined by the rapid risk assessments of rating agencies, the Organisation for Economic Co-operation and Development (OECD) reports put national education systems under pressure to adapt, and oppositional movements turn to social networks to topple authoritarian regimes. This de-centralisation and differentiation of world society are Janus-headed phenomena, offering new opportunities and changing power structures while simultaneously evoking great risks. This poses the transnational social question. In the last years, it has primarily been the big players of the global economy and financial markets, who have feathered their own nests at the expense of the environment and social justice. Yet global science and technology also generate new risks to health and to the environment. Different social sectors tend to maximise their own forms of logic and impose them on their social environments. The WTO, the World Bank and the *lex mercatoria* are among those that have assumed a dominant role within this transnational constellation in their attempt to universalise their free-market liberal Esperanto.¹⁴ In doing so, they hope to assert their interests, their way of thinking and their rules on all other social spheres. The systematic

¹⁴ Martti Koskeniemi and Päivi Leino, “Fragmentation of International Law? Postmodern Anxieties”, (2002) 15 *Leiden Journal of International Law*, p. 578.

desire for power is evidenced by the important roles played by politico-economic institutions such as the WTO and the IMF, which form the regulative framework for the global relations of production.

The political institutions, however, are not the only ones growing in the process of global governance; they are joined by legal institutions. Legal norms and the reach of courts are expanding into more and more aspects of society. It seems that there are no limits to what can be considered and decided as a legal question. States have set up courts such as the European Court of Human Rights (ECtHR), regional human-rights courts, the International Tribunal for the Law of the Sea (ITLOS), the International Criminal Court (ICC) as well as the monitoring bodies of universal human rights treaties; the United Nations has established *ad hoc* criminal tribunals, and the international community has permitted the prosecution of international crimes in East Timor and elsewhere before so-called hybrid courts. National courts are included into this system of world courts,¹⁵ such as when US courts hear compensation cases arising from grave human-rights violations in South America or a Dutch court orders Shell Nigeria to compensate Nigerians for oil pollution damage caused by third-party sabotage in Nigeria.¹⁶

These forums are also on the rise outside the state-created system of global jurisdiction: transnational corporations assert the *lex mercatoria* through privately established courts of arbitration.¹⁷ International judicative and quasi-judicative bodies, such as the World Bank's International Center for Settlement of Investment Disputes (ICSID), are on their way to becoming world courts.¹⁸ It is clear that law has long been transnational, affording rights to, and imposing duties on, individuals, states and transnational corporations.¹⁹ The only way to ensure that this transnational law upholds basic social and environmental justice is – as Otto von Gierke put it – to allow the necessary “drops of socialist oil” to filter through the legal system.²⁰

¹⁵ See George Scelle's theory of “dédoublement fonctionnel” in: idem, *Précis de droit des gens*, Vol. I, (Paris: Recueil Sirey, 1932), p. 54 *et seq*; on this, see Antonio Cassese, “Remarks on Scelle's Theory of ‘Role Splitting’ (dédoublement fonctionnel) in International Law”, (1990) 1 *European Journal of International Law*, p. 210 *et seq*.

¹⁶ See, also, note 66 below.

¹⁷ Claire Cutler, “Legal Pluralism as the ‘Common Sense’ of Transnational Capitalism”, (2013) 3 *Oñati Socio-Legal Series*, p. 719 *et seq*.

¹⁸ For a powerful critique, see Ibironke Odumosu, “The Law and Politics of Engaging Resistance in Investment Dispute Settlement”, (2007) 26 *Penn State International Law Review*, p. 25 *et seq*.

¹⁹ See, most recently, Sally Engle Merry, “Firming up Soft Law”, in: Terence C. Halliday and Gregory Shaffer (eds.), *Transnational Legal Orders*, (Cambridge: Cambridge University Press, 2015), p. 374 *et seq*.

²⁰ Otto von Gierke, writing on the occasion of the development of the German Civil Code in the 19th century in *Die soziale Aufgabe des Privatrechts*, (“The Social Function of Private Law”) (1889), reprinted in 1946, p. 28 *et seq*.

The complexity of the transnational constellation is brought sharply into focus by the response to the global food crisis, within which we see various crisis points collide with devastating effects. In 2009, shortly before the G20 states gathered for their summit in Pittsburgh, Olivier De Schutter, the former United Nations Special Rapporteur on the Right to Food, issued a statement in which he called on the G8 and G20 states not to limit their discussions to the financial and economic crisis, but to strive also to reach agreements on fighting global hunger, stating:

“Just like the collapse of large banks, widespread hunger entails systemic risks.”²¹

This is, indeed, the case. Since 2008, we have seen, parallel to the global financial crisis, an intensified worldwide food crisis. The explosion in food prices led to an extra 40 million people going hungry in 2008 alone, bringing the number of people worldwide who are living in hunger to over one billion. More people die each day from hunger than in all the military flashpoints around the world combined. A report of the World Bank of 2011²² made clear that the huge increase in the number of people living in hunger is largely due to the commodification of food production, food price fluctuations, and the economic crisis. The 82 states then classified as Low-Income Food-Deficit Countries, *i.e.*, countries which depend on food imports in order to meet their own demand, were affected particularly badly by the crisis.

The food crisis is not, however, merely a crisis of supply. We are also noticing a crisis in climate, which is rendering entire regions unsuitable for farming. A closer look at the economic structure of the agricultural sector confirms that the current food crisis will not simply lead back to the ostensibly older phenomenon of malnutrition. The unfolding of events is now shaped by global speculation on food products and by the major agricultural companies. “Agribusiness”, which incorporates huge agricultural companies such as Monsanto, concentrates on industrial growth and the development of monocultures at the expense of ecological structures and smallholders.

Such firms sell their patented, genetically engineered seeds and matching pesticides at high prices to farms. If a farmer suffers a crop failure and subsequently cannot afford the newest plant technology, he or she goes bankrupt. Farmers who do not subscribe to seed-buying from such large companies are often sued if patented plants are found growing in their fields, even if the land was cross-contaminated through no fault of the farmer. Big companies often

²¹ Olivier De Schutter, “The global food crisis is not over”, 26 June 2009, available at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=8991&LangID=E.

²² World Bank, *Poverty Reduction and Equity Group*, August 2011, p 1, available at: http://siteresources.worldbank.org/INTPOVERTY/Resources/335642-1210859591030/FPW_August2011.pdf.

obtain large tracts of land in the Global South, striking deals with the relevant governments and driving small farmers from their holdings.²³ This land is generally used to grow monocultures such as soya, which is shipped back to the company's home country to be used as fodder or as palm oil, which is used in the production of so-called "agrofuel". This practice of land expropriation is now known as "land grabbing".²⁴

During the 1990s, foreign direct investment in agriculture amounted to an annual average of 600 million USD; between 2005 and 2007 this rose to an average of 3 billion USD.²⁵ This structural change is leading to an increased globalisation of the agricultural industry, a process dominated by large transnational companies. It is estimated that roughly 50 million hectares of land are affected, in Latin America, Asia, and Africa. These land deals are about more than just profit, they are also made with an eye to geo-strategic interests and spheres of influence. The climate crisis and population growth in many parts of the world has turned the issue of nutrition into a geo-strategic question of power. Thus, agribusinesses often co-operate with the governments of the countries in which they are based, including the governments of states in the Global South, in order to secure a competitive advantage in the approaching fight for food supplies.

The phenomenon is best evidenced by the case of Madagascar, where the South Korean firm Daewoo sought to obtain 1.3 million hectares of land. According to the NGO *Grain*, the land was to be used solely for the cultivation of maize and palm oil for export back to South Korea. Madagascar belongs to the poorest third of the world and is plagued with malnutrition and poverty. The land grabbing resulted in a severe setback for the country's already ailing food supply system. The Madagascan government backed the deal with Daewoo but was subsequently toppled by widespread protest against Daewoo's land acquisition. The new government was able to revoke the deal, and the Daewoo Corporation has, for the time being, withdrawn from the transaction.

What is driving these scandalous developments which are exacerbating the food crisis and expropriating whole sections of the population? This question brings us back to the UN Rapporteur's appeal to the G20 states. The NGO *Grain* points to a direct link to the crisis in the financial markets:

²³ See the critique of investor protection in international law by Sundhya Pahuja, *Decolonising International law, Development, Economic Growth and the Politics of Universality*, (Cambridge: Cambridge University Press, 2011), p. 95 *et seq*; see, also, Saskia Sassen, "Land Grabs Today: Feeding the Disassembling of National Territory", (2013) 10 *Globalizations*, p. 25 *et seq*.

²⁴ See Steffen Kommer, Chapter 9 in this volume.

²⁵ Olivier De Schutter, Special Rapporteur on the Right to Food, *Report: Agribusiness and the Right to Food*, A/HRC/13/33, 22 December 2009, at para. 6.

“Given the current financial meltdown, all sorts of players in the finance and food industries – the investment houses that manage workers’ pensions, private equity funds looking for a fast turnover, hedge funds driven off the now collapsed derivatives market, grain traders seeking new strategies for growth – are turning to land, for both food and fuel production, as a new source of profit.”²⁶

The interplay between these two phenomena is instantly clear. The economic crisis has shown financial products to be extremely risky, and so the search begins for “future-proof” investment options as an alternative to capital markets. It becomes apparent that agricultural land is being imbued with a new significance: it is being transformed into a commodity and recast as a whole new economic sector. Its attractiveness as an investment rises with the threat of climate change, which is posed to reduce the amount of land available. More frequent extreme weather conditions will see entire tracts of land sink into the sea. The greenhouse effect will be amplified through the expansion of industrial agriculture which relies on the use of chemicals and the depletion of natural resources. The dynamics of the financial, food, and climate crises are gradually combining to form a global social crisis.²⁷ These developments will also have consequences for migration patterns; the World Bank identifies high food prices as a significant trigger for the movement of refugees. The World Bank also points out that an effective response to these crises cannot be found within the individual sectors and calls, instead, for “an integrated agricultural, food security, poverty, and climate agenda”.²⁸

III. EMANCIPATION THROUGH TRANSNATIONAL LAW?

But doesn’t the Global North simply fashion transnational law in its own image? Isn’t transnational law simply a more or less subtle way for industrialised nations to keep the Global South in a state of dependence?

A. DIALECTICS OF TRANSNATIONAL LAW

Like all law, transnational law always plays a part in the formation of alienated social relations and, as such, is part of the problem. In a world shaped by political emergencies, and economic and environmental crises, law does not always make the world a more just place. A common critique posits that modern law is an

²⁶ Grain, *Grabbing for Land*, 18 January 2009, available at: www.grain.org/article/entries/753-grabbing-land-for-food.

²⁷ For these linkages, see Anne Trebilcock, Chapter 8 in this volume.

²⁸ World Bank, note 22 above, p. 1.

instrument of domination. This line of argument is particularly pertinent when it comes to the transnational constellation. The law constructs a veil of equality and thus obscures the reality of socio-economic inequality. And no one can say that *everyone* has the same access to legal procedures. Who can match the resources of transnational companies or the giant factories of advocates known as international law firms? How many people have the requisite know-how to bring a case before the International Court of Justice? The idealistic belief in civilising the world through law may seem naïve if one fails to take into account the simple fact that the very starting point for this juridico-political struggle is rife with inherent inequalities. The law merely provides a liberal smokescreen to obscure the inherent injustice of global power relations.

The fact that even human rights can be instrumentalised is the central tenet of critical theories of law. At the global level, too, it is clear that this poses a virulent risk: the economic instrumentalisation of human rights is particularly evident in the lending policies of the IMF and the World Bank. In the main, the buzzwords “human rights” and “good governance” denote a particular borrower’s economic policy orientation: the protection of liberal human rights, the investors’ property rights, and the patent rights of transnational companies.²⁹ As well as serving the crystallisation of economic property relations, human rights are also invoked in the context of security policy. Thus, in the case of so-called “humanitarian interventions”, we see human rights being re-framed as an interventionary norm. The vague nature of human rights allows for “interpretation by special interests” according to their own purposes, while re-interpretations of human rights are employed to legitimise violence.

All of this, however, is just one side of the story. One can also point to the way in which NGOs and other networks are articulating their concerns through the language of human rights and thereby drawing attention to injustice in the transnational public sphere. The socialisation of transnational law has nothing to do with a new vein of juridical socialism. It is concerned not with the legal interpretation of socialism, but with interpreting transnational law in a socialist way. In the words of Friedrich Engels and Karl Kautsky, social and democratic demands must be formulated “as legalistic demands within a program”.³⁰ The struggle for transnational social rights is able to represent an emancipatory project if we express social claims in the form of legal demands, and, in this spirit, re-interpret and re-organise existing rights.

As far as human rights policy is concerned, the above shows the contradictory and paradoxical way in which the law is hauled back and forth between domination and emancipation. This ambivalent quality of law gives rise to a number of warnings. Why should the subalterns turn to the law when it represents

²⁹ David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy’s Promise*, (Cambridge-New York: Cambridge University Press, 2008).

³⁰ Friedrich Engels and Karl Kautsky, “Juristen-Sozialismus”, printed as “Juridical Socialism”, in: (1977) 7 *Politics and Society*, p. 203 *et seq.*, at 219.

the very tool which guarantees the existing societal order,³¹ and which maintains the essential structures that facilitate the re-occurrence of acts of domination?

As far back as the 1920s and 1930s, this was the central question of the critical legal theories emerging from the Frankfurt School. The works of Franz L. Neumann and Otto Kirchheimer, in particular, offer important insights relating to the transnational constellation. Kirchheimer and Neumann provided devastating portrayals of how law worked and its capacity for instrumentalisation. Both take as their starting point the idea that modern law develops into an autonomous social form. Neumann described the law as being only relatively independent.³² Law is embedded in social relations. Here, Neumann recognised that the reference to its economic embeddedness is not sufficient in order to describe the function of law. He saw that the law is related to politics and academia, too. Political, religious and intellectual structures as well as family structure are all realities that affect the law, just as the economy does.

Otto Kirchheimer's analyses of juridification similarly address this treatment of law as an autonomous force which is independent of other societal spheres, and meticulously describe the processes of juridification that expand to furthest corners of society:

"In all fields of endeavor things are turned into law."³³

Everything is subjected to legal discourse: from administration, the principles of business and economics, worker co-determination and the education system, to issues of family and private life. Discourse theory took on these ideas and interpreted them as the colonising tendencies of functional systems. The existing colonisation through law turns all social problems and conflicts into legal questions.³⁴ World society's most complicated conflicts are given legal hearings, translated into legal terminology and often unrecognisably transformed into conflicts of principles; there is no longer any issue of world society that cannot be decided in the language of law, the programme of law and the code of law. The key players in this fundamental juridification are the transnationally operating courts, elite lawyers, law firms, transnational companies, and NGOs. All are engaged in stabilising societal structures through the legal structure.

³¹ Otto Kirchheimer, "Reichsgericht und Enteignung: Reichsverfassungswidrigkeit des Preußischen Fluchtliniengesetzes?", (1930), in: Otto Kirchheimer, *Von der Weimarer Republik zum Faschismus: Die Auflösung der demokratischen Rechtsordnung*, edited by Wolfgang Luthardt, (Frankfurt aM: Suhrkamp Verlag, 1976), p. 77 *et seq.*, at 78.

³² Franz L. Neumann, *The Rule of Law: Political Theory and the Legal System in Modern Society*, (Leamington Spa: Berg Publishing, 1986).

³³ Otto Kirchheimer, "The Socialist and the Bolshevik Theory of the State", in: idem, *Politics, Law, and Social Change: Selected Essays of Otto Kirchheimer*, edited by Frederic S. Burin and Kurt L. Shell, (New York-London: Columbia University Press, 1969), p. 3 *et seq.*, at 7.

³⁴ Jürgen Habermas, *The Theory of Communicative Action*, Vol. II, (Boston MA: Beacon Press, 1987), p. 362 *et seq.*

In extreme cases, fundamental questions are no longer decided in democratically organised forums, but, instead, in an expertocratic way before the world's courts, be it by national Constitutional Courts, regional Courts or the International Court of Justice (ICJ).³⁵ Kirchheimer was the first to describe the subtle mechanisms of the legal structure in terms of its tendency to subjugate, alienate and determine social relations. His conclusions also offer an important impetus for a transnational legal policy. He did not call for de-juridification, something that would have been too simple as well as unrealistic. He realistically assessed the chances of an alternative legal policy by combining Karl Marx's analyses with a movement towards politicisation. From Marx, he adopted the observation that social relations undergo a differentiation, and that one section can follow its self-referential expansionary tendencies to the detriment of other sections of society. Thus, Marx's economic analysis that the economy produces an autonomous commodity form is extended by Kirchheimer to law and legal structure. He combines this Marxist analysis with a critical legal perspective, which reveals the political moment within law's autonomy. He holds in contempt those petty practitioners of the law who believe that law is divorced from politics and that identifying the objective law is a purely scientific exercise. He sees legal decisions not as a mathematical calculation, but as the product of legal and political conflicts. If we accept the diagnosis of juridification, it follows that there are consequences for the form that these conflicts take: in the juridified society, they always relate to law and the legal code.

Through Kirchheimer, one can demonstrate how the law, which, at first glance, only seems to function in a mechanical and technical way, can – itself – be internally re-politicised.³⁶ A considered understanding of transnational social rights requires one to “bring to light power relations”³⁷ and confront the established and employed techniques of domination; only then can strategies of resistance be identified, invented or strengthened. Since “[t]he element of strife and of struggle [...] is an integral part of [the law], and has been from the

³⁵ On the relationship between law and politics at global level, see the International Court of Justice, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, ICJ Reports, p. 136 *et seq.* (155, para. 41).

³⁶ On this kind of link between analysis and scope for politicisation in Kirchheimer, see Gunther Teubner, “Man schritt auf allen Gebieten zur Verrechtlichung: Rechtssoziologische Theorie im Werk Otto Kirchheimers”, in: Marcus Lutter, Ernst C. Stiefel and Michael Hoeflich (eds), *Der Einfluß deutschsprachiger Emigranten auf die Rechtsentwicklung in den USA und in Deutschland*, (Tübingen: Mohr Siebeck, 1993), p. 505 *et seq.* Parallels to this challenging model based upon Kirchheimer's analysis can be found in the materialist theory of law in the work of Evgeny Pashukanis. See Evgeny Pashukanis, *Law and Marxism: A General Theory*, (London: Pluto Press, 1978).

³⁷ Michel Foucault, “The Subject and Power”, (1982) 8 *Critical Inquiry*, p. 777 *et seq.*, at 780.

first”,³⁸ the law is a battleground for the “civil war of ‘language’ with itself”.³⁹ This opens the way for world society to re-appropriate the law and allows for the re-socialisation of the juridification process, thus reclaiming the arenas of transnational law from the technocrats.

B. TRANSNATIONAL JURIDIFICATION

This kind of re-appropriation of the law has yet to be achieved. While world society has gone through an intensive juridification, transnational law is predominantly geared towards those interested parties within the functional systems. As far back as 1971, the sociologist Niklas Luhmann put forward the “speculative hypothesis” that law would see a move from normative expectations (politics, morality, law) to cognitive expectations (economy, science, technology):

“At the level of global society, this means that norms (in the form of values, stipulations, goals) will no longer pre-programme recognition patterns; rather, and in stark contrast, the problem of learning adaptation will gain structural primacy, so that the structural conditions for learning within each social system must be supported through normatisation.”⁴⁰

In other words, the functional systems – primarily the economy – manage to procure everything that they require from world society – including law.

In order to be in a position to suggest effective changes, it is important to establish which legal, economic and political factors allowed for the emergence of financial market capitalism – from the watered-down capital requirements of the Basel Committee on Banking Supervision to the structural adjustment programmes of the IMF. What the public debate on managers’ bonus packages overlooks is that the current economic crisis is part of a development that began in the 1970s with the collapse of the Bretton Woods system of internationally fixed exchange rates. Only since then have we witnessed the triumphant march onward of neo-liberalism and the extreme pressure thereby exerted on social rights. In international political economy, this epoch – in which the global economic players provide their own neo-liberal legal norms – will be seen as

³⁸ Rudolph von Jhering, *The Struggle for Law*, originally printed by Callaghan and Co., 1915, p 138.

³⁹ This formulation in Jean-François Lyotard, *The Differend: Phrases in Dispute*, (Minneapolis MN: University of Minnesota Press, 1988) (Theory and History of Literature Vol. 46, 1988, \$198, p. 141).

⁴⁰ Niklas Luhmann, “Die Weltgesellschaft”, (1971) 57 *Archiv für Rechts- und Sozialphilosophie*, p. 313 *et seq.*, English translation gathered from Andreas Fischer-Lescano and Gunther Teubner, “Regime-collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law”, (2004) 25 *Michigan Journal of International Law*, p. 999, at 1000, translated by Michelle Everson.

one of market-liberal constitutionalism.⁴¹ The global economic order primarily protects the rights of private industry.

The path towards this market-liberal dominance was not a straightforward one. The global economic crises prior to the Second World War and the failure of the supply-orientated economic doctrine resulted in calls for a socially orientated regulatory system coming even from those who had previously supported the capitalist economic order: the Atlantic Charter drawn up by Roosevelt and Churchill in 1941, the 1944 Declaration of Philadelphia of the International Labour Organization, the Charter of the United Nations from 1945, and the Universal Declaration of Human Rights from 1948, were the first to formulate – with the claim of universal application – the idea of social human rights and an international system geared towards social objectives.⁴²

Of the many forms of capitalism, the epoch of embedded liberalism in Western nations is distinguished by economic regulation that is demand-orientated, and which stimulates growth through public institutions and wage increases. This economic appeasement policy is supplemented by corporatist arrangements and social compromises between the *bourgeois* and the subaltern classes.⁴³

At international level, this period corresponded with increasing law-making under the framework of the United Nations. The Universal Declaration of Human Rights (1948), the International Covenant of Civil and Political Rights (ICCPR) (1966) and the ICESCR (1966) all three emerged in this period. The latter bears witness to the fact that the increased significance of social rights on a national scale at the time was also borne out on an international scale. The ICESCR secures the right to social security, the right to freedom of association, and the right to strike.

The so-called Bretton Woods Institutions exert their influence over the sphere of international economic regulation. The International Monetary Fund and the World Bank safeguard the system of fixed exchange rates and, in doing so, rule out – officially at least – currency speculation and high-risk financial transactions.⁴⁴

This model plunged into crisis in the early 1970s, and the system of fixed exchange rates was abandoned and replaced by a floating exchange rate system.

⁴¹ Stephen Gill, “Constitutionalizing Inequality and the Clash of Globalizations”, (2002) 4 *International Studies Review*, p. 47 *et seq.*

⁴² Benjamin Davy, Ulrike Davy and Lutz Leisering, “The Global, the Social and Rights. New Perspectives on Social Citizenship”, (2013) 22 *International Journal of Social Welfare*, issue supplement 1, p. 1 *et seq.*

⁴³ Wolfgang Abendroth, “Zum Begriff des demokratischen und sozialen Rechtsstaates im Grundgesetz der Bundesrepublik Deutschland”, (1954), in: *Gesammelte Schriften Band 2*, (Hannover: Offizin Verlag, 2008), p. 338 *et seq.*, especially at 354.

⁴⁴ A watering-down of this attitude has been evident since the 1960s. See Duncan Wood, *Governing Global Banking: The Basel Committee and the Politics of Financial Globalisation*, (Aldershot-Burlington VT: Ashgate Publishing, 2005), p. 32.

Only since then has it been possible to speculate on fluctuating exchange rates, which has since allowed banks to expand their activities in the area of financial and exchange rate speculation.

Neo-liberal economic policy was in line for a change. The IMF and the World Bank acquired a new role: ensuring stable conditions for speculation. The establishment of the WTO in 1995 provided a legal framework for the liberalisation of world markets. It aimed to contribute to “the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations” (WTO-Agreement).

This market-liberal constitutionalism is the product of the one-sided configuration of a transnational law that legally guarantees the transactions of the global economy. It also involves a de-democratisation of decision-making processes.⁴⁵ This democratic deficit mainly arises from the elimination of the public spheres open to democratic participation and the establishment – in their place – of private institutions without democratic legitimacy. Under this new arrangement, corporate freedom and corporate property rights are removed from democratic and public supervision. These neo-liberal norms are bolstered by a system of global jurisdiction, which sees transnational institutions install their own jurisdictions and dispute resolution procedures, such as the WTO arbitration procedure.

This leads to legal mechanisms that are difficult to change, and whose market-liberal viewpoint excludes alternative paths of politico-economic development. Instead of being subject to democratic decision-making processes, the economic and societal order is safeguarded by a less than transparent process of juridification hatched in the back rooms of international diplomacy and corporations.

While the winners in the global economy have long taken control of the legal machinery and thus created the perfect conditions for their own interests to flourish, attempts to introduce a sense of social and environmental responsibility to the system remain all too rare. As yet, there have been no radical changes in thinking on the scale necessary to bring about a lasting socialisation of neo-liberal excesses.

If the diagnosis is correct that the process of globalisation has given free rein to the economic system, it seems flawed to expect the remedy to come from a kind of national *résistance*. We would be better advised to pinpoint elements of an alternative juridico-political approach that have the potential to re-arrange the unfettered transnational system in a social and ecological way.

Two examples demonstrate the need to extend the fight for social rights beyond the constraints of the nation state:

⁴⁵ See Kolja Möller, *Formwandel der Verfassung. Die postdemokratische Verfasstheit des Transnationalen*, (Bielefeld: Transcript, 2015); Colin Crouch, *Post-Democracy*, (Cambridge-Malden MA: Polity Press, 2004).

1. *The World Trade Organization: AIDS Medicines and the Right to Health*

WTO law primarily supports the liberalisation of world markets, a position which leads to a number of negative consequences. But in the dispute between Brazil and the US over patent protection for AIDS medicines a political struggle around the WTO's essential commitments took place. It escalated in 2001, with the US claiming that Brazilian law was too lenient regarding the production of generic medicines and was thus violating the patent rights of US pharmaceutical companies. The US commenced proceedings against Brazil before the WTO arbitration panel, which had to decide between the social right to health and the economic right to patent protection. The US, however, had under-estimated the forces that it would be up against. From the US perspective, there could not have been a worse time to initiate proceedings relating to patent protection for AIDS medicines before the WTO. A special session of the UN General Assembly focusing on HIV/AIDS was scheduled to begin just a few months after the start of the WTO proceedings. Such special sessions, which focus on issues of the utmost importance, are relatively rare, requiring years of preparation and involving players from both national and civil society spheres. Before long, there was a widespread public outcry surrounding the fact that US economic policy was denying appropriate treatment to people suffering from AIDS. Keen to harness this public sentiment, Brazil managed to get a resolution passed at the next sitting of the UN Commission on Human Rights: Resolution 2001/33 was passed with 52 votes out of 53 – the US abstaining – and called on states:

“[t]o ensure that their actions as members of international organizations take due account of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”

The resolution made fairly plain reference to the simmering conflict around the Brazilian AIDS programme, and served as a diplomatic barometer for the pressure mounting against the US government. This explains why, on the first day of the UN's special session, the US announced that it was withdrawing the WTO complaint in favour of negotiations with Brazil. From a US perspective, the proceedings also had a counter-productive effect within the WTO system, as it led to the so-called Doha Compromise (2001), which provided for exceptions from WTO obligations for developing countries.

2. *The Centre for Settlement of Investment Disputes (ICSID): Bolivia and the Right to Water*

Another example is provided by the protests by residents of the Bolivian town of Cochabamba against high water prices and poor water quality following the privatisation of the water supply. Public pressure eventually led to the

government reversing the privatisation, to wit, re-nationalising the “public” utility. This prompted the company in question, Aguas del Tunari, a subsidiary of the US firm Bechtel, to bring the Bolivian government before the ICSID in an attempt to force them to uphold the contracts.⁴⁶ The case posed the fundamental question of whether the property rights of Aguas del Tunari could trump the rights to food, to freely enjoy natural resources, and to one’s own means of subsistence as guaranteed by the ICESCR. Civil societal pressure which pitted property rights against social counter-rights led to an out-of-court settlement, and exposed the contradiction of world society. This is much more than a collision between national regulation and the norms of globalisation. At heart, the conflict represents the tension between profit-driven private business and access to public goods. This tension, prevalent in national law, is also evident in transnational law, as two different normative regimes collide – WTO law and the law of the ICESCR. What happened after the ICSID proceedings reveals the socio-structural conflict at play. Not only were Bolivia’s water laws amended, but its new 2009 Constitution also guarantees the right to access to water and stipulates that access to water may not be the object of concession or privatisation. It shows that intervention was required to prevent democratic and social rights from being trounced by global norms, and demonstrates how successful civil-society protests can be.

IV. TRANSNATIONAL SOCIAL RIGHTS

The category of transnational social rights unites three strands of rights that have been separated in conventional legal discourse. Transnational social rights combine *liberal*, *social* and *political* human rights. The fact that these rights would be amalgamated in this way is far from self-evident, due to a pervasive tendency to treat liberal human rights and social rights as two distinct categories, and, in turn, to separate both groups from the category of democratic rights. Liberalism has been particularly effective at giving priority to liberal human rights at the expense of political and social interests. Over time, this has weakened social rights and prevented them from achieving their democratic potential.

A. THE INDIVISIBILITY OF HUMAN RIGHTS

Initially, social and liberal human rights were conceived of as one. This is evident from the Universal Declaration of Human Rights, proclaimed by the UN General

⁴⁶ ICSID, *Aguas del Tunari S.A. v. Republic of Bolivia*, (ICSID Case No. ARB/02/3).

Assembly on 10 December 1948, which reflected the prevailing conceptions of rights immediately after World War II. Along with the usual liberal rights, such as freedom of expression, the prohibition of torture and the right to bodily integrity and effective legal protection, it also included social rights, such as the right to social protection, work, health and food, within the catalogue of human rights.

A tendency to separate these categories of rights emerged with the adoption of the two international covenants in the 1960s, wherein social rights are textually split from liberal human rights: the ICCPR ratified by 168 states, and the ICESCR with 164 parties. This division is echoed at European level. While the European Convention on Human Rights (ECHR) focuses on liberal human rights, social rights are relegated to the European Social Charter.

The main result of this division was that the two categories of rights were not made equally enforceable. The liberal human rights are safeguarded by the European Court of Human Rights (ECtHR), while the social rights are protected only by a committee, which does not even have the power to hear individual complaints. Finally, some attempts are under way to introduce a complaint mechanism into the context of the ICESCR. An optional protocol to this effect was drawn up by the General Assembly in 2008 and entered into force in May 2013.⁴⁷ Since then, those whose rights have been violated are able to make a submission to the Committee, which can then make the appropriate recommendations to the state in question.

The separate institutional handling of the two categories of rights shows that, while liberal human rights are conceived of as “hard” actionable rights, social rights are often reduced to the status of non-actionable “non-rights”, which robs them of their normative clout.

Slowly, however, the debate is picking up speed. The 1993 Vienna Conference on Human Rights made a significant contribution to the idea of the indivisibility of human rights. Many states ratified both UN Covenants in the wake of the conference. The current status of ratifications indicates that liberal and political human rights *and* social human rights can claim to be valid right across cultural boundaries. Both the Vienna Declaration – adopted at the end of the Vienna Conference in June 1993 – and the United Nations Millennium Declaration explicitly stress the indivisibility of human rights, with the Millennium Declaration going so far as to set out the goal, in paragraph 19, “[t]o halve, by the year 2015, the proportion of the world’s people whose income is less than one dollar a day and the proportion of people who suffer from hunger”.

The concepts of the indivisibility of human rights and the inter-dependence of liberal, political and social rights are now once again finding favour. This

⁴⁷ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (UN GA Res. A/RES/63/117 from 10 December 2008); available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en.

viewpoint sees social, political and liberal rights as simply various manifestations of human rights, and not as categorically separate entities.

This typology of human rights is therefore not limited to liberal rights; instead, it can be thought of as being three-dimensional. The (liberal) human rights of the first dimension include defensive and freedom-orientated rights, such as the right to life and to personal freedom. The (social) rights constituting the second dimension are, to a large extent, codified in the ICESCR.⁴⁸ These are joined by the third group of rights to political participation and collective rights, such as the rights to development, peace, solidarity and the right to share in the common heritage of mankind.⁴⁹ These three dimensions are different forms of human rights. They are interwoven with one another and cannot be categorically divided. Only together can they fulfil their purpose: namely, to enable individual and collective self-constitution.

Other recent codifications of fundamental and human rights re-inforce this conception of indivisible human rights. The Charter of Fundamental Rights of the EU – which became incorporated into primary law following the Treaty of Lisbon – encompasses social as well as liberal rights. The same is true for the Banjul Charter of the African Union and the American Convention on Human Rights. Specialised agreements such as the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities include both liberal and social rights.

Even where there is no such immediately apparent merging of social and liberal rights, the categorical separation of the groups cannot be maintained; the two sets of rights are mutually dependent. The liberal rights have a social dimension, and the social rights have a liberal dimension. The social right to health is not limited to basic claims to health-care – it includes liberty rights which protect the individual against state interference. Relevant state interference could consist of permitting the use of dangerous technologies or breaches of bodily integrity through irreversible surgical measures carried out on intersexual children. The liberal right to free choice of employment brings with it the obligation to provide for fair and reasonable allocation of jobs. Liberal property rights can give rise to social security entitlements, while the right to human dignity combined with the principle of social justice and the welfare state leads to an entitlement to the guarantee of the socio-cultural basic income.

⁴⁸ Manoj Sinha, “New Dimension of International Human Rights Law, with Special Reference of Economic Rights”, (2009) 6 *Soochow Law Journal*, p. 65 *et seq.*

⁴⁹ To the gender-related questions in relation with those third-generation rights, see Celestine Nyamu, “How should Human Rights and Development respond to Cultural Legitimization of Gender Hierarchy in Developing Countries”, (2000) 41 *Harvard International Law Journal*, p. 381 *et seq.*; see, also, Mosope Fagbongbe, “The Future of Women’s Rights from a TWAIL Perspective”, (2008) 10 *International Community Law Review*, p. 401 *et seq.*

Similarly, there is no clear delineation between political and social human rights. The fundamental right to worker co-determination, for example, is derived from human dignity, general personality rights and the free choice of profession. These liberal rights give rise to an employee's entitlement to contribute to the governing of his or her own professional environment. The fundamental right to co-determination is therefore not only a social right which is derived from liberal rights, but is also a political right since it establishes the entitlement to democratic participation in business life. The sociologist Thomas H. Marshall pointed out that the social right to freedom of association, for example, also counts as one of the political participation rights that transfer the status as citizen into the industrial sphere, giving rise to the notion of industrial citizenship.⁵⁰ Major features of industrial democracy arose through the interpretation of liberal and social human rights.

While the principle of transnational social rights puts emphasis on a combined approach to liberal, political and social human rights, it is possible to identify five distinct kinds of social rights within this approach:⁵¹

1. liberal human rights with a social component (e.g., free choice of profession) and social human rights with a liberal component (e.g., the right to health);
2. political human rights with a social component (e.g., the right to co-determination) and social human rights with a political component (e.g., the right to strike);
3. equality rights which provide social entitlements to inclusion;
4. rights to social security, which can range from social support to health and environmental protection; and
5. social objectives, such as the goals of social progress and international peace set out in the preamble of the UN Charter.

All of the five elements of this typology have the potential to establish subjective entitlements, *i.e.*, individual social rights that can be enforced in courts. The discovery that social rights exist in current international law leads us directly to the most important point of debate: What are the required conditions to turn subjective rights into concrete enforceable entitlements?

B. OBJECTIONS

Conservative lawyers argue against unlocking the potential of transnational social rights for a number of reasons. Four main objections are generally presented.

⁵⁰ Thomas H. Marshall, *Citizenship and Social Class and Other Essays*, (Cambridge: Cambridge University Press, 1950).

⁵¹ See, also, the typology used by Karl-Jürgen Bieback, in "Soziale Rechte", (2010) 43 *Kritische Justiz*, p. 230 *et seq.*

1. *Vagueness*

It is often claimed that social rights are too vague and too ill-defined to establish concrete rights and duties. This was the approach taken, for example, by a German administrative court in refusing to recognise the substantive content of a number of norms from the ICESCR. Students who tried to rely on the Covenant to fight against university fees in Nordrhein-Westfalen in Germany in 2007 were blocked from doing so by the court, which stated:

“the text of the treaty ... lacks the necessary exactness for a legal norm ... The normal requirements of certainty and precision relating to international treaties cannot be applied here. Due to its political nature and its character as the product of diplomatic compromise, the law of international treaties is often vaguely worded, and occasionally not at all intended to regulate a real life situation, but instead deliberately uses language to cover up the fact that precisely nothing is, in fact, meant to be regulated.”⁵²

This attempt to erode social rights was subsequently rejected by a higher court, which recognised in its decision that the ICESCR can indeed establish norms and is not merely a political declaration of will.⁵³ This makes it clear that “vagueness” is, in itself, a vague criterion. All legal norms are vague. The central task of the law is to convert inexactness into exactness, in other words, to determine indeterminable issues. The uncertainty of the law is the starting-point for every legal dispute, which involves pitting two competing interpretations of the law against each other to see which will prevail. Legal norms, particularly human-rights norms, are always in need of concretisation. Take, for example, the first provision of the German Basic Law: “Human dignity shall be inviolable.” This provision is no less in need of concretisation than the social ICESCR-guaranteed right at stake in the case of the university fees, which states that:

“with a view to achieving the full realization of this right [to education] ... [h]igher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.”

2. *Progressive Realisation*

Social rights are often guaranteed only on condition of feasibility. Article 2 (1) of the Convention on Social and Political Rights obliges a state to do no more than “take steps [...] to the maximum of its available resources, with a view

⁵² Higher Administrative Court of Münster, *Deutsches Verwaltungsblatt* 2007, 1442.

⁵³ Federal Administrative Court, *Official Series*, 134, 1 *et seq.*

to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures". The fact that social rights are to be progressively realised does not mean, however, that it is impossible to substantiate these rights. The Committee on Economic, Social and Cultural Rights, the monitoring body of the ICESCR, thus differentiates between the obligations of states to respect, to protect and to fulfil rights. It argues that progressive realisation, as set out in Article 2 (1) of the Convention, is proof that the Convention represents more than a non-binding list of aims. As Eibe Riedel correctly notes, Article 2 (1) of the Covenant "places an unequivocal legally-binding duty on all State Parties, the intensity of which is balanced against the objective situation in which State Parties find themselves".⁵⁴ This duty can establish a prohibition on retrogressive measures, for example, the prohibition on the introduction of university fees, but can also lead to a duty to improve the situation progressively, which could entail a duty to abolish such fees gradually.

3. *Resource Dependence*

The argument based upon the resource-dependent nature of social rights and the need for democratic decisions on the distribution of limited resources has had a significant influence on international law practice. It is indeed the main reason for the reluctance on the part of states when it comes to establishing monitoring bodies for the enforcement of social rights. This approach disregards, however, that political and liberal human rights also depend on resources. This is all the more true if the right requires legal mechanisms to be set up. The establishment of the system of patent protection in order to uphold liberal property rights, for example, entails significant costs. The World Bank estimates the costs of enforcing a WTO-compliant intellectual property right in developing countries at around 1.5 million to 2 million USD per country and warns that:

"Given other pressing needs in education, health, and policy reform, it is questionable whether the least-developed countries would be willing to absorb these costs, or indeed whether they would achieve much social payoff from investing in them. Moreover, note that poor countries are extremely scarce in trained administrators and judges, suggesting that one of the largest costs would be to divert scarce professional and technical resources out of potentially more productive activities."⁵⁵

⁵⁴ Eibe Riedel, "Measuring Human Rights Compliance, The ISBA Procedure as a Tool of Monitoring", in: Andreas Auer, Alexandre Flueckiger and Michel Hottelier (eds), *Les Droits de l'homme et de la Constitution: Études en l'honneur du Professeur Giorgio Malinverni*, (Geneva: Schulthess, 2007), p. 251 *et seq.*, at 256.

⁵⁵ World Bank Global Economic Prospects 2002: "Making Trade Work for the World's Poor", (Washington DC: World Bank, 2002), p. 136 *et seq.*

There is a further flaw in the argument that the actionability of social rights would lead to immense costs, in that there are lots of social rights that do not lead to an entitlement to services. They often have more in common with classic defensive rights. If the right to water is violated by environmental pollution, what is required is not some cost-intensive service, but, instead, a mere omission, just as with liberal rights. And where social rights *do* give rise to entitlements, granting these entitlements does not necessarily result in a burden on state finances. The fair distribution of available natural resources such as land and water, the recognition of the traditional usage rights of indigenous peoples or other local communities, or the permission to produce generic medicines despite existing patents, all represent rights that do not entail increased costs to the state. The actionability of social rights does not mean that the court will never take financial considerations into account – quite the opposite. This is why the Committee on Economic, Social and Cultural Rights leaves a certain amount of discretion when it comes to the allocation of resources. The burden of proof rests on the state if it cites “resource constraints” as an explanation for its failure to fulfil its obligations. In practice, the Committee applies the following criteria to the legality of any retrogressive steps taken by a state: the country’s level of development, the severity of the alleged breach of rights, the country’s current economic situation, and the existence of other serious claims on the state party’s limited resources; for example, resulting from a recent natural disaster or from recent internal or international armed conflict.⁵⁶

4. *Judicial Enforceability*

The final objection to social rights holds that, for structural reasons, it is generally not feasible to conceive of social fundamental rights in the same way as directly enforceable rights, such as liberty rights.⁵⁷ This argument challenges the justiciability of social rights as such, and generally takes one of two forms. The first one voices doubts about the applicability of such a right, and questions whether the norm has the structural capacity to oblige the addressee to take a particular course of action. The second one posits that such rights represent a duty imposed by international law that is binding on states, but that this does not empower an individual to have recourse to international law in order to claim the right. Both points are important fields of legal and political debate in the battle to determine whether norms may be enforced or whether these provisions will be rendered toothless.

⁵⁶ UN Committee on Economic, “Social and Cultural Rights, An Evaluation of the Obligation to take Steps to the ‘Maximum of Available Resources’ under an Optional Protocol to the Covenant”, 10 May 2007, E/C.12/2007/1, para. 10.

⁵⁷ See, for example, Wolfgang Rüdner, “§40 Leistungsrechte”, in: Detlef Merten and Hans-Jürgen Papier (eds), *Handbuch Grundrechte II*, (Heidelberg: CF Müller, 2007), para. 53.

A look at the European Social Charter demonstrates the fate that awaits social rights when this battle is not fought to the end. For example, the Charter guarantees the right to strike, a right not limited to union-led wage-based strikes. The German approach, which forbids so-called “political strikes”, therefore represents a breach of the Charter. German courts, however, have been reluctant to apply the Charter, despite the fact that Germany has ratified it. The reason given for this reluctance is that the Charter’s provisions are to be seen as aims that all state parties should strive to achieve. The prevailing legal opinion in Germany maintains that the word “aims” implies that the Charter is not intended to establish subjective rights.

There is good reason to reject this approach, a view shared by the European Committee of Social Rights, the treaty’s monitoring body.⁵⁸

The EU Charter of Fundamental Rights presents a similar situation. This Charter introduced a differentiation between “real’ rights” and “principles”. The official clarification given is that “real’ rights” are to be treated as “subjective rights”, while “principles” need only to be generally observed. Here, in the small print, we see another attempt to weaken social rights – the principles are largely made up of social rights – by framing them in terms of vague concepts, instead of actionable rights.⁵⁹

The enforceability question is also debated with reference to the justiciability of these rights in international forums. As mentioned, states have, to date, been extremely reluctant to allow for individual or collective complaint procedures before both the ICESCR and the European Social Charter. In both cases, the legal and political debate must focus on working towards strengthening these rights. There is nothing in the structure of social, liberal or social-liberal rights that can justify the different way in which these norms are treated.

There is no principled distinction between social human rights and liberal/political human rights. Nor are social rights any less binding. Transnational social rights are equal to, overlap, and cannot be divided from, liberal and political rights. Without the right to self-constitution, *i.e.*, the right to a guaranteed basic income, and without the rights to environmental protection and migration, political and liberal human rights would be rendered hollow.

Liberal and political human rights cannot adequately deal with the problems of people living in refugee camps or people who have lost their livelihoods due to environmental disasters. Social rights are thus a necessary addition to – and not the opposite of – liberal and political rights. All three dimensions rely upon

⁵⁸ Tino Frieling and Roland Czycholl, “Auswirkungen der Europäischen Sozialcharta auf das Arbeitskampfrecht. Das Streikrecht aus Art. 6 Abs. 4 ESC als vorrangige gesetzgeberische Entscheidung”, (2011) *Zeitschrift für europäisches Sozial- und Arbeitsrecht*, p. 322 *et seq.*

⁵⁹ Thomas Giegerich, “Steuern Völker- und Europarecht die Globalisierung ‘im Geiste der Brüderlichkeit?’”, in: Thomas Giegerich and Andreas Zimmermann (eds), *Wirtschaftliche, soziale und kulturelle Rechte im globalen Zeitalter*, (Berlin: Duncker & Humblot, 2008), p. 7 *et seq.*, at 26 *et seq.*

each other. They are indivisible. The co-originality of political, liberal and social rights is essential for the self-determination of individuals.⁶⁰ This indivisibility also means that there are no rights without social rights. Transnational law is social, or it isn't law at all.

V. ARENAS OF TRANSNATIONAL LEGAL POLICY

There are three different arenas where transnational social rights must be strengthened: (A) at global level, the main challenge is to find a timely solution to the threats to social rights posed, not by states, but by transnational corporations. At European level (B), we have to make sure that a social Europe becomes a reality. This is of utmost importance with regard to the strengthening of transnational social rights: a social union which resists the temptation to establish imperial and exploitative (transnational) relations, could be a powerful resource which promotes social rights. Lastly, we must ensure that (C) states and the political organisations of global governance are held to the standard of the emancipatory ideal.

A. TRANSNATIONAL SOCIAL RIGHTS AND TRANSNATIONAL CORPORATIONS

A crucial element of contemporary legal policy is to ensure that transnational corporations are bound to respect social human rights.⁶¹

The fact that Deutsche Bank can, on the one hand, speculate on crop failures, food scarcities and hunger-related deaths while, on the other, it can issue enthusiastic declarations relating to the UN Global Compact Initiative on upholding human rights is evidence of the complexities of transnational legal policy. How can private companies be bound to uphold transnational social rights? How can the concept of human rights for corporations move from being a mere marketing instrument to becoming actionable legal obligations? We urgently need to find answers to the new kinds of risks that social rights face *not* from global politics, but from transnational corporations.

But what obligations – if any – does international law impose on transnational corporations? For decades, the steadfast position was that international law is a legal order both for and by states. The authors and addressees of this law were therefore states, and not individuals or corporate entities. Yet the transnational constellation of global communication, as well as global social systems of

⁶⁰ Jürgen Habermas, trans. William Rehg, "Remarks on Legitimation through Human Rights", (1998) 24 *Philosophy and Social Criticism*, p. 157 *et seq.*, at 161.

⁶¹ See Ibrahim Kanalan and Sebastian Eickenjäger, Chapter 6 in this volume.

business, science and technology, all raise the question of how international law – and particularly human rights – respond to these all-encompassing processes of transnationalisation. As far back as 1934, Hans Kelsen recognised that:

“[t]o the extent that international law penetrates areas that heretofore have been the exclusive domain of national legal orders, its tendency toward directly authorizing and obligating individuals must increase.”⁶²

Calls for direct obligations to be placed on non-state actors are still, however, met with stiff resistance. It is extremely difficult for the victims of violations of transnational social rights to have their rights enforced. This is made shockingly clear in the case of violations of social human rights relating to the right to food. Oil drilling in the Niger Delta has caused extensive environmental pollution. Consortia of transnational corporations headed by the British/Dutch oil company Shell have devastated huge tracts of land, collaborated in the execution of human-rights lawyer Ken Saro-Wiwa and his supporters, and violated the social rights of the Ogoni people. In 2011, the United Nations Environment Programme published an extensive report detailing the contamination caused by oil exploration and production in the Ogoniland of Nigeria.⁶³

The oil drilling is a violation of the right to food as well as the collective right to the protection of the natural environment. This protection is one of the key concerns – indeed, the core ecological demand – of transnational social rights. This is due to the fact that environmental rights are rights that are closely linked to human rights. Courts often read ecological concerns into liberal and social human rights, a phenomenon known as the “environmentalisation of human rights”. In this way, the European Court of Human Rights has developed the environmental components of the European Convention on Human Rights based upon the right to life and the right to privacy. Similarly, the UN Human Rights Committee interprets the ICCPR in such a way as to include ecological human rights.

The environmental leaning is particularly important when it comes to social human rights. The right to an adequate standard of living, including adequate nutrition, clothing, accommodation and health, contained in the ICESCR also encompasses the right to stable environmental conditions to enable human existence. The UN Committee on Economic, Social and Cultural Rights thus found that these two norms could be read as establishing a right to water.⁶⁴

All of these fundamental norms are directed, in the traditional way, at states. These rights impose three legal obligations on states: (1) the duty to respect

⁶² Hans Kelsen, *Pure Theory of Law*, (Oakland CA: University of California Press, 1978), p. 327.

⁶³ United Nations Environment Programme, *Environmental Assessment of Ogoniland*, Nairobi 2011.

⁶⁴ UN Committee on Economic, Social and Cultural Rights, General Comment 15, 2002, E/C.12/2002/11 from 20 January 2003.

obliges all states to refrain from violating these rights; (2) the duty to protect obliges all states to protect against violations of these rights by third parties; and (3) the duty to fulfil obliges states to ensure that these rights are enforced, which includes their taking active measures to do so.

However, this triad of duties cannot directly impose any obligations on the transnational corporation Shell. The powerlessness of transnational law when it comes to the human rights obligations of transnational corporations is evidenced by the fact that, to date, there has been no final court judgment against Shell. The proceedings in the Netherlands are still ongoing, as Shell has appealed against a judgment of the District Court of The Hague which granted compensation to the victims.⁶⁵

The jurisdiction of national courts also presents problems, as this requires a legal connection to the state in which the court is sitting, *i.e.*, that the corporation, the victim, or the place in which the crime was committed has a connection to the state in question. This is often difficult to achieve in the case of human rights violations. A certain amount of legal creativity is required if, for example, a Nigerian victim of a crime that took place in Nigeria wishes to take a foreign subsidiary of a transnational corporation to court. The US legal system offers quite a lot of scope in cases such as these. In the US, corporations involved in grave violations of human rights may be brought before courts even if there is no immediate connection between the violation and the US. It was for this reason that lawyers taking a case relating to the killing of Ken Saro-Wiwa initiated proceedings before a New York court. When, in June 2009, the court declared the compensation claim admissible, Shell agreed to a settlement with the victims in the region of 15 million USD.⁶⁶ Apart from this case, which made use of the opportunity presented by the US legal system, there is little scope at global level to seek a judgment against Shell.

Judgment on the issue has been handed down only to the state of Nigeria, in a case before the African Commission on Human and Peoples' Rights relating to violations of the right to food. In its decision, the Commission stressed the importance of the right to food in the human rights system, finding that:

“the minimum core of the right to food requires that the Nigerian Government should not destroy or contaminate food sources. [...] The Government has destroyed food sources through its security forces and State Oil Company; has allowed private oil companies to destroy food sources; and, through terror, has created significant obstacles to Ogoni communities trying to feed themselves.”⁶⁷

⁶⁵ District Court of The Hague, C/09/337050 / HA ZA 09–1580, judgment of 30 January 2013.

⁶⁶ US District Court Southern District of New York, *Wiwa v. Shell Petroleum*, 96 Civ. 8386, Settlement of 8 June 2009.

⁶⁷ African Commission on Human and Peoples Rights, *SERAC, Center for Economic and Social Rights v. Nigeria*, October 2001, ACHPR/COMM/A044/1, para. 65 f.

The crux of this decision from the African Commission was the involvement of the Nigerian state in violations of social rights.

But what *concrete* human rights obligations exist for transnational corporations?

Thus far, attempts have failed to formulate a draft on the responsibility of corporations under international law and on a declaration of a code of social responsibility with universal applicability and direct effect.⁶⁸ Currently, the concept of voluntary codes does have some traction. While these voluntary declarations are problematical, they do at least represent a start. One should not be too quick to reject categorically the legal applicability of such declarations just because they are voluntary in nature. Law is not limited to what states, themselves, set out. Legal norms can also be formed in society. To see the concept of law as being too closely linked to the state is to overlook the unique nature of social norms.

The struggle for law has always entailed debate on the significance of certain symbolic texts. Even the idea that the constitution could have a binding effect on politics was established only after a legal debate. Even the *Magna Carta* was not initially conceived of as a justiciable document.

In a similar way, transnational social and democratic legal policy will have to work to transform these voluntary declarations into binding transnational social rights. The future obligations on transnational corporations to uphold human rights might take a multi-dimensional form, encompassing binding fundamental rules, incentives and voluntary initiatives. There is certainly no shortage of initiatives to create such norms. The following initiatives are of particular importance: (1) The United Nations Global Compact (UNGC): a public-private initiative of the UN, which aims to establish ten universal principles, including that business should respect the protection of human rights. (2) In May 2010, the UNGC came to an agreement with the Global Reporting Initiative to monitor the ten principles by means of the “G3 Guidelines”. This will, for the first time, provide guidelines for a monitoring mechanism. (3) The International Organization for Standardization (ISO) should also be mentioned in this context. In May 2010, it adopted the draft ISO 26000 on Social Responsibility. This ISO norm makes a significant contribution to the standardisation of the human rights obligations of companies. (4) The ILO Core Labour Standards also provide for binding human rights obligations on companies. The Declaration on Fundamental Principles and Rights at Work of June 1998 sets out universal fundamental principles for corporations operating internationally, such as the ban on child labour. (5) Finally, reference must be made to the OECD Guidelines

⁶⁸ See Ronen Shamir, “Corporate Social Responsibility: A Case of Hegemony and Counter-hegemony”, in: Boaventura de Sousa Santos and César A. Rodríguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality*, (Cambridge: Cambridge University Press, 2005), p. 92 *et seq.*

for Multinational Enterprises, a code of conduct for responsible worldwide corporate behaviour.

A common feature of all these efforts is that they are stated in terms of recommendations, attempts to standardise, or voluntary commitments, and thus are not declared as law in a formal sense. This does not, however, exclude the possibility that the legal character of these rules can emerge as a result of the struggle to determine their substance.⁶⁹ The legally binding nature of these rules may also emerge with the help of national law. A common litigation strategy of transnational lawyer groups is to hold companies accountable to their Codes of Conduct. Voluntary standards can often be enforced in accordance with competition or consumer laws, where they include relevant representations to the consumer. Thus, a corporation's non-adherence to its own codes can be enforced before courts in the country of the corporation's headquarters.

These are the tentative first steps in the attempt to "get serious" about the human rights obligations of transnational corporations. Transnational social rights that place obligations on corporations can develop out of the complex interplay between various state and non-state systems. In his report from 2008/2009, John Ruggie, the former UN Secretary-General's Special Representative for Business and Human Rights, referred to precisely this multi-dimensional aspect. Ruggie sees complementary responsibilities in terms of human rights, and categorises these interconnected duties into a three-pillar system. His "*protect, respect and remedy*" framework encompasses, apart from the state duty to protect against human rights violations, a corporate responsibility to respect human rights, *i.e.*, a direct duty, aimed at corporations, to act with due diligence to avoid infringing upon the rights of others. Added to this is the right of access to judicial and non-judicial remedies. Thus, alongside the traditional state obligations, he sets out a distinct corporate responsibility, which he says has acquired near-universal recognition. He states:

"By near-universal is meant two things. First, the corporate responsibility to respect is acknowledged by virtually every company and industry CSR initiative, endorsed by the world's largest business associations, affirmed in the Global Compact and its worldwide national networks, and enshrined in such soft law instruments as the ILO Tripartite Declaration and the OECD Guidelines. Second, violations of this social norm are routinely brought to public attention globally through mobilized local communities, networks of civil society, the media including blogs, complaints procedures such as the OECD NCPs [...] This transnational normative regime reaches not only Western multinationals, which have long experienced its effects,

⁶⁹ On the emergence of binding legal rules in the field of the *lex mercatoria*, see Moritz Renner, "Occupy the System! Societal Constitutionalism and Transnational Corporate Accounting", (2013) 20 *Indiana Journal of Global Legal Studies*, p. 941 *et seq.*

but also emerging economy companies operating abroad, and even large national firms.”⁷⁰

Ruggie goes into more detail on this corporate responsibility in his final report of 2011, in which duties to adhere to certain due diligence standards are placed on corporations in order to guarantee human rights.⁷¹

Ruggie’s work has, however, been criticised for not going far enough. Indeed, efforts must be made, particularly in the area of social rights, to ensure that it is not just defensive rights that exist against transnational corporations, but that corporations can also be obliged to take certain positive steps.⁷² In the above-mentioned example of patents for medicines, it is easy to imagine situations in which the patent holder could be obliged to allow for the production of generic drugs or be obliged to make lifesaving medicines available.

What does this mean for the enforcement of transnational social rights regarding corporations? It is clear that defensive as well as positive rights should be demanded from corporations. Political human rights should also be developed in the same way so that the idea of participation can be applied against corporations as well. The Aarhus Convention set up innovative participation and control structures in relation to corporations and environmental issues. Strengthening the rules on co-determination in transnational corporations thus remains a central task.

In all of these areas, it is essential to open up access to judicial avenues. The Ruggie report sets out the right to greater access to effective judicial and non-judicial remedies for victims, and refers to the UN General Assembly’s “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”. The General Assembly declared that these principles emanate from customary international law. The question remains, however, as to whether or not public international law as it currently stands provides for a duty to compensate. If rights violations can be attributed to a corporation, are they obliged to compensate the victims? Conservative international lawyers flatly deny the existence of *any* individual right to compensation under international law. Yet there is no settled prevailing opinion on the matter. A further question relates to which transnational social rights are included in these basic principles and guidelines, *i.e.*, whether the latter apply only to “gross violations” of human rights. Restrictive answers to this question

⁷⁰ John Ruggie, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises 2009, para. 47.

⁷¹ John Ruggie, “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework”, 21 April 2011, A/HRC/17/31.

⁷² For recent attempts to draft an international convention concerning human rights and business, see Ibrahim Kanalan and Sebastian Eickenjäger, Chapter 6 in this volume.

refer to the drafting history of the principles. During negotiations, the term “gross violations” was understood as referring only to crimes in the category of genocide and slavery. But states decided against such a narrow interpretation. Instead, it was made clear that systematic violations would also trigger the legal obligation to provide compensation. The task here is to ensure that as many kinds of violations as possible are included in this system of compensation.

Of more fundamental importance, however, is the dispute over whether the right to the legal proceedings and compensation set out by Ruggie also applies in cases of the violations of rights by private persons and corporations. Here again, the restrictive view argues that the principles are directed solely at states. This claim is not, however, supported by the wording of the principles, which stipulate the duty to:

“Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation.”⁷³

It is certainly possible that even those violations of transnational social rights that are caused by private parties could trigger a claim to an adequate, effective and prompt remedy. In short, based upon these principles and guidelines, it is possible to extrapolate from the existing law an obligation on corporations to compensate victims where the former have violated transnational social rights.

B. THE EUROPEAN SOCIAL UNION

The European Union is a forceful example for a transnational polity that is highly juridified and even vested with parliamentary institutions. This affects not only the European continent. The EU and the Eurozone is an integrated market that establishes relations of economic exchange to the rest of the world. And, in international institutions such as the WTO, the EU acts as a unitary polity. For the strengthening of transnational social rights, it is absolutely crucial that such regional actors promote social rights instead of echoing the market-liberal and imperial dominance that we have already pointed out. This is why the quest for a social Europe attains a huge importance with regard to the overall project.

Not least, the turn towards austerity policies that the Union has seen in the last years is an important example in order to elucidate the devastating effects of neglecting social rights: the social and democratic deficit of the EU is one of the main reasons why the European competitive order is increasingly plagued by crisis. There is no economic stability without social stability. Financialisation and massive wage restraint have led to economic imbalances. The riots and unrest that we have seen spreading through Europe over the last years are a

⁷³ UN GA, A/RES/60/147, 21 April 2008, Guidelines, No. 3) c).

reaction to these imbalances, which leave many Europeans with no prospects. In the Parisian *banlieues*, young people, in particular, are protesting against social stigmatisation, while, in the latest occupations at *Puerta del Sol* in Madrid, well-educated students and graduates are drawing attention to their lack of prospects and demanding a *democracia real*. They call for “a Europe of the citizens and not of the markets. We are not commodities in the hands of politicians and bankers”.⁷⁴

The lack of European harmonisation in social and economic policies has exacerbated the crisis. The increasingly precarious job markets play a central role here. Minimum social standards have been lowered while the low-wage sector and atypical forms of employment flourish. Even beyond socio-political considerations, the urgent question now is whether or not a social union which protects minimum wages and income can be established, which could, in turn, help to prevent future imbalances. To date, a Europeanisation of social rights is difficult to discern. In contrast, the jurisprudence of the European Court of Justice, the European Commission and of most of the Member States is agreed that Europe is principally a sphere of economic competition, not a sphere of social justice.

But the crisis in the European competitive order extends beyond the socio-economic dimension in that it is closely linked to the crisis of European democracy. The latter arises out of a growing sense of alienation between the majority of EU citizens and the political and economic élite.

This is also reflected in the EU’s approach to international trade policies and regional co-operation. While it tries to establish free-trade agreements with the US and Canada, it is not willing to implement fair trade, based upon asymmetrical trade relations, with the Global South.⁷⁵ It still echoes the chants of free trade. And not least of all, it attempts to shield its borders against refugees by implementing new police and security apparatuses. Clearly, the current state of the Union is neither committed to social rights nor to an awareness of Europe’s colonial past.

As the EU’s situation intensifies, the question must be asked: Will the EU deepen its market-liberal constitution and set up increasingly authoritarian means of regulation, or will it face the crisis by prioritising social rights, democracy and economic re-distribution?

A European social union can only be achieved if we make a great effort to transform the market-liberal legal structure into one that guarantees democratic and social rights. This will require institutional reforms as well as pressure from civil society.

Two issues could be of particular significance when it comes to the Europeanisation of social rights. The strengthening of the European Social

⁷⁴ See www.democracyreal.es.

⁷⁵ See Steffen Kommer, Chapter 9 in this volume.

Charter and the establishment of a “social” EU citizenship by means of a minimum income system.

1. The *strengthening of the European Social Charter and the establishment of a European court of social rights* could act as a counter development to market-liberal single market integration. With the adoption of the Social Charter, the majority of the Council of Europe agreed on a catalogue of social rights, precisely those social rights that the European Court of Justice categorises as being subordinate to economic fundamental freedoms: the rights to strike and to demonstrate, and the right to collective bargaining.

In a whole series of judgments from the 1970s and 1980s onwards, the ECJ developed a market-liberal leaning. Recent examples of this tendency can be found in the Court’s jurisprudence in the decisions in the *Laval*, *Viking*, *Luxembourg* and *Rüffert* cases.⁷⁶ In the *Laval* and *Viking* cases, the Court found that strike and protest actions against wage dumping represented violations of fundamental freedoms. In the matter of *Luxembourg*, the ECJ found Luxembourg’s laws protecting workers were not in conformity with EU law. The decision in the *Rüffert* case found that, when awarding contracts, the German state of Lower Saxony was not permitted to set minimum wage limits.

In each of these cases, the Court asserted that the four economic freedoms of the single market – the free movement of goods, people, services and capital – are more important than collective bargaining autonomy and the right of trade unions to strike. It seems that the *effet utile* of European law has long become an *effet néolibéral*, which cossets the European competitive order against calls for social justice.⁷⁷

While the European Charter of Fundamental Rights has become binding with the entry into force of the Treaty of Lisbon, it remains unlikely that the ECJ will revise its single market leaning at any time in the near future. There is nothing to suggest that this might change significantly in the near future. The outlook is all the more gloomy given that the social rights set out in the Charter are largely categorised as “principles”, thus deliberately rendering the enforceability of such rights uncertain.

It would be a real breakthrough for social rights in Europe if the EU itself were obliged to adhere to the European Social Charter, given that the Charter is an international treaty that forms part of the law of the European Council and has been signed and ratified by 27 European states (but not by all the EU Member States). As it currently stands, the treaty is of meagre significance.

⁷⁶ Decisions of the European Court of Justice: *Viking* – C-438/05 of 11 December 2007, *Laval* – C-341/05 of 18 December 2007, *Rüffert* – C-346/06 of 3 April 2008 and *Luxembourg* – C-319/06 of 19 June 2008.

⁷⁷ Christoph Schmid, “From *Effet Utile* to *Effet Néolibéral*: A Critique of the New Methodological Expansionism of the European Court of Justice”, in: Rainer Nickel (ed), *Conflict of Laws and Laws of Conflict in Europe and Beyond*, (Oslo: Arena, 2009), p. 421 *et seq.*

Apart from the required ratification, there is no reason why the rights contained in the Charter could not be relied upon in court or invoked to establish an individual or collective complaint procedure. The EU should sign up to the European Social Charter, a move which would significantly bolster the Charter's status. A judicial forum under the framework of the Charter – a “European Court of Social Rights” – could supplement the network of existing European courts. Such a court could be established in complementarity to the European Court of Human Rights in Strasbourg. Alternatively, the monitoring of the Social Charter could be entrusted to the Strasbourg court. Both approaches would fulfil the same purpose: there is a need for a court which – unlike the ECJ/CJEU – does not give priority to upholding the principles of the single market, but, instead, aims to ensure that social rights finally become a central concern in Europe. This is not about legal chicaneries or jurisdiction tricks; it is simply a question of where and how the collision between social democracy and market-liberal economy can be articulated by law, but without priority rules automatically relegating social guarantees to the status of second-class rights.

2. If the observation is correct that securing a minimum standard of subsistence is crucial for inclusion and democratic participation, then this brings with it direct consequences for a socio-legal policy in Europe. The goal is to *establish a social EU citizenship by way of a nuanced system of guaranteed basic income*. Precarity and a lack of prospects have an exacerbating effect on Europe's crises: wage levels and purchasing power plummet while financial insecurity makes it more difficult for people to participate in democratic processes or to have a hand in shaping the future. The sociologist Pierre Bourdieu thus found that such increasingly precarious conditions gave rise to a new form of domination.⁷⁸ The right to a basic income could represent an important antidote to the fundamental insecurity felt by people in Europe. In this vein, the Committee on Employment and Social Affairs of the EU Parliament called on the Member States to provide for minimum-income schemes in order to “prevent poverty and social exclusion”.⁷⁹

In the report, the Committee finds that “social assistance in most Member States is already below a level which makes poverty a risk”, *i.e.*, under 60 per cent of the national average income. Thus, the Committee calls for a differentiated minimum income for everyone in Europe based upon the income levels of the particular state. This social security system should guarantee a minimum income, while minimum wages should be introduced to combat wage dumping. The call for a minimum income is thus framed in terms of a fundamental entitlement. The system would not represent charitable hand-outs, but would,

⁷⁸ Pierre Bourdieu, “Prekarität ist überall” (Precarity is everywhere), in: idem, *Gegenfeuer. Wortmeldungen im Dienste des Widerstands gegen die neoliberale Invasion*, (Konstanz: UVK, 1998), p. 96 *et seq.*

⁷⁹ Report on Promoting Social Inclusion and Combating Poverty, Including Child Poverty in the EU, Committee on Employment and Social Affairs, A6–0364/2008 at 2 (a).

instead, ground actionable legal claims. The demand for a legally-enforceable minimum income in accordance with the economic situation of each country could inject new energy into the struggle for social rights in the European Union.⁸⁰

The European Court of Justice, in a series of decisions on single-market integration and cross-border mobility, has found that all EU citizens – regardless of their nationality – should have access to social entitlements in their country of residence.⁸¹ This lays the foundations for a form of EU citizenship, which would need to be attuned accordingly in a system of minimum income and expanded to include minimum wages and economic participation. We must aim to create a social EU citizenship that entails more than just cross-border mobility and anti-discrimination rights. This would guarantee a minimum level of subsistence, which could form the basis for further calls for co-determination rights and economic democratisation.

C. INSTITUTIONS OF TRANSNATIONAL SOCIAL RIGHTS

The question remains: In which forums can transnational social rights be enforced? The answer depends on whether the aim is of national, regional or worldwide enforceability.

National infrastructure has an important role to play in the enforceability of transnational social rights. It is not just the US legal system that allows for fundamental human rights to be enforced in a de-centralised manner – *i.e.*, before national courts. Through “role splitting”,⁸² national court decisions can write transnational legal history. National courts represent more than just an important addition to international institutions; they can – in themselves – drive the enforcement and strengthening of transnational social rights. In the *Pinochet* case, for instance, Spanish and British courts made a significant contribution to the protection against the arbitrary use of state power. In numerous cases, US courts – against the interests of US foreign policy – are playing a leading role in the enforcement of transnational law.

The existing regional and global forums for the protection of human rights must also be strengthened. This applies, first and foremost, to judicial practice. Here, pressure must be applied to ensure that national courts are obliged to take the statements of these and similar bodies into account. The organs of the

⁸⁰ This could be linked with a model of different social corridors within the EU. See Klaus Busch, “The Corridor Model – Relaunched”, Working-Paper, International Policy Analysis, (Berlin: Friedrich Ebert Foundation, 2011).

⁸¹ See Dawid Friedrich, Patrizia Nanz and Kerstin Blome, “Free Movement and the Emergence of European Social Citizenship”, (2012) 41 *Österreichische Zeitschrift für Politikwissenschaft*, p. 383 *et seq.*

⁸² See note 15 above.

International Labour Organization that monitor observance of core labour standards must be strengthened, as must the complaint procedure of the OECD relating to adherence to the OECD Guidelines for multinational enterprises.

Non-state actors must, to a greater degree, be brought into the system of global jurisdiction. Transnational corporations as well as international organisations such as the United Nations and NATO must be subjected to the jurisdiction of human-rights forums. The same is true for transnational corporations.

VI. THE POLEMICS OF TRANSNATIONAL SOCIAL RIGHTS

The right to a minimum basic income, participation rights, the right to an undamaged environment, and the right to freedom of movement: all of these refer to the law of world society as we know it, while simultaneously suggesting an alternative. The promise of transnational social rights lies not in an elaborate blueprint for a better world order; instead, it is confined, at least for the moment, to the modest demand of allowing the inherent contradiction(s) in transnational law to emerge, so that the critical appropriation of human rights can find a way to gain traction in the arena of legal and political debate. We can use the language of human rights in order, finally, as Theodor Adorno put it, “to put a spark to all this antiquated mustiness, which may even blow it apart”.⁸³

Transnational social rights are thus directed in a polemical way against the existing system of rights. We thereby enter a conflict of laws. Without *pólemos*, that is, without a fight, without argument, without dissent, a new and different world will remain out of reach. Transnational social rights gently endeavour to achieve the coarsest demand: the ideal of emancipation.

⁸³ Theodor W. Adorno and Hellmut Becker, “Education for Maturity and Responsibility”, (1999) 12 *History of the Human Sciences*, pp. 21–34, at 24.