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Robert Schuman Centre for Advanced Studies

Legal Trajectories of Neoliberalism:  
Critical Inquiries on Law in Europe

Edited by Margot E Salomon and Bruno de Witte



European University Institute  
**Robert Schuman Centre for Advanced Studies**

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## **Abstract**

Responses to the recent (and ongoing) debt and austerity crises in Europe reveal multiple techniques through which the rule and role of law operate in these times of neoliberal capitalism. From international law, to human rights law, to European Union law, and constitutional law the deployment and orientation of law in the past few years point up ways in which law co-constitutes neoliberal values and structures, legitimating and hardening those values and foreclosing alternatives. Framing market interests, capital accumulation and profit as the common interest, advancing conditions for competition, favouring the private over the public and over the commons, and situating social justice as derivative of those goals are just some of the neoliberal values that have been reflected through the instrumentalism of law. The contributors to this collective working paper offer short 'think pieces' exploring the legal trajectory of neoliberalism in particular fields of law. Some of them take a general perspective on the evolving role of law, whereas others focus on select but representative examples. The authors may not all concur in their assessment of the role of law, but they all engage with the role of law in the recent evolution of European politics and society.

## **Keywords**

Neoliberalism – human rights – social rights – market regulation

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## Legal Trajectories of Neoliberalism: Critical Inquiries on Law in Europe Introductory Remarks

Margot E Salomon\* and Bruno de Witte\*\*

Responses to the recent (and ongoing) debt and austerity crises in Europe reveal multiple techniques through which the rule and role of law operate in these times of neoliberal capitalism. From international law, to human rights law, to European Union law, and constitutional law the deployment and orientation of law in the past few years point up ways in which law co-constitutes neoliberal values and structures, legitimating and hardening those values and foreclosing alternatives. Framing market interests, capital accumulation and profit as the common interest, advancing conditions for competition (including among vulnerable individuals), favouring the private over the public<sup>1</sup> and over the commons, and situating social justice as derivative of those goals are just some of the neoliberal values that have been reflected through the instrumentalism of law. We have seen the aims of a stable economy, redistribution, and the public interest all positioned through law as handmaidens to neoliberal goals.<sup>2</sup> The expediency of an emergency situation has laid bare the lawlessness of international actors, obscured structural problems, and limited possibilities for dissent. With the help of law, the meaning of sovereign and popular consent has been lost and democracy truncated.

Law is not merely a tool to resolve disputes and protect some people's human rights; it is a mediator and an enabler. The focus of this workshop was on where and how the form and content of law in this dark period of Europe's present – its core tenets, contemporary assumptions and organization, its rules and their interpretation – contribute to the dominant project that is neoliberalism. Using the recent European crises as a point of reference, this workshop was organized as an opportunity to share ongoing research on where neoliberalism is to be found in its relations with law (whether international, human rights, EU, or constitutional) and with what implications for law and for law's emancipatory functions. The workshop was supported by the European Union's Horizon 2020 research and innovation programme under the Marie Skłodowska-Curie grant agreement No 703063 on 'Legal Rights and the Political Economy of Debt and Austerity in Europe' held by Dr Margot Salomon at the Robert Schuman Centre for Advanced Studies (RSCAS), European University Institute (EUI), in 2017-18. The event was hosted by the RSCAS and the Law Department, EUI. The 'think pieces' herein offer preliminary reflections on the topic from workshop presenters and we thank them and the commentators for bringing their formidable and varied knowledge bases from across disciplines to bear on the topics that were under discussion at the workshop.

As the title of the workshop suggests, the working assumption is that contemporary capitalism takes a form that could reasonably be referred to as neoliberalism. Whether through its particular animating components or framed as ideal type, neoliberal capitalism is sufficiently clear conceptually and in practice to inform study;<sup>3</sup> its efficacy in enriching our understanding of the world readily embraced by

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<sup>1</sup> Evident also in the shifting of law itself to the private sphere, see, U Mattei, 'Emergency-Based Predatory Capitalism: Rule of Law, Alternative Dispute Resolution, and Development' in D Fassin and M Pandolfi (eds) *Contemporary States of Emergency: The Politics of Military and Humanitarian Intervention* (Zone Books 2010) 89.

<sup>2</sup> On the question of public interest compare the European Court of Human Rights and the European Committee of Social Rights. In the Court's admissibility decision in *Koufaki and ADEDY v. Greece*, the notion of public interest is reducible to structural reform of the Greek economy and subject to a wide margin of appreciation. In the latter body, as per Lukas herein, 'the Committee has emphasized that obligations stemming from international law, including the European Social Charter, play a definitive role in shaping the public interest. More specifically, it stressed that states may not surrender their power to define the public interest to external institutions (such as European and international creditors) and that a level of protection adequate to meeting basic social needs must be guaranteed.'

<sup>3</sup> See further, D Singh Grewal and J Purdy, 'Law and Neoliberalism' 77 *Contemporary Legal Problems* (2014) 1, at 6-7.

scholars from across disciplines.<sup>4</sup> Its values include the central goal of maximizing economic gain, the sanctity of private property rights and contract, endorsement of the competitive individual keen to maintain and develop the economic power inherent in capitalist production and transactions, and subordination of the social, cultural and political spheres to the justice of the market. With its support for market imperatives and unequal economic power against political intervention<sup>5</sup> in making the world safe for capital,<sup>6</sup> neoliberalism works against the social contract, solidarity, collective organization, and the institutions that make them possible.<sup>7</sup>

Any assessment of neoliberalism's consequences cannot be limited to the argument that 'the world has never been richer'. That aggregate finding disregards growth in gross inequality between and within countries, the generalized trend towards widespread poverty, and, of course, environmental devastation in many countries passing the point at which the extra environmental costs of growth exceed the extra production benefits that it produces.<sup>8</sup> Neoliberalism has also been accompanied by multiple forms of dispossession and displacement as part of its dedication to capital accumulation. Recognition of 'market failures' has done nothing to address market social failure which remains endemic; moreover, addressing market economic failures ('externalities') doesn't require that we confront the system of global economic relations in which those harms are produced nor the fact that production is internationalized and hence at the lower echelons of the production process there is tremendous social failure.<sup>9</sup> Perhaps most perilously, neoliberalism's institutionalized dominance – including as facilitated through law – serves to close off alternatives to social ordering, first and foremost through the prevailing belief that, fundamentally, a different code is not needed and, in any case, is not possible.

It may also be helpful to consider neoliberalism on the basis of that which its general ethic does not endorse, for example: universalist social-welfare programmes, steeply progressive taxation, labour standards, a large non-market public sector, significant public and/or collective ownership of the means of production,<sup>10</sup> democratic decision-making about basic socioeconomic priorities,<sup>11</sup> (constitutional) social rights protections,<sup>12</sup> and markets that are truly transparent and regulated by democratic negotiation

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<sup>4</sup> The term neoliberalism is contested along a number of metrics but it is clear enough in its normative, economic, and political articulations to be used as a tool for assessing the present historical moment, including in relation to law. Among its recent, valuable analytical uses see, S Gill and AC Cutler (eds) *New Constitutionalism and World Order* (CUP 2014); W Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (Zone Books 2015); JD Ostry, et al., *Neoliberalism Oversold?* (IMF Research Dept 2016); H Brabazon (ed) *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Routledge 2017); J Andersson and O Godechot (eds) *Destabilizing Orders: Understanding the Consequences of Neoliberalism*, Proceedings, MaxPo 5<sup>th</sup> Anniversary Conference (2018).

<sup>5</sup> Singh Grewal and Purdy, at 1.

<sup>6</sup> See, not least, the accounts provided in M Neocleous, *The Universal Adversary: Security, Capital and "The Enemies of All Mankind"* (Routledge 2016); Q Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press 2018).

<sup>7</sup> Henry Giroux, *Neoliberal Fascism and the Echoes of History*, Truthdig (2018).

<sup>8</sup> On this third point, HE Daly, 'A Foreword' in T Jackson, *Prosperity without Growth: Economics for a Finite Planet* (Earthscan 2009) xii.

<sup>9</sup> J Linarelli, ME Salomon and M Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (OUP 2018) 248-249; see also, A Kadri, 'The Islamic World and Capitalism: Military Routs, Not Formal Institutions' in ES Reinert, J Ghosh, and R Kattel (eds) *Handbook of Alternative Theories of Economic Development* (Edward Elgar 2016) 161.

<sup>10</sup> See, N Fraser, 'From Redistribution to Recognition: Dilemmas of Justice in a "Post-socialist" Age' *New Left Review* (July–Aug 1995) 68, at 84;

<sup>11</sup> See the findings of the IMF's Independent Evaluation Office on the IMF's handling of the crisis in Europe, 'The IMF and the Crisis in Greece, Ireland, and Portugal' (2016) and 'The IMF and Social Protection' IMF Independent Evaluation Office (2017).

<sup>12</sup> The conditionalities in the MoU with Greece for receipt of the third bailout frames court rulings that may require the reversal of spending cuts – for example where human rights violations are found – as 'fiscal risks'. Greece: Memorandum of Understanding for a three-year ESM programme, 19 August 2015, 7.

among social partners.<sup>13</sup> The 2019 IMF/World Bank Spring Meeting saw the IMF Chief Economist Gopinath remark that globalization and technology are not the only drivers of inequality; there is also labour market deregulation, decline of collective bargaining and lack of progressivity of taxes. Yet, World Bank Group Chief Economist Pinelopi Goldberg flagged how the IFIs – long accused of market thinking and neoliberal sympathies – are yet to consider distributional questions upfront, instead advocating structural reform and then leaving distribution and redistribution to national policymakers<sup>14</sup> (assuming they have the policy space). Empirics tell their own story: almost a decade after EU and IMF sought to ‘save Greece’ ‘Greek GDP has fallen by 22%, an output collapse unprecedented in the annals of modern Europe and one that rivals the severity of the Great Depression in the United States. Unemployment remains in excess of 20%, youth unemployment in excess of 40%. The debt-to-GDP ratio, rather than falling, has continued to rise and exceeded 180% already in 2017. None of this is as promised in official forecasts’.<sup>15</sup> The Greek economy is likely to be dominated by a small number of relatively large enterprises, small and medium enterprises will continue to collapse, forever changing the patterns of ownership of capital in Greece, while unemployment, precarious employment and low incomes will characterise the lives of the majority.<sup>16</sup>

Neoliberalism is a telling lens through which to analyse and assess another prevailing aspect of contemporary social organization: the institution of law. To think about law and neoliberalism is to be part of a longstanding tradition in critical legal scholarship that while having taken various approaches over the decades,<sup>17</sup> has been preoccupied with asking: what law does, for whom, and to whom, which rules and rights are enforced, to whose benefit, and with what wider implications? This workshop explored how the law has been positioned to endorse particular *values* over others, for example, efficiency, private property, and ‘market justice’; how law favours particular *interests* over others, for example, the transnational private sector over local communities; people with economic weight over those without; market directives over democratic governance. And we sought to explore how law embeds particular *objectives*, such as, capital accumulation and profit-generation; economic maximization over or before redistribution; redistribution not predistribution (i.e.: how the rules favour those at the top). In short, when we probe what law does for neoliberalism, fundamentally we are interested in how law co-constitutes neoliberalism and, of course, why it matters. From laissez-faire to contemporary neoliberalism the study of the legal-economic nexus foregrounds how markets, like all else, are made of legal rights – rights that are traded-off with other legal entitlements, ‘so any challenge to the economic order must necessarily be a legal challenge in terms of rights’.<sup>18</sup> Honor Brabazon is thus right to contend that neoliberalism is as much a juridical phenomenon as a political and economic one.<sup>19</sup>

To these ends, speakers and commentators at the workshop on *Legal Trajectories of Neoliberalism* reflected on how neoliberalism has impacted on various domains of the law, in particular international economic law, international human rights law, and European Union law. Here is a taster:

In her think piece, ‘From Empire to Austerity: The Golden Thread of International Economic Law’ **Fiona Macmillan** explores the origins and structure of international economic law to situate its role in

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<sup>13</sup> See, S Amin, *The Implosion of Capitalism* (Pluto Press 2014) 142-143.

<sup>14</sup> Report on 2019 Spring Meetings of the IMF and World Bank, Leo Baunach, Director, ITUC/Global Unions Washington Office, available via [recoveryhumanface@socpro.list.ilo.org](mailto:recoveryhumanface@socpro.list.ilo.org) 14 Apr 2019.

<sup>15</sup> B Eichengreen, E Avgouleas, M Maduro, U Panizza, R Portes, B Weder di Mauro, C Wyplosz, J Zettelmeyer, ‘Independent Report on the Greek Official Debt’ Policy Insight No 92, *Centre for Economic Policy Research* (2018) 1.

<sup>16</sup> H Flassbeck and C Lapavistas, *Against the Troika: Crisis and Austerity in the Eurozone* (Verso 2105) 94.

<sup>17</sup> From American Legal Realism and Critical Legal Studies to Third World Approaches to International Law and more recently Marxism and (International) Law.

<sup>18</sup> S-A Way, *Human Rights from the Great Depression to the Great Recession: The United States, ‘Western’ Liberalism and the Shaping of Economic and Social Rights in International Law* (2018). LSE PhD Thesis on file.

<sup>19</sup> H Brabazon, ‘Introduction: Understanding Neoliberal Legality’ in H Brabazon (ed) *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Routledge 2017) 1.

facilitating capital accumulation and the generation of interstate competition for mobile capital. She moves then to the function of international economic law in mediating the relationship between development and global capital accumulation, and then to the embedding of neoliberal strategies in international economic law and its consequent role in the globalization of austerity. What we see, Macmillan argues, is ‘the post-colonial “development” project, which has been a main concern of international economic law and which has been central to the accumulation of capital in the post-second world war period, ... rolled out globally in a new version of empire’. Her paper explores the putative division between the political and the economic post war schism that situated public international law in the former and international economic law in the latter and paved the way for the current system. Macmillan’s piece unpacks the ways in which this ‘de-politicization’ of the international economic law system and its ‘fragmentation of regulation’ plays out across a range of institutional projects including IFI lender conditionality, the establishment of the WTO (‘homogenisation of markets through “free trade” and homogenisation of law’), and the reliance on resource extraction from weaker states (‘essential to capitalist expansion’), as well as, labour standards (e.g.: as constituting non-tariff barriers to trade), and the ascendancy of the multinational corporate enterprise (‘a creature of the constant intensification of capitalist power identified by Arrighi<sup>20</sup>). Austerity and its accompanying adjustments, Macmillan explains, are one more way in which the central requirement of competition for mobile capital is advanced. ‘Only a political decision, expressed through international economic law, can challenge this empire of capital’ – something hard to come by, she suggests, given the supranational project of shielding capitalism.

In a think piece on ‘The Utility of Crises and the Regressive Development of International Law’, **Margot Salomon** draws inspiration from the work of Silvia Federici who alerted readers back in 1992 that ‘[W]hat is at stake in the debt crisis is not the repayment of debt, but the process that can be activated through it.’<sup>21</sup> This prompt that asks us to consider a debt crisis as a ‘productive crisis’ for the capitalist classes and a tool by capital to ‘shift the balance of forces to its side’ leads Salomon to explore the dangers and ‘utility’ that come from a minimum protection of socio-economic rights in times of economic crisis and austerity. For one, the European debt fiasco opened the way for official insistence on the mere protection of the ‘minimum core content’ of socio-economic rights in times of crisis. For a variety of reasons outlined in her piece, not least the likely permanence of the crisis in one form or the other, Salomon suggests that human rights deployed in this minimalistic manner help sustain the alienation of so many from their full socio-economic rights. Second, thinking about the welfare state as a construction essential to the flourishing of capitalism, the crisis-invoked concentration on minimum essential levels of rights serves to bolster neoliberal capitalism, the very source of the emergency, along with the advantages claimed by its beneficiaries. This, Salomon argues, is a ‘utility’ that the protection of human rights serves under the autocracy of sovereign debt, demonstrating how the protection of the minimum essential levels of rights is as much a part of making sure no one goes hungry as it is a considered policy of neoliberal statecraft.

In the next contribution, **Başak Çalı** offers a further critical assessment of human rights law, with a focus on the activities of the European Court of Human Rights. Although the ECtHR is often seen as a successful defender of human rights, Çalı shows the limits of that role when the Court is confronted with neoliberal state conduct. This is only partly due, she argues, to the fact that the European Convention does not contain much by way of socio-economic rights. It is also due to what she calls the ‘interpretive ethos’ of the Court. The Court’s well-known creative modes of interpretation expanded the reach of the Convention when it comes to the protection of democracy, of vulnerable minorities and of procedural rights, but not in matters of distributive justice. The Court refrains from closely scrutinizing

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<sup>20</sup> G Arrighi, *The Long Twentieth Century: Money, Power & the Origins of Our Times* (Verso 2002).

<sup>21</sup> S Federici, ‘The Debt Crisis, Africa and New Enclosures’ in Midnight Notes Collective, *Midnight Oil: Work, Energy, War 1973-1992* (Autonomedia 1992) 303, at 312.

socio-economic policies of the States parties to the Convention, leaving them in this domain a very wide margin of appreciation.

The think piece by **Karin Lukas** continues the discussion of the role of human rights law and offers, to some extent, a counterpoint to the contributions of Salomon and Çalı. Lukas examines the ‘jurisprudence’ of the European Committee of Social Rights (of which she is a member) and more particularly the way it dealt with the collective complaints against the austerity measures adopted by Greece as a result of the sovereign debt crisis. As the Committee of Social Rights is the monitoring body of Europe’s social rights instrument (the European Social Charter), its performance is crucial when assessing whether rights arguments can offer effective protection against the disruptive consequences of neoliberalism and austerity. Lukas’ assessment is cautiously positive. Although the Committee did not contest the possibility for states to limit the enjoyment of social rights in crisis times, it looked closely at the extent to which those rights were curtailed, and it found in several cases that Greece failed that proportionality test.

The next contribution, by **Emilios Christodoulidis**, continues the discussion on the role of fundamental social rights, here foregrounding the significance of their constitutional iteration. Christodoulidis sees danger in prominent ‘accommodations’ (e.g.: the thesis that social rights are continuous to civil and political rights (liberty) instead of distinctly about need satisfaction (entitlement) or that all rights are positive and require expenditure thereby masking the specific and essential justification of social rights – their redistributive demand). He explores how these various claims to rights continuity (instead of discontinuity) serve to weaken the redistributive requirements of social rights, better aligning them to market thinking. In his appeal to cull a variety of methods that paper over antinomies, Christodoulidis implores us to consider how the *contradictions* between capitalism and democracy that social rights expose are, in fact, the point: social constitutionalism offers language (‘hermeneutic traction’) to claims that the suffering is ‘unjust’ and retrieving that important injunction, we are reminded, ‘may still invoke the aspiration of solidarity contained in social constitutionalism [that] is at once the mark of the antinomic and of constitutional traction’.

The next two contributions offer contrasting glimpses of the way in which European Union law promotes (or not) the neoliberal agenda. **Francesco Costamagna** describes how the Court of Justice of the EU, in its recent *Polbud* judgment, greatly facilitated the free movement of business companies, allowing them to establish their legal seat in the country that offers them the most attractive conditions, even though their effective economic activities continue to be situated in another EU country. Costamagna calls this judgment from 2017 ‘a paradigmatic case of the use of freedom of establishment as a vehicle for law shopping’. The Court thereby invites regulatory competition among European countries. These countries are encouraged to create the most welcoming climate for the establishment of business, and to avoid ‘excessive regulation’, which is precisely what the neoliberal model advocates.

In fact, the European Union continues to combine the yin and yang of negative and positive integration. The example of negative integration, eliminating barriers to the functioning of the market, presented by Costamagna, stands in contrast to the story told in the next contribution. **Sophie Robin-Olivier** deals with one of the current ‘flagship’ initiatives of the European Union, namely the promotion of the so-called ‘digital single market’. The concept itself refers to the well-known European project, dating from the 1980s, to build a single market among the EU states, and could therefore be seen as a new avatar of the neoliberal project of European integration. In fact, Robin-Olivier argues, the role of the European Union in this domain has not just been that of market making but also of market regulation, as illustrated by the EU’s legislative intervention of 2015 seeking to ensure internet neutrality. The European legislator considered it necessary to limit the power of private internet providers operating in the European market, by prohibiting them to block, or slow down, selected content and to treat equally all content providers. In this manner, the EU does not seek to maximize market efficiency in the digital domain (which would be the right thing to do for neoliberals) but rather seeks to safeguard what Robin-Olivier calls a fundamental right of access to the internet, which operates regardless of whether the users have an economic or non-economic aim when accessing the net.

In the final think piece, **George Katrougalos** returns to the broader picture of the impact of neoliberalism on European societies. Rather than addressing the place of fundamental social rights in constitutional law, a matter he addressed in earlier work, he reflects here on how neoliberal policies have weakened the very fabric of democracy. He argues that the development, over the years, of an ‘undemocratic liberalism’ has paved the way for the current trend towards ‘illiberal democracy’. He points out that, during the past decades, national and European policies have created widening gaps, in most countries, between the rich and the poor, and have eroded their welfare state systems. This has caused, among many citizens, a decline in confidence in the representative system, which has in turn encouraged the emergence and growth of populist policies. From this perspective, neoliberalism is not at all a bulwark against right-wing populism. It has rather massively contributed to its current success.

# From Empire to Austerity: The Golden Thread of International Economic Law

Fiona Macmillan\*

## 1. Introduction: International Economic Law and Neoliberalism in the Post-Colonial Period

Long before the politics and practices of austerity arrived on European shores as the neoliberal response to the series of “crises” beginning in 2008, the imposition of austerity regimes was one of the potent weapons used by the Bretton Woods institutions to discipline states, especially states forming part of the so-called “developing world”.

In this short paper I comment on the way in which the post-colonial life of international economic law has participated in the creation of the conditions for the extension of the neoliberal politics of austerity from the former subjects to the former metropolitan centre(s) of empire. My argument is, essentially, that the post-colonial “development” project, which has been a main concern of international economic law and which has been central to the accumulation of capital in the post-second world war period, has now been rolled out globally in a new version of empire.

In order to make out this argument, the paper is divided into three substantive sections. First, the paper considers the origins and structure of the current system of international economic law, which it argues are central to understanding the way in which the system facilitates capital accumulation and the generation of interstate competition for mobile capital. Secondly, the paper turns from the general question of systemic facilitation of capital accumulation to the more specific question of the way in which international economic law mediates the relationship between development in the post-colonial period and global capital accumulation. In the final section, the paper focuses on the embedding of neoliberal strategies in international economic law and its consequent role in the globalization of austerity.

## 2. Origins and Structure of International Economic Law

The current international legal order, which has emerged since the end of the Second World War, embraces a kind of schism between international economic law and public international law, marking a bifurcation in international law along the lines of the putative division between the political and the economic.<sup>1</sup> This bifurcation appears to be rooted in the origins of the Westphalia System, with respect to which Arrighi remarks that “[t]his reorganization of political space in the interest of capital accumulation marks the birth not just of the modern inter-state system, but also of capitalism as world system”.<sup>2</sup> Arrighi is far from being the only prominent commentator to have noticed that this division between the political and the economic is critical to the modern system of global capitalism.<sup>3</sup> The same

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<sup>1</sup> Sundhya Pahuja, “Trading Spaces: Locating Sites for Challenge within International Trade Law” (2000) 14 *Australian Feminist Law Journal* 38; Fiona Macmillan, “International Economic Law and Public International Law: Strangers in the Night” (2004) 6 *International Trade Law and Regulation* 115; John Linarelli, Margot E Salomon and Muthucumaraswamy Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (OUP 2018).

<sup>2</sup> Giovanni Arrighi, *The Long Twentieth Century: Money, Power & the Origins of Our Times* (Verso 2002), 44.

<sup>3</sup> See also, eg, Karl Polanyi, *the Great Transformation: The Political and Economic Origins of our Time* (first published 1944, Beacon Press, 2000); Albert O Hirschman, *The Passions and the Interests: Political Arguments for Capitalism before Its Triumph* (New Jersey, Princeton University Press, 1977, reprinted 1997); Samir Amin, *Capitalism in the Age of*

observation is fundamental to Hirschman's argument that the division between the political and the economic was essential to controlling the power of despotic rulers in the pre-democratic period. The division was a political question in the sense that the power of the economic system was regarded as a constraint on the operation of the political system. In the nineteenth century when Western politics had developed its own forms of democratic restraint, the economic system was liberated from its role in politics. Instead, however, of democratic politics taking up the role of constraining the power of the economic system, the global capitalist system was liberated from much in the way of political restraint and so effectively de-politicized.<sup>4</sup> Nevertheless, as this paper will argue, the neoliberal project has never abandoned its central concern to ensure that capitalism is protected from the incursions of democracy.<sup>5</sup> The split between the political and the economic in the newly re-made post-war international law system was a step in what Slobodian describes as the eventual "encasing" of capitalism through international regulatory structures.<sup>6</sup>

In addition to de-politicizing - or attempting to de-politicize - the international economic law system, the split between the political and the economic in the post-war international legal system also led to the fragmentation of regulation. The international law principles governing human rights, labour rights and development are particularly affected by the fragmentation of regulation. Arguably different concepts of human rights, for example, operate in the two parts of the system.<sup>7</sup> Maybe even worse, labour rights seem to have completely disappeared from the international economic law system. And specifically in relation to development, the dedicated instrumentalities are all part of the United Nations system, but the real action (or damage) is taking place in the international economic law system. Thus, it can be seen that de-politicization and fragmentation operate in tandem, as part of the neoliberal project of encasement of capitalism to protect it from the sorts of effusions of democratic principles that might be seen to be embedded in things like human rights and labour rights.

This fragmentation and de-politicization has enabled the imposition of conditions attached to lending by the World Bank and the International Monetary Fund (IMF) (the Bretton Woods institutions) in their role as lenders (often of last resort) to states. Structural adjustment using loan conditionality has become one of the famous ways in which these institutions put pressure on developing countries (and other countries in need of emergency finance) to change their laws and institutions.<sup>8</sup> Distressing cases of the damage caused by this type of loan conditionality abound.<sup>9</sup> Not only do these forms of conditionality require the Westernization of the law and institutions of the recipient states, they also reflect the tenets of neoliberalism, especially as expressed in the Washington Consensus. Consequently, they are driven by ideas like reduction of the public sector, low taxation, privatization of public services, limitation – or even elimination – of labour standards, liberalization of inward FDI, and austerity. In other words, conditionality is driven by the needs of global capital.

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*Globalization* (London & New York, Zed Books, 1998); John Gray, *False Dawn: The Delusions of Global Capitalism* (New York, New Press, 1998); Ellen Meiksens Wood, *Empire of Capital* (Verso 2003).

<sup>4</sup> Dimitris Milonakis and Ben Fine, *From Political Economy to Economics: Method, the social and the historical in the evolution of economic theory* (Routledge 2009); Fiona Macmillan, "The World Trade Organization and the Turbulent Legacy of International Economic Law-making in the Long Twentieth Century" in Julio Faundez and Celine Tan (eds), *International Economic Law, Globalization and Developing Countries* (Edward Elgar, 2010); Benjamin Selwyn, *The Global Development Crisis* (Polity 2014), ch 5.

<sup>5</sup> See Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press, 2018).

<sup>6</sup> Slobodian, n 5 above.

<sup>7</sup> Pahuja, n 1 above.

<sup>8</sup> See, eg, Faundez, n 4 above; Richard Peet, *Unholy Trinity: The IMF, World Bank and the WTO* (Zed Books 2003), ch 4; Celine Tan, *Governance Through Development: Poverty Reduction Strategies, International Law and the Disciplining of Third World States* (Routledge 2011).

<sup>9</sup> See, eg, Michel Chossudovsky, "India under IMF Rule" (1993) 28 *Economic and Political Weekly* 385; B. Rajagopal, *International Law From Below: Development, Social Movements, and Third World Resistance* Cambridge (CUP 2003), ch 5



The use of the concept of the rule of law as a means to facilitate capital accumulation and drive interstate competition for mobile capital has also been achieved through obligations imposed by the third major institution of international economic law, the World Trade Organization (WTO), which require national laws to be brought into conformity with its rules. Here we can see the mutually supportive relationship between homogenisation of markets through “free trade” and homogenisation of law. The arrival of the WTO not only constituted the perfection of the neoliberal encasement strategy, but also demonstrated the importance of law as the technology for implementing this strategy.<sup>10</sup> The effects of the fragmented system of international law and the de-politicization of international economic law are also fundamental in relation to the WTO. While the Bretton Woods institutions have, for example, developed their own concepts of human rights in order to discipline states to which they have given financial accommodation, the WTO appears to embrace the position that things like human rights and labour standards are outside its sphere of operation. Perhaps the honesty is refreshing, but the failure to acknowledge its role in the perpetuation of human misery as a result of downward pressure on labour standards, which are seen as constituting non-tariff barriers to trade, is not appealing.

### **3. Colonialism, Post-colonial Development and Global Capitalism**

A critically important process that informs the birth of the international economic law system, and especially its entanglement with development, is the post-war process of decolonization. It was essential to enmesh newly decolonizing states in the remade system of international law in order, apart from anything else, to continue to extract resources from them on favourable terms.<sup>11</sup> This question of extraction of resources is a critical theme in international economic law in a number of ways. First, the principle of most favoured nation (MFN) treatment in WTO law operates to protect extraction of primary resources by countries lacking them on favourable terms. Secondly, the doctrine of comparative advantage upon which the idea of free international trade is based has forced many resource rich countries, mostly from the global south, into the position of suppliers of primary resources without having the opportunity to develop manufacturing capacity. Thirdly, extraction of biological and knowledge-based resources seems to be one of the primary drivers behind the international patent system, which was reinforced with the conclusion of the WTO and its Agreement on Trade-Related Aspects of Intellectual Property (the TRIPs Agreement). Fourthly, the internalization of trade within the domains of multinational corporations, which forms part of the post Second World War global economic landscape,<sup>12</sup> has also operated to extract capital and other resources from weaker states. This is because the direct relationship between multinational corporations and states of the global south has mostly taken place through a process of FDI, often on extremely disadvantageous terms.<sup>13</sup>

Access to resources, in other words, has been essential to capitalist expansion. And capital accumulation and state power were, and continue to be, linked. In the colonial period this relationship was expressed through the joint stock corporations, which were state backed trading enterprises, the role of which was to advance both empire and capitalist expansion. Arrighi recognises the role of these corporations in his argument that capitalism is a history of cycles of capitalist accumulation (meaning success in attracting mobile capital) dominated by a leading agency of capital accumulation in the form

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<sup>10</sup> Slobodian, n 5 above, esp 7-13, citing as an example of this neoliberal approach one of the legal architects of this new order, Ernst-Ulrich Petersmann, “International Economic Theory and International Economic Law: On the Tasks of a Legal Theory of International Economic Order” Ronald St John Macdonald & Douglas M Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (Martinus Nijhoff, 1983).

<sup>11</sup> Gustavo Esteva, “Development” in Wolfgang Sachs (ed.), *The Development Dictionary: A Guide to Knowledge as Power* (Zed Books 2009).

<sup>12</sup> Arrighi, n 2 above, 74.

<sup>13</sup> Eg (directly from the belly of the beast) WTO Working Group on the Relationship between Trade & Investment (2002) *Communication from China, Cuba, India, Kenya, Pakistan and Zimbabwe: Investors’ and Home Governments’ Obligations*, WT/WGTI/W/152, 19/11/2002.

of a state.<sup>14</sup> In Arrighi's theory each of these cycles of state led capital accumulation follows the same trajectory. That is, when capital can longer be profitably employed by use in the development of new markets that expand the productive capacity of the existing markets, then a switch occurs and excess profits are ploughed into the trade in money. That is, a switch is made from trade to finance.<sup>15</sup> Arrighi argues that interstate competition for mobile capital has been essential to the material expansion of the capitalist world economy and that capitalist power has intensified during each period of capitalist accumulation.<sup>16</sup> To guarantee the conditions for the continued expansion of capital, however, the neoliberal project has focussed on protective regulatory structures at the supranational level. This, obviously, is not a problem for the leading state agency of capital accumulation since it is the same state that leads the making – and un-making - of international law. In short, in the current period of capital accumulation regulation at the international level is part of the deal for the leading capitalist power.

#### 4. Neoliberalism and the Globalization of Austerity

##### *(a) The New International Economic Order and “neoliberalism”*

The key historical moments of the current US-dominated cycle of capital accumulation are, first, the end of the Cold War and the *Pax Americana* or Washington Consensus, and secondly, the Uruguay Round of trade negotiations leading to the creation of the WTO in 1994. But the important phenomenon of the entire American period is the modern multinational corporate enterprise, which is very much a creature of the constant intensification of capitalist power identified by Arrighi. The pre-condition of the ascendancy of the multinational enterprise was the twentieth century processes of vertical integration and internalization of international trade within those enterprises. And the dominance of multinational enterprises is crucially linked to interstate competition for investment and its pressure on the “weakest” states to make their legal regimes “welcoming” to the interests of capital.<sup>17</sup>

The so-called developing world did start to re-organize and fight back, agitating for changes in the world system under the banner of a call for the famous, but never appearing, New International Economic Order (NIEO). This campaign was well placed to take advantage of the interruption to the process of corporate-led globalization as a result of the so-called “exogenous shocks” of the 1970s and 1980s, including the collapse of the fixed exchange rate system established under the auspices of the IMF, and the OPEC crisis. As a result of these shocks, many states introduced non-tariff barriers to protect domestic production, which included things like labour rights, environmental protection, limits on the entry of foreign capital and differential taxation systems for foreign multinational corporations. The NIEO, however, never appeared for the very simple reason that a political decision was taken to create the conditions for the re-intensification of corporate-led globalization and expansion of the capitalist system. This is a decision that we commonly call the Washington Consensus, which imposed on states fiscal discipline, tax reform, interest rate liberalization, trade liberalization, liberalization of inward FDI, reduction and redirection of public expenditure, deregulation, privatization and a religious zeal for the security of property rights. In the end, the only new international economic order to emerge was what is now referred to as neoliberalism.

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<sup>14</sup> Arrighi, n 2 above.

<sup>15</sup> Arrighi, n 2 above, 215.

<sup>16</sup> Arrighi, n 2 above, 12ff.

<sup>17</sup> See n 13 above.

***(b) The Uruguay Round, the WTO and Comparative Advantage***

The Washington Consensus coincides historically with the beginning of the Uruguay Round of trade negotiations, which was primarily concerned with three things: first, removal of these “non-tariff barriers”, which had been inhibiting the growth of international trade; secondly, putting in place a global intellectual property regime; and, thirdly, liberalizing trade in services, including financial services. These negotiations culminated in the birth of the WTO, which claims to promote free international trade based on the concept of comparative advantage, a doctrine of classical economics into which the neoliberal spirit has breathed new life.<sup>18</sup>

In order to make some sense of these developments in systemic terms, it is useful to revisit one of Arrighi’s insights, which is that every cycle of capitalist accumulation has a signal point when the profits derived from trade become so poor that money switches from trade to investment capital. These signal points and their accompanying switches are autumnal and generally inaugurate a period of economic turbulence. They do not, however, spell the immediate end of the dominant regime of capital accumulation.<sup>19</sup> In the current turbulent stage Arrighi argues that a combination of structural changes in the form of “the withering away of the modern system of territorial states as the primary locus of world power”, “the internalisation of world-scale processes of production and exchange within the organizational domains of transnational corporations” and “the resurgence of suprastatal world financial markets” have created a pressure to relocate state authority and counter systemic chaos through a process of world government formation.<sup>20</sup> What has become evident in the current neoliberal period is that for such world government formation to become effective, economic governance has to be encased at the supranational level, while democratic politics remains trapped within the boundaries of national political systems.<sup>21</sup>

Going further and reflecting on the nature and ideology of the WTO, does it also represent an attempt on the part of the US, in its death throes as the dominant agency of capitalist accumulation, to control interstate competition for mobile capital? Certainly, the chronological coincidence between Arrighi’s post-switch phase in the US cycle of capital accumulation and the Uruguay Round negotiations is striking, as is the fact that the two new Uruguay Round agreements, the TRIPs Agreement and the GATS, are quite conceivably conceptualised as being essentially concerned with investment.<sup>22</sup>

***(c) Developing countries in the global capitalist system***

For developing countries, loan conditionality and structural adjustment requirements imposed by the Bretton Woods institutions, and also by the WTO as a condition of entry into the WTO system, are generally connected to gearing up for comparative advantage. It is the theory of comparative advantage and its concomitant doctrine of free trade that keep developing countries in the same economic position they have always been in: suppliers of primary products or suppliers of manufactured products made on the back of often appalling labour, environmental and human rights conditions. Domestic regulation to improve standards in these areas is not only directly constrained by the legal obligations placed on states through the international economic law system, but also by the need to survive in the international capitalist system by competing for mobile capital through FDI. The dominant state agencies, using the

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<sup>18</sup> See further Graham Dunkley, *The Free Trade Adventure: The WTO, the Uruguay Round & Globalism – A Critique* (Zed Books 2001); Donatella Alessandrini, “WTO and the Current Trade Debate: An Enquiry into the Intellectual Origins of Free Trade Thought” [2005] *International Trade Law and Regulation* 53; Macmillan, n 4 above.

<sup>19</sup> Arrighi, n 2 above.

<sup>20</sup> Arrighi, n 2 above, 331.

<sup>21</sup> Slobodian, n 5 above.

<sup>22</sup> Fiona Macmillan, “Looking Back to Look Forward: Is there a Future for Human Rights in the WTO?” [2005] *International Trade Law and Regulation* 163, 178-80.

system of international economic law, have rigged the rules to give themselves a vast competitive advantage in the attraction of interstate mobile capital.<sup>23</sup>

*(d) Globalizing development disadvantage*

How is it then that these dominant states agencies, or some of them, have fallen foul of the system? I hypothesize that the answer lies in a toxic combination of the following factors: first, the de-policization of the international economic law system has dealt a blow to the link between state sovereignty and the creation and operation of international economic law; secondly, the fractured system of international law means that political and legal protections stemming from the system of public international law (human rights, labour rights) make no real impact on the operation of the international economic law system; thirdly, the US, in the autumnal phase of its reign as the leading state agency of capital accumulation is ready to throw its old “First World” bedfellows to the dogs in the hope of staving off its demise; fourthly, the intensification of capitalist power under the US-lead system has now, in any case, outstripped the ability of even the leading state agency of capital accumulation to control it. The system requires every state in it to participate in the competition for mobile capital. Every state must be a market for investment. Austerity and its accompanying adjustments to the labour market are designed to achieve this end. Only a political decision, expressed through international economic law, can challenge this empire of capital.

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<sup>23</sup> See also Amin, n 3 above, 97.

# The Utility of Crises and the Regressive Development of International Law\*

Margot E Salomon\*\*

In her incisive 1992 assessment of the Debt Crisis and Africa, Silvia Federici inverted conventional lines of exploration when she held that ‘[W]hat is at stake in the debt crisis is not the repayment of debt, but the process that can be activated through it.’<sup>1</sup> She went on to narrate how the debt crisis and Structural Adjustment Policies (the infamous SAPs) have made it ‘possible to destroy or neutralize the labor unions, to freeze wages, to pass laws making labor and other social struggles acts of economic sabotage; to end free health care and free education ... . It has also resulted in the demise of local industry (not connected to foreign capital ... ); and most important it has given the green light to the privatization of land’.<sup>2</sup> Contrary to the shared view of both the Right and the Left, she demonstrates how the debt crisis, far from being an obstacle to capitalist development in the 1990s, was ‘a productive crisis for the capitalist classes of both the debtor and creditor nations.’<sup>3</sup> Written over 25 years ago, Federici’s account is remarkable not least for the accuracy of its description of debt crises today. Then as now, a core motif shaping debt crises is the alignment of prevailing economic interests and the rhetoric and practice of emergency governance.<sup>4</sup>

Taking inspiration from Federici, I am interested in exploring responses to the recent debt crisis in Europe and the significance of that ‘crisis’ and ‘emergency’ for the regressive development of international law. There is an insightful contemporary literature on the constitutionalization of neoliberal capitalism under legal globalization and while taking a different tack here, this work recognizes that the international law to emerge from Europe’s debt crisis does so out of existing modern affinities between law and neoliberalism. In this paper I want to contemplate the ‘utility’ of those (regressive) legal developments for serving dominant economic narrative theories and interests. In this ‘think piece’, I will pursue these lines of inquiry in relation to the protection of the minimum essential level of socio-economic rights in times of debt and austerity.

## 1. Protecting minimum essential levels of socio-economic rights: dangers and ‘utility’

Crises have always influenced international human rights law, both the codification of its norms and the departure from them through legal derogation. The ‘barbarous acts’ of the second world war as well as Roosevelt’s efforts at a New Deal following the Great Depression shaped the Universal Declaration of Human Rights.<sup>5</sup> In the area of civil and political rights, the ‘temporary’ departure from certain human rights obligations in times of emergency is a familiar aspect of how those rights are formally applied. Following a determination by the state party of ‘an emergency that threatens the life of the nation’, the

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<sup>1</sup> S Federici, ‘The Debt Crisis, Africa and New Enclosures’ in Midnight Notes Collective, *Midnight Oil: Work, Energy, War 1973-1992* (Autonomedia 1992) 303, at 312.

<sup>2</sup> *Id.*, 312.

<sup>3</sup> *Id.*, 303.

<sup>4</sup> For a sweeping account of ‘the intersection of political economic interests and the emergency governance paradigm’ past and present, see J Reynolds, ‘The Political Economy of States of Emergency’ 14 *Oregon Review of International Law* (2012) 85.

<sup>5</sup> On the domestic influences and central role of the US on the crafting of economic and social rights internationally, see S-A Way, *Human Rights from the Great Depression to the Great Recession: The United States, ‘Western’ Liberalism and the Shaping of Economic and Social Rights in International Law* (2018). LSE PhD Thesis on file.

temporary measures giving effect to the derogation from human rights obligations and the material consequences of the derogation are subject to a number of safeguards, with the ‘restoration of a state of normalcy’ – the conditions whereby full respect for human rights can again be secured – being of paramount importance and ‘the predominant objective’.<sup>6</sup> A comparable provision exists in the European Social Charter,<sup>7</sup> with no express provision on derogations in the International Covenant on Economic, Social and Cultural Rights.<sup>8</sup> Whether or not derogations are anticipated and whether then a formal proclamation is required or made,<sup>9</sup> the essence of emergency measures that allow for derogations from human rights obligations and any restrictions they might inflict are based on an expectation of temporariness.<sup>10</sup> The arguments in this section can be juxtaposed against that assumption of temporariness when it comes to de facto or de jure state of emergencies<sup>11</sup> and, in particular, the idea that it is possible to go back to normal.

The Greek debt crisis was alleged to have amounted to an economic and financial emergency nationally and for the eurozone by domestic and especially international elites. While the need to deviate from a robust application of socio-economic rights was not self-evidently necessary,<sup>12</sup> the debt fiasco

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<sup>6</sup> Human Rights Committee, General Comment 29 on States of Emergency (Art 4), UN Doc CCPR/C/21/Rev.1/Add.11 (2001) para 1.

<sup>7</sup> Art 30(1): ‘In time of war or other public emergency threatening the life of the nation any Contracting Party may take measures derogating from its obligations under this Charter to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.’ Art 30(2). ‘Any Contracting Party which has availed itself of this right of derogation shall, within a reasonable lapse of time, keep the Secretary General of the Council of Europe fully informed of the measures taken and of the reasons therefor. It shall likewise inform the Secretary General when such measures have ceased to operate and the provisions of the Charter which it has accepted are again being fully executed.’

<sup>8</sup> See further B Saul, D Kinley and J Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (OUP 2014) 258-262.

<sup>9</sup> See *GSEE v Greece*, European Committee of Social Rights, Complaint No 111/2014, decision of 23 March 2017, para 78: ‘In its decision on admissibility (*GSEE v. Greece*, Complaint No. 111/2014, op.cit, §§9-10), the Committee pointed out that, while it could not examine a situation with regard to Articles 30 or 31 of the 1961 Charter as such, these provisions could nevertheless be taken into account when assessing the merits of the complaint with regard to a substantive article of the 1961 Charter.’ *Id.*, Para 79: ‘With regard to Article 30 of the 1961 Charter, the complaint was lodged at a time when Greece, as it had not availed itself of the right of derogation, was fully bound by its obligations under the 1961 Charter, and the Committee is therefore not called to rule on derogations permitted under certain conditions in time of war or public emergency.’

ICCPR ‘Before a State moves to invoke article 4 [on states of emergency], two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency.’ HRC GC 29, para 2.

<sup>10</sup> *Inter alia*, CESCR Austerity Statement 16 May 2012; CESCR, Concluding Observation: Spain, UN Doc UN Doc. E/C.12/ESP/CO/6 24 April 2018, para 13.

<sup>11</sup> On the use and abuse of emergency procedures to displace or bypass parliamentary oversight in ushering in the MoUs in Greece, see A Marketou, ‘Greece: Constitutional Deconstruction and the Loss of National Sovereignty’ in T Beukers, B De Witte and C Kilpatrick (eds) *Constitutional Change through Euro-Crisis Law* (CUP 2017) 179. On the law-making process ‘reminiscent of a state of emergency’ without the express use of exceptional legislative procedures, see the case of Ireland by S Coutts, ‘Ireland: Traditional Procedures Adapted for Economic Emergency’ in *Constitutional Change through Euro-Crisis Law*.

It is not the aim of this article to take a position on the merits or demerits of the regime of derogation, although there is the view that it legitimates violations and opens up the way for repetition. Considering civil and political rights, Charlesworth and Authers argue that: ‘Thus, crisis legitimates the undermining of rights not only because international law explicitly allows for such limits, but also through a glossing of the legalised violation of rights as exceptional, a rhetorical turn that masks that the capacity for derogations is in fact entrenched in law itself. Rather than being novel, international law in fact ensures that derogation is potentially repeatable’. B Authers and H Charlesworth, ‘The Crisis and the Quotidian in International Human Rights Law’ *Netherlands Yearbook of International Law* 2013 (2014) 19, at 30.

<sup>12</sup> See eg: A Mody, ‘Saving the IMF’ *Project Syndicate* (9 Apr 2016); and I Ortiz, M Cummins, K Karunanethy, *Fiscal Space for Social Protection and the SDGs: Options to Expand Social Investments in 187 Countries*, ESS Working Paper 48 (ILO

opened the way both for an abridged interpretation of human rights obligations – the mere protection of the ‘minimum core content’ of socio-economic rights<sup>13</sup> – along with the jurisprudential assumption as to the permanence of this diminished approach. The protection of the minimum core content of rights (or minimum essential levels of rights as per CESCR’s earlier terminology) in times of large national debt and the grip of austerity dogma<sup>14</sup> has fed into the contested view that debt requires cuts in social spending, displacing the more far-reaching ‘progressive realization’ requirement when it comes to applying socio-economic rights.<sup>15</sup> Paradoxically, the dedication of the Committee to ensuring the minimum core of rights works against its own invocation that austerity measures will be temporary. While ‘retrogressive measures’ should remain in place only insofar as they continue to be necessary (and ‘should not affect the minimum core content of rights in the Covenant’<sup>16</sup>), the focus of rights compliance on ensuring the minimum core is not framed as a temporary solution deployed during a crisis,<sup>17</sup> nor is the very idea of a crisis problematized. For example, by taking at face value the need for austerity measures and thus moving directly to focusing on how best to ensure the most vulnerable are protected,<sup>18</sup> the structural questions are left out of the equation such as to how it came to be and for whose benefit that a bankrupt country was effectively denied the use of a loan but was left to pay it off with interest, compelling the need for ever new loans (and ever more conditionality). Or more profoundly, how immense wealth is captured through financialization and austerity.<sup>19</sup> This wider context is part of the background that drove the need for action to secure minimum rights, but is not the subject of inquiry in its own right; the notion of a crisis serving to factor out complex contexts and impoverishing the substantive context of law.<sup>20</sup> International human rights law is not ideally set up to confront these wider structural issues,<sup>21</sup> but by taking the context for granted, protecting human rights contributes to reinforcing the root cause of the problem. Not only do human rights deployed in this minimalistic manner help sustain the alienation of so many people from their full socio-economic rights, but the crisis-invoked concentration on minimum essential levels of rights serves to bolster neoliberal capitalism, the very source of the emergency, along with the advantages claimed by its beneficiaries. This is a ‘utility’ that the protection of human rights serves under the autocracy of sovereign debt.

It is of course the case that ensuring basic needs is essential and urgent and framing those needs as human rights invites the possibility of the pressures and remedies that are ascribed to rights when understood as legal entitlements. But under the crisis jurisprudence of CESCR the progressive realization dimension of socio-economic rights is relinquished and along with it the possibility of transformation out of neoliberalism to a form of socio-economic organisation that is fairer and kinder to

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2017). Moreover, default on debt wasn’t allowed in 2010. The first loan was in order to pay private creditors. No restructuring took place until 2012 and then it was inadequate.

<sup>13</sup> Statement by the Committee on Economic, Social and Cultural Rights, *Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights*, UN Doc E/C.12/2016/1, 24 June 2016, para 3.

<sup>14</sup> On the series of events that led to austerity being legitimated and widely endorsed see, P Krugman, ‘How the Case for Austerity Has Crumbled’, (6 June 2013) LX(10), *New York Review of Books* 67.

<sup>15</sup> ICESCR Art 2(1).

<sup>16</sup> CESCR, *Public Debt, Austerity Measures and the Covenant*, para 4; also, CESCR Austerity Statement 2012.

<sup>17</sup> See, CESCR, *Public Debt, Austerity Measures and the Covenant*, para 4.

<sup>18</sup> *Id.*

<sup>19</sup> On this, M Lazzarato, *Governing by Debt* (transl by JD Jordan, semiotext(e) 2013) 21 and at 8 (‘Public debt has reached record levels in every country that has enacted austerity measures. This means that the rents of creditors have also reached record levels’).

<sup>20</sup> H Charlesworth, ‘International Law: A Discipline of Crisis’ 65 *Modern Law Review* 3 (2002) 377, at 390-91.

<sup>21</sup> See R Knox, ‘Marxism, International Law, and Political Strategy’ 22 *Leiden Journal of International Law* (2009) 413, at 430-431 (deals with effects (violations) but not causes); J Linarelli, ME Salomon, M Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (OUP 2018) 21 (‘Structural and causal accounts are increasingly considered in international human rights law, even if there is still too little it can do about it.’)

the many.<sup>22</sup> The idea, presumably, is that the progressive realization dimension of rights is put aside *only temporarily*, only as long as the crisis continues and there are widespread minimum essential levels of rights not being met. But it is a real possibility that the crisis continues *forever* in one guise or the other and is meant to be endless. Official loan repayment is a lucrative business, creating a perverse incentive to have bailout programmes do further damage to a debtor's economy. The business of loan repayment, once a resource focused on developing countries,<sup>23</sup> is now also available from the 'South in the North'. Varoufakis calculates that between 2010 and 2015 the bankrupt state of Greece paid over €3.5 billion in interest and fees to the IMF, averaging 37% of the IMF total net income and covering 79% of its total internal expenses.<sup>24</sup> All the while, lender conditionality has caused poverty and social exclusion to explode,<sup>25</sup> devastating the human condition of many in Greece and triggering an exodus that one newspaper referred to as the 'world's biggest brain drain'.<sup>26</sup> This creation of a debtor's prison brings with it the promise of an 'indefinite state of exception'<sup>27</sup> and 'permanent transition',<sup>28</sup> indeed the IMF said as much in the first MoU with Greece noting that: To bring the fiscal deficit to a sustainable position, we will implement bold structural spending and revenue reforms. *The adjustment will be achieved through permanent expenditure reductions*, and measures to this end have already been

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<sup>22</sup> I have elsewhere dealt with the importance of addressing how the realization of socio-economic rights can fuel neoliberalism's worst tendencies by silently relying on the resources for redistribution that economic globalization problematically provides. See, ME Salomon, *Sustaining neoliberal capital through socio-economic rights*, *Critical Legal Thinking* 18 Oct 2018 <http://criticallegalthinking.com/2017/10/18/sustaining-neoliberal-capital-socio-economic-rights/> and more fully in Linarelli, Salomon and Sornarajah, chapter 7.

<sup>23</sup> African governments received \$32.8 billion in loans in 2015 and paid \$18 billion in debt interest and principal payments, with the overall level of debt rising rapidly. See the report by 10 NGOs, *Honest Accounts 2017: How the world profits from Africa's Wealth*. [https://www.globaljustice.org.uk/sites/default/files/files/resources/honest\\_accounts\\_2017\\_web\\_final\\_updated.pdf](https://www.globaljustice.org.uk/sites/default/files/files/resources/honest_accounts_2017_web_final_updated.pdf)

<sup>24</sup> Y Varoufakis, *Adults in the Room: My Battle with Europe's Deep Establishment* (The Bodley Head 2017) Appendix 2, The IMF's Motivational Error, 491. On the IMF's more recent call for debt relief for Greece, Varoufakis offers this insight: 'In a sense, Brussels and Berlin-based official who look discomfited every time the IMF calls upon them to grant Athens debt relief do have a point: the International Monetary Fund wants Greece's European Creditors, who have provided the IMF with immense profits, to haircut the country's debt to them but not to itself. And thus Greece is caught between the IMF, which correctly proposed debt relief despite having profited from Greece's being denied it, and the EU, which has used the IMF to deny Greece debt relief'. *Id.*

<sup>25</sup> See among the reams of desolate statistics: CESCR, Concluding Observations: Greece UN Doc E/ C.12/ GRC/ CO/ 2, 9 Oct 2015; Report of the UN Independent Expert on the effects of foreign debt and other related international financial obligations of states on the full enjoyment of all human rights, particularly economic, social and cultural rights: Mission to Greece, UN Doc A/ HRC/ 31/ 60/ Add2, 29 Feb 2016; D Stuckler and S Basu, *The Body Economic: Eight Experiments in Economic Recovery from Iceland to Greece* (Penguin 2013). Since the contested bailout arrangements economic output shrank by roughly one-quarter with, as Blustein writes, a 'correspondingly wrenching impact on living standards'. P Blustein, 'The Greek Crisis: Human Errors— And Divine Forgiveness' Centre for International Governance Innovation (20 Feb 2015). See also, *GSEE v Greece* Merits (2017), para 92: 'In addition, even if any given measure cannot be assessed exclusively on the basis of the results it produces, the Committee notes that the legislative measures in the present case, if construed as aimed at restoring the economic and financial situation of Greece and of the labour market, did not achieve any of these objectives. The information produced by the Government itself shows that over a period of six years unemployment has increased by 26%, poverty by 27%, while the gross domestic product (GDP) has fallen by more than 25% and the measures adopted have not made it possible either to restore the labour market or sustainable growth or to achieve the main objective of the support programmes since during the same period public debt increased from 109% to 175% of GDP.'

<sup>26</sup> H Smith, 'Young, Gifted and Greek: Generation G - the World's Biggest Brain Drain', *The Guardian*, 19 Jan 2015. <https://www.theguardian.com/world/2015/jan/19/young-talented-greek-generation-g-worlds-biggest-brain-drain>

<sup>27</sup> McFalls drawing on Agamben and the example of "democratic" intervention in the former Yugoslavia in L McFalls, 'Benevolent Dictator: The Formal Logic of Humanitarian Government' in D Fassin and M Pandolfi (eds) *Contemporary States of Emergency: The Politics of Military and Humanitarian Intervention* (Zone Books 2010) 317, at 325.

<sup>28</sup> M Pandolfi, 'From Paradox to Paradigm: The Permanent State of Emergency in the Balkans' in Fassin and Pandolfi (eds) 153.



implemented as prior actions. [...] We remain committed to our ambitious privatization plans'.<sup>29</sup> The promise of re-establishing a normal order can never be met.

The focus on compliance with the Covenant as requiring minimum essential levels of rights in times of emergency provides for the distinct possibility of reducing the realization of socio-economic rights merely, and permanently, to their minimum essential levels. Moreover, the creation of perpetual poverty addressed through schemes that are allied to systemic commodification and consumerism works towards the consolidation of neoliberalism. It also occludes the deeper emergency: the strategy of political and economic intervention into poor countries framed as solutions and the role of that 'development' model in creating deprivation.<sup>30</sup> On this account, the protection of minimum essential levels of socio-economic rights is not a stopgap focus of international human rights law in times of crisis, it is part of a permanent moratorium on a better future for its victims.

To consider more fully the 'utility' of the crisis-induced focus on minimum essential levels of socio-economic rights we should ask who the ultimate beneficiaries are of saving the *new* poor from destitution and indignity?<sup>31</sup> In answering, it is fruitful to situate the crisis-compelled legal devotion to securing minimum essential levels of socio-economic rights within the wider consideration of the role and function that welfare policy plays in *servicing* capitalism. Historical sociology and economic sociologists have exposed the ways in which the welfare state is a construction essential to the flourishing of capitalism: the welfare state protects capitalism from itself, from its inherent capacity for self-destruction. It provides capitalism with its healthy, workforce, the infrastructure within which people can function, and a population of consumers.<sup>32</sup> The specific nature and extent of social policy shifts with the dominant ideology and practice of how best to manage the economy, with neoliberalism having modified welfare states everywhere toward market-oriented forms,<sup>33</sup> austerity thus being a prevalent feature of many a current [European] 'welfare state'.<sup>34</sup>

There is a circular connection that can thereby be drawn from the defence of a neoliberal policy programme to austerity to the provision of *minimum* essential levels of rights and back to neoliberal capitalism. The *corollary* of the (neoliberal) containment of social spending today is securing minimum essential levels of rights (or framed as guaranteed minimum income or other such basic schemes). On

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<sup>29</sup> Emphasis added.

<sup>30</sup> See, U Mattei, 'Emergency-Based Predatory Capitalism: Rule of Law, Alternative Dispute Resolution, and Development' in Fassin and Pandolfi (eds) 89, at 90.

<sup>31</sup> On the new poor: In Greece for example, the number of people who live in households that cannot keep their home adequately warm doubled between 2010 and 2014 from 15.4% to 32.9%. Report of the UN Independent Expert on the effects of foreign debt and other related international financial obligations of states on the full enjoyment of all human rights, particularly economic, social and cultural rights: Mission to Greece, UN Doc A/ HRC/ 31/ 60/ Add2, 29 Feb 2016, para 69. See also B Eichengreen et al, 'Independent Report on the Greek Official Debt' Policy Insight No 92, Centre for Economic Policy Research (2018) 1: 'Unemployment remains in excess of 20%, youth unemployment in excess of 40% ...'. 'The promise of more official debt relief in the form of interest rate concessions and maturity extensions is on the table, but realising that promise will require the Greek government and society to commit to substantial primary budget surpluses for two generations.' *Id.*

<sup>32</sup> D Garland, 'The Welfare State: A Fundamental Dimension of Modern Government' 53 *European Journal of Sociology* 3 (2014) 327, at 359; ('the welfare state is an essential basis for human flourishing in capitalist society and an essential basis for capitalist flourishing in human society') *id.*, 360. As will be pursued in the subsequent, fuller elaboration of the ideas herein, the welfare state is the countervailing force that allows capitalism to avoid self-destruction (*id.*, 359), but, as per the insights of Claus Offe, the services of the welfare state are not major social accomplishments ... [they are a] 'stopgap mechanisms to offset the process of rapid and often permanent deterioration of social life caused by the capitalist pattern of industrialization ... rather than the path of improvement and the widening of life chances'. C Offe, *Advanced Capitalism and the Welfare State* 4 *Politics and Society* (1972) 479.

<sup>33</sup> D Garland, *The Welfare State: A Very Short Introduction* (OUP 2016) 112 for an exposition on the reforms.

<sup>34</sup> SC Matteucci and S Halliday, 'Social Rights, the Welfare State and European Austerity' in SC Matteucci and S Halliday (eds) *Social Rights in Europe in an Age of Austerity* (Routledge 2018) 3, at 11.

this account, the protection of the minimum essential levels of rights is as much a part of making sure no one goes hungry as it is a considered policy of neoliberal statecraft.

The MoU for Greece's third bailout offers a nod to 'social justice and fairness' with 'a basic social safety net in the form of a Guaranteed Minimum Income' (GMI). According to the European Commission, the GMI is 'a crucial aspect of enhancing the effectiveness, fairness and coverage of social protection'.<sup>35</sup> On the face of it this sounds like a measure that would give effect to minimum essential levels of socio-economic rights, as required, for example, under the International Covenant on Economic, Social and Cultural Rights. Indeed, human rights advocates and the official human rights community have vigorously endorsed a comparable idea under the Sustainable Development Goals' universal social protection floors.<sup>36</sup> But while GMI demonstrates an affinity with the approach of human rights obligations, minimum essential social protection is not merely objectionable on the basis of reinforcing neoliberalism by providing it with social safety nets,<sup>37</sup> it is a product of capitalism's defining feature of creating winners and losers. And just as the minimum essential levels of rights are a product of capitalism, it is a doctrine that can also serve to bolster the dominant form of capitalism today. Here are a few examples as to how.

Speaking on the subject of Greece's 3<sup>rd</sup> MoU, the Greek Finance Minister Tsakalotos remarked recently that the GMI has seen 'the creditors push to drop benefits and leave *only* the Guaranteed Minimum Income – so no redistribution'.<sup>38</sup> This trade off aligns with the point Yanis Varoufakis advanced in his commentary to the 3<sup>rd</sup> MoU when he wrote that: '[The GMI] would be great, except that not one fresh euro will be made available for the GMI program whose funding will be siphoned off existing benefits provided by the Greek state, e.g. child benefit'. So a minimum income can justify limiting redistribution and validates other social support being left to the market. The terms under which the (transnational) neoliberal market economy functions, such as through weakened collective bargaining, increasingly 'flexible' labour, privatization of essential services etc is retained and bolstered. A universal minimum income today may be viewed as a radical paradigm because it detaches income from labour,<sup>39</sup> but it does so under very particular terms: here a 'guaranteed minimum income' also risks guaranteeing the imprint of the invisible hand of the freest possible market. As such, ensuring the minimum essential levels of rights has to be one aspect of a far bigger social strategy.<sup>40</sup> Put differently, in neoliberal times, ensuring the minimum essential levels of rights is, in significant ways, part of the problem.

A consideration of the celebrated Bolsa Família conditional cash transfer programme made famous in Brazil helps elaborate the argument. The programme has been criticized for turning 'the miserable

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<sup>35</sup> EC Assessment of the Social Impact of the new Stability Support Programme for Greece (19 Aug 2015) 20. A separate but related point: The reference in the MoU to the need for 'social justice and fairness both across and within generations' can be understood as an endorsement of austerity on the argument that '[d]eficits are considered to represent sinful profligate spending at the expense of future generations who will be left with a smaller endowment of invested capital'. Y Varoufakis, 'Commentary to the 3rd Memorandum of Understanding between the European Commission Acting on Behalf of the European Stability Mechanism and the Hellenic Republic and the Bank of Greece' (11 Aug 2015). See further, O Komlik (on William Vickery, 1998), 'Get Free from the Dogmas of the Apostles of Austerity: Fifteen Fatal Fallacies of Financial Fundamentalism' (15 Aug 2015) *Economic Sociology and Political Economy*, <https://economicsociology.org/2015/08/15/get-free-from-the-dogmas-of-the-apostles-of-austerity-fifteen-fatal-fallacies-of-financial-fundamentalism>

<sup>36</sup> For coverage and critique of that scheme see, Linarelli, Salomon and Sornarajah, chapter 7. CESCR, Statement on Social Protection Floors: An Essential Element of the Right to Social Security and of the Sustainable Development Goals, UN Doc E/C.12/2015/1, 15 Apr 2015; CESCR Austerity Statement 2012.

<sup>37</sup> If economic institutions would provide income, health and education for all there would be no need for "safety nets". J Weeks, *Economics of the 1%* (Anthem Press 2014) 204.

<sup>38</sup> E Tsakalotos, 'Economic Blues: The Left in Government Times' LSE Public Lecture (10 Nov 2015).

<sup>39</sup> A thoughtful point made by Marie-Catherine Petersmann at a presentation I delivered on 'Redistribution, Suffering, and the Human Rights Paradox' at the Academy of European Law, European University Institute, 30 Jan 2018.

<sup>40</sup> See Mattei.

into consumers'<sup>41</sup> offering what a conservative Mexican commentator notes is an 'innovative welfare programme that is as neoliberal as one can get'.<sup>42</sup> What Ruckert refers to as a 'shallow social compromise' seeks merely to subsidize impoverished consumers under conditions of privatization.<sup>43</sup> The shape of social protection under neoliberalism does not challenge the commitment of international financial institutions to privatization and liberalization – controversial prescriptions that thrive under social protection schemes (whether GMI, social assistance, or minimum essential levels of rights). These are not schemes to decommodify the core provisions of health, education, housing, and social insurance by removing them from the effects of the market, they are based on an 'enabling state' there to facilitate the role of market forces;<sup>44</sup> as social provisions become strong, the idea of universal rights to *decommodified* public services wanes.<sup>45</sup> Income support or support to basic social services is reflective of an awareness that extremely poor people are unable to pay for those services at market-determined rates and as such cannot become customers.<sup>46</sup> With the renationalizing of big business in Brazil deemed an improbable exercise, Lula concluded that he would seek to reverse the poor's exclusion by putting a little cash in their pockets.<sup>47</sup> Under the Bolsa Familia programme of cash transfers 'Brazil is also no exception to the wider continental tendency to concentrate social spending on cash transfers rather than expanding provision of decommodified services, such as public health, education, sanitation and other basic social goods'.<sup>48</sup> Figures that suggest poverty and inequality have been reduced in Brazil<sup>49</sup> need to be considered critically.<sup>50</sup>

CESCR's dedication to ensuring minimum essential levels of rights in times of economic and financial upheaval does not reflect a neutral application of the Covenant, as the Committee provides.<sup>51</sup> As I have developed elsewhere, the Committee's efforts to protect socio-economic rights are given effect against the backdrop of global neoliberalism. What it sees as focused on protecting the most vulnerable might also be pushing further away the possibility of economic transformation and human

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<sup>41</sup> L Lavinias as cited in J Tepperman, 'Brazil's Anti- Poverty Breakthrough: The Surprising Success of Bolsa Família' (Jan–Feb 2016) 95 *Foreign Affairs* 34, 41.

<sup>42</sup> Tepperman 41.

<sup>43</sup> A Ruckert, 'Towards an Inclusive- Neoliberal Regime of Development: From the Washington Consensus to the Post-Washington Consensus' 39 *Labour, Capital and Society* 1 (2006) 36, at 63. See also, Mattei at 90 (poverty organized around 'capitalist-generated consumer needs').

<sup>44</sup> L Lavinias, '21st Century Welfare' 84 *New Left Review* 5 (Nov–Dec 2013) 5, at 6.

<sup>45</sup> *Id.*, 34. See also, Garland, 'The Welfare State' 110.

<sup>46</sup> Ruckert 52.

<sup>47</sup> 'Lula had also realized that the wave of privatizations that had swept Latin America in the 1980s and 1990s— as governments sold off everything from airlines and energy producers to utility providers— had left hundreds of millions of citizens stranded, too poor to participate in the expanding market economies. Lula and his advisers reckoned that, rather than go through the nightmare of renationalizing big businesses, the best and simplest way to reverse the poor's exclusion was to put a little cash in their pockets' Tepperman, at 38.

<sup>48</sup> Lavinias 32.

<sup>49</sup> Advisory Group, Report of the Advisory Group: Social Protection Floor for a Fair and Inclusive Globalization (2011). [http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS\\_165750/lang--en/index.htm](http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_165750/lang--en/index.htm)

<sup>50</sup> See the excellent study by Lavinias 5. '... The runt of the litter here is health spending: not only did it grow at a rate below average, but it also saw its share in federal social spending reduced from 13 per cent in 2001 to 11 per cent in 2010. By that time federal expenditures on education and welfare benefits amounted to 1 per cent of gdp, whereas sanitation and housing received only 0.1 and 0.8 per cent of GDP. Indeed, 'There was no change in the availability of clean water over the entire decade'. (p 33). Access to consumer goods however, such as cell phones, washing machines and computers, on the other hand, has soared: 'it is primarily rising labour earnings that have accounted for the decline in poverty in Brazil, as was the case elsewhere in Latin America.

<sup>51</sup> CESCR, General Comment No 3, The Nature of States Parties' Obligations (Art 2(1)), UN Doc E/ 1991/ 23 (1990), annex III.

emancipation.<sup>52</sup> It is often highlighted how the protection of socio-economic rights is incompatible with central principles of neoliberal doctrine,<sup>53</sup> that they represent a ‘clash of economic rationalities’.<sup>54</sup> But a closer look at the recent interpretation and contextual application of socio-economic rights shows that these two visions are not necessarily set against each other.

The very idea of a ‘right’ as opposed to a ‘need’ or a service removes it from the realm of commodity, and socio-economic rights (also as applied by the Committee) offers an almost deviant conception of social justice as distribution according to need and not just as the requital of desert or according to contribution. Unlike the GMI and other social protection schemes, legal rights also require justification be removed. As elegantly voiced by Emiliios Christodoulidis moreover, social rights can ‘provide a measure against which suffering is experienced not as necessary, but as a wrong’.<sup>55</sup> The requirement of ensuring a minimum core of socio-economic rights as developed by CESCR, ‘combines the consequences of immediate effect, immunity from the excuse of insufficient resources, non-retrogression, and direct applicability’.<sup>56</sup> But part of the paradox evinced when saving lives and redressing suffering through these various minimum schemes is that a life of possibility is substituted for a life of survival. The doctrine of immediacy that the economic state of emergency has triggered may attempt to alleviate suffering, especially physical, while foreclosing ambition of greater personal, societal and structural change. A failure to meet the minimum threshold required by the Committee may tell us when a violation has occurred, but not when the full potential of an obligation has been fulfilled.<sup>57</sup> Socio-economic rights as we see applied in neoliberal times expedited by a crisis scenario offer a withered version of the welfare state and a mere chimera of a social nation. More treacherously still, they keep neoliberalism flourishing.

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<sup>52</sup> The issue of the Committee’s commitment to growth alongside its alleged ‘neutrality’ is explored in chapter 7 of Linarelli, Salomon, and Sornarajah.

<sup>53</sup> CB Macpherson, *The Rise and Fall of Economic Justice and Other Papers* (OUP 1985); W Streeck, ‘The Crisis of Democratic Capitalism’ 71 *New Left Review* (2011) 5; and in sum, Christodoulidis: ‘It is largely conceded in the literature that social rights are incongruous to capitalism and its particular structures of opportunity and reward, which accounts for the fact of their marginalisation, even eradication under austerity regimes, or their ‘elevation’ to aspirational status. Where the market does *all* the work of allocating value to resources amongst possible uses, the distribution of resources with the explicit aim to meet needs is, from the point of view of market thinking, *irrational*.’ E Christodoulidis, ‘Critical Theory and the Law: Reflections on Origins, Trajectories and Conjunctures’ in E Christodoulidis, R Dukes and M Goldoni (eds) *Research Handbook on Critical Legal Theory* (Edward Elgar 2019).

<sup>54</sup> Matteucci and Halliday 12.

<sup>55</sup> E Christodoulidis, ‘Social Rights Constitutionalism: An Antagonistic Endorsement’ 44 *Journal of Law and Society* 1 (2017) 127, at 148.

<sup>56</sup> M Scheinin, ‘Core Rights and Obligations’ in D Shelton (ed) *The Oxford Handbook of International Human Rights Law* (OUP 2013) 527, at 538.

<sup>57</sup> ME Salomon, ‘Why Should It Matter That Others Have More: Poverty, Inequality and the Potential of International Human Rights Law’ 5 *Review of International Studies* (2011) 2137, at 2155.

# The European Court of Human Rights and Accountability for Neoliberal State Conduct: Never the Twain Shall Meet?

Başak Çalı\*

## 1. Neoliberalism at the European Court of Human Rights

In this brief think piece my aim is to reflect on the limits of the European Convention on Human Rights (ECHR) and its interpretation by the European Court of Human Rights (ECtHR) in responding to the legal trajectories of neoliberalism. The working definition of neoliberalism in this piece is state conduct that foregrounds deregulation, privatisation, free trade and investment, the withdrawal of the state from delivery of public goods, such as water, education, health and social care both as a *modus operandi*, and as a response to economic and financial crises.

The think piece offers two central starting points for how the ECtHR engages with neoliberal state conduct. First, the ECHR text is ill suited to address neoliberal state conduct comprehensively not only as a matter of substantive rights covered in the Convention and its additional protocols but also as a matter of how scrutiny of state conduct is triggered through rules of jurisdiction and admissibility. Second, the interpretation of the Convention by the ECtHR thus far has desisted from interpreting the Convention as a living instrument adjusting to the prevalence of neoliberal state conduct and its adverse consequences for the enjoyment of human rights across Europe.

The piece puts forward the argument that due to the textual limitations and the interpretive ethos of its interpreters, the legal opportunity structure of the European Court of Human Rights (understood as the nature of the available legal stock, the rules governing access to the judiciary) to address neoliberal state conduct has been very limited and continues to be so, despite attempts at legal advocacy before the European Court of Human Rights by various groups and individuals<sup>1</sup>. When cases arrive before the Court, the interpretive response of the ECtHR to forms of neoliberal state conduct has been marked by deference to domestic judiciaries and policy makers.<sup>2</sup> By and large, the ECtHR does not see itself as playing a fundamental role in reviewing economic-political state conduct.<sup>3</sup> Due to its interpretive telos that foregrounds prevention of arbitrary and anti-democratic state conduct and hostile political preferences towards vulnerable groups, neoliberal state conduct becomes cognisable in the imaginary of the ECtHR, only when it appears as manifest arbitrary conduct<sup>4</sup> or in cases where such conduct reveals

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<sup>1</sup> On legal opportunity structures, see Ellen Ann Andersen, *Out of the Closets and into the Courts. Legal Opportunity Structure and Gay Rights Litigation* (The University of Michigan Press 2006); Rhonda Evans Case and Terri E. Givens, 'Re-engineering legal opportunity structures in the European Union? The starting line group and the politics of the racial equality directive' (2010) 48 *Journal of Common Market Studies* 221. On attempts to litigate austerity measures in Europe before the European Court of Human Rights see European Court of Human Rights, 'Austerity Measures Factsheet' (2017) <[https://www.echr.coe.int/Documents/FS\\_Austerity\\_measures\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Austerity_measures_ENG.pdf)> accessed 3 September 2018

<sup>2</sup> *Taskin and others v. Turkey* [2004] ECHR 621; *Valkov and others v. Bulgaria* App no 2033/04 (ECtHR 25 October 2011); *Koufaki and ADEDY v. Greece* App nos 57665/12 and 57657/12 (ECtHR 7 May 2013); *Da Conceição Mateus v. Portugal and Santos Januário v. Portugal* [2013] ECHR 1203; *Savickas and others v. Lithuania* App nos 66365/09, 12845/10, 29809/10, 29813/10, 30623/10, 28367/11 (ECtHR 15 October 2013); *da Silva Carvalho Rico v. Portugal* App no 13341/14 (ECtHR 24 September 2015)

<sup>3</sup> This has been called 'negative textual inferentialism' by Scott, suggesting that the Court sees the presence of other treaties recognising economic and social rights as a reason to limit the interpretation of such rights itself. Craig Scott, 'Reaching Beyond (Without Abandoning) the Category of "Economic, Social and Cultural Rights"' (1999) 21 *Human Rights Quarterly* 633, 638–639.

<sup>4</sup> *McDonald v. the United Kingdom* [2014] ECHR 492 (partial admissibility and violation decision of an elderly person due to lack of a domestic framework for some parts of her healthcare cuts).

severe and stark consequences to the interests of individuals.<sup>5</sup> This is not only reflected in the outcome of cases that touch on and concern neoliberal policies and their adverse consequences before the Court, but also the lack of interest of the Court in reflecting on these issues in its obiter dicta.<sup>6</sup>

## 2. Textual limitations

### 2.1 A limited set of civil and political rights

The European Convention on Human Rights, despite the recognition in its preamble that it is an instrument for the implementation for the Universal Declaration on Human Rights of 1948, is decidedly a civil and political rights treaty, focussing on a limited subset of civil and political rights. Article 11 is the only hybrid right, where the right to unionise and protection of rights of members of the unions as well as unions themselves are explicitly recognised. This article, however, also protects the right not to be a member of a union.

The textual scope of the Convention has seen some important expansions over time, arguably making it more apt for engaging with social and economic rights. For example, Protocol 1 Article 1 expanded the protections of the Convention to cover the right to property and Protocol 1 Article 2 protects the right not to be denied education. Protocol 12 makes the principle of non-discrimination a stand-alone right. The latter Protocol, however, has not attracted a significant number of ratifications.

### 2.2 Jurisdictional clause

Alongside the short and selective list of rights recognised in the Convention, the European Convention on Human Rights has a jurisdictional clause, where the states have duties to protect the Convention within their jurisdiction. This is in contrast to UN human rights treaties where such jurisdictional clauses are not present, such as the case with ICESCR, CEDAW and the CRC. The Court's interpretation of its jurisdictional clause over time has expanded the responsibilities of the state parties where they have control over territory or control over persons<sup>7</sup>, but neither of these doctrines offer a basis to interrogate the activities of state owned or domiciled corporations of European states extraterritorially.

### 2.3 Admissibility

Admissibility hurdles at the European Court of Human Rights are many, not only by way of traditional rules with regard to exhaustion of domestic remedies and the direct victim requirement, but also in the form of 'manifestly ill-founded cases', where the Court may deem that the facts of a case do not raise a significant disadvantage for the applicants. Cases concerning the effects of austerity measures in Greece, Portugal, Lithuania brought before the Court, for example, faced this hurdle. In *Koufaki and ADEDY v. Greece*<sup>8</sup>, the Court declared the applications inadmissible as being manifestly ill-founded, holding that the reduction of the first applicant's salary from EUR 2,435.83 to EUR 1,885.79 did not impose an excessive burden on the applicant, and therefore did not bring it within the scope of Article 1 Protocol 1. In *Da Conceição Mateus v. Portugal and Santos Januário v. Portugal*,<sup>9</sup> too, the reduction of public

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<sup>5</sup> *N.K.M. v. Hungary* [2013] ECHR 546; *Chowdury and Others v Greece* [2017] ECHR 300

<sup>6</sup> *Ozel and others v. Turkey* [2015] ECHR 1024 (concerning lack of interest in addressing liability of corporations for right to life violations)

<sup>7</sup> *Al-Skeini and others v. UK* [2011] ECHR 1093

<sup>8</sup> *Koufaki and ADEDY* (n 2)

<sup>9</sup> *Da Conceição Mateus v. Portugal and Santos Januário v. Portugal* [2013] ECHR 1203. Also see, *Savickas v. Lithuania and Others* (dec.), no. 66365/09, 15 October 2013

sector pensions as a result of cuts to Portuguese government spending were found manifestly ill-founded as this cut was instituted in light of financial difficulties facing Portugal. Given that measures were temporary, the state stayed within its margin of appreciation.

### **3. Limitations due to interpretive ethos**

A key interpretive trend of the ECtHR case law since the 1970s has been that textual limitations of the ECHR do not limit the interpretive scope of the court. This has been justified by the drafters' intention (as found in the preamble) to effectively protect human rights in a forward looking manner. This has been reflected in the Court's embrace of principles such as the living instrument doctrine, effective interpretation, and the doctrine of positive obligations. The ECtHR thus is able to interpret the scope and the limitation grounds of rights recognised in the Convention in dynamic and *pro homine* ways.

This interpretive ethos opens up possibilities for the ECtHR to engage with issues that have not been foreseen by the drafters in the text of the Convention. The Court, for example, was able to bring sexual orientation within the scope of Article 8 (right to privacy), conscientious objection within the scope of Article 9 (freedom of thought, conscience and religion) and non-refoulement within the scope of Article 3 (torture, inhuman and degrading treatment). These examples, at first sight, may suggest that opportunities exist for the Court to turn its attention to the enjoyment of economic and social rights through adopting a permeability of rights doctrine, bringing some of the adverse consequences of neoliberal conduct within the imaginary of the Convention. Indeed, perhaps one of the landmark cases of the ECtHR of the 1970s, *Airey v. Ireland*<sup>10</sup>, attests to this interpretive potential, where the court saw the lack of legal aid to a woman trying to divorce as hampering the lack of access to court, and in turn a violation of the right to fair trial under Article 6 of the Convention.

As seen in the case of *Airey*, however, the Court needs to undertake interpretive work to bring the adverse consequences of neoliberal state conduct under one of the Articles of the Convention. Here, alongside Article 11, Article 6 and Protocol 1 Article 1, Convention articles with such potential may also be thought to include Article 2, Article 3 and Article 8. For each of these articles, however, a direct victim of the Convention must convincingly show that the adverse effects of neoliberal state conduct in terms of omission or commission comes within the scope of these articles, meeting a test of risk to life or loss of life (Article 2), severity of treatment (Article 3), or a direct and concrete harm to private or family life (Article 8).

The dynamic interpretation of the Convention, however, does not take place in a vacuum and the ECtHR justifies expansive moves in its case law either with reference to underlying fundamental values of the Convention (or its telos)<sup>11</sup> or an emerging European consensus<sup>12</sup> or both.

The Court's understanding of the underlying fundamental values of the Convention makes important references to the protection of democracy, and protection of vulnerable groups in society against the hostile preferences of the majorities<sup>13</sup> and procedural rights states owe to individuals to protect them against arbitrariness in their domestic legal system.<sup>14</sup> This decidedly political equality reading of the Convention does not enable a critical substantive assessment of economic policies, in particular, when such policies are undertaken by democratic governments and overseen by domestic judiciaries. In effect, the Court has repeatedly recognised that states have a wide margin of appreciation in matters of economic policy.

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<sup>10</sup> *Airey v. Ireland* [1979] ECHR 3

<sup>11</sup> *Bayev and others v. Russia* [2017] ECHR 572

<sup>12</sup> *Bayatyan v. Armenia* [2011] ECHR 1095

<sup>13</sup> *Bayev* (n 10)

<sup>14</sup> *Volkov v. Ukraine* App no 21722/11 (ECtHR 9 January 2013); *McDonald* (n 4)

This broader interpretive outlook of the Court fundamentally hampers the Court's ability to address adverse consequences of economic or regulatory conduct of states, unless such conduct is manifestly arbitrary or the consequences of the conduct can be shown to reach a level of severity to engage one of the rights in the Convention. This means that neoliberal state conduct can only be canvassed as a weak claim concerning the lack of respect by state authorities to the decisions of their own judiciaries or it must be shown to have severe consequences for the enjoyment of civil and political rights of individuals. The weak review of neoliberal state conduct can be illustrated by the Court's case law finding that non-enforcement of domestic court judgments is a violation of the right to fair trial. Whilst this interpretation is expansive as this notion of fair trial is not included in the text of the Convention, it is also deferential to domestic judiciaries and their assessment of neoliberal state conduct.

The case of *Taskin and others v. Turkey*<sup>15</sup> is a paradigmatic example of the weak protection against neoliberal state conduct before the ECtHR. The case involved the repeated granting of permits for gold mining to multinational mining companies in Turkey with clear detrimental effects to the lives of the villagers living in the vicinity of the mine. In this case, instead of reviewing and condoning the government's relentless commitment to this neoliberal policy, the ECtHR simply saw the issue as one of non-enforcement of domestic court decisions and in turn asked the State to comply with these domestic decisions. It has thus created a fiction that Strasbourg requiring enforcement of domestic court decisions would be adequate to change the mining license policies of the government. To this day, the villagers continue to fight domestic legal battles against the mining companies in Ovacik.

Despite the burgeoning field of obligations of non-state actors, in particular, business enterprises to respect human rights and states' duty to provide effective remedies to regulate private enterprises, the ECtHR's case law so far has not aimed to develop state obligations to regulate corporations. For example, despite the Court's recognition in the *Oneryildiz v. Turkey*<sup>16</sup> case that all actors have a duty to protect life, in cases where corporations directly contributed to the loss of life, it has refrained from developing an obiter dicta about how states should regulate business enterprises. In contrast, the ECtHR has a more lax approach when it comes to recognition of corporations as enjoying victimhood status under the Convention.<sup>17</sup>

In the few cases that have been successful before the ECHR at the merits stage, the Court has been moved by arguments of absolute or near absolute deprivation. In *N.K.M v. Hungary*<sup>18</sup>, a civil servant complained that the imposition of a 98 per cent tax on part of her severance pay under legislation entered into force ten weeks before her dismissal had amounted to an unjustified deprivation of property. The Court found a violation of Article 1 of Protocol No. 1, the right property of the applicant, because of excessive reduction of severance payments and the lack of a transitional period in which to adjust to a new severance scheme. In *Kjartan Asmundsson v Iceland*, concerning the removal of specific classes of disability pension entitlements as a response to the economic crisis in Iceland, the Court pointed to the total deprivation as an excessive and disproportionate burden.<sup>19</sup> These cases show that ECtHR is willing to review economic conduct that is manifestly severe and excessive. The concept of severity of neoliberal conduct, however, does not come with a normative theory, but is rather driven by the sensational nature of the particular facts of cases that appear before the Court.

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<sup>15</sup> *Taskin* (n 2)

<sup>16</sup> *Oneryildiz v. Turkey* [2004] ECHR 657

<sup>17</sup> *Yukos v. Russia* App no 14902/04 (ECtHR 31 July 2014)

<sup>18</sup> *N.K.M.* (n 5)

<sup>19</sup> *Kjartan Asmundsson v. Iceland*, App. No. 60669/00, 12 October 2004, para 43-45.



#### **4. Conclusion**

In this piece I aimed to argue that neoliberal state conduct is difficult to capture under the textual constraints and the interpretive telos of the ECtHR in meaningful ways. When such conduct does come within the catchment area of the Convention, it must appear as manifestly arbitrary conduct or manifestly severe conduct. In addition, the signal that the ECtHR sends in its obiter dicta in the sphere of economic policy is one of principled deference to domestic authorities. Neoliberal conduct and the ECtHR do meet. But in this meeting neoliberal conduct easily passes through the filter of the ECtHR with its emphasis on deference to national authorities in the field of economic policy unless the severity of the effects on particular individuals is impossible to ignore. ECtHR, by design and interpretive telos, thus often ends up legitimising neoliberal conduct or bouncing legal advocacy for distributive-justice claims back to domestic law.

# Austerity and Human Rights: Reflections on the Jurisprudence of the European Committee of Social Rights

Karin Lukas\*

## 1. Introduction

Budgetary restrictions to address the effects of the 2008 economic crisis in Europe have been undertaken in a number of EU countries. Such austerity measures have more often than not been steered by specific macroeconomic considerations and shaped by conditionalities of the so-called Troika (the European Commission, the European Central Bank, and the International Monetary Fund). These conditionalities have at times negatively impacted on human rights by dismantling social protection and introducing pro-cyclical austerity policies which had disproportionately negative effects on disadvantaged groups. Thus, austerity can be seen to incorporate the neoliberal objective to shrink the social welfare state.<sup>1</sup> In this context, the following sections provide some reflections on national austerity measures and their impact on human rights, in particular social rights.<sup>2</sup> They are focused on the decisions of the European Committee of Social Rights (the monitoring body of the European Social Charter of the Council of Europe) on the impacts of austerity measures in Greece. This case law shows the negative effects of budgetary cuts on particular social rights, and the balancing act the Committee undertakes to weigh this rights interference with the public interest to maintain a functioning national economic system.

## 2. Austerity measures and the principle of non-retrogression

Austerity measures are intended to reduce a government deficit through planned cuts to spending in order to align spending and revenue and avoid increases in government debt. In particular in the Euro crisis context, this led to major budgetary cuts in certain sectors such as health and social welfare and thus, to a potential or actual retrogression on the realisation of economic, social and cultural rights.

Sepúlveda defines retrogression as „backward steps in the level of enjoyment of economic, social and cultural rights as a consequence of an intentional decision of a state.”<sup>3</sup>

As states commit to expand the realisation of economic, social and cultural rights (ESC rights), they simultaneously assume a general obligation to refrain from reducing the existing level of protection. Thus, the corresponding obligation to the duty to realise progressively is the „duty to not regress, lose

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<sup>1</sup> K. Farnsworth and Z. M. Irving, ‘Austerity: Neoliberal dreams come true?’ *Journal of Critical Social Policy* (forthcoming 2018), J. Mercille and E Murphy, *Deepening Neoliberalism, Austerity, and Crisis* (Palgrave 2015).

<sup>2</sup> For more comprehensive analyses of the impacts of the economic crisis on human rights see for example A. Nolan, (ed.), *Economic and Social Rights after the Global Financial Crisis* (2014), Cambridge University Press; M. Dowell-Jones, ‘The Economics of the Austerity Crisis: Unpicking Some Human Rights Arguments’ *15(2) Human Rights Law Review* (2015), 193; M. Salomon, ‘Of Austerity, Human Rights and International Institutions’, *European Law Journal*, Vol. 21, No. 4 (2015), 521; I. Saiz, ‘Rights in Recession? Challenges for Economic and Social Rights Enforcement in Times of Crisis’, *1 Journal of Human Rights Practice* (2009), 277.

<sup>3</sup> M. Sepúlveda (2011) Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, A/HRC/17/34.

ground or backslide, in the fulfilment of ESC rights.<sup>4</sup> It creates a rebuttable presumption that deliberate measures of retrogression are a „prima facie violation” of ESC rights.<sup>5</sup>

The Office of the High Commissioner for Human Rights clarifies that where austerity measures result in retrogressive steps affecting the realisation or implementation of human rights, the burden of proof shifts to the implementing state to provide justification for such retrogressive measures. In ensuring compliance with their human rights obligations when adopting austerity measures, states should demonstrate the existence of a compelling state interest; the necessity, reasonableness, temporariness and proportionality of the austerity measures; the exhaustion of alternative and less restrictive measures; the non-discriminatory nature of the proposed measures; the protection of a minimum core content of the rights; and genuine participation of affected groups and individuals in decision-making processes.<sup>6</sup>

Austerity measures are such backward steps to rights realisation in the name of public interest. The European Committee of Social Rights had already been confronted with the effects of austerity for several cycles. In 2009 it stated that „the economic crisis should not have as a consequence the reduction of the protection of the rights recognised by the Charter. Hence, the governments are bound to take all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when beneficiaries need protection the most.

### **3. Prelude: The European Social Charter and the Collective Complaints Procedure of the European Committee of Social Rights**

The European Social Charter<sup>7</sup> represents the social standards in Europe spanning across areas such as housing, health, education, employment, legal and social protection, migration and non-discrimination.<sup>8</sup> It can be seen as the counterpart of the European Convention on Human Rights. Its monitoring body, the European Committee of Social Rights (ECSR) has developed a substantive body of jurisprudence on economic, social and cultural rights. One key instrument to monitor the compliance of States Parties with the Charter is the collective complaints procedure.<sup>9</sup> It is a form of collective redress in the human rights system, pursuing a systemic approach in addressing social problems which affect specific groups of persons rather than individuals.<sup>10</sup> It has been ratified by 15 of the 43 states parties to the European Social Charter. The following section looks specifically at this type of case law development in the context of austerity.

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<sup>4</sup> A. Nolan, N. Lusiani and C. Curtis, ‘Two steps forward, no steps back? Evolving criteria on the prohibition of retrogression in economic and social rights’, in: A. Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (2014), 123.

<sup>5</sup> Id, 124-125.

<sup>6</sup> Office of the High Commissioner for Human Rights (2013), Report on Austerity and Economic and Social Rights.

<sup>7</sup> For a more comprehensive analysis of this instrument see O. De Schutter, *The European Social Charter / La Charte Sociale Europeenne: A Social Constitution for Europe / Une Constitution Sociale Pour l'Europe* (1st edition 2010); M. Mikkola, *Social Human Rights in Europe* (1st edition 2010); D. Harris, J. Darcy, *The European Social Charter* (2nd edition 2001).

<sup>8</sup> On the Charter texts see <https://www.coe.int/en/web/turin-european-social-charter/charter-texts> (accessed 27 November 2018).

<sup>9</sup> The following organisations are eligible to submit collective complaints: the international organizations of trade unions and employers organizations; non-governmental organizations which have consultative status and have been put on a list drawn up by the Governmental Committee of the Council of Europe; the trade unions and employers’ organizations in the country concerned; and national non-governmental organizations. The last option has only been accepted by Finland.

<sup>10</sup> On the collective complaints procedure see for example K. Lukas, ‘The Collective Complaints Procedure of the European Social Charter: Some Lessons for the EU?’ (2014), *Legal Issues of Economic Integration*, Vol. 31, Nr. 3, 275-288; R. R. Churchill and U. Khaliq, ‘The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?’ (2004), *15 EJIL* 3, 417.

#### 4. Jurisprudence of the ECSR on austerity measures

The starting point of the Committee's development of "austerity case law" was the right to social security. The Committee considered that even when reasons pertaining to the economic situation of a state party make it impossible for a state to maintain their social security system at the level that it had previously attained, Article 12(3) – the duty to raise the system of social security progressively to a higher level – requires the state party to maintain the social security system at a satisfactory level, taking into account the legitimate expectations of beneficiaries of the system and the right of all persons to effective enjoyment of the right to social security.

In a number of collective complaints, the ECSR has considered the effects of austerity measures taken by the Greek authorities on social rights, in particular on this right (Collective Complaint No. 76/2012, No. 77/2012, No. 78/2012, No. 79/2012 and No. 80/2012).<sup>11</sup> The ECSR has considered both substantial and process-related aspects of rights compliance.

Regarding the compatibility of any restrictions on the rights relating to social security, as a result of economic and demographic factors, with the Charter, the ECSR took into account the following criteria:

- the nature of the changes (field of application, conditions for granting allowances, amounts and lengths of allowance, etc.);
- the reasons given for the changes and the framework of social and economic policy in which they arise; the extent of the changes introduced (categories and number of people concerned, levels of allowances before and after alteration);
- the necessity of the reform, and its adequacy in the situation which gave rise to these changes (the aims pursued);
- the existence of social assistance measures for those who find themselves in a situation of need as a result of the changes made; and
- the results obtained by such changes.

Taking into account the above criteria, the ECSR considered that certain reductions (holiday bonuses and reductions of pensions in cases where the level of pension benefits was sufficiently high) introduced by the Government did not amount to a violation of the Charter. However, the cumulative effect of the restrictions led to a significant degradation of the standard of living of certain groups of persons, in particular those pensioners with pensions close to or below the poverty line. The ECSR concluded that the restrictive measures at stake, which appear to have the effect of depriving one segment of the population of a very substantial portion of their means of subsistence, have been introduced in a manner that does not respect the legitimate expectation of the pensioners that adjustments to their social security entitlements will take account of their disadvantaged position, settled financial expectations and ultimately their right to enjoy effective access to social protection and social security.

Even taking into account the particular context in Greece created by the economic and financial crisis and the fact that the Government was required to take urgent decisions, the ECSR considered that the Government had not conducted the minimum level of analysis into the effects of such far-reaching measures and their impact on disadvantaged groups in Greek society. Neither had the Government discussed the available studies with the organisations concerned, which represent the interests of many of the groups most affected by the austerity measures. And even though the 'Troika' imposed severe legal restrictions on Greece, Greece still retained its legal obligations under the Charter.

According to the Committee, governments have to take „all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when beneficiaries need protection the most". "[D]oing away with such guarantees would not only force employees to shoulder an excessively

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<sup>11</sup> These decisions and the case documentation can be found at <https://www.coe.int/en/web/turin-european-social-charter/processed-complaints> (accessed 28 November 2018).

large share of the consequences of the crisis but also accept pro-cyclical effects liable to make the crisis worse and to increase the burden on welfare systems, particularly social assistance, unless it was decided at the same time to stop fulfilling the obligations of the Charter in the area of social protection.”

In follow-up of this issue, the Committee rendered its decision no. 111/2014.<sup>12</sup> The Greek General Confederation of Labour alleged violations of an array of rights (such as the right to work, just conditions of work, and fair remuneration), as well as the “right to take part in the determination and improvement of the working conditions and working environment” (article 3 (1) of the 1988 Additional Protocol to the 1961 Charter). It submitted that the legislation enacted between 2010 and 2014 in response to the economic and financial crisis:

- deregulates working conditions by destroying the protective legal framework, resulting in extreme forms of labour flexibility and high levels of job insecurity;
- freezes or reduces workers’ wages and pensions;
- reduces notice periods and severance pay;
- deregulates working hours;
- increases the length of probationary periods without notice or severance pay;
- increases recourse to agency work.

The Committee held a public hearing on this case. For the first time in the history of the procedure of collective complaints, the Government did not dispute the allegations submitted by the complainant organisation. It asserted its commitment to comply with the obligations of the European Social Charter by, in particular, providing assistance to the most vulnerable members of society.

The European Commission in its observations to the case noted that it had paid particular attention to ensure that the financial programme of the Memorandum of Understanding III was „designed to take account of social fairness, a fair division of the burden of the adjustment and protection for the most vulnerable.“

The main point of dispute between the parties, most clearly voiced by the European Trade Union Confederation (“ETUC”, intervening alongside GSEE) and the International Organisation of Employers (“IOE”, intervening alongside the Greek Government), revolved around the question whether the legislative measures stated above were justified in light of Articles 30<sup>13</sup> and 31<sup>14</sup> of the 1961 Charter.

While IOE argued that the protection of social rights under the Charter must permit a certain degree of flexibility to take account of changing economic conditions, ETUC insisted on strict adherence to specific justifications for any restrictions of social rights under the conditions of Article 31 ESC.

After a detailed analysis of the relevant law, the Committee addressed the issue through the lens of Article 31, stressing that it is an “exception applicable only in extreme circumstances” and therefore must be interpreted narrowly”. The Committee recalled the preconditions for restrictions under Article

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<sup>12</sup> Greek General Confederation of Labour (GSEE) v. Greece, complaint no. 111/2014, decision on the merits of 23 March 2017.

<sup>13</sup> Art. 30 regarding derogations in time of war or public emergency reads as follows: „In time of war or other public emergency threatening the life of the nation any Contracting Party may take measures derogating from its obligations under this Charter to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law“ (para. 1).

<sup>14</sup> Article 31 regarding restrictions reads as follows: „The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals“ (para. 1). The restrictions permitted under this Charter to the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed“ (para. 2).

31, (i) a clear basis in law, (ii) furtherance of a legitimate aim defined in Article 31(1) and (iii) necessity in a democratic society.

Finding that all measures at issue had a clear basis in law, the Committee identified the notion of “public interest” as the only available aim under Article 31(1). In accordance with its standing case law, the Committee recognized a certain margin of appreciation for the legislature in defining the public interest, but it emphasized that obligations stemming from international law, including the European Social Charter, play a definitive role in shaping the public interest. More specifically, it stressed that states may not surrender their power to define the public interest to external institutions (such as European and international creditors) and that a level of protection adequate to meeting basic social needs must be guaranteed.

Having previously stated that States should ensure that the rights of the Charter are guaranteed when beneficiaries need them most (instead of reducing the protection of rights), the Committee recognized that the enjoyment of human rights cannot be subordinated to “changes in the ... economic ... environment”. In light of the Committee’s prior case law, it noted that austerity measures could in principle be regarded as suitable for responding to the difficulties encountered if being the least restrictive measure. However, the Committee found that there was no evidence that the Government had considered less restrictive measures and compared their impact on disadvantaged groups to those measures actually put in place. It therefore held that the restrictions could not be justified under Article 31 ESC, failing to be proportionate and unable to achieve the objectives envisaged.

After its analysis of the availability of justifications under article 31, the Committee proceeded with its examinations of the complainant organisation’s claims regarding violations of individual Charter rights.<sup>15</sup> Finally, the Committee addressed the complainant organisation’s claims under Article 3 of the 1988 Additional Protocol to the 1961 Charter (right to take part in the determination and improvement of the working conditions).<sup>16</sup> The legislative changes regarding industrial relations resulted in the regulation of working conditions being shifted to the level of the company or even the individual worker. In the GSEE’s view, these mechanisms allow employers to exert a dominant position and to downgrade working conditions.

The Committee held that these legislative measures abolished the previously applicable bargaining systems and failed to ensure the effective exercise of the right of workers to participate in the determination and improvement of working conditions. The ECSR drew attention to the exceptional features of the situation giving rise to this complaint. It emphasised that the violations of the 1961 Charter were particularly serious due to the large number of provisions concerned and the effects for persons protected by the rights violated; the number of victims of these violations, affecting a significant part of the population; and the persistent nature of some of these violations, already identified in the examination of previous complaints. It further underlined that the legislature’s inaction, under strong pressure from the creditor institutions, with respect to amending the laws for a period from April 2012 until September 2015 despite the violations of the Charter to which they gave rise, had led to a worsening of the situation over the years, contrary to the obligation for States Parties to undertake both legal and practical measures that will allow the full exercise of the rights recognised by the Charter.

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<sup>15</sup> The Committee unanimously found that the reduction of the minimum wage of workers under 25 years constitutes (disproportionate) discrimination based on age and is thus in contravention to article 1(2). It also concluded on violations of working time and fair remuneration.

<sup>16</sup> Greece only ratified the Revised Charter in 2016, rendering its Articles 5 and 6 (dealing with the right to organise and the right to bargain collectively) inapplicable in this case. The complainant therefore raised its arguments pertaining to the right to bargain and the right to organise under the umbrella of Article 3 of the 1988 Additional Protocol.

## **5. Conclusions**

The Committee has not framed its analysis on austerity measures from the point of view of the principle of non-retrogression,<sup>17</sup> but rather as amounting to unjustified restrictions in violation of certain Charter rights. In the austerity context, the assessment of retrogression and the analysis of restriction are quite similar and they are assessed through a proportionality test. This balancing of rights and interests by the Committee reveal in which system it operates – it is one that assigns priority to (fundamental) social rights over public interests in a situation where the state, sometimes driven by supranational interests, employs means that are seen as too intrusive on rights given the aim pursued and thus fail the strict proportionality test.

The Committee's case law clearly limits the national execution of Troika conditionalities in the name of the public interest. Considering the Committee's analysis regarding article 31, it imposed through a strict proportionality test a high threshold on States to offer probative evidence regarding the achievement of the measures' objectives, the unavailability of alternative measures and the consideration of the measures' impact on particularly disadvantaged groups.

Although the Committee recognized a certain margin of appreciation for the legislature in defining the public interest, it stressed that obligations stemming from international human rights law play a definitive role in shaping the public interest. Moreover, it stressed that states may not surrender their power to define the public interest to external institutions (such as European and international creditors) and that a level of protection adequate to meeting basic social needs must still be guaranteed.

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<sup>17</sup> As suggested by ETUC in its submission on CC 111/2014.

## Social Constitutionalism in the Age of Austerity

Emilios Christodoulidis\*

*The paper draws on, and occasionally develops, an argument that was first presented in the paper 'Social Rights Constitutionalism: an antagonistic endorsement' in JLS (2017)*

To constitutionalise solidarity in the forms of social rights means, at minimum, to introduce it as binding as a matter of the expression of a political will of a society. It is, in other words, to introduce it as axiomatic and non-negotiable. 'Collective self-determination' in the field of work sanctions collective capacity for action in the forms of freedom to associate, to bargain and to strike; and the provision of a living wage, of unemployment benefit and the protection of the health and safety of people at work offer collective defence against the risks of existence. Together they offer the institutional forms of the realisation of solidarity, as organising principle and mainstay of the constitutional imaginary, extending from the social production of value through labour (right to work) to the forms of protection of vulnerability and the pooling of the risks to which we are collectively exposed. And while it would exaggerate the function of social constitutionalism to suggest that the institutions of social democracy and constitutional commitments of the social state actually resolved the contradiction between democracy and capitalism, they went a long way to sheltering democracy from capitalist excess, imbuing democratic institutions *within* the economy with force, and recognising the constituent role of *virtue* in the economy.

In the context of the European Union, for those economies that austerity has locked into the vicious circle of shrinkage, the spectre of sovereign debt has largely come to displace social constitutionalism as such. The transition of many European states from 'tax States' to 'debt States' - States, that is, that cover the larger part of their expenditure through borrowing rather than taxation and have to service that accumulating debt with an ever increasing share of their revenue -has led to excessive borrowing and the spectre, or reality, of sovereign debt. This entails the loss of budgetary sovereignty and the shrinking of the political capacity of the State.

The forms of "debt conditionality" that have been mobilized within the EU show debt governance to be significantly more coercive than the more traditional, classical forms of governance (Lazzarato). But debt conditionality does not come alone. It comes with an unprecedented by European standards buttressing of the economic freedom afforded to capital to circumvent the national systems of social protection by relocating to cheaper sites – whether it is the reality, or merely the threat, of relocation (see *Laval*, *Viking*, *Rueffert*, etc). As a consequence, systems of social and labour protection have been thrown into the vicious circle of competitive alignment, with the slashing of the welfare budget and the diminution of social protection as the principal adjustment factor. The effects that the 'race to the bottom' has had on social rights have been devastating. The *social constitution* entrusted with the redress of the worse effects of market integration can only be mobilized at the extreme end of the released social devastation, as *ultimum refugium* at the most basic level of guaranteeing the needs of biological existence, and remains otherwise toothless in regard of the majority of the effects of globalisation.

In his seminal lecture of 1949,<sup>1</sup> Thomas Marshall argued that successive waves of rights - civil, political and social - should be conceived along a continuous trajectory as markers of society's struggle to contain and *overcome* the constitutive significance of class. Social rights in the continuity argument are tied to the efforts of 'political power to supersede, supplement or modify operations of the economic system in order to achieve results which the economic system would not achieve on its own, ... guided by values other than those determined by market forces.' His theory engaged a 'secondary system of industrial citizenship', where syndicalist activity assumes 'the guise of an action modifying the whole

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<sup>1</sup> T H Marshall, *Citizenship and social class in sociology at the Crossroads and other essays* (1963 [1949])



pattern of social inequality.<sup>2</sup> Keen to remain with Marshall's normative argument about citizenship, current 'resolutions' to the contradiction between democracy and capitalism have variously invoked, rationalised and deployed social rights *as continuous* to civil and political rights. As we explore these 'accommodating' syntheses they are gradually exposed as forms of the reconciliation-cum-subsumption of democracy to capitalism, and all too often captive forms of thought.

The 'continuity argument' appears to stumble early on the objection that the successive categories of rights involve different bases of justification. To argue for their continuity presupposes therefore some prior alignment at the deeper level of justification. For theorists of *discontinuity*, to place the categories on a continuum misses the fundamental opposition between the rationales of entitlement and liberty, underlying civic rights, participation, underlying political rights, and need satisfaction, underlying social rights. For them, where not actually zero-sum, the rights might align in a relationship of mutual limitation, or, at best, mutual correction. Continuity arguments, their objection goes, miss this.

Take the varieties of the argument popularised under the rubric of the '*tragedy of the commons*'. With its connotations of overstepping and inexorability, it stands as a warning against *hubris*. The lesson conveyed is that rational action – taken unquestionably by the theorists of tragedy as coincident with the maximisation of individual returns - cannot guarantee the sustainability of the commons. Although presented as an argument that individual motivations, typically greed, stand in the way of sustainable use, it is only a small step to the argument that the satisfaction of need, inexhaustible and unchecked, will invite a raiding of the common pool of resources through overfarming, overfishing, etc, where that pool as freely available is bereft of the sanction of the exclusionary device of individual property. Property and civil rights typically come to the rescue as framing conditions to what the requirements of ordering the commons might require. Discontinuities abound: property rights are pitted against the potentially overwhelming demands carried by social rights, and pitted also against political rights, the apparent risk here being that the motivation of politicians to promise too much to electorates to secure re-election, makes democracy an inappropriate register and means to achieve any kind of equilibrium, let alone the delivery of efficient outcomes. The rational response in the face of the tragedy is to understand the individual (negative) rights as corrective of social (positive) rights. Against the hubris of organising a society solely on the principle of need satisfaction, the threatened raiding of the common pool of societal resources is controlled through individual negative rights and property title.

In their much quoted and admired book *The Cost of Rights*,<sup>3</sup> Stephen Holmes and Cass Sunstein, took issue with Garrett Hardin's influential rendering of the 'tragedy' thesis<sup>4</sup> and argued against the naïve separation of negative and positive rights that marks out the discontinuity thesis, and in favour of the *budgetary* continuity between categories of rights. The 'negative rights/positive rights distinction' turns out to 'be based on fundamental confusions,' they argued, for 'all legally enforced rights are necessarily positive rights, as the legal maxim "where there is a right, there is a remedy" highlights.'<sup>5</sup> Every first generation civil/political right is exercised in the shadow of public enforcement: the right to vote requires a publicly-funded polling station; the right to property must be protected by fire fighters and the police; contracts would be useless if creditors could not instigate a public judicial procedure against a defaulting debtor.<sup>6</sup> Importantly the normative separation of the private and the State realms is unsustainable, as even 'rights in contract law and tort law are not only enforced but also created, interpreted, and revised by public agencies.'<sup>7</sup> In short, the 'opposition between "government" and "free

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<sup>2</sup> Ibid., at 28

<sup>3</sup> S Holmes and C Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (1999)

<sup>4</sup> G Hardin, 'The Tragedy of the Commons' in 162 (1968) *Science*, 1243–1248

<sup>5</sup> Holmes, *op cit.* n.18, 43

<sup>6</sup> *Id.* 53; 13; 48

<sup>7</sup> *Id.* 49

markets”” turns out to be largely spurious.<sup>8</sup> Finally, a budgetary perspective of rights undermines the notion that some rights are non-derogable, or ‘absolutes’, for if rights imply budgetary costs, then their enforcement engenders opportunity costs, and in a world of scarce resources a ‘no-compromise attitude will therefore produce confusion and arbitrariness and may, on balance, disserve the very rights it intends to promote.’<sup>9</sup> In short, the ‘cost of rights’ approach undermines a plethora of conventional binary oppositions (negative rights vs. positive rights; private law vs. public law; government vs. free markets; etc) which may obfuscate more than they clarify.

For all its self-proclaimed honesty and good sense, and its widely professed wisdom, this is a remarkably superficial argument. For one, why assume that the fact that the defence of all categories of rights are overlaid by their administration by the State effecting transfers and making public provision is salient or *decisive* to continuity? Why does the fact that all rights involve costs collapse any qualitative definitional feature and place civil and social rights on a continuum, the latter distinct from the former as a question of ‘degree rather than kind’ in being ‘more expensive and more redistributive’?<sup>10</sup> Why would the fact that ‘all rights depend on the availability of economic resources and political will’ establish any kind of common denominator that might accommodate continuity other than in its most surface manifestation, given that the political question and the fight are over the justification of the allocations? The political question thus re-invokes a deep *discontinuity*, under which the tenuous accommodations across the faultline of democracy and capitalism are potentially torn asunder. In all this, the ‘budgetary’ argument that establishes continuity by stringing together the shared *surface* characteristics of rights offers an argument for continuity-cum-elision. Where the difference of kind (of social rights vis-à-vis individual rights) is transfigured into a difference of degree, their *differentia specifica* – their eidetic specificity – collapsed, they are forced to blend seamlessly into the long postscript of the political, then social, accommodations of capitalism. And with this blending-in the very thing they name, *solidarity*, is supercoded to capitalist determinations and thereby cancelled out. To argue that both social and property rights are ‘positive’, institutional’, ‘costly’ and ‘social’ is hardly controversial but certainly inattentive to the redistributive demand at the heart of the clash of their respective essential justifications. Unless an argument is offered that writes re-distributive demands into property relations, in the way, say, of deviationist doctrine or ‘the commons’, the ‘social’ nature of the property rights regime remains comfortably immune to the demands of solidarity.

And this is all *before* we get to the governance of austerity and its field of fierce appropriations. Because if the ‘budgetary continuity’ argument already falters on its own gathering principle, it certainly collapses with the transition from the tax state to the debt state, that gives the lie to the proffered accommodation of liberty - negative, positive, collective, what have you - under conditions of sovereign debt and the partial or wholesale hollowing out of budgetary sovereignty the first to lose any credible line of defence to the ‘Matthew effect’ of globalisation.<sup>11</sup> The separation of economic from social constitutionalism creates the conditions of a staggering asymmetry between the damage that labour markets wield and the remedies available in terms of social rights jurisprudence, and ‘budgetary continuity’ simply seals over this damage.

The argument that follows is not an abandonment of Marshall’s argument about continuity but its (improbable) restatement in the framework of fundamental antinomy. To hold on to continuity in the face of the contradictory articulation of categories of rights gives antinomy its epistemological

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<sup>8</sup> Id. 64

<sup>9</sup> Id. 125

<sup>10</sup> Ibid., at 627

<sup>11</sup> Alain Supiot refers to the bizarre effect ‘where the very commitment of national economies to political redress of the social costs of globalization becomes self-defeating because it weakens the state’s ability to deliver it. Accordingly those most in need of protection are those most bereft of it, due to the labour market’s flexibility at circumventing the costs of social protection by relocating to cheaper sites. A. Supiot, *L’esprit de la Philadelphie: la justice sociale face au marché total* (2010)

significance. The ‘accommodationist’ positions did indeed address the question of continuity *institutionally*; and it was the institutional junctures of selective coupling and de-coupling that invited us to probe the dynamics of selective alignment on which so much of their casting of continuity in fact hangs *and falters*. The continuity-as-commensurability of the ‘budgetary continuity’ argument, the toothless corrective of the *social* market, the insidious attribution of proportionate weightings, cast continuity on a register where market allocations always-already skew distribution, where *re*-distribution comes too late, where the recuperation of what is owed to the producers of value is obscured and undercut.

Let us insist then on the fundamental, if controversial, premise that social rights are incongruous to capitalism and its particular structures of opportunity and reward.<sup>12</sup> Where the market does *all* the work of allocating value to resources amongst possible uses, the distribution of resources with the explicit aim to meet needs is, from the point of view of market thinking, *irrational*. This incongruity made the ‘accommodations’ problematic, incapable of managing the faultline between democracy and capitalism except by subsuming the former to the latter. What does it mean to insist on the incongruity, and to act on this assumed ‘irrationality’? In essence, I suggest that if social rights are beset by the contradiction between capitalism and democracy, that we explore the significance of their constitutional iteration, as enunciated, that is, with constitutional force, and as unyielding to the various accommodations we explored above. With the urgent appeal not to displace the antinomic significance of social constitutionalism, we might begin to conceptualise how the insistent strategic use of social rights may import a real contradiction, the Hegelian/Marxist moment of the *Dasein des Widerspruchs*, from which the system cannot retract. Let us look a little more gradually about what this means, and why antinomy matters.

To focus on antinomy is to pick up from Hegel, with Marx, not the drive to culmination and synthesis, but the self-undermining moment of contradiction, of thought hitting upon its limit *given* the categories available it. While in Marx contradictions are indices of concrete historical situations, contrary to the cruder materialisms (of Engels and others) they [contradictions] are not to be understood as merely the reflections in thought of real material antagonisms. They point instead to a shortfall of the categories available to us to make sense of the processes of value production and social reproduction, the mismatch between the categories of thought and the modes of social being. Their emergence as contradictions marks the crisis-points of articulation, of expressibility and of intelligibility: of *meaninglessness* that is experienced as such. It is important to emphasise this experiential dimension, the lived incomprehensibility (the ‘*Dasein*’ of the contradiction, as it were) that emerges in particular experiential contexts and that carries its potential energies. It is the lived dimension that is the potential site of disruption of the economy of representation that would otherwise organise meaning, seal it over and, in this state of self-immunisation, place it out of reach. For Frederic Jameson who has given us one of the most thoughtful restatements of the concept, it is the *dialectic* that disrupts such finitude, that refuses the sealing-over, that, to use his formulation, ‘translates the experience of finitude back into upsurges of transcendence.’<sup>13</sup> Whether, as in Marx, this movement receives a historical guarantee, is a separate issue. The complexities that attend both Marx’s and Jameson’s positions need not concern us here. Let us focus instead on what forces through as contradiction against the structural conditions that make such appearance, one might put it, *improbable*. The reference to structural conditions here are those under which people dwell and experience meaninglessness.

This discussion points us in a direction that we cannot possibly take here, and I retain only the elements that return it to our concern with social rights. And the key point is this: social rights as markers

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<sup>12</sup> A Foucauldian reading of incongruity in the theory of rights is suggested by Ben Golder; ‘[Foucault’s] invocations of rights are strategic in this *incongruous* sense as they are situated within the spaces of political formation but are intended to resist and go beyond that formation, to transcend it.’ In B. Golder, ‘Foucault’s critical (yet ambivalent) affirmation: Three figures of rights.’ *Social & Legal Studies*, 20.3, 2011, pp 283-312, at 295

<sup>13</sup> F Jameson, *Valences of the dialectic* (2009) at 34

of society's commitment to sustain lives of dignity for all its members, extend a vocabulary on which meaninglessness may achieve - what we might call - *hermeneutic traction as injustice*. To retrieve the hermeneutic link to injustice, let alone to act on it, is improbable precisely because the register of justice that would authenticate such a link has been disarticulated under the compulsion of market thinking. Under these conditions, that the injunction 'this is unjust' may still invoke the aspiration of solidarity contained in social constitutionalism is at once the mark of the antinomic and of constitutional 'traction'.

At none of the junctures on which the withdrawal of meaning occurs is a communicative-'agonistic' stance capable of redressing the usurpation of value or the withdrawal of speaking position; the collapse, in other words, of democratic defence to capitalist expropriation. Recognition, dignity, solidarity can only be interpreted as *antagonistic* to the given economies of representation, the recognition orders, the given distributions of contingency and necessity, what Rancière with such insight called the '*partage du sensible*'. The antinomic here, expressed by Rancière as 'dissensus' elevates contradiction as condition of staging of political subjectivities, where the collective is not thought of in terms of identification but of enactment.

We can transfer this insight of Rancière's to radicalise Marshall's, in the only way that does justice to his argument about continuity, one that could not have foreseen at the time the paradigm change brought about by the totalising ideology of the market. If Marshall argued for the continuity of generations of rights as a means to overcome the injuries of class, it is because the form of continuity that culminates in social rights can be read back across the preceding generations to disturb received distributions and class positions as sanctioned by property rights, *by means* of political rights. To the dialectic unfolding of rights, each successive generation promises a moment of transcendence. There is a clear message in Marshall against the priority of market allocations and a synthesis that projects back along the path of its culmination a different logic of distribution: at this point the sequential dialectic turns *transversal*. For the radicalised Marshall, then, continuity is understood as antinomic or not at all.

A useful practical example refers us back to the right to strike. In *Laval* and *Viking*, the social right of Scandinavian workers to act to protect the significant achievements of decades of social and labour protection was deemed disproportionate vis-à-vis the economic rights of entrepreneurs to move their capital and hired labour around in a classic case of the race to the bottom. Emboldened, perhaps, by the new constitutional mindset of Europe's constitutional Court, the Employers' group at the ILO, in a move that has created a protracted deadlock particularly conducive to the interests of capital, challenged the settled interpretation of Convention 87 and decades-long jurisprudence of the ILO that the constitutional protection of the Freedom of Association extends to the right to strike.<sup>14</sup> Note how clearly the collectivist and individualist paradigms diverge here to fall on either side of this dispute. Understood as a *social* right, freedom of association enjoins democratic and collective categories and is therefore inseparable from the right to strike as the collective-democratic expression of its exercise. As an *individual* right, freedom of association attaches to the individual's right to (or not to) associate, and is in fact inimical to collective democratic expression and ultimately, to the extent that it may undercut collective agreements and syndicalism, a clear move to 'de-socialise' freedom of association. Pooling the rights and their interpretations here achieves nothing except an insidious commensuration, and the right, as a social right, needs to be understood and exercised, against market-driven harmonious and proportionate realignments, in its *contradictory* articulation to individualism.

A series of political, and therefore reversible, decisions<sup>15</sup> have constructed, buttressed and underwritten the collapse of the constitutional imaginary into its market form. There has been nothing necessary about this construction or its protection; in fact it marks the increasingly desperate attempts

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<sup>14</sup> See T Novitz *International and European protection of the right to strike* (2003) and C La Hovary "Showdown at the ILO? A Historical Perspective on the Employers' Group's 2012 Challenge to the Right to Strike." *Industrial law journal* (2013) 42.4 338

<sup>15</sup> See Supiot *Grandeur et misère de l'État social: Leçon inaugurale prononcée le jeudi 29 novembre 2012*. No. 231. Fayard/Collège de France, 2013.

of Europe's commissars to protect the market from itself.<sup>16</sup> The result has been an insidious constitutionalisation of soft instruments, a creeping, rushed and unsystematic campaign to shore up monetary union that receives the aegis of the constitutional, backed by the noxious exercise of proportionality as optimisation according to market metrics. The suggestion for an antinomic constitutionalism, that will be more fully developed in part 4, invites us to insert 'social rights' in the gap between normative language and social experience, to enable the hermeneutic traction I suggested earlier, to provide a measure against which suffering is experienced not as necessary, but as a wrong. The suggestion is, in other words, to import constitutional contradiction and to act on it.

In previous work I had suggested that at this cusp of the theorisation of antinomy it might be useful for the critical project to recall the idea of 'constitutional *placeholder*'. I argued that as hostage to no functionality – because what is functional about contradiction? – but with an emphasis now on what is being *held*, and held *to*, the constitutional – as placeholder - marks the limit point beyond which there can be no yielding to market determinations without collapsing the constitutional achievement itself.

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<sup>16</sup> What, one might ask, from the market perspective, allows one to draw the line, in the way that Mario Draghi drew it, between usual and unusual market turbulence that licenses the ECB's highly selective and arbitrary decisions over the grant of liquidity?

# Regulatory Competition and Free Movement of Companies under EU Law: Exercise of a Genuine Economic Activity or Just Law Shopping?

Francesco Costamagna\*

## 1. Neoliberalism, regulatory competition and free movement of companies in the EU: Some introductory remarks

Neoliberalism has been traditionally described as an ideology favouring small government and unfettered markets whose main objective is to create an environment in which private interests can flourish. In this context, the State “is supposed to be activist in creating a good business climate and to behave as a competitive entity in global politics”.<sup>1</sup> The promotion of this form of competition has progressively become one of the main objectives of the neoliberal agenda, contributing to the emergence of what has been defined as the competition State.<sup>2</sup> From a neoliberal perspective, putting law-makers in competition with one another is as a way to undermine ‘excessive’ regulation, restraining States’ regulatory power and freeing up more space for market forces.<sup>3</sup>

Regulatory competition can be defined as a process enabling economic actors to select and deselect the law regulating their formation or activity, putting jurisdictions in competition with one another for the attraction of scarce resources.<sup>4</sup> Earlier theoretical models posited that, under conditions of perfect competition, the creation of a market for the rules, whereby laws are made to match the preferences of economic actors, contribute to maximising allocative efficiency.<sup>5</sup> This vision proved to be over-optimistic, failing to take into due consideration the negative spill-over effects that regulatory competition could have in many fields, such as labour law, tax and environmental law, by inducing a ‘race to the bottom’. Indeed, one of the ways in which States can succeed in the race to attract or retain resources is by lowering regulatory standards. The need for increasing ‘international competitiveness’ has been rhetorically used to justify the implementation of de-regulatory policies and the adoption of measures putting severe constraints, *inter alia*, on workers’ rights.<sup>6</sup>

The paper deals with regulatory competition in the EU legal order. The relationship between regulatory competition and the European integration process is a controversial one. The multi-tiered structure of its legal order creates the perfect conditions for regulatory competition. Economic actors can exploit the differences existing between national legal orders thanks to the removal of the obstacles hindering their freedom of movement at supranational level.<sup>7</sup> In particular, the ability of companies to move freely across borders, as protected by Article 54 TFEU, represents a potentially potent driver of

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<sup>1</sup> David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2005) 79.

<sup>2</sup> See Philip G. Cerny, ‘Paradoxes of the Competition State: The Dynamics of Political Globalization’ (1997) 32 *Government and Opposition* 251. See critically Philippe Genschel and Laura Seelkopf, ‘The Competition State: The Modern State in a Global Economy’ in Stephan Leibfried, Evelyne Huber, Matthew Lange, Jonah D. Levy and John D. Stephens (eds), *The Oxford Handbook of Transformations of the State* (Oxford University Press 2015) 234.

<sup>3</sup> John O McGinnis, ‘The Decline of the Western Nation State and the Rise of the Regime of International Federalism’ (1996) 18 *Cardozo Law Review* 903, 915-916

<sup>4</sup> Simon Deakin, ‘Is Regulatory Competition the Future for European Integration?’ (2006) 13 *Swedish Economic Policy Review* 71, 74.

<sup>5</sup> Charles Tiebout, ‘A Pure Theory of Local Expenditure’ (1956) 64 *Journal of Political Economy* 416.

<sup>6</sup> Peter Kunzlik, ‘Neoliberalism and the European Public Procurement Regime’ (2013) 15 *Cambridge Yearbook of European Legal Studies* 283, 300.

<sup>7</sup> Catherine Barnard and Simon Deakin, ‘Market Access and Regulatory Competition’ in Catherine Barnard and Joanne Scott (eds), *The Law of the European Single Market: Unpacking the Premises* (Hart 2002) 198.

regulatory competition. Adhering to the neoliberal vision of this process, regulatory competition can be considered as a force that contributes to the dismantling of the barriers to the free circulation of goods and services. If viewed from this angle, regulatory competition is not accident, and even less an abuse, but a constituent element of the internal market.

However, there is now greater awareness on the fact that regulatory competition can be a threat for the legitimacy and the acceptability of the European integration process as a whole. Fostering unbridled intra-EU regulatory competition comes at the expense of the pursuit of non-economic objectives and the safeguard of non-economic values, which tend to be perceived just as obstacles on the road toward greater efficiency. This may undermine one of the key features of the EU constitutional identity, as enshrined in Article 3 TEU. Furthermore, the process encroaches upon Member States' autonomy in the exercise of their legislative prerogatives in fields – such as taxation or social policy – that are still their exclusive competence. This occurs with regard to both the content of the norms, which must conform with the expectations of market actors even at the expenses of the pursuit of other competing objectives, and the legislative process.<sup>8</sup> As for the latter, the unleashing of regulatory competition contributes to transform law-making from a political process to a market-based one.

Against this background, the paper purports to shed more light on the status of regulatory competition in the EU legal order and, thus, on how far national authorities can go in confronting it: whether they have to accept this process as an inevitable consequence of the internal market or whether they can consider it as an abuse and, thus, take action against it. To this end, the paper looks at the rules governing the free movement of companies in the EU, focusing, in particular, on the scope of application of the freedom of establishment and the limits thereto. More in details, it seeks to determine whether this freedom is intended to simply allow companies to freely choose the place where they want to carry out their activity on a stable basis or as a tool enabling them to freely choose the law that governs their formation and activity.

## **2. Lack of genuine economic activity in the host State as a reason to exclude the applicability of the rules on the freedom of establishment?**

The question whether Treaty provisions on freedom of establishment also cover companies' transfers whereby the undertaking only aims to change its legal clothes with no intention to pursue an actual business in the host State was a key issue in *Polbud*, a judgment adopted by the CJEU in October 2017.<sup>9</sup> The case concerned the decision of a Polish company to convert into a private limited liability company governed by Luxembourg law, while continuing to carry out its activity in Poland. The Polish legislation stood in the way of this plan, since it made the cancellation from the national commercial register conditional upon the company being wound up after being liquidated. *Polbud*, wishing to retain its legal personality, refused to fulfil this requirement and, accordingly, saw its application to be removed from the register rejected by the competent authorities. It then brought a judicial action against this decision, claiming that the requirement imposed by the Polish legislation was incompatible with Article 49 and 54 TFEU. The Polish Government, backed by other intervening Member States contested the applicability of these provisions in the case at hand, pointing to the fact that *Polbud* was just trying to change its legal clothes for tax purposes, without any intention to move the centre of its commercial activities from Poland to Luxembourg.

In her Opinion, AG Kokott held that, assuming that the claim put forward by the Polish Government was correct, the situation did not fall in the scope of application of EU rules on freedom of establishment.

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<sup>8</sup> Floris De Witte, 'The Architecture of EU's Social Market Economy' in Panos Koutrakos and Jukka Snell (eds), *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar 2017 )125.

<sup>9</sup> Case C-106/16 *Polbud* [2017] EU:C:2017:804.

Indeed, “although that freedom gives economic operators in the European Union the right to choose the location of their economic activity, it does not give them the right to choose the law applicable to them”.<sup>10</sup> Her reasoning started from the seemingly unassailable premise according to which freedom of establishment’s rules apply only to operations involving an act of establishment.<sup>11</sup> According to AG Kokott, the notion presupposes the exercise by the undertaking of a genuine economic activity in the host Member State on a stable and continuous basis. This view of establishment corresponds to the one codified by Article 4 of the Services Directive,<sup>12</sup> which defines establishment as “the actual pursuit of an economic activity, as referred to in Article 43 of the Treaty, by the provider for an indefinite period and through a stable infrastructure from where the business of providing services is actually carried out”. Moreover, the definition is perfectly in line with the one elaborated in *Gebhard*, where the CJEU held that “[t]he concept of establishment within the meaning of the Treaty is therefore a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom”.<sup>13</sup> Furthermore, AG Kokott highlighted that the CJEU has referred to an economic activity-based definition of establishment also in a number of judgments concerning the free movement of companies. Both in *Cadbury Schweppes* and in *VALE*, for instance, it maintained that the notion of establishment “presupposes the actual establishment of the company concerned and the pursuit of genuine economic activity there”.<sup>14</sup>

The emphasis put on the exercise of a genuine economic activity as a prerequisite for the application of Treaty rules on freedom of establishment led AG Kokott to exclude cross-border conversions having the sole objective of changing the *lex societatis* from the protection of these provisions. This conclusion has the merit to fully embed freedom of movement into the internal market,<sup>15</sup> provided that the latter is intended as an area where the obstacles to the free movement have been removed in order to stimulate the pursuit of actual business activities across border and not to increase regulatory competition opportunities. Indeed, the solution proposed by AG Kokott makes clear that, at least, regulatory competition cannot be considered as an objective of the internal market.

For all its merits, the CJEU chose not to adhere to the solution proposed by AG Kokott, rejecting the proposition according to which freedom of movement rules apply only when the company pursues a genuine economic activity in the host State. Indeed, according to the CJEU it is immaterial whether the company wishes to convert in an entity governed by the law of another Member State without any intention to conduct its business there. This type of transformation falls within the scope of application of Article 49 and 54 TFEU, as being an economic operation in respect of which Member States have to comply with the freedom of establishment. The only requirements to be fulfilled are, first, that the converting company has been formed in accordance with the legislation of a Member State and has its registered office, central administration or principal place of business within the EU and, second, that the conditions set forth by the legislation of the State of destination are satisfied.<sup>16</sup> Any consideration concerning the activity that the converting company is set to carry out in the host Member State is immaterial in this context.

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<sup>10</sup> Case C-106/16 *Polbud* [2017] EU:C:2017:351, Opinion of AG Kokott, para. 38

<sup>11</sup> *Id.*, para. 35.

<sup>12</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376.

<sup>13</sup> Case C-55/94, *Gebhart* [1995] EU:C:1995:411, para. 25.

<sup>14</sup> Case C-196/04, *Cadbury Schweppes* [2006] EU:C:2006:544, para. 54; case C-378/10, *VALE* [2012] EU:C:2012:440, para. 34.

<sup>15</sup> Johan Meeusen, ‘Freedom of Establishment, Conflict of Laws and the Transfer of a Company’s Registered Office: Towards Full Cross-Border Corporate Mobility in the Internal Market?’ (2017) 13 *Journal of Private International Law* 294, 322.

<sup>16</sup> *Polbud* (n 9), paras. 32-33.



The formalistic approach adopted by the Court led to a solution that seems to be logically flawed, coming to admit the applicability of freedom of establishment' rules to situations where there is no establishment. Yet, the choice to construe freedom of establishment's scope of application broadly, disconnecting it from the exercise of any genuine economic activity in the host State, is in line with CJEU's case-law.<sup>17</sup> This approach had been first adopted in *Segers*, a case concerning the exclusion from a national sickness scheme of a director of a company incorporated in England that did business entirely in the Netherlands. Replying to the doubts expressed by the national courts as for the relevance of the latter element, the CJEU made clear that Article 58 EEC (now Article 54 TFEU) "requires only that the companies be formed in accordance with the law of a Member State and have their registered office, central administration or principal place of business within the Community. Provided that those requirements are satisfied, the fact that the company conducts its business through an agency, branch or subsidiary solely in another Member State is immaterial".<sup>18</sup> The ruling represented the first moment in which the CJEU came to admit, even though only implicitly, that the freedom of establishment could be a vehicle for law shopping. In his Opinion on the case, AG Darmon made it explicit, arguing that "the logical consequence of the rights guaranteed under the Treaty [is] the fact that a national of a Member State may take advantage of the flexibility of United Kingdom company law".<sup>19</sup>

What was just latent in *Segers* became manifest in *Centros*, a case concerning the exercise of the freedom of establishment by a British company that had been openly set up by a Danish couple with the sole purpose of circumventing the Danish legislation on the paying up of the minimum share capital. This was the reason why the competent Danish authorities had refused to register *Centros*' branch office. The CJEU rejected the claim put forward by the Danish Government according to which the situation had a purely internal character, falling outside freedom of establishment's scope of application. According to the CJEU, it is "immaterial" whether the company has been established in a country where it does not conduct any business and with the sole purpose of benefiting from a laxer corporate law. The only relevant element is that *Centros* has been formed in accordance with the UK legislation and has its registered office there.<sup>20</sup> The very same approach has been adopted also in *Inspire Art*.<sup>21</sup>

Admittedly, even in those rulings concerning cross-border corporate mobility where the CJEU explicitly linked the notion of establishment to the exercise of a genuine economic activity in the host State, such as the above-mentioned *Cadbury Schweppes* and *VALE*, it did so when reviewing the justification of a restriction and not when defining the scope of application of the rules on freedom of establishment. Some authors argued that this made little difference, since "[n]othing in the wording of both judgments suggest that the Court wishes to limit the impact of its interpretation".<sup>22</sup> In their view, these judgments had to be understood as excluding from the protection of freedom of establishment cross-border conversions not relating to the pursuit of an economic activity in the receiving State. This understanding is now clearly untenable in the light of *Polbud*, which made clear that freedom of establishment also protects corporate transformations aiming solely at modifying the law applicable to the corporation through the transfer of the sole registered office.

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<sup>17</sup> For an overview see Martin Gelter, 'Centros, the Freedom of Establishment for Companies and the Court's Accidental Vision for Corporate Law', in Fernanda Nicola and Bill Davies (eds), *EU Law Stories* (Cambridge University Press 2015) 309-337.

<sup>18</sup> Case 79/85, *Segers* (1986) EU:C:1986:308, para. 16.

<sup>19</sup> Case 79/85, *Segers* (1986) EU:C:1986:233, Opinion of AG Darmon, para. 6.

<sup>20</sup> Case 212/97, *Centros* (1999) EU:C:1999:126, paras. 17-18.

<sup>21</sup> Case C-167/01, *Inspire Art* (2003) EU:C:2003:512.

<sup>22</sup> Meeusen (n 15) 318.

### 3. Law shopping as an abuse justifying the non-applicability or a restriction of the freedom of establishment?

Member States intervening in the cases concerning the free movement of companies repeatedly claimed that corporate transformations not involving the pursuit of an economic activity in the host State amounted to an abuse justifying either the exclusion of these operations from the scope of application of the freedom of establishment or the adoption of restrictive measures thereon.

The notion of abuse is a frequent presence in the CJEU case law. Saydé observed that references to this notion, or related ones, can be found in one out of ten judgments and in one out of five opinions delivered by advocate generals.<sup>23</sup> Abuses have been traditionally divided into two main categories. The first one encompasses those situations where a person seeks to obtain an undue benefit by formally exercising the right in conformity with EU rules granting that right. The second category includes cases where the exercise of a right granted by EU law serves as a vehicle to circumvent national laws or regulations.

The prohibition to rely upon EU law for abusive or fraudulent ends is considered as a general principle of EU law.<sup>24</sup> The CJEU has played a major role in the consolidation of this principle, delineating the criteria for assessing the existence of an abuse. In particular, in *Emsland-Stärke* (paras. 52-53) the CJEU came to define the notion on the basis of two main elements. The first one is the so-called “objective test”, according to which the “finding of an abuse requires [...] a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved”.<sup>25</sup> The abusive character of the behaviour depends, thus, on the attainment of the objective of the relevant rules of EU law. The second element, the so-called “subjective test”, looks at “the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it”.<sup>26</sup>

In the cases concerning the free movement of companies, the CJEU has consistently held that law shopping does not constitute an abuse excluding the transfer through which it takes place from the scope of protection of Treaty provisions on freedom of establishment. In *Centros*, the CJEU made clear that seeking to circumvent domestic rules governing the formation of private limited companies fails to pass the objective test, as elaborated in *Emsland-Stärke*. Indeed, according to the CJEU, this conduct is not in contradiction with the purpose of freedom of establishment and, thus, cannot be considered as having an abusive character.<sup>27</sup> Likewise in *Inspire Art*, the CJEU stated “the fact that Inspire Art was formed in the United Kingdom for the purpose of circumventing Netherlands company law which lays down stricter rules with regard in particular to minimum capital and the paying-up of shares does not mean that that company’s establishment of a branch in the Netherlands is not covered by freedom of establishment as provided for by Articles 43 EC and 48 EC”.<sup>28</sup>

The CJEU seemed to have steered a new course in *Cadbury Schweppes*, at least with regard to the possibility to consider law shopping as an abuse justifying the adoption of restrictive measures by the competent national authorities. The case concerned the UK Controlled Foreign Company (CFC)

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<sup>23</sup> Alexander Saydé, *Abuse of Law and Regulation of the Internal Market* (Bloomsbury 2016) 13.

<sup>24</sup> See Annkatrinen Lenaerts, ‘The General Principle of the Prohibition of Abuse of Rights: A Critical Position on its Role in a Codified European Contract Law’ (2010) 18 *European Review of Private Law* 1121, 1123-1139 and Rita De La Feria, ‘Prohibition of Abuse of (Community) Law: The Creation of a New General Principle of EC Law through Tax’ (2008) 45 *Common Market Law Review* 395. See generally Marco Gestri, *Abuso del diritto e frode alla legge nel diritto comunitario* (Giuffrè 2003).

<sup>25</sup> Case 110/99, *Emsland-Stärke* (2000) EU:C:2000:695, paras. 52-53.

<sup>26</sup> See Saydé (n 23) 78-98.

<sup>27</sup> *Centros* (n 20) para. 27.

<sup>28</sup> *Inspire Art* (n 21) para. 98.

legislation then in force, taxing resident companies on profits of subsidiaries established in a jurisdiction with a lower level of taxation, while exempting those with subsidiaries in the UK – even if more favourably taxed – or in a jurisdiction with a higher level of taxation. Cadbury Schweppes Treasury International was a subsidiary of Cadbury Schweppes that had been established in Ireland. In the view of the referring court, this move was aimed at avoiding the application of certain UK tax provisions on exchange transactions and, more in general, to benefit from the Irish tax regime. Therefore, it asked the CJEU to clarify whether such a conduct can be considered as an abuse of the right of establishment and, thus, justifies the adoption of restrictive measures by the concerned Member State. At first, the CJEU followed *Centros*, reiterating that the fact that a company was established in a country with the sole purpose of benefiting from its legislation does not constitute abuse in itself.<sup>29</sup> However, the CJEU went on to assess whether a restriction such as that imposed by the UK legislation on CFC could be justified. The British Government, backed by many other Member States, maintained that the measure intended to counter a form of tax avoidance deriving from the artificial transfer of a resident company to a low-tax Member State through the establishment of a subsidiary there. The CJEU found that a national measure restricting freedom of establishment can be justified if it “relates to wholly artificial arrangements aimed at circumventing the application of the legislation of the member State concerned”.<sup>30</sup> According to the CJEU, the objective of this freedom is to allow a national of a member State to participate on a stable basis to the economic life of another Member State, by carrying out an actual business therein. The creation of arrangements that do not reflect the economic reality<sup>31</sup> and have the sole purpose of escaping the application of tax provisions is not in line with this objective and, thus, can be contrasted by Member States through the adoption of measures restricting the right of establishment. The CJEU also identified a number of elements to be taken into account in order to determine whether the subsidiary can be classified as a “wholly artificial arrangement”.<sup>32</sup> In particular, one needs to look at its physical existence in terms of premises, staff and equipment in the territory of the host Member State, so as to assess whether the subsidiary carries out any genuine activity.

This decision was very well received by many commentators, and even members of the CJEU, considering it a more careful attempt to strike a balance between the competing interests at stake, if compared with *Centros*. For instance, in his Opinion on *Cartesio*, AG Poiares Maduro affirmed that the finding according to which Member States are not precluded from taking action against ‘letter-box’ or ‘front’ companies “represents a significant qualification of the rulings in *Centros* and *Inspire Art*, as well as a reaffirmation of established case-law on the principle of abuse of Community law, even though the Court continues to use the notion of abuse with considerable restraint – and rightly so”.<sup>33</sup>

However, in *Polbud*, which, even more than *Centros*, represented a paradigmatic case of the use of freedom of establishment as a vehicle for law shopping, the CJEU reverted to the old habits. In particular, it made clear that the decision of a company to move its registered office to another Member State “for the purpose of enjoying the benefit of more favourable legislation does not, in itself, constitute abuse”.<sup>34</sup> Furthermore, it did not even take into account the possibility that incorporating a company under Luxembourg law without it carrying out any economic activity there could be considered as a “wholly artificial arrangement” and, thus, justify the adoption of restrictive measures. Instead, it held that imposing a restriction upon the exercise of the freedom of establishment would amount to establishing a general presumption of fraud in any case in which the transfer does not reflect the economic reality and this is not admissible under EU law. Against this background, law shopping can

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<sup>29</sup> Cadbury Schweppes (n 14) para. 37.

<sup>30</sup> Id., para. 51.

<sup>31</sup> For a critical take on the choice to rely on this element, see Saydé (n 23) 89-93.

<sup>32</sup> Cadbury Schweppes (n 14) paras. 67-68.

<sup>33</sup> Case 210/06, *Cartesio* [2008] EU:C:2008:294, Opinion of AG Maduro, para. 29.

<sup>34</sup> *Polbud* (n 9) para. 40.

no longer be considered as an unintended consequence of the internal market, having become an inherent feature thereof or even an objective to be pursued through the application of EU rules.

## The “Digital Single Market” and Neoliberalism: Reflections on Net Neutrality

Sophie Robin-Olivier\*

Net neutrality does not easily fit in the framework of neoliberalism. Indeed, it is an element of the “digital single market”, according to the European Commission. But market integration does not constitute the only objective of internet regulation and the notion of “digital single market” is misleading. Although private actors and economic freedoms are key elements of the digital legal framework, this centrality does not capture the whole dimension of EU law in this field. The notion of “net neutrality”, in particular, which was affirmed by Regulation 2015/2120<sup>1</sup>, illustrates the entanglement of fundamental freedoms (freedom of speech, freedom of information and pluralism), economic rights and interests, and democratic values. It is thus hard to decide whether this Regulation falls on either side of a binary order.

As the EU stands out as a strong defender of net neutrality, together with other digital rights (cf. the General Data Protection Regulation - Regulation 2016/679<sup>2</sup>), EU law developments cannot be fully understood in the categories of neoliberalism. Because they concern an emerging “common good”, to which a “right of access” must be recognized, for both private and public entities, and for both profit and non-profit activities, internet regulation appears as a new territory for EU law, which is neither limited to a new dimension of the internal market (notwithstanding the reference to a “digital single market”) nor an element of the area of freedom, security and justice.

The concept of net neutrality goes back to the initial ideas and developments of the internet, where the “cyber-space” was considered a virtual second world characterized by openness and freedom. Myth or reality, access to the internet was originally “neutral” (without discrimination between different data packages passing on it based on user, content, platform, etc.). However, openness and freedom are threatened by traffic management practices developed by Telecom operators (increasing control over data flow, blocking or slowing down specific applications or services and opening the possibilities for differentiated pricing). In this economic context, net neutrality had to be guaranteed by the law and, preferably, since the network extends internationally, at an international or, at least, European level. The evolution that led to Regulation 2015/2120 took time. It had to overcome the resistance of telecommunications operators, who were openly against net neutrality and lobbied against it. To begin with, the 2002 Universal Services Directive was amended, in 2009<sup>3</sup>, to include a rather limited obligation to inform end-users of limitations imposed on access or distribution possibilities. The adoption of Regulation 2015/2120, years after, was a little victory for defenders of net neutrality, which was all the more valued when net neutrality was called in question, in the US<sup>4</sup>.

By focusing on net neutrality, this contribution intends to explore the emergence of new categories of EU law (a fundamental right of access to the internet, a new kind of free movement, namely), which do not fit in the structures of neoliberalism (the opposition between social and economic rights and interests, or the private/public divide, namely). Rather, this new field requires taking into account the particular way through which EU law reacts to social, economical and, mostly, technological transformations associated with the “internet ecosystem”. We will start by examining net neutrality in

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<sup>1</sup> Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access.

<sup>2</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

<sup>3</sup> Directive 2009/136/CE of the European Parliament and of the Council of 25 November 2009.

<sup>4</sup> In Dec. 2017, the US Federal Communications Commission (FCC) decided to revoke net neutrality.

the framework of the “digital single market”, where Regulation 2015/2120 is classified, before considering why and how it reaches beyond market regulation to touch constitutional issues.

## 1. Net neutrality as (digital) market regulation

With Regulation 2015/2120, net neutrality has become a norm regulating an economic activity for the purpose of market integration (positive integration). By adopting such a regulation, the EU is not deregulating (as the US FCC recently did) nor inviting Member States to do so. Giving a legal force to the notion of “open internet” is considered necessary to limit the power of internet providers and avoid that they block selected content, or slow down internet speeds for customers. Thus, net neutrality implies a restriction to the freedom of central market actors, who would, otherwise, be free to discriminate between different types of internet traffic.

Those who are opposed to the Regulation contend that it will slow down the development of the market and investments, hinder the capacity of Telecom companies to recoup investments quickly by developing innovative premium services around security, artificial intelligence or even specialized “IoT” (Internet of Objects) traffic like tracking. To be sure, the EU Regulation is not granting more market freedom to ISP (Internet Service Providers), but aims at ensuring that they are submitted to the same restrictive rules, throughout the single market. It is not surprising however, that harmonization of business law for internal market purposes is not a source of more freedom for economic actors. Regulation 2015/2120 compares with many other regulations based on article 114 TFUE, which allows harmonization for “the establishment and functioning of the internal market” and requires that the Commission, in its proposals concerning, namely, consumer protection, takes as a base “a high level of protection”.

In addition, even if this is not as central as the free movement dimension, the new Regulation is also motivated by anti-trust concerns, which tends to confirm that it is “internal market-oriented”: it is supposed to avoid vertical integration through ISP preference for their own downstream services over those of competing content providers.

## 2. Neutrality as formal equality

Net neutrality implies that ISP must treat data equally and cannot block or slow down specific applications or services based on paid prioritization or other preferences. Although it is not a term used by the EU Regulation, which preferred the notion of “open internet”, non-discrimination and the prohibition of restrictions to the circulation of contents, neutrality is what the regulation requires from ISP. According to article 3(3), “providers of internet access services shall ***treat all traffic equally***, when providing internet access services, ***without discrimination, restriction or interference***, and irrespective of the ***sender and receiver***, the ***content*** accessed or distributed, the ***applications or services*** used or provided, or the ***terminal equipment*** used.”

The notion of non-discrimination, when associated with neutrality, is a concept that belongs *a priori* to the vocabulary of neoliberalism. Compared to social law that takes into account concrete situations and the consequences on these situations on individual or collective choices, neutrality requires the same treatment for all, without distinguishing according to the respective powers or specific situations of the persons benefiting from the equal treatment rule. Thus, the conception of equality in the Regulation does not correspond to the concrete conception of equality that social law and social policies require. It does not try to compensate for inequalities nor prevent some of the most powerful economic actors to reap most of the benefits of the rights or advantages granted.

Net neutrality, in the EU Regulation, is indeed based on the recognition of the power of ISP and the risk of abuse, when they decide on the management of traffic, based on their own interests, and, possibly, to the detriment of users. However, if net neutrality, as an obligation for ISP, is a limitation of their

economic power to protect other interests (fair competition and the common good), the non-discrimination principle itself, that ISP must respect, is a formal rule, which can be put in the category of “liberal” or “free-market” rules. Indeed, “end-users” consist in a non-homogeneous group of persons, including very powerful economic actors (Facebook or Google, for instance), which disproportionately benefit from the non-discrimination rule.

### **3. Net neutrality: a new right of access**

Although it has been observed that net neutrality is market-oriented, the goals pursued by Regulation 2015/2120 do not only include fair competition and the achievement of a “digital” single market. Much broader objectives are sought. Access to the internet and non-discrimination between content providers allows all internet users to distribute and receive contents without a prior selection based on the economic power of content providers. Net neutrality determines access to essential resources (information, data), contributes to media pluralism, freedom of expression, free enterprise... It is quite obvious that regulation 2015/2120 is not striving only to achieve a market, but aims at creating (maintaining) a virtual area of freedoms (the “internet ecosystem”), where different kinds of relationships take place, in addition to business transactions. To this aim, it is giving birth to a new right of (equal) access to the internet and a new kind of free movement.

According to article 3(1) of Regulation 2015/2120 on “Safeguarding of open internet access”, “end-users shall have the right to access and distribute information and content, use and provide applications and services, and use terminal equipment of their choice, irrespective of the end-user’s or provider’s location or the location, origin or destination of the information, content, application or service, via their internet access service.” This right of equal access to the internet includes the right to be informed and to communicate information, to use and provide applications and services.

### **4. Emergence of a fundamental right of access to the internet**

Whether this right constitutes a fundamental right is one important question, when considering its legal force. The Body of European Regulators for Electronic Communications (BEREC), in its Guidelines on net neutrality (2016), refer to the “fundamental right” of consumers to benefit from an open, non-biased, internet. And, according to G. Teubner<sup>5</sup>, internet neutrality belongs to the category of fundamental rights to inclusion: this “access rule” ensures that all users of the internet possess the same freedoms (“possibilities of action”).

But if the right of access to the internet classifies in the category of fundamental rights, it is undoubtedly of a particular type. First, private actors (ISP) are bound by the right of access, not the EU or Member states. This *exclusively* horizontal effect contrasts with the regime of most other fundamental rights. To be sure, it corresponds a recognition of the need to limit private powers, which, in certain contexts, including digital activities, have become more threatening to individual dignity, freedoms or capacities than States’ powers. But, as far as access to the internet is concerned, the difference is that the evolution cannot be described as an extension of limits and obligations imposed on government to private entities: the source of power that was creating a risk of abuse was, initially, private. Net neutrality gave birth to a right of access to a non-political institution, and the “network asset” is governed by private law<sup>6</sup>. This is a major transformation of the conception and function of fundamental rights.

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<sup>5</sup> G. Teubner, “Transnational Fundamental Rights: Horizontal Effect?”, *Netherlands Journal of Legal Philosophy*, Aflevering 3, 2011.

<sup>6</sup> G. Teubner, “Transnational fundamental Rights: Horizontal Effect” (n. 6).

## **5. A new kind of fundamental right**

This situation triggers a series of questions. The impact of individual consent to be deprived of this (fundamental) right is one of them. According to the Regulation, the right to access cannot be restricted by private contracts: “agreements between providers of internet access services and end-users on commercial and technical conditions and the characteristics of internet access services such as price, data volumes or speed, and any commercial practices conducted by providers of internet access services, shall not limit the exercise of the rights of end-users laid down in paragraph 1”<sup>7</sup>. In a private law regime, this solution can be understood as an expression of the classical doctrine of public order requirements: consent is made ineffective to protect the most vulnerable party in a contractual relationship.

Some restrictions to the right of access are nonetheless tolerated. According to article 3(3) § 2 of the Regulation: “reasonable traffic management measures” are accepted. These restrictions are not left to the discretion of their authors but depend on a series of conditions, including proportionality, which allows for judicial review: “to be reasonable, such measures shall be transparent, non-discriminatory and proportionate, and shall not be based on commercial considerations but on objectively different technical quality of service requirements of specific categories of traffic. Such measures shall not monitor the specific content and shall not be maintained for longer than necessary.” The Regulation explicitly limits the exceptions to three categories of traffic management measures: to comply with a legal order, to ensure network integrity and security, and to manage congestion. It adds that equivalent categories of traffic must be treated equally.

As a result, no restriction should be based on commercial objectives pursued by ISP but only technical justifications are deemed legitimate: limits to the fundamental right of access to the internet cannot be justified by economic interest (which is also true in other fields of anti-discrimination law) but only by technical reasons (which is more restrictive than in other fields, and more specific too). Thus, the conflicting interests to be balanced are not private economic interests v. the general interest (including social rights). Rather, a fundamental right of access must be balanced against technical constraints. The limit to the right lies in the technology involved in internet access. Thus, technology can sometimes dominate over rights, as a “natural” obstacle. It remains to be seen how this legal restriction, based on the recognition of technical necessity, can be controlled efficiently.

## **6. Free circulation out of the scope of the internal market**

The prohibition of discriminations, and, beyond, of all restrictions to traffic on the internet recalls the notion of discrimination conceived in the domain of free movement within the internal market (free movement of goods, persons, services and capital). But it is related to a different type of circulation. For one thing, it is not based on nationality, origin, or the place of residence or establishment. Rather, it is a general principle of equality among persons using the internet, among information, applications or services, or equipment used. Such a general principle of non-discrimination (equality) forces one category of persons, in a situation of power, to refrain from behaviors that would result in unfair exclusion of a person from the benefit of a fundamental right or essential good. In the case of net neutrality, it is supposed to avoid exclusion from access to the essential good that internet has become.

According to the third recital of the Regulation, net neutrality is meant to preserve the internet as an open platform for innovation with low access barriers for businesses (providers of content, applications and services and providers of internet access services) but also to promote the ability of end-users to access and distribute information or run applications and services of their choice. As a result, protection is granted to an heterogeneous group: not only to firms that are the actors of innovation (or factors of disruption), but also to all internet users, including persons whose activity is not economic. Free and

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<sup>7</sup> Article 3(2).



open access is also granted to “economically inactive persons”<sup>8</sup>. The activities concerned do not have to be economic activities: no remuneration (of goods or services provided) is required, which distinguishes the “digital” single market from the “real” single market.

This new freedom is also characterized by its specific spatial dimension. According to Article 3(1) of the Regulation, “end-users shall have the right to access and distribute information and content, use and provide applications and services, and use terminal equipment of their choice, *irrespective of the end-user’s or provider’s location or the location, origin or destination of the information* (...)” This does not, as in the case of the four freedoms constitutive of the internal market in the TFEU, require the crossing of a national border: “purely internal” situations are included in the field of application of the “digital single market”. In the “digital” world, free access and free circulation do not necessarily imply transnational mobility.

## 7. Net neutrality and EU conferred powers

As ever, one decisive issue in EU law development is competence. The legal basis of Regulation 2015/2020 is Article 114 TFEU. As in a number of other instances, the EU justified its competence, and exercised it, under the auspices of the market. Considering the aims and achievements of the Regulation, however, this legal basis stands out as a rather artificial classification<sup>9</sup>. Moreover, since the internal market does not justify net neutrality more than any other harmonized (uniform) solution, it is reversible and, for that matter, fragile. Lastly, there is a risk, with article 114 TFEU as a legal basis, that the interpretation of the Regulation is tilted in favor of market objectives, which would contradict its central objectives<sup>10</sup>. This may lead to an extensive interpretation of article 3 of Regulation 2015/2020, concerning exceptions to net neutrality. Such considerations argue in favor of new competences, comparable to article 16 TFEU on protection of personal data, which served as a legal basis for Regulation 2016/679 (General Data Protection Regulation).

## 8. Net neutrality and EU integration

The question of competence is all the more important that net neutrality can be considered an essential vehicle to EU political integration. According to I. Pernice, open access to information and knowledge resources from anywhere for everybody worldwide is about to transform the society, power structures and politics and even the concept of “constitution” as a legal instrument of the society for organizing itself politically, within and beyond national borders<sup>11</sup>. Reflecting on the construction of a constitutional frame of governance at the global level, Pernice affirms that information and transparency, communication and discourse, participation of and control by (global) citizens necessary for organizing legitimacy can be achieved through the internet, which provides “the public sphere needed for effectively setting up a framework and legitimating processes for constituting a global political community”. Transposed at the EU level, the potential of open and free internet is probably even higher. And it has both an internal and external dimension: EU legitimacy can be strengthened, both internally and at a global level, when the EU asserts itself as an authority able to regulate what has become the cornerstone of an ever-growing number of human activities.

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<sup>8</sup> These very persons, whose rights have recently become more limited under free movement rules as illustrated namely in the *Dano* case (ECJ, C-333/13, 2014).

<sup>9</sup> But, for a defense of Article 114 as a proper legal basis, see: J. P. Sluijs, “Network neutrality and internal market fragmentation”, *Common Market Law Review*, n° 5, 2012, p. 1647.

<sup>10</sup> For a comparison, see the interpretation of social directive 2001/23 (on transfers of undertakings) based on Art. 114 in ECJ, *Alemo Herron*, C-426/11.

<sup>11</sup> I. Pernice, “Global Constitutionalism and the Internet. Taking People Seriously”, HIIG Discussion Paper Series n° 2015-01.

## Neoliberalism and Democracy

George Katrougalos\*

A number of empirical surveys, such as Freedom House's "*Freedom in the World*" or the annual "*Democracy Index Report*" by the Economist indicate a relative decline of democracy worldwide and in the West<sup>1</sup>, attributed generally to the emergence of "illiberal democracies", in other words the rise of autocrats in states where elections are held, but rule of law is weakened. This phenomenon is usually associated with populism, an even vaguer term with disputable heuristic value. According to New York Times the two most prominent populist leaders of our times are considered to be President Trump and Pope Francis!<sup>2</sup>

I find this line of analysis fairly superficial. I argue, on the contrary, that the weakening of our democracies can clearly be associated with the dominance of neoliberal policies and more specifically a) the breach of the social contract associated with the welfare state and b) the delegation of important political decisions to politically unaccountable decision makers. By the confluence of these two trends emerges a regime where human rights, especially economic and property rights, are fully protected but the will of the majority has little, if any, influence to substantive decisions related to the overall direction of economic policies and the relations of state and the market. I consider this «undemocratic liberalism» as a catalyst for the generation of its inversed idol, the «illiberal democracy». The archetype of this type of polity is Enlightened despotism, Prussia of Frederick the Great. There may be judges in Berlin, but the miller of Sans Souci is politically unrepresented there.

It is true that under a Schumpeterian, elitist concept of democracy, undemocratic liberalism is impossible, at least after the historic moment when the electoral right is generalized to the whole population. Contrary to the republican ideal of civic participation, Hannah Arendt's "*Vita Activa*", as the only way for a meaningful democracy, in the elitist theories citizens' involvement occurs exclusively via their elected representatives. Electors are not supposed to control the latter in any way except by refusing to reelect them. This is by definition guaranteed in countries having periodical elections. And actually, in periods of relative prosperity, the normal pattern of behavior is that electorates do not consider they should back-seat drive their representatives. The formal legitimacy of the electoral procedure is producing also substantive legitimacy.

However, this is true only when there is undisputed trust in the institutions, in the sense of a widespread and not contested confidence to the fairness of the political process as a whole and, more specifically, in the institutions of political representation. This is not any more the case either in Europe (graph 1) nor in the majority of western democracies (graph 2). Interestingly, despite the common wisdom that EU institutions are facing an existential crisis, actually distrust towards national governments and parliaments is more acute (graph 1).

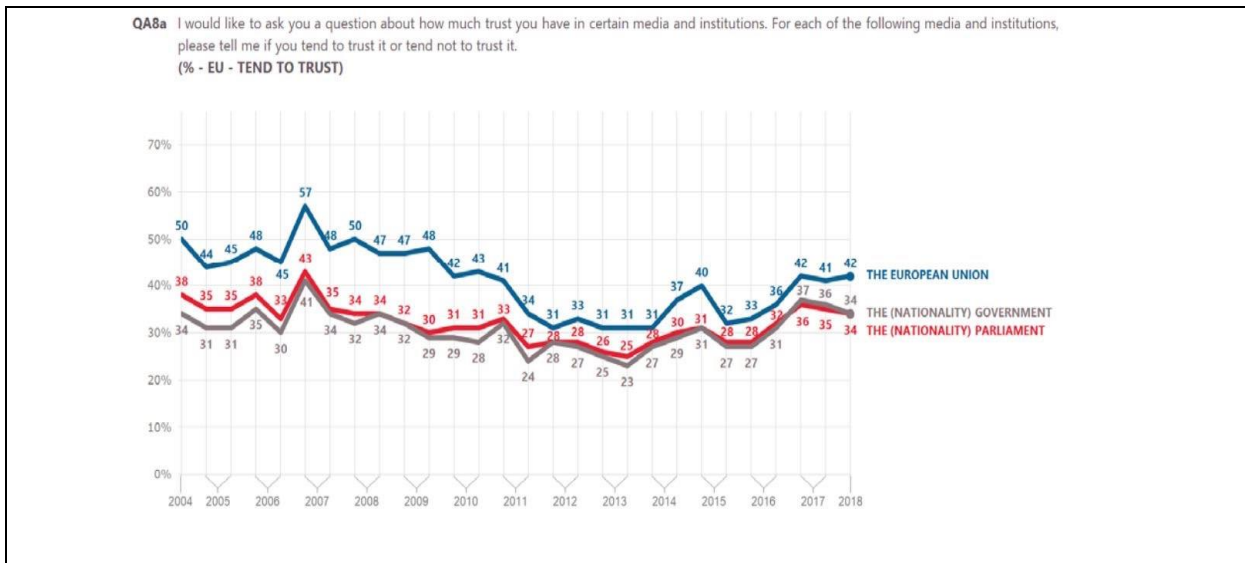
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<sup>1</sup> Cf., for instance, the special issue of Journal of Democracy, R.Kagan, 'Is Democracy in Decline?' Twenty-Fifth Anniversary Issue, (January 2015), Volume 26, Number 1

<sup>2</sup> A. Ivereigh, 'Is the Pope the Anti-Trump?' *NY Times* (4 March 2017) <https://www.nytimes.com/2017/03/04/opinion/sunday/is-the-pope-the-anti-trump.html>, claiming that "the president and the pope, are the world's most famous populists." Cf. Jim Yardley Francis and Trump: Populist Leaders Preaching Divergent Messages, *NY Times*, Feb. 19, 2016, <https://www.nytimes.com/2016/02/20/world/europe/pope-francis-donald-trump.html>.

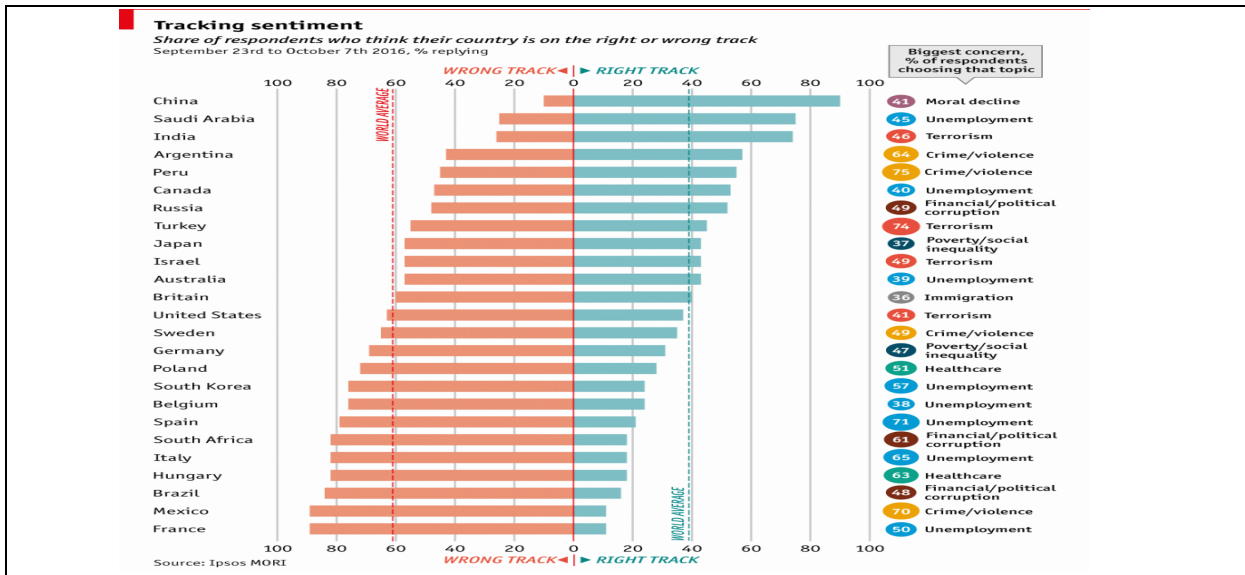
**Graph 1 Trust to National Governments, Parliaments and EU Institutions, 2014-2018**



Source: Standard Eurobarometer, Public opinion in the European Union, 2018, QA 8A

The more interesting finding in graph 2, besides the obvious dissatisfaction of the majority of population in almost all mature western Democracies, is that the biggest concern of the citizens is about social problems related to poverty and inequality, as well as to the decline of welfare state in healthcare or unemployment. (Corruption, crime and violence dominate the answers of the rest of the countries).

**Graph 2 Responders to the question ‘Is my country on the right or the wrong track?’**



Source: Ipsos MORI 2016, <https://www.ipsos.com/ipsos-mori/en-uk/majority-across-25-countries-say-their-country-wrong-track>

The slow process of erosion of the welfare state of the last decades, precipitated by the recent economic crisis, has dramatically uprooted confidence and produced a huge gap of trust towards the political institutions, both national and transnational. In Europe it has been the result of confluence of two parallel trends: the general deregulating impact of globalization and the gradual erosion of the European social model by the dominant in EU neoliberal policies of the last decades.

The limits on the state's regulatory capacity and the removal of barriers to market access are part of the broader process of globalization, as a driving force of both denationalization and extraterritoriality. There is an evolving "disaggregation" of the state through the transfer of public functions both "upwards" to international or transnational entities (EU, WTO) and "downwards," through the de-centering of the decision-making either to lower state levels (devolution) or by new blends of public and private power at all levels of government.

For Europe this trend constitutes a shift of institutional paradigm, a mutation of the European social model, stemmed from the historical compromise of the golden post-WWII decades. In this model, the State, instead of regulating the market only on the basis of norms that derive from the private law of contract, property and tort, uses, in addition "*political power to supersede, supplement or modify operations of the economic system in order to achieve results, which the economic system would not achieve on its own (...) guided by other values than those determined by open market forces*"<sup>3</sup>. In this framework, the relationship between social rights and democratic citizenship has been a dialectic one. On the one hand, social citizenship triggered, through an evolutionary process, the development of modern states. The social dimension was pivotal in state formation<sup>4</sup> and identity<sup>5</sup>, as a direct source of legitimacy. On the other hand, distributive justice has been legitimised on the basis of solidarity that comes from the membership of the political community.

Even before the crisis, the jurisprudence of the European Court of Justice has often exerted a deregulatory impact to the European social model. EU rights were tailored according to the functional requirements of the internal market and the judicial review resulted to an economic constitution, with only two Grundnorms: free movement and competition rules<sup>6</sup>. Consequently, any national interference with market freedoms, even if it derives from constitutional provisions, reflecting "a deeply held national societal more or value"<sup>7</sup>, or even if it concerns matters that do not fall directly within the scope of application of EU law, is deemed to be contrary to free competition and prohibited. This jurisprudence had a grave impact on the Keynesian potential of the European welfare states.

In parallel, at national level, similar policies of deregulation have become the new norm, such as Germany's national strategy of the Agenda 2010 to cut domestic wages in order to increase competitiveness, a policy of 'beggar thyself and thy neighbour'. And, as coup de grace, the effect of these neoliberal policies has been magnified by the crisis. The institutional response to the latter was the intensification of austerity policies aiming to reduce deficits, regardless of the social cost. The EU Fiscal Compact imposed an arbitrary fiscal straitjacket of procyclical policies that pushed the weaker economies to a vicious downward circle, exacerbating inherent the structural imbalances of the Eurozone.

But how these overlapping economic and societal crises have been morphed to a democracy crisis? Rising economic inequality, accentuated by the financial crisis, has been the major catalyst to political destabilization. At the center of this evolution is not, as often posited, just the cleavage between winners and losers of globalization, "somewheres" and "anywheres"<sup>8</sup>. It is neither a cultural problem, related to

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<sup>3</sup> T.H. Marshall, *Social Policy*, (London: Routledge 1975) 15

<sup>4</sup> P. Pierson, "Investigating the Welfare State at Century's End", in P. Pierson (eds) *The New Politics of the Welfare State*, (2001) 1–14, who writes that welfare states are not merely "protective reactions" against the market but, instead, an integral part of modern capitalism.

<sup>5</sup> D.E. Ashford, *The emergence of Welfare States*, (Oxford: Basil Blackwell 1986)

<sup>6</sup> On the concept of the European economic constitution see, M.P. Maduro, *We The Court: The European Court of Justice and the European Economic Constitution*, (Oxford: Hart Publishing 1998), 61

<sup>7</sup> J.H.H. Weiler, "Fundamental Rights and Fundamental Boundaries", in J.H.H. Weiler (eds), *The Constitution of Europe* (Cambridge: Cambridge University Press, Chapter 3, 1999) 121

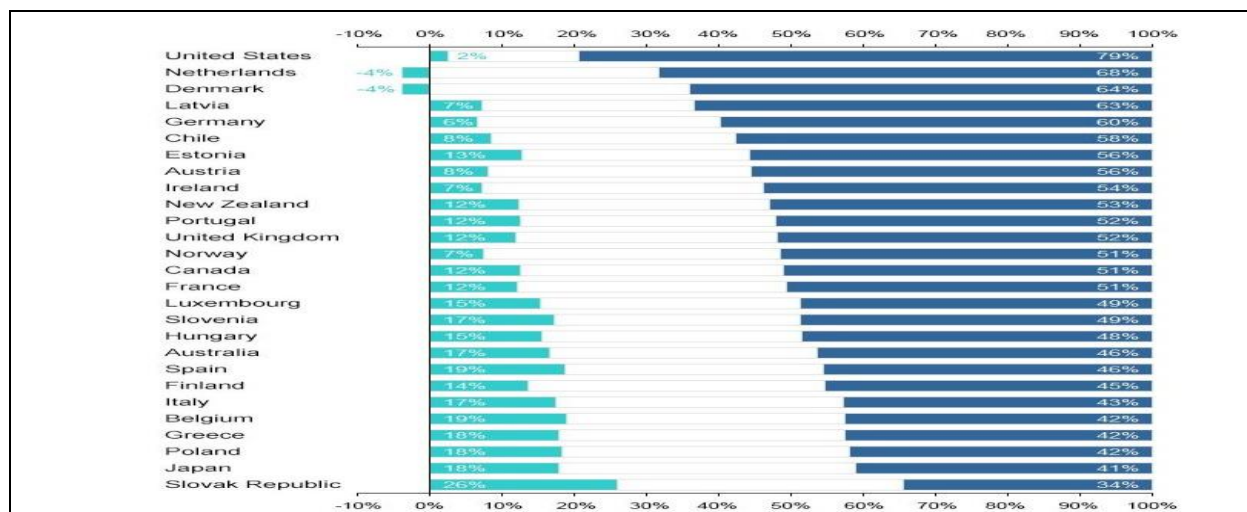
<sup>8</sup> In D. Goodeheart's bestseller, *The Road to Somewhere: The Populist Revolt and the Future of Politics*, (London: Oxford University Press 2017) "anywheres" are the winners of globalizations, educated, middle class professionals who feel at

the emergence of rigid cultural identities, between cosmopolitan citizens and backwaters. The widespread social malaise is caused by more tangible causes: the fall of living standards and the rise of inequalities.

It is true that regional inequality within rich countries has increased, reflecting trends of globalization favoring the open, “global” cities. According to OECD, the average productivity gap between the most productive 10% of regions and the bottom 75% widened by nearly 60% over the past 20 years. But this is a secondary aspect of the much wider upsurge of inequalities. At global level, estimates suggest that almost half of the world’s wealth is now owned by just 1% of the population, amounting to \$110 trillion—65 times the total wealth of the bottom half of the world’s population. Strikingly, the bottom 70% accounts for just 2,7 percent of global wealth<sup>9</sup>.

Even in the more affluent OECD countries, as seen in graph 3, the 60% of the population has considerably less wealth than the richer 10%, whereas. In addition, the top 10% now has an income close to nine times that of the bottom 10%. Even more spectacular is the widening gap between the super rich and the rest of the society: Between 1980 and 2015 the average real income of the 0,01% of the population has grown by 322%, whereas the income of the lowest 90% has stagnated, rising only by 0,003%<sup>10</sup>. This results to a general pauperization of the whole society but also to the squeeze of the middle class, through the shrinkage of the income share accruing to the middle 20%. In the European South the situation is even worse: 97% of the households in Greece and Italy had stable or falling income between 2005 and 2014, compared with just 20% in Sweden<sup>11</sup>, where the welfare state has not been so gravely degraded.

**Graph 3 Distribution of Wealth: Bottom 60% (left) and top 10% (right) of the population**



Source: OECD, Inequalities in Household Wealth among OECD Countries, 2018, <https://twitter.com/OECD/status/1022407707440103424>

ease everywhere, whereas “somewheres” are those attached to their communities, basically because of lack of skills, ambition or professional abilities.

<sup>9</sup> F. Nieva, R. and N. Galasso, ‘Working for the Few - Political Capture and Economic Inequality’ (2014), 178 Oxfam Briefing Paper.

<sup>10</sup> Household income/income share: Congressional Budget Office as appears in <https://www.motherjones.com/politics/2015/02/income-inequality-in-america-chart-graph/>

<sup>11</sup> R. Dobbs et alii, ‘Poorer than their Parents?, Flat or falling economies in advanced economies’, McKinsey Global Institute (July 2016) <http://www.mckinsey.com/global-themes/employment-and-growth/poorer-than-their-parents-a-new-perspective-on-income-inequality> accessed 26 september 2018

The continuous lowering of living standards and the explosion of inequalities should not be attributed abstractly to globalization. The latter is not a natural phenomenon. It is irreversible, but it can be steered and reined by national policies towards either pro-social or pro-market objectives. One of the neoliberal fallacies responsible for the political alienation is the claim that only one set of policies is possible under globalization. For instance, Prime Minister Tony Blair's in 2005 was challenging those calling for a deeper debate on possible alternatives: "You might as well debate whether autumn should follow summer." What has been described in the previous paragraphs is the outcome of deliberate political options, which have degraded labour relations and dismantled the redistributive mechanisms of the welfare state. More specifically:

- Labour market deregulation and accentuated flexibility, in tandem with a decline in trade union rate and worsening of prevalent collective bargaining legislation has reduced the bargaining power of middle and lower-income workers, leading to lower minimum wages relative to the median wage. According to a recent IMF work report, a decline in trade union membership (union rate) and the resulting easing of labour markets measured by an increase in labour market flexibilities index by 81/2 %—from the median to 60th percentile—is associated with rising market inequality by 1.1 %<sup>12</sup>. Moreover, the rapidly increasing gap between rise of productivity and wages<sup>13</sup>, has a cumulative effect on workers' share of national income, which has fallen dramatically after 2000<sup>14</sup>.
- A huge decline of the progressivity of taxation has undermined the funding of the welfare state and widened the inequalities, through cuts of social transfers such as welfare assistance or public retirement benefits. According to OECD, top marginal tax rates, which have been above 80% in 1960, have fallen from 59% in 1980 to 30% in 2009. The average rate of Corporation Tax has been cut from a nominal 34% in 1995 to 22% in 2017<sup>15</sup>. The deterioration of provision of public goods that boosted productivity and growth in the past is also associated with the massive privatization of important social services.

Societal inequalities can be tolerated in a capitalist system, even considered as the "natural" outcome of the invisible hand of the market. It is quite different if people believe that they are unfair, as a direct product of a political decision, such as the cancellation of the social contract inherent to the welfare state. It is highly indicative that the declaration that "economy is rigged" does not come only by outspoken critics of neoliberalism like Jeremy Corbyn, but also by prominent Tory ministers, such as Michael Gove<sup>16</sup>.

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<sup>12</sup> E.Dabla-Norris, K.Kochhar, F.Ricka, N.Suphaphiphat and E.Tsounta (with contributions from P. Sharma and V. Salins) 'IMF, Causes and Consequences of Income Inequality: A Global Perspective' 1 Authorized for distribution by Siddharh Tiwari (June 2015) <<https://www.imf.org/external/pubs/ft/sdn/2015/sdn1513.pdf>> accessed 10 October 2018

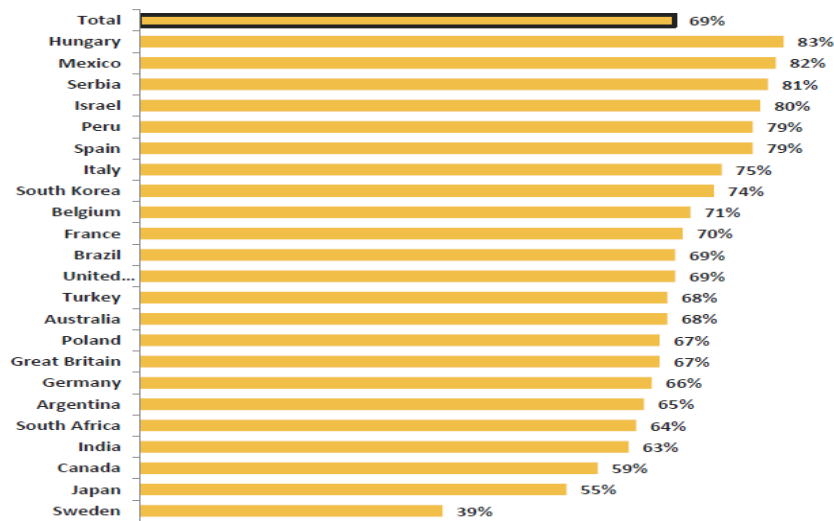
<sup>13</sup> ILO, Global Wage Report 2016-1017, 'Wage inequality in the workplace', ILO, Geneva (2016) <[http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms\\_537846.pdf](http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_537846.pdf)> accessed 30 September 2017

<sup>14</sup> ILO-OECD, with contributions from International Monetary Fund and World Bank Group, 'The Labour Share in G20 Economies' (February 2015) <<https://www.oecd.org/g20/topics/employment-and-social-policy/The-Labour-Share-in-G20-Economies.pdf>> accessed 10 October 2018

<sup>15</sup> IMF, 'Causes and Consequences of Income Inequality'

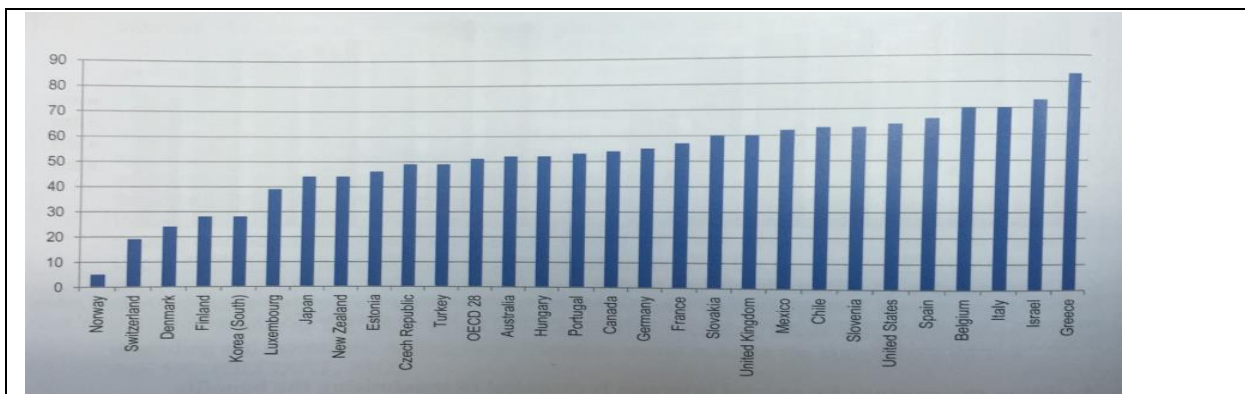
<sup>16</sup> Editorial, 'More Money, more problems', *Economist*, (July 28th-August 3d 2018) vol. 438, n. 9102, 23

**Graph 4 Respondents agreeing that “the economy is rigged to advantage the rich and the powerful”**



Source: IPSOS, Global @visor, Power to the People?, 2017, <https://www.ipsos-mori.com/Assets/Docs/Polls/ipsos-global-advisor-power-to-the-people-tables.pdf>

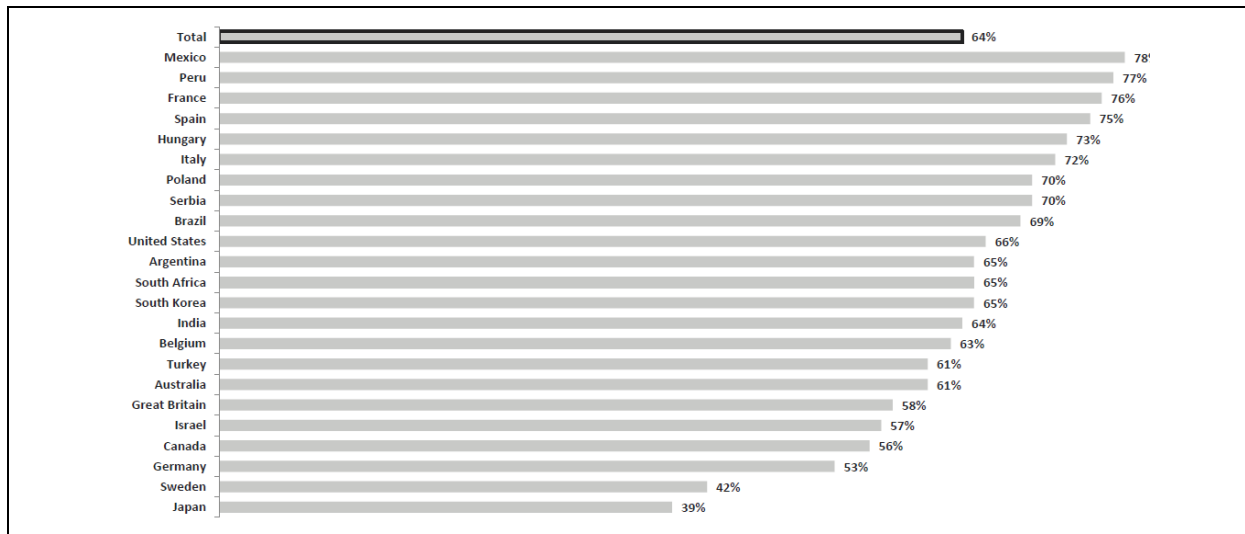
**Graph 5 Respondents agreeing that “the government is run by a few big entities in their own best interests”**



Source: OECD Public Governance Reviews, Paris, 2016, p. 18, based on Transparency International , Global Corruption Barometer 2013, OECD Integrity Framework for Public Investment.

Graphs 4 and 5 show that the feeling that the economy is “is rigged to advantage the rich and the powerful” is a widely embraced impression by the majority of the population in all countries, with the exception of the Nordic ones. It is combined by the alienation of the electorate from the established political parties (Graph 6). These findings provide evidence that populism is rather a symptom than the cause of the declining trust to institutions of political representation.

**Graph 6 Respondents agreeing that that “traditional political parties don’t care about people «like us»”**



Source: IPSOS, Global @dvisor, Power to the People?, 2017, <https://www.ipsos-mori.com/Assets/Docs/Polls/ipsos-global-advisor-power-to-the-people-tables.pdf>:

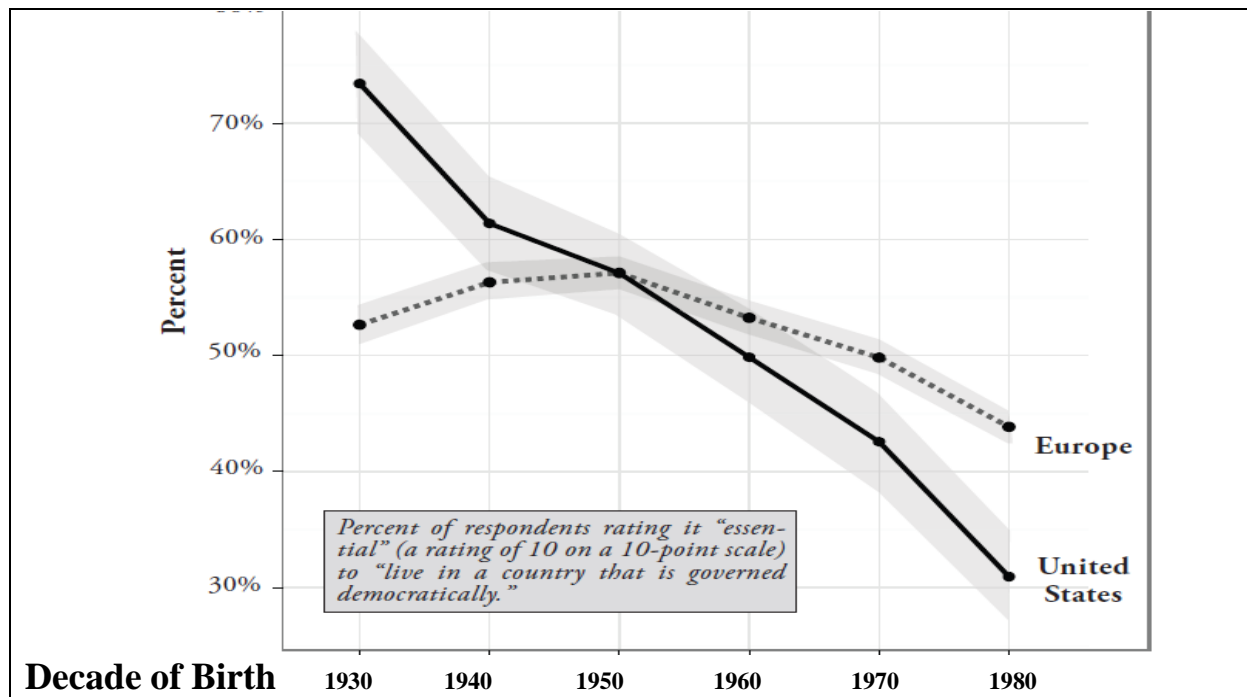
Another clear indication for this assumption is that these opinions are shared not only by those who support populist politicians, but by a clear majority of the whole electorate. For instance, the exit polls after the recent American Presidential election included the following question: “*Is government doing enough for the working class*”? This question has been answered negatively by 67% of Trump voters, but, astonishingly, also by the 66% of Clinton voters<sup>17</sup>.

Finally, as it was to be expected, the democracy per se is affected by the ramping crisis of confidence. As shown in Graph 7, for the majority of the Americans born after the 1960s and the Europeans born after the 1970s, it is not deemed anymore “essential” to live in a Democracy.

<sup>17</sup> J.Tseng and J. Agiesta, ‘The anatomy of a white, working-class Trump voter’ (23 September 2016) CNN/KFF Poll <<http://edition.cnn.com/2016/09/19/politics/trump-supporters-working-class-white-kaiser-family-foundation-infographic>> accessed 2 October 2018



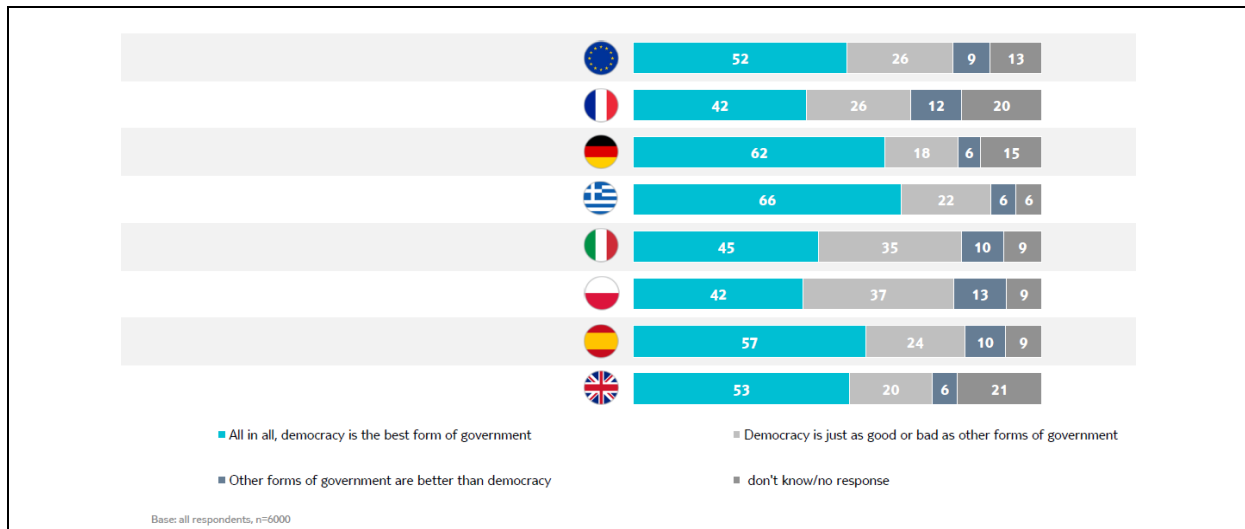
**Graph 7 Respondents agreeing that “It is «essential» living in a Democracy?”**



Source: Responses by Birth Cohorts 1930-1980. Source: World Values Surveys, Waves 5 and 6 (2005–14). Data pooled from EU member states. Valid responses: United States, 3,398; European Union, 25,789, Yascha Mounk and Roberto Stefan Foa, “The Signs of Democratic Deconsolidation,” *Journal of Democracy*, vol. 27, nr. 3, 2016 p. 5-17.

This alienation of younger generations is also depicted in Graph 8, where in some European countries the majority of the young generations have doubts on whether Democracy is indeed the «Best form of Government»”:

**Graph 8 Young Europeans agreeing that “Democracy is the «Best form of Government»”?**



Source: Young Europe 2017, What young Europeans think about Europe, Survey conducted by YouGov on behalf of TUI Foundation, TUI Stiftung 2017

Even moderate politicians, like the former Prime Minister of Australia K. Rudd are considering this situation as an existential threat for the future of democratic regimes: “*Citizens will continue to support their democratic capitalist systems so long as there is reasonable equality of opportunity and a humane social safety net. Take these away and the citizenry no longer has a material stake in mainstream democratic politics*”.<sup>18</sup>

<sup>18</sup> K. Rudd, ‘The rise of authoritarian capitalism’, *New York Times*, (17 September 2018) S5



## WORKSHOP

# LEGAL TRAJECTORIES OF NEOLIBERALISM: CRITICAL INQUIRIES ON LAW IN EUROPE

Scientific Coordinators:

**Margot Salomon** | Robert Schuman Centre for Advanced Studies (RSCAS), European University Institute (EUI) and Law Department, London School of Economics (LSE)

**Bruno de Witte** | Law Department, EUI

Sala Triaria

Villa Schifanoia, Via Boccaccio 121 - Florence

**4 JUNE 2018**

## ■ PROGRAMME

- 09.00 - 09.15 Welcome and Introduction
- 09.15 - 10.45 **International Law**  
From Empire to Austerity: The Golden Thread of International Economic Law  
Speaker: **Fiona Macmillan** | School of Law, Birkbeck (University of London) and Roma Tre  
Commentator: **Ulrich Petersmann** | EUI  
The Utility of Crises and the Regressive Development of International Law  
Speaker: **Margot Salomon** | RSCAS, EUI and Law Department, LSE  
Commentator: **León Castellanos-Jankiewicz** | EUI
- 10.45 - 11.15 *Coffee Break*
- 11.15 - 12.45 **European Human Rights Law**  
The European Court of Human Rights and Accountability for Neoliberal State Conduct: Never the Twain Shall Meet?  
Speaker: **Başak Çalı** | Hertie School of Governance and Director of the Center for Global Public Law, Koç University  
Commentator: **Martin Scheinin** | EUI

Austerity and Human Rights: Reflections on the Jurisprudence of the European Committee of Social Rights

Speaker: **Karin Lukas** | Vice President, European Committee of Social Rights and Ludwig Boltzman Institute of Human Rights, University of Vienna

Commentator: **Bruno de Witte** | EUI

12.45 - 14.00

*Lunch*

14.00 - 15.30

### **EU Law**

Freedom of Establishment for Companies under EU Law: Exercise of a Genuine Economic Activity or Just Law Shopping?

Speaker: **Francesco Costamagna** | Dipartimento di Giurisprudenza, Università Delgi Studi di Torino

Commentator: **Kinanya Pijl** | EUI

Net Neutrality in Times of Crisis: Protection of Democracy, or the Market, or Both?

Speaker: **Sophie Robin-Olivier** | Université Paris I - Ecole de Droit de la Sorbonne

Commentator: **Elda Brogi** | EUI

15.30 - 16.00

*Coffee Break*

16.00 - 17.30

### **Constitutional Law**

The Impact of Neoliberal Policies on Democracy

Speaker: **George Katrougalos** | Alternate Minister of Foreign Affairs, Greece

Commentator: **Dorothee Bohle** | EUI

Social Constitutionalism in the Age of Austerity

Speaker: **Emilios Christodoulidis** | Chair of Jurisprudence, School of Law, University of Glasgow

Commentator: **Gabor Halmai** | EUI

19.30

*Dinner*

## ■ **SPEAKERS**

<b>Dorothee Bohle</b>	Department of Political and Social Sciences, EUI
<b>Elda Brogi</b>	Scientific Coordinator, Centre for Media Pluralism and Media Freedom, RSCAS, EUI
<b>Başak Çalı</b>	Hertie School of Governance and Director of the Center for Global Public Law, Koç University
<b>León Castellanos-Jankiewicz</b>	Max Weber Fellow, Law Department, EUI
<b>Emilios Christodoulidis</b>	Chair of Jurisprudence, School of Law, University of Glasgow
<b>Francesco Costamagna</b>	Dipartimento di Giurisprudenza, Università Delgi Studi di Torino
<b>Bruno de Witte</b>	Law Department, EUI
<b>Gabor Halmai</b>	Law Department, EUI
<b>George Katrougalos</b>	Alternate Minister of Foreign Affairs, Greece
<b>Karin Lukas</b>	Vice President, European Committee of Social Rights and Ludwig Boltzman Institute of Human Rights, University of Vienna
<b>Fiona Macmillan</b>	Corporation of London Professor of Law, School of Law, Birkbeck (University of London) and Roma Tre
<b>Ulrich Petersmann</b>	Law Department, EUI
<b>Kinanya Pijl</b>	Researcher, Law Department, EUI
<b>Sophie Robin-Olivier</b>	Université Paris I - Ecole de Droit de la Sorbonne
<b>Margot Salomon</b>	Marie-Sklodowska Curie Research Fellow, RSCAS, EUI and Law Department, London School of Economics
<b>Martin Scheinin</b>	Law Department, EUI

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