

# Capitalism and Problems of Law: A Marxist critique of social rights

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Economic and social rights ('social rights') relate to goods, services, and activities that are absolutely fundamental to any society, in that they are connected to the means of subsistence and reproduction of the population. No matter what type of economic, social, and political system is prevalent, society will need to produce and distribute things like food and housing and allow for the provision and accessing of education and healthcare. The impetus behind human rights law is that the best way to access these things is by making them (individual) legal entitlements<sup>1</sup>.

It has been well documented that social rights have long been seen as a lesser form of rights<sup>2</sup> in comparison with civil and political rights<sup>3</sup>. The original objective of this project was to argue for the rectification of this subordination. This has evolved as this project has progressed, and the primary objective now is to explore the incompatibility between social rights and liberal capitalist societies, which stem from, among other things, the structural constraints of capitalism and the role of law in capitalist societies.

This project is justified by the increasingly impossibility of a return to something resembling the post-war settlement, in which welfare state provision temporarily accomplished similar aims to social rights law<sup>4</sup> within the confines of capitalism<sup>5</sup>. The evolving dynamics of 20<sup>th</sup>-21<sup>st</sup> century capitalism has eroded this welfare provision<sup>6</sup>. It is justified by the powerful political imperatives of austerity that push governments to both reduce any remaining amounts of welfarist provision that may remain<sup>7</sup> and to ensure that wages are restrained where economic growth, is interrupted<sup>8</sup>, both of which may erode living standards. Finally, it is justified by growing widespread dissatisfaction with liberal capitalist democracy<sup>9</sup>.

Mainstream international legal discourse on social rights envisages these rights being incorporated into domestic legal systems<sup>10</sup>. The principal argument of this thesis is that social rights institutional discourse has no theory of the way the law operates under global capitalism. Several critical legal methodological approaches, like Third World Approaches to

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<sup>1</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171, Article 2(1)

<sup>2</sup> Henry J Steiner, Philip Alston, and Ryan Goodman, *International Human Rights in Context* (3rd edition, Oxford University Press 2008), 263-264

<sup>3</sup> Wade M. Cole, 'Strong Walk and Cheap Talk: The Effect of the International Covenant of Economic, Social, and Cultural Rights on Policies and Practices' (2013) 92(1) *Social Forces* 165, 182

<sup>4</sup> Asbjørn Wahl, *The Rise and Fall of the Welfare State* (Pluto Press 2011), 41

<sup>5</sup> David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2007), 71

<sup>6</sup> Madeleine Johansson, 'Sweden's welfare state; myths and realities: a Marxist analysis of the 'Nordic Model'' (2012) 1(3) *Irish Marxist Review* 47, 51

<sup>7</sup> Magdalena Sepúlveda Carmona, 'Alternatives to austerity: a human rights framework for economic recovery' in Aoife Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press, 2014), 33-40

<sup>8</sup> Robert Brenner, 'The Boom, the Bubble, and the Future' (2002) 45(4) *Challenge* 6, 8

<sup>9</sup> Financial Times Editorial Board, 'Trump's new world order' *Financial Times* (London, 6 November 2024), Peter Mair, *Ruling the Void: The Hollowing of Western Democracy* (Verso Books 2013), 20-22

<sup>10</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171, Article 2(1); Council of Europe, *European Social Charter*, 18 October 1961, ETS 35, article I 1(a)

International Law (TWAAIL)<sup>11</sup>, Law and Political Economy (LPE)<sup>12</sup> and especially Marxist theory will be used in order to analyse connections between the social, political, and legal implications of capitalism<sup>13</sup>.

Most nation-states have rejected the implementation of social rights as legal rights<sup>14</sup>. However, as mentioned, the goods and activities they represent are produced and distributed in all societies. There is, however, somewhat of an incompatibility between social rights as essential societal goods and processes and capitalism: many of these things, like food and housing, are also commodities, capable of being possessed as private property and subject to profit motives<sup>15</sup>. They are also subject to financial speculation and thus rent extraction<sup>16</sup>. Other activities related to social rights, like education and healthcare, may be provided at low-to-no cost but are similarly subject to profit motives and wage restraint<sup>17</sup>. The right to work therefore becomes a conduit through which all other rights are realised, which becomes a problem as work, in a capitalist society, is a necessarily exploitative process in which capitalists often exploit workers by appropriating profits from their labour<sup>18</sup> or consumers by overcharging them for services<sup>19</sup>.

The concern here is that it places standards of living in the hands of the capitalist class and subject to the dynamics of capitalism<sup>20</sup> rather than with the workers. In the absence of meaningful legal implementation of social rights, these activities appear to operate outside law (and politics) but in reality this reflects that rights are not created by law or the state<sup>21</sup>, that law responds to underlying social and economic conditions. Mainstream theories of the rule of law ignore this, placing disproportionate emphasis upon the constraining of state power<sup>22</sup>, framing law as something that emerges from the need to protect private relations from the power of the state<sup>23</sup>.

These private relations, based upon capitalist private property, are the basis of law in a capitalist society<sup>24</sup>. A more complete conception of the rule of law would recognise that in a capitalist society, exploitation and coercion primarily takes place through these private property relations<sup>25</sup>, whether they are between a corporation and an individual employee or between a landlord and a tenant. Conducting these exploitative relations through law, a

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<sup>11</sup> Makau Mutua and Antony Anghie, 'What is TWAAIL?' (2000) 94 Proceedings of the Annual Meeting (American Society of International Law), APRIL 5-8, 2000 31, 31

<sup>12</sup> Ntina Tzouvala, 'International Law and (the Critique of) Political Economy' (2022) 121(2) South Atlantic Quarterly 297, 308

<sup>13</sup> Ellen Meiksins Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (first published 1995, Verso 2016), 19

<sup>14</sup> Makau Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press 2008), 20

<sup>15</sup> Paul O'Connell, 'The Death of Socioeconomic Rights' (2011) 74(4) Modern Law Review 532, 535

<sup>16</sup> Olivier De Schutter, 'The role of global governance in supporting human rights: the global food price crisis and the right to food' in Aoife Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press, 2014), 94

<sup>17</sup> Susan Ferguson, *Women and Work: Feminism, Labour, and Social Reproduction* (Pluto Press 2020), 128-129

<sup>18</sup> Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 134

<sup>19</sup> Yossi Margoninsky, 'The political economy of rent seeking: The case of Israel's water sector' (2006) 8(3) Journal of Comparative Policy Analysis 259, 261

<sup>20</sup> Thomas Piketty, *Capital in the 21<sup>st</sup> Century* (Belknap Press of Harvard University Press 2014), 308

<sup>21</sup> Karl Marx, 'On the Jewish Question' in Jack Cohen and others (eds), *Marx and Engels: Collected Works Volume 3* (Lawrence & Wishart 2010), 163

<sup>22</sup> A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (first published 1885, Liberty Fund Inc 1982), 114; Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (first published 2004, Cambridge University Press 2009), 137;

<sup>23</sup> Lon Fuller, *The Morality of Law* (first published 1964, Yale University Press 1969), 210

<sup>24</sup> Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 96, 112

<sup>25</sup> Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 110

unique feature of capitalism, tends to render underlying inequalities invisible<sup>26</sup>. Social rights conflict with the individuality of private legal relations. It must therefore be made clear that simply implementing social rights in law, in the absence of underlying social change, would have a limited impact.

Considering social rights as international legal rights throws up a different set of problems. International legal argument mostly takes place between nation-states and, in the absence of a sovereign power<sup>27</sup>, is necessarily indeterminate<sup>28</sup>. This means that international legal principles, like rights, are (even more) subject to underlying political struggles<sup>29</sup> between supposedly<sup>30</sup> (but not genuinely)<sup>31</sup> equal nation-states. International law is also excessively fragmented<sup>32</sup>; legal arguments over the meaning of human rights are therefore carefully separated from other areas of law. Two concepts structure this international legal argument over these legal principles: imperialism and hegemony. The former shapes and conditions these arguments, forcing them to comply with international law's capitalist premises<sup>33</sup>. The latter allows dominant international actors (i.e., the US and its allies) to impose their own political preferences as universal values<sup>34</sup>.

At the international level, this thesis locates the marginalisation of social rights ultimately in the post-war struggle over the terms of decolonisation between the West and the Third World, one that revolved around the contested<sup>35</sup> concept of self-determination, the capacity of nations to determine their political, social, and economic arrangements<sup>36</sup>. The West successfully exercised its hegemonic power to limit the social and economic aspects of self-determination<sup>37</sup>, which placed limits upon the ability of nations to provide for the social needs of their citizenry and led social rights to be overtaken by the neocolonial<sup>38</sup> logic of development<sup>39</sup>.

The broad conclusion of this thesis is that the struggle to achieve control over the goods and activities related to social rights must not rely entirely upon law but should instead only use law to the extent that it furthers social and political struggles. These movements should attempt to overcome the fragmentation and divisions of global capitalism and unite with other movements pursuing adjacent goals. Finally, any movement attempt to actualise social rights must be mindful about uncritically accepting the premises of capitalism.

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<sup>26</sup> Robert Knox, 'Marxism, International Law, and Political Strategy' (2009) 22 *Leiden Journal of International Law* 413, 416

<sup>27</sup> China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 142

<sup>28</sup> Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (first published 1989, Cambridge University Press 2005), 60

<sup>29</sup> China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 136

<sup>30</sup> Charter of the United Nations, (adopted 24 October 1945), 1 UNTS XV, Article 2(1)

<sup>31</sup> Robert Knox, 'Marxism, International Law, and Political Strategy' (2009) 22 *Leiden Journal of International Law* 413, 416

<sup>32</sup> Martti Koskenniemi, 'International Law and Hegemony: A Reconfiguration' (2004) 17 *Cambridge Review of International Affairs* 197, 205

<sup>33</sup> Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 45

<sup>34</sup> Robert Knox, 'Hegemony' in Jean d'Aspremont and Sahib Singh, *Concepts for International Law* (Elgar Publishing 2019), 359

<sup>35</sup> Sofia Cavandoli, 'The unresolved dilemma of self-determination: Crimea, Donetsk and Luhansk' (2016) 20(7) *International Journal of Human Rights* 875, 877

<sup>36</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 1

<sup>37</sup> Siba N'Zatioula Grovgui, *Sovereigns, Quasi Sovereigns, and Africans: Race and Self-Determination in International Law* (University of Minnesota Press 1996), 200

<sup>38</sup> Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 100

<sup>39</sup> Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 216