JUSTICE UNDER GLOBAL CAPITALISM?

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I. DOUBLE DIAGNOSIS: CLASH OF RATIONALITIES, RE-SOCIALISATION OF CONFLICTS

Globalised capitalism cannot be understood as being driven by economic processes alone. The alternative to conventional ideas of an economy-led form of globalisation is "polycentric globalisation". The primary motor is an accelerated differentiation of society into autonomous social systems, each of which expands beyond territorial boundaries and constitutes itself globally. This process is not confined to markets alone but also encompasses science, culture, technology, health, the military, transport, tourism and sport, as well as, albeit in a clearly more restricted form, politics, law and welfare.[1]

When describing the external relations between these global villages, the term "clash of cultures" is appropriate. Through their own operative closure, global functional systems are free to intensify their own rationality without regard to other social systems or, indeed, regard for their natural or human environment. Ever since the pioneering analysis of Karl Marx, repeated proof has been provided as to the destructive potential of a globalised economic rationality. Max Weber deployed the concept of modern polytheism in his efforts to identify this potential within other areas of life, and to analyse the resulting (and threatening) rationality conflicts that can arise. In the meantime, the human and ecological risks posed by other highly specialised global systems, such as science and technology, have also become readily apparent to a far broader public. Similarly, and especially where the position of countries within the

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[1] Various social theories on legal globalisation make this point: on theories of global culture see, for example, J.W. Meyer, J. Boli, G.M. Thomas and F.O. Ramirez, "World Society and the Nation-State", in *American Journal of Sociology* 103/144 (1997); on discourse analysis, see A. Schütz, "The Twilight of the Global Polis: On Losing Paradigms, Environing Systems, and Observing World Society", in G. Teubner, ed., *Global Law Without A State*, 257ff; on global legal pluralism, see B. de Sousa Santos, *Toward A New Legal Common Sense: Law, Globalisation & Emancipation* (London: Butterworths, LexisNexis, 2003) *passim*; on global civil society, see D. Held, Democracy and the Global Order: From the Modern State to Cosmopolitan Governance (Cambridge: Polity, 1995), *passim*; on world society, see the contributions in M. Albert & L. Hilkermeier, eds., *Observing International Relations. Niklas Luhmann and World Politics* (London, New York: Routledge, 2004)

southern hemisphere is considered, it is clear that real dangers are posed less by the dynamics of international politics and more by economic, scientific and technological rationality spheres that instigate a "clash of rationalities". In Niklas Luhmann's central thesis, the underlying cause for post-modern risks is to be found within the rationality maximisation that different globally active functional systems are engaged in, which hides an enormous potential for endangering people, nature and society.[2] Problems raised by global finance markets, hedge funds, financial speculation, pharmaceutical patents, drugs trade, and reproductive cloning, for example, are caused by the fragmented and operationally closed functional systems of a global society in all their expansionist fervour. A reversal, or a turn towards the de-differentiation of society and a resurrection of old myths, is also excluded if the civilising achievements of this highly ambivalent development are to be retained: '[T]he sin of differentiation can never be undone. Paradise is lost."[3]

In the eighties of the last century, Habermas diagnosed a conspicuous trend in the crisis of late capitalism: explosive social conflicts have been moved from the private markets to the welfare state institutions.[4] Today we can observe a reversal of this trend: explosive political conflicts that were formerly absorbed within the diverse regimes of the welfare state do not vanish after privatisation; rather, after the take-over by the market, these conflicting energies move back from welfare state institutions to private markets and re-emerge there in new forms. It is now the new private regimes of governance that have to cope with them, but they cannot be resolved by market mechanisms. As a result, privatised activities will be driven into a new politicisation. This re-politicisation is not necessarily limited to the establishment of public law regulatory agencies, however, but also entails the politicisation of private governance itself, its different modes of self-regulation and conflict resolution via private litigation. The sources of this conflict can be identified in those privatised activities that have to bear the clash of rationalities themselves, the structural tensions between their proper rationality and economic calculation – professionals as well as clients suffer from those tensions. Here, in the resistance of social practices to their new economic regime, is the source of all kinds of new quasi-political conflicts, which now take place within the "private" spheres.[5] A good indicator for this change is the

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[2] N. Luhmann, *Die Gesellschaft der Gesellschaft*, (Frankfurt/M: Suhrkamp, 1997), at 1088 *et seq*.

[3] N. Luhamnn, *Die Wirtschaft der Gesellschaft* (Frankfurt/M: Suhrkamp, 1994), at 344.

[4] J. Habermas, *Legitimation Crisis* (Cambridge, UK: Polity, 1975)

[5] For what these changes mean for private law, see G. Teubner, "In the Blind Spot: The Hybridization of Contracting" (2007) *Theoretical Inquiries in Law* 1/4/8, at 51-71;

growing intensity of political fights between regulatory agencies, consumer groups, regulated companies and their shareholders that we are presently witnessing, and the extent to which protest movements and other forms of civic resistance are switching their targets from political to economic institutions. There is also the strange alliance between civic protest movements and mass media speaking up in the name of ethics against a comprehensive economisation of activities which damages their integrity.

II. SOCIAL AND LEGAL COUNTER-MOVEMENTS

Societal constitutionalism is not limited to a tendency within the law; rather, it designates a series of social counter-movements directed against the destructive aspects of functional differentiation. These counter-movements coerce expansive social systems to self-restriction. [6] In particular, fundamental rights are not just judicially protected rights of individuals against state power as lawyers usually see them, but are much broader social counter-institutions that, after long-term conflicts, emerge inside expansive social sub-systems and serve to restrict this expansion from within. Historically, basic rights have emerged in reaction to the emergence of autonomous spheres of action in modern society, especially in response to the matrix of autonomised politics. As soon as expansionist tendencies that threatened the integrity of other autonomous areas of society became evident in politics, turbulent social conflicts ensued. Expansionist tendencies have manifested themselves historically in very different constellations; in the past, mainly in politics but today, mainly in economics, science, technology and other sectors of society. If the core task of political basic rights was to protect the autonomy of spheres of action from political instrumentalisation, then the central task of "social basic rights" has become to make it possible to safeguard so-called non-rational action logic against the matrix of the dominant social trends

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G. Teubner, "Global Private Regimes: Neo-spontaneous Law and Dual Constitution of Autonomous Sectors?" in K-H. Ladeur, ed., *Public Governance in an Age of Globalisation* (Aldershot: Ashgate, 2004); Gunther Teubner, "Contracting Worlds: Invoking Discourse Rights in Private Governance Regimes", *Social and Legal Studies* 9 (2000) at 399-417

[6] For details see, G. Teubner, "The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors" in *Modern Law Review* 69 (2006) at 327-346; see also G. Verschraegen, "Human Rights and Modern Society: A Sociological Analysis from the Perspective of Systems Theory" *Journal of Law and Society* 29 (2002) at 258-281; K-H. Ladeur, "Helmut Ridders Konzeption der Meinungs- und Pressefreiheit in der Demokratie" in *Kritische Justiz* 32 (1999) at 281-300; C. Graber and G. Teubner, "Art and Money: Constitutional Rights in the Private Sphere" *Oxford Journal of Legal Studies* 18 (1998) at 61-74

towards rationalisation.[7]

Human rights, therefore, cannot be limited to the relation between State and individual, or the area of institutionalised politics, or even solely to phenomena of power in the broadest sense. Specific endangerment of physical and mental integrity by a communicative matrix comes not just from politics but, in principle, from all social sectors that have expansive tendencies. For the matrix of the economy, Marx clarified this particularly through such concepts as alienation, autonomy of capital, commodification of the world, exploitation of man by man. Today we see – most clearly in the writings of Foucault, Agamben, and Legendre – similar threats to human integrity from the matrices of the natural science, of psychology, the social sciences, technology, medicine, the press, radio, television, and telecommunications.[8]

The human rights question in the strictest sense must today be seen as a response to the endangerment of individuals' integrity of body and mind by a multiplicity of anonymous and globalised communicative processes. It now becomes clear how a new "equation" replaces the old "equation" of the horizontal effect. The old one was based on a relation between two private actors – private perpetrator and private victim of the infringement. Now, in the new equation, one side is no longer a private actor as the fundamental rights violator, but rather the *anonymous matrix of an*

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[7] This is the core idea of societal constitutionalism developed by D. Sciulli in his *Theory of Societal Constitutionalism* (Cambridge: Cambridge University Press, 1992) at 21 ff.; see also D. Sciulli, *Corporate Power in Civil Society: An Application of Societal Constitutionalism* (New York: New York University Press, 2001) at 131 ff. For an elaboration, G. Teubner, "Societal Constitutionalism: Alternatives to State-centred Constitutional theory?" in C. Joerges, I-J. Sand and G. Teubner, eds., *Constitutionalism and Transnational Governance* (Oxford: Hart, 2004), 3-28. For the related concept of constitutional pluralism beyond the nation state, see N. Walker, "The Idea of Constitutional Pluralism", 65 Modern Law Review 65 (2002) 317-359 and N. Walker, "Taking Constitutionalism Beyond the State", RECON Online Working Papers (2007)1-18; C. Walter, "Constitutionalizing (Inter)national Governance: Possibilities for and Limits to the Development of an International Constitutional Law", *German Yearbook of International Law* 44 (2001) 170-201; H. Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets*, (Oxford: Hart, 2005), 161 ff.; For a parallel diagnosis in the "new economic constitutionalism", see J. Tully, "The Imperialism of Modern Constitutional Democracy", in N. Walker & M. Loughlin, eds., *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: OUP, 2007) 315-338

[8] G. Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1998), 15 et seq.; M. Foucault, *Discipline & Punish: The Birth of the Prison*, (London: Penguin Books, 1991); P. Legendre, *Leçons VIII. Le crime du caporal Lortie. Traité sur le père* (Paris: Fayard, 1989)

autonomised communicative medium. Similarly, the other side is no longer simply the compact individual – now on this side of the equation the fundamental rights have to be systematically divided into three dimensions:

> - *Institutional rights* protecting the autonomy of social discourses – the autonomy of art, of science, of religion – against their subjugation by the totalising tendencies of the communicative matrix. By protecting social discourses against the totalitarian tendencies of science, media or economy, fundamental rights take effect as "conflict of law rules" between partial rationalities in society.
> - *Personal rights* protecting the autonomy of communications, attributed not to institutions, but to the social artefacts called "persons".
> - *Human rights* as negative bounds on societal communication, where the integrity of individuals' body and mind is endangered by a communicative matrix that crosses boundaries.

However, even after such a reformulation of the human rights concept, the nagging question remains: can one discourse do justice to the other? This is a problem the dilemmas of which have been analysed by Lyotard,[9] but it is at least a problem *within* society, one Luhmann sought to respond to with the concept of justice as socially adequate complexity.[10] The situation is still more dramatic in terms of human rights in the strict sense, located as they are at the boundary between communication and the individual human being. All the groping attempts to juridify human rights cannot hide the fact that this is a strictly impossible project. How can society ever "do justice" to real people if people are not its parts but stand outside communication, if society cannot communicate with them but at most about them, indeed not even reach them but merely either irritate or destroy them? In the light of grossly inhuman social practices, the justice of human rights is a burning issue, but one which has no prospect of resolution. This has to be said in all rigour.

If a positive concept of justice in the relation between communication and human beings is definitively impossible, then what is left, if we are not to succumb to post-structuralist quietism, is only second best. In the law, we

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[9] J-F Lyotard, *The Differend: Phrases in Dispute* (Manchester: Manchester Univ. Press, 1988), cif. 1 et seq.

[10] N. Luhmann, *Rechtssystem und Rechtsdogmatik* (Stuttgart: Kohlhammer, 1974); N. Luhmann, *Ausdifferenzierung des Rechts: Beiträge zur Rechtssoziologie und Rechtstheorie*, (Frankfurt: Suhrkamp, 1981) 374 et seq.

have to accept that the problem of the integrity of body and mind can only be experienced through the inadequate sensors of irritation, reconstruction and re-entry. The deep dimension of conflicts between communication, on the one hand, and mind and body on the other, can at best be surmised by law. The only signpost left is legal prohibition, through which a self-limitation of communication seems possible, but even this prohibition can only describe the transcendence of the other allegorically. This programme of justice is ultimately doomed to fail, and cannot, with Derrida, just console itself that it is "to come, *à venir*",[11] but it has to face up its being, in principle, impossible. The justice of human rights can, then, at best be formulated negatively. It is aimed at removing unjust situations, not creating just ones. It is only the counter-principle to communicative violations of body and soul, a protest against inhumanities of communication, without it ever being possible to say positively what the conditions of humanly just communication might be.

[11] J. Derrida, "Force of Law: The Mystical Foundation of Authority", *Cardozo Law Review* 11 (1990) 919 et seq., at 969.