

CHAPTER 1

What International Social Justice in the Twenty-First Century?*

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The concept of social justice appeared in international law a century ago, in the aftermath of the bloodbath of the First World War, in the form of a solemn declaration in 1919 included in the Treaty of Versailles, which continues to be enshrined in the Preamble of the Constitution of the International Labour Organization (ILO):

Universal and lasting peace can be established only if it is based upon social justice.

There was little follow-up in the interwar period to the appeal for a peace with social justice. The creation of the ILO was insufficient to avoid the economic and political disasters engendered by capitalism's social incompetence, of which the highlights were the crash of 1929 and the turning of many countries into dictatorial and warmongering regimes. As we know, the American response to this crisis was different, with the experience of the New Deal – which strongly inspired the main directions adopted in the aftermath of the Second World War. Thus it is that the link established in 1919 between social justice and peace between nations was reaffirmed by the Declaration of Philadelphia (1944), according to which:

Experience has fully demonstrated the truth of the statement in the Constitution of the International Labour Organisation that lasting peace can be established only if it is based on social justice.

This reference to *experience* cannot be too strongly emphasized. Social justice has not only been asserted in international law as an ideal – a moral obligation borne by the countries, one that should counterbalance political and economic realism. It itself also makes a claim to realism, more precisely the historical experience that has always seen

* Keynote address to the XXI World Congress of the International Society for Labour and Social Security Law, Cape Town, 15-18 September 2015.

humiliation and poverty engender hate and violence – violence that on many occasions in the course of the twentieth century went beyond the imaginable.

From January 1941, in his famous four freedoms speech, President Roosevelt established a close link between the achievement of social justice and the defence of democracy. He returned to it in January 1944, in his speech on the ‘Second Bill of Rights’, which announced what would become the 1948 Universal Declaration of Human Rights:

We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. People who are hungry and out of a job are the stuff of which dictatorships are made.

The assertion that men in need are not free men is taken from the *Vernon v. Bethell* judgment dating from 1762. Roosevelt was thus able to anchor in the long history of the common law the idea that social justice is not a luxury that democracy might or might not avail itself of, but rather a precondition for its very existence and its ability to stand up to all kinds of dictatorships. Far from leading Western democracies onto the road of servitude – as the neoliberal rewriting of history¹ would have us believe – the ideal of social justice has allowed them to not go down that road.

This ideal is neither that of a transcendent justice imposed from on high by a putative benevolent dictator, nor that of an immanent justice arising spontaneously from the free play of supposedly scientific laws, be they based on race, history or the market. Social justice avoids these two pitfalls, as it combines a values dimension with a procedural dimension. Its values dimension is that of human dignity and of the economic, social and cultural rights that flow from it. Its procedural dimension comes simultaneously from free enterprise and from freedom of association; the tension between the two, regulated by the right to strike and collective bargaining, allows the conversion of power relations into legal relations.

It is in this spirit that the Declaration of Philadelphia was adopted, soon after Roosevelt’s speech. It did not simply reassert the need for social justice internationally. It sought to subordinate ‘all national and international policies and measures, in particular those of an economic and financial character’ to achievement of this objective. With this end in mind, the Havana Charter – adopted in 1948 but never ratified – envisaged the creation of an International Trade Organization (ITO), one of the missions of which would have been the achievement of the objectives of full employment and raising of the standard of living, as set by the Charter of the United Nations. Its statutes enjoin it in particular to combat balance of payments surpluses and deficits; to contribute to economic cooperation and non-competition between states; to promote compliance with international labour standards; to control capital movements and to pursue stability in commodity prices In a nutshell, its role would have been nearly the opposite of that assigned to the World Trade Organization (WTO) at its creation in 1994.

The failure of this project did not condemn social justice to remaining as a legal dead letter. But it is in domestic law that its offspring saw the light of day. Inscribed in

1. See F.A. Hayek: *The Road to Serfdom* (Routledge, Abingdon, 1944), 266 pp.

the forefront of numerous constitutions, in most industrialized countries it has led to a reinvention of States. Having become 'social' states, each one of them has interpreted and implemented it in its own way, by endowing itself with labour law, a social security system and public services corresponding to its history and legal tradition (which explains their extreme variety from country to country). This splintering into national models is an essential feature of social justice in the twentieth century. Its international dimension remained limited and subsidiary. Ratification of the ILO Conventions in fact exposes the States to a 'double penalty': on the one hand, they must submit to the ILO's supervision and monitoring system; on the other hand, they deprive themselves of a comparative advantage in relation to their competitors.² As well, they scarcely ratified them except inasmuch as the level of the social demands in these Conventions remained below that of their domestic law. Internationally, the greatest social injustice was in practice that resulting from colonization. To rectify it would have required a form of international economic solidarity that the failure of the Havana Charter suffocated at birth.

As a consequence, a gap opened up between international social and business standards, one that has steadily expanded for the past forty years. Promoting social justice certainly still appears as one of the duties assigned to the States by the 'Charter of Economic Rights and Duties of States', adopted by the United Nations General Assembly on 14 December 1974, so as to 'establish and maintain' between industrialized countries and developing countries 'a just and equitable economic and social order'.³ But lacking the agreement of the rich countries on the whole of its provisions, this charter has never had binding legal effect. With this setback, this charter constitutes something of a swan song for the projects of international social justice coming out of the war. In the same decade the abandonment of the fixed exchange rate in favour of floating currencies, the coming into office of Mr Reagan and Mrs Thatcher, and the beginning of the merger of communism and capitalism in China all opened up a different era, one that is still with us: that of neoliberalism and the disowning of what Friedrich Hayek called the 'mirage of social justice'.⁴

Having taken note of the refusal of the rich countries to agree on a just international social order founded on solidarity with the poor countries, the latter embarked on the route opened up by the creation in 1994 of the WTO: that of global competition, where in accordance with the liberal theses of David Ricardo, each should cultivate its 'comparative advantage'.⁵ This comparative advantage might lie in natural

2. See F. Maupain: *The Future of the International Labour Organization in the Global Economy* (Oxford, Hart Publishing, 2013), 320 pp.

3. Preamble to the Charter of Economic Rights and Duties of States, ratified by the UN in 1974. On this Charter, see M. Virally: 'La charte des droits et des devoirs économiques des états. Note de lecture', in *Annuaire français de droit international*, Vol. 20, 1974, pp. 57-77.

4. See F.A. Hayek: *Law, Legislation and Liberty, Volume 2: The Mirage of Social Justice* (London, Routledge, 1976).

5. D. Ricardo: *On the Principles of Political Economy and Taxation* (London, 1817). Significantly, the concept of comparative advantage appears in black and white only once in this work, to caution against tax rises likely to lead to losing it: 'A new tax may destroy the comparative advantage which a country before possessed in the manufacture of a particular commodity' (*supra.*, Chapter 19).

resources, or in a 'human resource', that they were thus encouraged to super-exploit in order to maintain their 'competitiveness' globally. Competing to be the lowest bidder in social and environmental terms is thus the path that has been followed by the most populous countries of the South – first and foremost China – with the economic successes and environmental disasters that are well known. This kind of competition obviously undermines the foundations of the social state in the countries of the North, engaged whether they like it or not in what the British Prime Minister has recently called a 'global race',⁶ a deadly sprint the iron law of which is to lower labour costs, which has become the be-all and end-all of the economic policies followed by all governing parties in Europe.⁷ As for the countries whose states were too weak to go down this path – notably many African countries – they have been left defenceless at the mercy of international competition, the looting of their natural resources and the IMF's structural adjustment plans. A significant proportion of their 'human resource' – in particular their youth – thus seeks security in mass emigration, which is as perilous for them as it is destabilizing for the countries of immigration.

With the same reasons producing the same effects, the attempt through the Kyoto Protocol (2005) to found an international legal order able to safeguard the climatic future of the planet has to date been a bitter failure, with the largest countries of the South refusing to lose the 'comparative advantage' integral to what standard economic theory calls their 'right to pollute'.⁸ From which follows a schizophrenic international legal order whose economic hemisphere encourages non-ratification or non-enforcement of standards, the necessity and universality of which are proclaimed by its social or ecological hemisphere.

What conclusions to draw from this historical and legal contextualizing of social justice? Should one consider – as we have been pushed for thirty years to do by the neoliberal doctrines and reforms – that this centenarian lady was in fact a freedom-killing vampire, that we must drive a stake through her heart and bury her once and for all in order to allow the emergence of the only justice that is worthwhile, the justice immanent in market forces? The future would thus be one of the drastic reduction of

6. 'The truth is this. We are in a global race today. And that means an hour of reckoning for countries like ours. Sink or swim. Do or decline. (...) These are difficult times. We're being tested. How will we come through it? Again, it's not complicated. Hard work.' D. Cameron: Speech to the Conservative Party Conference, *The Telegraph*, 9 October 2012.

7. Often attributed to Karl Marx, the 'iron law of wages' was first formulated by Ferdinand Lassalle, who himself drew inspiration (in order to criticize them) from the ideas of David Ricardo and Thomas Malthus: '*Die beschränkung des durchschnittlichen arbeitslohnes auf die in einem volke gewohnheitsmäßig zur fristung der existenz und zur fortpflanzung erforderliche lebensnotdurft — das ist also (...) das eherne und grausame gesetz, welches den arbeitslohn unter den heutigen verhältnissen beherrscht*'. ('The iron and inexorable law, according to which, under the domination of supply and demand, the average wages of labour remain always reduced to the bare subsistence which, according to the standard of living of a nation, is necessary for the maintenance of life and the reproduction of the species') Ferdinand Lassalle: 'Open Letter in Response to the Central Committee for the Calling of a General German Workers' Congress in Leipzig, March 1, 1863', in *Gesammelte Reden und Schriften (Collected Speeches and Writings)*, ed. Edward Bernstein. Berlin: Paul Cassirer, 1919-1920, Vol. 3, pp. 41-107.

8. Disseminated among jurists by the Law and Economics doctrine; this concept comes from the 'Nobel Prize' winner in Economics, Ronald H. Coase: 'The Problem of Social Cost', *Journal of Law and Economics*, III (October 1960), pp. 1-44.

the scope of social justice to a few fundamental rights, and to the consequent capture of the potentially lucrative segments of social security by the insurance industry. Social justice would thus meet the same fate as that promised to the state by anarcho-capitalism, which deems that it should ‘reduce it to the size where it can be drowned in the bathtub’.⁹

This call to have done with ‘the mirage of social justice’ disregards the fact that without it, in the future as in the past, there will be no lasting peace. The overlooking of this lesson of history is presently one of the causes of hitherto unknown violence marking the breakdown of the weakest states. The tensions and inequalities engendered by globalization certainly lead to the resurgence of solidarity in action, as one can see in such different situations as the strikes in China¹⁰ and the uprisings in the Arab world – but also, and in particular, to solidarity based on exclusion, founded on new religious, ethnic or identities, which are the soil in which terrorism thrives.¹¹

In this context, social justice comes again to be a political priority, in particular in the large emerging countries, which do not perceive it as an obstacle to development, but on the contrary as one of its most pressing preconditions. From this remarkable institutional innovations follow – like the ‘family allowance’ programme in Brazil or the National Rural Employment Guarantee Act in India. Even in the United States, homeland of anarcho-capitalism (but also of the New Deal), the Obamacare reform provides evidence of this renewal. This is a necessary renewal since, while the basis of social justice in values is intangible (as is the dignity of human beings proclaimed coming out of the Second World War), its implementation is diverse and evolving, and needs to respond to the present age. This age is marked by the growing interdependence of all of the people of the earth, and it is thus at international level that we must envisage social justice in the twenty-first century. At this level it has new dimensions that we will take stock of (section §1.01) prior to exploring the paths for its achievement (section §1.02).

§1.01 THE NEW DIMENSIONS OF SOCIAL JUSTICE

The signs are there of a reconfiguration of social justice, one that yields neither to awe nor to despondency in the face of the steamroller of globalization, but that rather advances toward a ‘world-forming’ (*mondialization*) that respects the diversity of humans and their life-supporting environments.¹² This implies not reducing social

9. See the famous declaration of G. Norquist: ‘My goal is to cut government in half in 25 years, to get it down to the size where we can drown it in the bathtub.’ DLC: *Blueprint Magazine*, 30 June 2003 (‘Starving the beast’).

10. See Feng Xiang: Chine: la solidarité en chanson. Les révélations d’une grève., in A. Supiot [ed.] *La solidarité. Enquête sur un principe juridique*, Paris, O. Jacob, 2015, pp. 221-237.

11. See *The People Want: A Radical Exploration of the Arab Uprising*. Translated by G.M. Goshgarian (London, Saqi Books, 2013).

12. According to the primary meaning of the Latin word *mundus* (where *monde* is opposed to *immonde*, just as *cosmos* is opposed to *chaos*), the ‘*mondialization*’ consists in making a physical realm inhabitable by humans: in making our planet a place that can be inhabited. In other words, it consists in mastering the different dimensions of the globalization process. Unlike globalization (*globalization*), which has as its perspective the homogenization of the

justice to a minimum set of fundamental rights – which would be more or less the right not to freeze to death or die of hunger – but on the contrary to enrich it with three dimensions ignored or neglected by the social state: that of justice in international trade, justice in relationships of economic allegiance, and lastly justice in the division of labour.

[A] Justice in International Trade

The generalized conversion to the neoliberal credo has everywhere been the source of a dizzying inequality gulf and of a rapid enrichment of the ruling classes, which are its main beneficiaries in all countries. It is not surprising in such a context that in 1996 the low-wage countries vigorously opposed any idea of a social clause in trade treaties, on the ground that ‘the comparative advantage of the countries, in particular of the low-wage developing countries, should in no way be called into question’.¹³ The ILO itself pledged allegiance to the WTO on this point, in underlining two years later in its Declaration on Fundamental Principles and Rights at Work that ‘the comparative advantage of any country should in no way be called into question by this Declaration and its follow-up’.¹⁴ The ILO could hardly go further in its self-denial. A repentance for this denial of its founding principles emerged ten years later in its 2008 Declaration, the terms of which are more balanced: ‘the violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage and labour standards should not be used for protectionist trade purposes’.¹⁵

Since the failure of the Havana Charter, the States have deemed themselves the sole entities responsible for social justice, with the role of the ILO being to encourage and assist them in the exercise of this responsibility. This essentially national path was practicable within an international legal order resting on sovereign states that were masters of their trade and monetary policies. But this order has changed since the free movement of goods and capital has become the rule. In combination with the IT revolution, the wiping out of trade boundaries has led to a radical transformation in the large firms, which is to say to a transformation of the arrangements for the organization

world under the aegis of a now all-encompassing market, world-forming ‘*mondialization*’ has as its perspective a world made liveable by humans through understanding of the diversity of civilizations and of their growing interdependence. On this distinction see A. Supiot: *Grandeur et misère de l’État social: Leçon inaugurale au Collège de France* (Paris, Fayard, 2013). In English: ‘Grandeur and Misery of the Social State’, *New Left Review*, No. 82, (August 2013) pp. 99-113 (abridged version. A full version is available at <http://books.openedition.org/cdf/3093>).

13. Singapore Ministerial Declaration adopted on 13 December 1996, paragraph 4 (‘The comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question’). Available in English, French and Spanish on the WTO website.
14. ILO: *Declaration on Fundamental Principles and Rights at Work*, 1998, Article 5. (‘The comparative advantage of any country should in no way be called into question by this declaration and its follow-up.’)
15. ILO: *Declaration on Social Justice for a Fair Globalization*, 2008, Articles I to IV (‘The violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage and (...) labour standards should not be used for protectionist trade purposes.’).

of work worldwide. The large Fordist enterprises – organizations that were highly integrated and hierarchical, working under the aegis of a state and of its tax, social and environmental laws – have given way to international production networks and chains that practice ‘optimization’ in these areas, which is to say that elude the empire of the rule of law so as to reap the full benefits of the opportunities for law shopping. For them the world no longer looks like a patchwork of sovereign states, but rather as an immense gaming table where it is possible to play one set of laws off against another.

Such a system undermines the financial foundations of the social state where it was the most developed, and halts its construction in the emerging countries, which continue to be threatened with losing their ‘comparative advantage’ if they get it into their heads to bid up labour costs, increase the amount of taxes or protect nature. It also undermines the enterprises themselves. Their networked organization leaves them exposed to new risks, inasmuch as they exert only indirect control over the chain of manufacture of their products. And they are subject to ever higher demands for short-term profitability, putting at risk the security of their activities and their needs for investment over the long term.

The wiping out of trade boundaries also affects the balance of power on which social justice rests. Whereas enterprises may deploy freely anywhere on the world stage, the collective freedoms of workers remain locked up in the cage of domestic laws. And at country level the pressure exerted by ‘the industrial reserve army’¹⁶ – whether that of the unemployed and workers in precarious employment, or that of the countries with low labour costs – undermines the economic and sociological foundations of trade unionism. A legal offensive is undertaken every day on behalf of this rupture in the equality of arms, against the right to strike. Labour law sets up a balance between the freedom of enterprise and the freedom of association. In order that this tension may constitute a factor for achievement of social justice, collective freedoms must not be subordinated to economic freedoms, and trade unions should be able to pressure the enterprises through collective actions, including strikes. In systems like those of the European Union or communist China, where the broad economic policy options are beyond electoral reach, the strike is the last arm citizens have available to contest the most unjust effects of these policies. It is this weapon that since 2007 the European Court of Justice seeks to render inoperative, in prohibiting on principle strikes directed against offshoring or international posting of labour. This challenge is not the doing of the authoritarian economic regimes alone. It has won the heart of the ILO itself since the International Organisation of Employers clashed with the Committee of Experts in 2012, with the aim of excluding the right to strike from the scope of application of Convention No. 87 concerning Freedom of Association.

16. This concept comes from Marx, as is well known (see *Capital*, Book I, Chapter XXV, section III (Penguin Classics, 1992)). Among the various methods used to ‘manufacture supernumeraries’, he mentions the fact of replacing ‘a Yankee by three Chinese’ or as well the intensification of work: ‘The overwork of the employed part of the working class swells the ranks of the reserve, whilst conversely the greater pressure that the latter by its competition exerts on the former, forces these to submit to overwork and to subjugation under the dictates of capital (see *Capital*, *supra*).

From the viewpoint of international social justice, we would do well to rather pose the question the other way round: how to restabilize collective bargaining, which at present pits enterprises that are free to practice law shopping worldwide, against trade unions whose action remains confined to a national scope? However necessary it may be, defence of the right to strike is an inadequate response to this question. It would be necessary to open up more widely the range of international solidarity in the face of injustice, by using as a basis other forms of collective action than strikes, such as labelling or boycotts, concurrently with precise legal conditions.

[B] Justice in Relationships of Economic Allegiance

Globalization (globalization) profoundly questions the very notion of the rule of law. The utopia of an all-encompassing market governing all human activity on the face of the earth leads to putting the law at the service of economic calculation. That is the whole object of the ‘law and economics’ doctrine, whose considerable influence on the theory and practice of contemporary law is well known. Governance by numbers thus replaces the rule of law, henceforth subservient to calculations of utility. But this overturning of the rule of law leads in practice to a generalization of the bonds of allegiance. Failing their placement under the aegis of a common law that is obligatory for all, people forge networks of loyalties among themselves, within which each seeks the protection of those stronger than oneself or the support of those weaker than oneself. The bonds of allegiance that make up the weft of these networks are oriented to the subjugation of one subject to the objectives of another, who simultaneously controls it and grants it a certain autonomy and protection. This new paradigm reflects both new forms of individual employment relationships (waged or not), as well as new forms of business organization (in supply chains and networks), or new forms of subjugation of certain states through their voluntary enrolment in unequal treaties or structural adjustment plans that take away part of their sovereignty.¹⁷

With regard to the employment contract, this change puts a new face on subordination. In the post-Fordist realm that today is that of the large firms, subordination is understood less as submission to orders than as behavioural programming, with each one being granted a sphere of autonomy to reach the quantified objectives that have been allocated to it. But unlike in legal subordination, this programming of the work is not limited to wage earners. It gives structure to the international supply chains and explains the boom in relational contracts.¹⁸ It obviously leads to a dispersion of responsibilities within dependency networks, which rest not on obedience but on the achieving of measurable objectives set out within the cascade of subsidiaries, subcontractors and suppliers – with the risk of allowing those who forge these networks and take advantage of them to shrug off their responsibilities and pass them on to underlings. In the event for example of an accident at work, of pollution or

17. For an account of this legal paradigm shift, see A. Supiot: *La gouvernance par les nombres* (Paris, Fayard, 2015).

18. The idea has been put forward by Ian R. Macneil: *The Relational Theory of Contracts, Selected Works of Ian Macneil* (London, Sweet & Maxwell, 2001).

of the bankruptcy of the subcontractor, only the latter's liability will be sought, whereas the one who gives the order – who has devised and controls the production system generating these damages – will escape the jurisdiction of the states on whose territory they take place.

The States themselves will often be inclined to not take on their public responsibilities in social, environmental or tax matters, for fear that hard laws may dissuade investors from setting up or continuing on their territory. All the more so since these States are as well more often than not themselves caught in bonds of allegiance that deprive them of all or part of their sovereignty. The Guinean state or the Greek state will thus be held accountable for the degradation of the health status of their population – even though this degradation results in fact from the instructions they have received from the IMF or the Troika. Globalization thus authorizes the most irresponsible actions in the management of human, natural and financial resources: the most irresponsible and also the most dangerous, as the networked organization of the global economy embodies systemic risks.

But the structure of the bond of allegiance also clarifies the means of avoiding this pernicious effect. The power of control that it bestows on the dominant party is simultaneously a right of oversight and a duty to take care of the long-term interests of the one made dependent on it. Thus what German law called *Sorgenpflicht* reappears. This is a duty of care that blends oversight and protection, control and support – one that modern law rediscovers under the name of 'due diligence'. The evolution of the employment contract is as always revealing of this resurgence. The 'flexibility' henceforth demanded from the employee in return calls forth the duty of the employer to watch over the maintenance of their occupational capacities, as well as a liability. The logic of a personal bond in the medium to long term thus goes beyond that of a simple exchange of services. Due diligence takes various forms, depending on whether the work constitutes employment or not, but it responds in both cases to the same social justice imperative.

The broadening of social justice beyond waged employment is thus necessary. It is already underway in the concept of Decent Work. This concept – promoted by the ILO since the turn of the century¹⁹ – refers to 'work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men'.²⁰ Enshrined in the 2008 Declaration on Social Justice for a Fair Globalization, the Decent Work Agenda is addressed not

19. See ILO: *Decent Work, Report of the Director-General*, International Labour Conference, 87th Session, (ILO, Geneva, 1999).

20. 'A work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men' <http://www.ilo.org/global/topics/decent-work/lang-en/index.htm>.

only to wage earners, but to ‘all workers’, as well as to ‘the entirety of enterprises’, the sustainability of which needs to be ensured.²¹

[C] Justice in the Division of Labour

In the twentieth century the scope of social justice was limited to earnings and working time, as well as to work being physically safe. Excluded from this scope, however, was the division of labour – which is to say, all matters affecting its organization, meaning and content. As long as it did not jeopardize the physical safety of the wage earner, work as such was thought to come under a ‘scientific organization’ that alone assured its efficiency. In both communist as well as capitalist territories, Taylorist dehumanization of work could never be unjust for those who deemed it necessary.²² The result of this restriction was to reduce the issue of social justice to that of an exchange of quantities: the quantity of work against the quantity of the wage – and on the contrary to disregard all that which has to do with quality: quality of the people and quality of the work. In other words, social justice in the twentieth century had as its essential purpose the distribution of wealth.

For some twenty years this purely asset-related and redistributive conception has been criticized, in particular in North America, by various authors who have accused it of ignoring inequalities based on sex, origin, ethnicity, sexual orientation or religious beliefs. A new conception of social justice has thus been developed, a recognitive justice, to address ‘struggles for recognition’ conducted by these minorities.²³ It has manifested itself in substantive law in a significant expansion of the number of prohibited grounds of discrimination.

The essential novelty of the contemporary debates on social justice is thus to no longer – or no longer only – define it in terms of the equitable distribution of resources, but rather in terms of the just recognition of persons. Focused in this way on the dichotomy between having and being, these debates however left invisible a third dimension of social justice – that of acting, which is to say of the work as such.²⁴ This dimension was nevertheless in embryo in the Preamble to the Constitution of the ILO, which calls for ‘humane conditions of labour’ (*un régime de travail réellement humain*).²⁵ It is found more clearly in the Declaration of Philadelphia, which places among workers’ fundamental rights that of having ‘the satisfaction of giving the fullest

21. ILO: *Declaration on Social Justice for a Fair Globalization*, adopted by the International Labour Conference (2008), Article I.A (Geneva, ILO, 2008), p. 11.

22. See Bruno Trentin: *La città del lavoro. Sinistra e crisi del fordismo* (Milan, Feltrinelli, 1997); French translation. *La Cité du travail: La gauche et la crise du fordisme* (Paris, Fayard, 2012), 448 p.

23. C. Taylor: *Multiculturalism and ‘the Politics of Recognition’* (Princeton, Princeton University Press, 1992); A. Honneth: *Kampf um Anerkennung: zur moralischen grammatik sozialer konflikte, Suhrkamp*, 1st edition, 1992, 2nd edition 2003 (*The Struggle for Recognition: The Moral Grammar of Social Conflicts* (Polity Press, 1995)); N. Fraser: *Redistribution or Recognition?: A Political-Philosophical Exchange* (London and New York, Verso, 2004).

24. See A. Supiot: ‘L’idée de justice sociale’, in L. Burgorgue-Larsen (ed.): *La justice sociale saisie par les juges en Europe*, Collection cahiers européens No. 4 (Paris, Pedone, 2013), pp. 5-30.

25. On the interpretation of this concept see *La gouvernance par les nombres, supra.*, Chapter 12.

measure of their skill and attainments and make their greatest contribution to the common well-being' (Article III(b)). It has reappeared recently in the Decent Work Agenda, which is aimed at providing to individuals the possibility of 'personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives'.²⁶ This long neglected dimension of social justice is today essential, for reasons both of security of persons as well as of environmental protection.

As Taylorism gives way to management by objectives, subordination takes on a new look: that of a programming of the worker. They are not asked to unplug their brains and act in a mechanical fashion, but on the contrary to plug them in to the information flow, and react to it to achieve the objectives that have been allocated to them. Amplified by information technology, this hold over the brain exerted by the organization of work led to the appearance at the end of the twentieth century of new hazards that were unknown in the industrial era: hazards damaging one's mental health. Unlike the industrial hazards of the Fordist era, this kind of hazards is faced as much (if not more) by managers as by those who perform the work.²⁷ And they cannot be prevented without questioning the choices in the organization of production, which up until now were excluded from the realm of collective bargaining – in other words, without bringing back into the scope of social justice the issue of the meaning and content of the tasks assigned to each person, such that all workers have 'the satisfaction of giving the fullest measure of their skill and attainments and make their greatest contribution to the common well-being'.

This search for a just division of labour is also required for environmental reasons, since work is not only the object of relations between people – it is also the locus of the relationship between humans and nature. The way in which it is designed and organized thus has a significant impact on our *ecumene*. In the modern age, with the beginnings of technoscience, the earth is no longer envisaged as humans' life-supporting environment, the equilibria of which need to be respected by work, but as an object at its disposal. It would be its 'master and possessor' and could exploit its resources indefinitely. Of course this involves a fiction, since humanity depends more on the earth than the earth depends on humanity. Like that of labour as a commodity to which it is closely linked, this fiction is sustainable only so long as the States remain the guarantors over the inter-generational time frame, and submit the use of labour and of nature to rules that protect them from overexploitation. With globalization these frameworks disintegrate. The world is imagined as a 'global village', with each of its inhabitants needing to specialize in the activity that is most profitable for them, trading freely with the others. This vision of the world as 'global village' is carried along by the IT revolution, which abolishes distances in the circulation of signs.²⁸ But it is deceptive

26. See <http://www.ilo.org/global/topics/decent-work/lang--fr/index.htm>.

27. See on the case of Amazon, the investigation by Jean-Baptiste Malet with regard to the workers (*En amazonie: Infiltré dans le 'meilleur des mondes'* (Paris, Fayard, 2013) and that of Jodi Kantor and David Streitfeld with regard to the managers ('Inside Amazon: Wrestling Big Ideas in a Bruising Workplace', *New York Times*, 15 August 2015).

28. The idea of global village comes from Marshall McLuhan, the theorist of information and communication technology (see *The Gutenberg Galaxy* (Toronto, University of Toronto Press,

when involving the production and circulation of things, which remain anchored in the diversity of natural environments.

Thus it is for example that it is assumed that raising chickens or pigs could be subject to international specialization, governed by ‘comparative advantage’ of ‘rootless’ industrial organization and cheap labour, the products of which would be exported worldwide by road or maritime transport that itself is ‘governed’ by competition and the seeking of ever lower prices. This type of organization of work has an exorbitant human and environmental cost that is not taken into account in market prices. To put it in economic terms: it engenders enormous negative externalities. The factory farming developed on a massive scale in Europe rests on the super-exploitation of the breeders integrated into the food industry or of underpaid posted workers. It is the cause of massive pollution of the soils and water resources. Export of this frozen meat requires road or maritime transport the carbon footprint of which has seen a massive increase,²⁹ and precludes any possibility of the importing country undertaking its own endogenous development of livestock raising on a human scale.³⁰

A just division of labour thus cannot ignore this environmental dimension. The organization of work not only has to have meaning for those who perform it, but must also respect the environment in order to ‘contribute to the common well-being’. These two dimensions of work are two sides of the same coin, since what the Constitution of the ILO calls ‘humane conditions of labour’ is a system that preserves the ecosystem of which humanity is a part.

§1.02 THE WAYS FORWARD FOR INTERNATIONAL SOCIAL JUSTICE

These new dimensions of social justice remain largely disregarded by the States, which continue to be prisoners of the neoliberal agenda of the 1970s. But they are, on the other hand very well captured by the major transnational companies, which are directly confronted with the hazards of globalization. Awareness of these hazards leads most of them to lay claim to their ‘social and environmental responsibility’ (SER). Motivated by morality – or by understanding of their long-term interests – they claim to take on a commitment, on a purely voluntary basis, in the service of safety or of the well-being of all stakeholders. These latter are their employees and customers, but also

1962)); see also by the same author *The Medium Is the Massage: An Inventory of Effects*. (New York, Bantam, 1967). McLuhan said he was inspired by the concept of noosphere developed some years earlier by Teilhard de Chardin, according to whom ‘thanks to the prodigious biological event represented by the discovery of electro-magnetic waves, each individual finds himself henceforth (actively and passively) simultaneously present, over land and sea, in every corner of the earth’ (*Phenomenon of Man* (New York, Harper, 1959), p. 240).

29. In Europe transport is the second-largest contributor to human-induced greenhouse gas emissions, after energy production. See Marie Cugny Seguin: ‘Les transports et leur impact sur le environnement: Comparaisons européennes’, in *Commissariat Général au Développement Durable, Observations et statistiques*, No. 8, March 2009, figure 5, p. 3.
30. On the case of the poultry industry, see the documentation published by the collective of NGOs entitled *Exportations de poulets: Le Europe plume l’Afrique*. (Campaign for the right to protect agricultural markets. CCFD and Agir Ici, 2004). http://ccfd-terresolidaire.org/img/pdf/dossier_volaof1b.pdf.

their agents (subsidiaries, subcontractors and suppliers). Allowing for exceptions, these commitments form part of what is called soft law. Their normative force depends on the sincerity of those that undertake them. Thus the practice of paternalism resurfaces at international level, just as it had developed at country level prior to the construction of the social state. However, numerous signs show that – on the model of the historical evolution of the paternalism of yesteryear – this soft law is destined to harden. SER cannot in fact be taken seriously until such time as it is secured by a neutral third party, in reference to common rules that are binding on all.

[A] What Guarantor?

There is first of all no true legal obligation without a neutral third party ensuring enforcement, be this third party a judge or trustee (*administrateur*). In international trade law – and this is what makes it ‘hard’ – the place of this third party is occupied by the dispute settlement body of the WTO and the deterrent sanction mechanisms it has available to it.³¹ In social and environmental matters, on the contrary, the third party is absent and the law is ‘soft’. As a consequence, their social or environmental responsibility is seriously called into question, with all of the resulting economic risks, and the large firms find themselves looking for this neutral third party. Thus the Rana Plaza drama gave rise to the signing under the auspices of the ILO of an agreement between large distribution companies and international trade union federations.³²

But the ILO lacks both a tribunal as well as a system of sanctions comparable to that of the WTO that would allow the States to be compelled to take their social responsibilities seriously. Even worse, its international labour standards supervision system is going through an unprecedented crisis. Since 2012 the International Organisation of Employers has denied to the Committee of Experts all power of interpretation of those Conventions whose application it controls.³³ It is true that despite the quality of its members and of the rigour of its procedures, this Committee is not a court of law. It is not subject to the adversarial principle, and its opinions lack the force of *res judicata*. Thus it is not without reason that the Employers’ group denies it true interpretive authority over the international labour standards. But neither is this without hypocrisy, since as a party to the dispute on the interpretation of Convention No. 87 that set off the crisis, this group has opposed the two solutions offered by the Constitution of the ILO for its settlement: referral to the International Court of Justice or the creation of the tribunal provided for in Article 37, paragraph 2. This refusal

31. See the *Agreement Establishing the World Trade Organization, Appendix 2: Understanding on Rules and Procedures Governing the Settlement of Disputes*. As the WTO very rightly explains on its website: ‘Dispute settlement is the central pillar of the multilateral trading system, and the WTO’s unique contribution to the stability of the global economy. Without a means of settling disputes, the rules-based system would be less effective because the rules could not be enforced. The WTO’s procedure underscores the rule of law, and it makes the trading system more secure and predictable.’ https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm.

32. *Accord on Fire and Building Safety in Bangladesh*, 13 May 2013.

33. See the Employers’ statement at the Committee on the Application of Standards of the International Labour Conference of 4 June 2012.

demonstrates a wish to be at one and the same time judge and party to the dispute. Since – contrary to the expectations in the Constitution of the ILO – interpretation of contentious Conventions would be within the sole discretion of those that have adopted them – i.e., of the Governing Body or of the International Labour Conference – the principle of the separation of powers was no longer guaranteed, and these Conventions would no longer entail hard law – but once again soft law, which is to say a law the interpretation of which is at the mercy of those that decree it.

As a consequence, one cannot exclude the possibility that the locus of the international guarantor of fundamental social rights ends up attaching to the standing appellate body of the WTO. The General Agreement on Tariffs and Trade (GATT) includes a few legal loopholes³⁴ of a nature that could authorize a country to close its market to products manufactured in violation of these rights. But it would of course be entirely illusory to think that this still hypothetical route could go beyond sanctioning the crudest violations of the most basic rights, since nothing in its constitution gives the WTO the mission of ensuring international social justice.

Failing an internationally recognized guarantor, questioning of the SER of the enterprises, like that of the States, falls within domestic or regional jurisdictions. The latter are confronted directly with the schizophrenia of the international legal order, whose rules (both social as well as commercial) they must apply. The European Union offers an excellent example of this clash of legal logics. On the one hand the Court of Justice of the Union has as much as possible seen fit since 2007 to subordinate social rights to economic freedoms, supported to this end by the action of the Troika in the indebted countries. On the other, the European Court of Human Rights – as well as a certain number of constitutional courts (notably in Germany, Portugal or Italy), and international bodies such as the European Committee of Social Rights or the Committee of Experts of the International Labour Office – oppose this approach as much as they can, and remind the States of their social obligations.³⁵ The domestic judge is today still the best equipped to give a certain extraterritorial scope to social justice. But this is not without regrets nor contradictions, as is shown by the *Kiobel* judgment, in which the Supreme Court almost entirely shut the door of the Alien Tort Claims Act in relation to gross infringement of fundamental rights committed outside the territory of the United States.³⁶ This prudence on the part of the Supreme Court breaks with the legal imperialism toward enterprises shown for its part by the American Department of Justice, as regards embargoes or in fighting corruption.³⁷

34. See G. Marceau and A. Doussin: 'Le droit du commerce international, les droits fondamentaux et les considérations sociales', in *L'observateur des Nations Unies* 2009, No. 2, Vol. 27, pp. 1-16. With regard to environmental standards, see G. Marceau and J. Wyatt: 'The WTO's Efforts to Balance Economic Development and Environmental Protection: A Short Review of Appellate Body Jurisprudence', *Latin American Journal of International Trade Law*, 1, Issue 1, Year 2013, pp. 291-314.

35. See the forthcoming special report on the subject in the *European Journal of Human Rights*.

36. Supreme Court of the United States. *Kiobel v. Royal Dutch Petroleum*, No. 10/1491. (17 April 2013).

37. See Antoine Garapon and Pierre Servan-Schreiber, (eds.): *Deals de justice. Le marché européen de l'obéissance mondialisée* (Paris, PUF, 2013).

The ability of domestic judges to impose respect for a certain international social or environmental order is thus real. This is one of the reasons why one seeks to eliminate their jurisdiction in international investment agreements by stipulating arbitration clauses in them. These clauses privatize the job of judging, by entrusting it to arbitrators, with the power to impose sanctions on those States that might dare to harden their legislation in these areas.³⁸ One might seriously question the ability and impartiality of these arbitrators. Their narrow specialization in corporate law is not such as to nourish their understanding of social and environmental issues.³⁹ And since the large firms are their main clients on the arbitration and legal consultation market, the arbitrators are economically dependent on their orders.⁴⁰ Already begun in the bilateral investment agreements, this placing of the States under supervision by private justice would spread considerably if the transatlantic⁴¹ and transpacific⁴² free trade treaties now being negotiated with the United States managed to be imposed on hostile public opinion. Since it is unable to ignore this hostility, the European Parliament has requested that the negotiators of the transatlantic treaty remove any arbitration clause, in favour of ‘independent professional judges appointed by the public authorities’, with the aim of avoiding ‘private interests undermining public policy objectives’.⁴³ The growing awareness of the risks that these treaties pose is not limited to the issue of arbitration. It also concerns respect for social standards.

[B] What Standards?

For forty years the international watchword has been deregulation of labour law and of social security. The rise in unemployment and lack of employment security, the dizzying inequality gulf and the environmental disasters and mass migrations caused by this deregulation will sooner or later oblige the States to call into question the

38. U. Kriebaum: ‘Privatizing Human Rights: The Interface between International Investment Protection and Human Rights’, *Transnational Dispute Management*, 2006, pp. 165-189.

39. See Marc Jacob: *International Investment Agreements and Human Rights*, INEF Research Paper Series on Human Rights, Corporate Responsibility and Sustainable Development, 03/2010. (Essen, University of Duisburg, 2010), 51 pp.

40. On the arbitration market see the very well documented investigation by P. Eberhardt and C. Olivet: *Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom*. (Brussels and Amsterdam, Corporate Europe Observatory and the Transnational Institute, 2012).

41. Transatlantic Free Trade Area (TAFTA).

42. Trans Pacific Partnership (TPP).

43. Resolution of the European Parliament of 8 July 2015 containing the recommendations to the European Commission with regard to the negotiations on the Transatlantic Trade and Investment Partnership (TTIP) (2014/2228 (INI)), point S-2-a- d-xv (‘to ensure that foreign investors are treated in a non-discriminatory fashion, while benefiting from no greater rights than domestic investors, and to replace the ISDS system with a new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured, the jurisdiction of courts of the EU and of the Member States is respected, and where private interests cannot undermine public policy objectives’).

dogmas of neoliberalism and to pull out of the race to be the lowest social bidder. Three legal avenues are emerging to create the social and environmental competition police the world so clearly needs.

The first is that of the bilateral trade agreements. Chased out of the multilateral trade organization by the Declaration of Singapore, the social clause has made a remarkable comeback in these bilateral agreements, as well as in the generalized systems of preferences instituted by the United States and the European Union.⁴⁴ A comprehensive study conducted recently under the auspices of the International Labour Office gives us an idea of the scale of this movement, whose dynamism has to do both with the number of agreements as well as with the social issues addressed.⁴⁵ It likewise shows the promotional nature of a majority of these clauses, which commit the countries that are signatories to compliance programmes that are supported by aid from the stronger party to the agreement. It is an irony of history that refusal of the social clause by the ‘developing’ countries within a multilateral framework leads them to place themselves under allegiance to the ‘developed’ countries for the definition of their social priorities.

Wherever it is not entirely muzzled, democracy has obliged the political leaders to subordinate the opening up of their markets to respecting social and environmental disciplines. The resolution of the European Parliament mentioned above regarding the draft transatlantic free trade treaty already provides evidence of this pressure. Its preamble underlines that ‘trade and investment flows are not an end in themselves (...); that a strong and ambitious trade agreement should not only focus on reducing tariffs and NTBs but should also be a tool to protect workers, consumers and the environment’.⁴⁶ By virtue of this, instructions are given to the European negotiators to ‘ensure that the sustainable development chapter is binding and enforceable and aims at the full and effective ratification, implementation and enforcement of the eight fundamental International Labour Organisation (ILO) conventions and their content, the ILO’s Decent Work Agenda and the core international environmental agreements’. They are also mandated to ‘ensure that the implementation of and compliance with labour provisions is subjected to an effective monitoring process, involving social partners and civil society representatives and to the general dispute settlement which applies to the whole agreement’.

Of course these are only recommendations. But coming from the sole democratic authority of the European Union, they demonstrate a loss of faith in the spontaneously beneficial properties of free trade, and a rather novel political will to subordinate the latter not only to respect for fundamental rights, but more broadly to the overall

44. W. Clatanoff: ‘Labor Standards in Recent U.S. Trade Agreements’, *Richmond Journal of Global Law and Business*, 5, 2005, No. 2, pp. 109-117; and for some examples: M.A. Cabin: ‘Labor Rights in the Peru Agreement: Can Vague Principles Yield Concrete Change?’, *Columbia Law Review*, 109, 2009, pp. 1047-1093; L. Compa: ‘Labour Rights in the FTAA’, in: John D. R. Craig and S. Michael Lynk: *Globalization and the Future of Labour Law*. Cambridge University Press, 2006, pp. 245-273; S.E. Martin: ‘Labor Obligations in the US–Chile Free Trade Agreement’, *Comparative Labor Law and Policy Journal*, 25, 2004, No. 2, pp. 201-226.

45. See C. E. Franz and A. Posthuma: *Labour Provisions in Trade Arrangements: Current Trends and Perspectives* (Geneva, International Labour Office, 2011).

46. Resolution of the European Parliament of 8 July 2015, *supra*.

improvement in labour and environmental protection. The route thus sketched out is promising. Only integrated intercontinental agreements are at present liable to lay the foundations for 'fair trade', by subordinating trade liberalization to the greater welfare of humanity and conservation of its environment.

A second route would consist in providing a legal foundation for corporate social responsibility, all the while leaving companies with a margin of autonomy in its implementation. Mentioned in the resolution of the European Parliament, such an increased legal stringency for SER has recently been put into effect in India, whose Companies Act requires since 2013 that all large firms dedicate at least 2% of their average net profits to pursuit of SER.⁴⁷ Much more timidly, to date the European Union has merely imposed on listed companies with more than 500 employees the inclusion in their financial reports of environmental and social information.⁴⁸

'Last but not least', as regards the international social standards, one must wonder how to give the ILO standards a legal effect commensurate with their unquestionable legitimacy. The difficulty here is well known, and dates from 1919, when the United States objected to the European proposals looking to make Conventions adopted by a two-thirds majority of the International Labour Conference directly enforceable in all Member States.⁴⁹ The result of this opposition is that the international labour standards drawn up by the ILO are subject to a kind of regulatory 'self-service', with each State remaining free to choose those to which it will submit, and to ratify only a handful of them.⁵⁰

The ebbing of the international social justice objectives that took place from the 1970s has brought to light the gap that exists between the universal mission of the ILO, and its legal impotence in fulfilling it. In its 1998 Declaration it tried to re-establish its authority by reminding its Member States of the obligations that are incumbent upon them by the mere fact of their membership. Thus in one go it sought in its Constitution the universal legal foundation that was lacking in its Conventions, and to get eight of these Conventions – designated as 'fundamental' – to be ratified by the largest possible number of States.

One understands the intellectual reasoning, but one also sees its drawback, which is that of giving up the social justice objectives of the Declaration of Philadelphia

47. Companies Act of 2013, section 135. All companies with a net worth of at least five hundred crore rupees (about 80 millions dollars), or business turnover of at least one thousand crore rupees (about 160 millions dollars), or net earnings of at least five crore rupees (about 800,000 dollars) over the course of one financial year are required to fulfil this obligation (see Supryia Routh: 'La responsabilité solidaire dans les réseaux de entreprises en inde', in A. Supiot and M. Delmas-Marty (eds.), *Prendre la responsabilité au sérieux* (Paris, PUF, 2015), Chapter 13.).

48. Directive 2014/95/EU of 22 October 2014 (the so-called Barnier Directive) modifying Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

49. The compromise solution suggested by the British consisted in instituting a right of veto for the national parliaments, with the Conventions becoming enforceable in the absence of such veto in the year following their adoption by the Conference (see Nicolas Valticos: 'Droit international du travail', in G.H. Camerlynck (ed.): *Traité de droit du travail*, Vol. 8, 2nd edition, No. 63 (Paris, Dalloz, 1983), p. 48).

50. This is the case for instance of the United States, which along with Bahrain at 14 ratifications is the country that has ratified the fewest.

in order to fall back to the defence of a minimum number of fundamental rights. Linking the constitutional obligations of the Member States to a handful of Conventions that are supposed to express them undermines the legitimacy of all of the other international labour Conventions, the purely optional and voluntary nature of which thus stands underlined. Doubtless conscious of this drawback, the ILO changed tack in its 2008 Declaration, which promotes the Decent Work Agenda by making reference to the constitutional foundations of the ILO, but without selecting a limited number of Conventions to correspond to it. But the ILO therefore finds itself caught once again in the trap of soft law and of declarations of intent that weigh lightly in the face of the power of the interests at play in international trade.

There is a way to get out of this trap. It would consist in imparting opposability *erga omnes* on ratification by a State of the ILO Conventions. Adoption of these Conventions by the International Labour Conference indeed gives them an unquestionable legitimacy, not least due to the qualified two-thirds majority that it needs to obtain.⁵¹ Each Member State of the ILO is certainly free to ratify an adopted Convention or not, but its membership in the ILO requires it to provide a reasoned justification for this decision, and to report on its legislation and practice with regard to the issue that is the subject of this Convention.⁵² One should even more so consider that its membership in the ILO prohibits it from compromising implementation of this Convention by the States that have ratified it. To put it in the terms of the Preamble of the ILO Constitution, no Member State should put obstacles ‘in the way of other nations which desire to improve the conditions [of workers] in their own countries’. A State that does not ratify a Convention is certainly not obligated to implement it on its own territory, but it must respect its implementation on the territory of the others. There should be a right – corresponding to this obligation to respect ratification by other States – for these other States to only open their markets to those members of the ILO that have ratified the same Conventions as they have. Such a reading would allow one to bring to an end the system of ‘double penalty’ that hits the States ratifying Conventions. An opposability *erga omnes* of ratified Conventions would certainly be a preferable system to the imposition of social clauses in the bilateral trade agreements, the content and implementation of which depend on the often unequal balance of power between the parties to these agreements. In order to be practicable, such a route would imply however that the ILO would be able to fully play its role of guarantor of the effective enforcement of the Conventions in the countries that have ratified them. Failing which, the States could lightly ratify Conventions that they would not implement. The issue of the guarantor and that of the standards are indissociable: international social justice can no more dispense with the judge than with the laws.

It is futile to expect that all the countries in the world come to agree on ambitious international rules respected by all. But it is realistic to think that some States that are determined to enforce rigorous social and environmental rules on their territories, subordinate access to their markets to compliance with rules of a comparable level, thus putting in motion a movement for positive emulation.

51. Constitution of the ILO, Article 19, section 2.

52. Constitution of the ILO, Article 19, section 5(e).