

The World Turned Upside Down? Neo-liberalism, Socioeconomic Rights and Hegemony

Joe Wills*

Abstract: This article draws upon a Neo-Gramscian analysis of World Order to critically assess the relationship between neo-liberal globalisation and socioeconomic rights. It argues that, notwithstanding the well-documented discursive tensions that appear to exist between neo-liberalism and socioeconomic rights, the latter have been re-conceptualised in a manner that is congruent with the hegemonic framework of the former in a number of international institutional settings. This has been achieved in part through three discursive framing devices which I term *socioeconomic rights as aspirations*, *socioeconomic rights as compensation* and *socioeconomic rights as market outcomes*. I conclude by arguing that, despite such appropriation, there are still fruitful possibilities for counter-hegemonic articulations of socioeconomic rights to contest neo-liberal globalisation.

Key Words: Socioeconomic Rights; Neo-Liberalism; Hegemony; Globalisation; Gramsci

1. Introduction

There has been much literature documenting the apparent normative incompatibility of socioeconomic rights and neo-liberal governance.¹ For the purpose of this article, this perspective

* Lecturer in Criminal Law and PhD Candidate, School of Law, University of Leicester. I would like to thank Paul O'Connell, Loveday Hodson, Anna Grear, Ingo Venzke and the three anonymous referees at the Leiden Journal of International Law for their constructive feedback on earlier drafts of this article. It goes without saying that any shortcomings in either style or substance are the sole responsibility of the author.

¹ Proponents of this thesis include both advocates of socioeconomic rights who are critical of neo-liberalism and *vice versa*. See for example M. Pieterse, 'Beyond the Welfare State: Globalisation of Neo-Liberal Culture and the Constitutional Protection of Social and Economic Rights in South Africa' (2003) 14 Stellenbosch Law Review 3 at 12; A Kirkup & T. Evans 'The Myth of Western Opposition to Economic, Social and Cultural Rights? A Reply to Whelan and Donnelly' 31 Human Rights Quarterly 221 at 235; R. Plant, *The Neo-liberal State* (2010)

will be termed the incompatibility thesis. At the risk of oversimplifying a broad array of perspectives, it can be stated that proponents of the incompatibility thesis argue that neo-liberalism as a doctrine is inherently hostile to socioeconomic rights. Historically, the neo-liberal rejection of socioeconomic rights has been founded upon a minimal conception of rights and government. Having at its centre a negative conception of freedom, neo-liberal doctrine limits human rights to traditional civil and political rights aimed at protecting individuals from the coercive actions of others.² Particular levels of education, healthcare, social security and so forth are not regarded as legal or moral entitlements, but rather as commodities or gifts to be acquired through the market. In accordance with this view, to conceive of guaranteed access to a material good or service as a 'right' is fundamentally misconceived because such a right requires unjust incursion into other people's fundamental (property) rights³ and also interferes with the 'spontaneous order' of the free market.⁴

On a more practical level, advocates of socioeconomic rights maintain that the policy prescriptions associated with neo-liberalism undermine the material conditions for the realisation of such rights.⁵ Policies such as privatisation, austerity, labour-market 'flexibility' and deregulation are argued to expose workers, poor people and other vulnerable groups to the vicissitudes of the market in ways that make the objects of their socioeconomic rights less secure.⁶ Such policy trends are currently being intensified in the context of the on-going global economic crisis, thereby undermining the

at 116. F. A. Hayek, probably the most influential theorist associated with neo-liberalism, expressly rejected socioeconomic rights as being incompatible with a free society. See F. A. Hayek, *Law, Legislation and Liberty Volume 2: The Mirage of Social Justice* (1976) at 101-106. See also, R. Nozick, *Anarchy, State and Utopia* (1974) at 238. Nozick is usually classified as a libertarian rather than a neo-liberal. Nevertheless, as Raymond Plant notes, Nozick's theories have been influential in the development of neo-liberalism. See Plant (*supra in this footnote*) at 96.

² F. Hayek, *The Constitution of Liberty* (1960) at 16-17.

³ Nozick, *supra* 1 at 238; See generally, D. Kelley, *A Life of One's Own: Individual Rights and the Welfare State* (1998).

⁴ Hayek, *supra* 1 at 103; C. R. Sunstein 'Against Positive Rights' (1993) 2 *East European Constitutional Review* 35

⁵ Pieterse, *supra* 1 at 15-19; P. O'Connell, 'On Reconciling Irreconcilables: Neo-liberal Globalisation and Human Rights' 7(3) *Human Rights Law Review* (2007) 483 at 501-507.

⁶ See e.g. UNCHR 'The right to food', Report by the Special Rapporteur on the right to food, Mr. Jean Ziegler (10 January 2002) UN Doc. E/CN.4/2002/58 at para.110.

social environment required for the realisation of socioeconomic rights.⁷ Structural Adjustment Programs (SAPS) imposed by the International Monetary Fund (IMF) and World Bank have been particular targets for socioeconomic rights advocates. It is argued that such programs, which invariably entail neo-liberal policy prescriptions, cause 'governments to lessen respect for the economic and social rights of their citizens, including the rights to decent jobs, education, health care, and housing'.⁸

Whilst this author concurs with much of the preceding analysis that is critical of neo-liberalism, this article represents a point of departure to the extent that it will explore the relationship between neo-liberalism and socioeconomic rights through a different optic, namely the concept of hegemony as developed by the Italian communist leader Antonio Gramsci.⁹ Whilst Gramsci has had enormous influence in the field of international relations, very little attention has been paid to his ideas in the area of international law and especially international human rights law.¹⁰ One of the strengths of Gramsci's contribution to social theory is the subtlety it brings to understanding the complex ways in which ideology is produced and reproduced. I hope to demonstrate in this article that Gramsci's theories can bring a nuanced contribution to the debate about the role of socioeconomic rights praxis which avoids lapsing into either uncritical embrace or uncritical rejection of the potential of 'rights talk'.¹¹

⁷ United Nations Department of Economic and Social Affairs *The Global Social Crisis: Report on the World Social Situation 2011* ST/ESA/334 (2011); P. O'Connell, 'Let Them Eat Cake: Socio-Economic in an Age of Austerity' in C. Harvey, A. Nolan and R. O'Connell (eds), *Human Rights and Public Finance* (2013).

⁸ M. Adouharb and D. Cingranelli, *Human Rights and Structural Adjustment* (2007) at 4-5.

⁹ A. Sassoon, *Hegemony* in T. Bottomore (ed), *A Dictionary of Marxist Thought Second Edition* (2006) at 230.

¹⁰ A number of noteworthy considerations of Gramsci and international law include Tony Evans, *Human Rights Fifty Years On: A Reappraisal* (1998); A. Claire Cutler 'Toward a radical political economy critique of transnational economic law', in S. Marks (ed) *International Law on the Left: Re-examining Marxist Legacies* (2008) 199-219; S. Buckel & A. Fischer-Lescano, 'Gramsci Reconsidered: Hegemony in Global Law' (2009) 22 *Leiden Journal of International Law* 437-454; U. Baxi 'Public and Insurgent Reason: Adjudicatory Leadership in a Hyper-globalizing World, 161-178 in S. Gill (ed), *Global Crisis and Crisis of Global Leadership* (2012)

¹¹ Neil Stammers, *Human Rights and Social Movement* (2009) at 8-22 (challenging both 'uncritical proponents' and 'uncritical critics' of the potential of human rights praxis).

Part 2 of this article will provide a Neo-Gramscian analytical framework for understanding the relationship between neo-liberal globalisation and socioeconomic rights. Part 3 will then examine the ways in which the discourse of socioeconomic rights has been incorporated into the neo-liberal framework. It will be argued that the co-option of socioeconomic rights discourse has been achieved through three framing devices which I will term *socioeconomic rights as aspirations*, *socioeconomic rights as compensation* and *socioeconomic rights as market outcomes*. Finally, Part 4 will briefly conclude by arguing that, despite such appropriation, there are plenty of opportunities to incorporate socioeconomic rights discourse into a counter-hegemonic praxis aimed at contesting the predations associated with neoliberal globalisation.

2. Neo-liberal Globalisation and Socioeconomic Rights: A Neo-Gramscian Framework

For proponents of the incompatibility thesis it is often explicitly or implicitly assumed that neo-liberalism can be understood as doctrine or ideology in the sense of a relatively unified set of ideas about the world.¹² Whilst such accounts are useful for allowing critical examination of the theoretical underpinnings of various neo-liberal policies, they may underestimate the reflexivity of neo-liberalism to adapt and change in the face of adversity, including its capacity to absorb and neuter counter-challenges.¹³ By contrast, what was central for Gramsci was that ideology is not simply the artificial and mechanical imposition of a ready-made doctrine but rather a historical process of on-going 'ceaseless struggle'.¹⁴

¹² For example, Raymond Plant attempts to understand the neo-liberal approach to rights through the construction of a composite position drawing upon neo-liberalism's most famous thinkers such as Friedrich Von Hayek, Ludwig Von Mises, James Buchanan and so forth. See Plant, *supra* 1 at 1.

¹³ For a very complex account of neo-liberalism that attempts to grapple with this question, see generally J. Peck, *Constructions of Neoliberal Reason* (2010).

¹⁴ A. Bieler and A. D. Morton, 'The Deficits of Discourse in IPE: turning base metal into gold?' (2008) 52 *International Studies Quarterly* 103 at 119.

I will argue in this section that a Gramscian account of ideology and hegemony calls into question assumptions that the category of 'socioeconomic rights' has a particular oppositional normative grounding in relation to neo-liberalism. Instead, this article is premised upon an understanding that all rights discourses can be appropriated, re-cast and incorporated into prevailing power structures in ways in which their subversive potential can be undermined.¹⁵

2.1 Neo-liberalism as a Hegemonic Project

Broadly speaking, neo-liberalism can be understood as the shift in governance formally inaugurated during the Thatcher and Regan administrations in the 1980s¹⁶ and subsequently taken up by a host of other States, as well as international bodies such as the IMF, the World Bank and the World Trade Organisation (WTO).¹⁷ By the 1990s, the term neo-liberalism was being used, usually pejoratively, to describe policy packages that involved public spending reduction, the removal of price controls, the devaluation of currency, trade liberalisation, financialisation, de-regulation of the financial sector and the privatisation of public services.¹⁸ However, this phenomenon has long since been transformed from a 'relatively closed doctrine' into 'a hegemonic concept that is seeping into and co-opting the whole spectrum of political life'.¹⁹ Indeed, whilst the present financial crisis has represented the biggest crisis in neo-liberalism's legitimacy since its inception, neo-liberalism seems not only to have weathered the storm of public criticism but also to have refortified itself and emerged even stronger than before.²⁰

¹⁵ N. Stammers, *supra* 11 at 102-130.

¹⁶ R. Munck, 'Neoliberalism and Politics, and the Politics of Neoliberalism' in Saad-Fiho & Johnson (eds), *Neoliberalism: A Critical Reader* (2005) at 62.

¹⁷ A. Colas, "Neo-Liberalism, Globalisation and International Relations" in Saad & Johnson (eds), *ibid* at 70-79.

¹⁸ R. Rowden, *The Deadly Ideas of Neoliberalism: How the IMF has Undermined Public Health and the Fight Against AIDS* (2009) at 66.

¹⁹ P. Cerny, 'Embedding Neoliberalism: The Evolution of a Hegemonic Paradigm' (2008) 2(1) *The Journal of International Trade and Diplomacy*, 1 at 3. Robert Pollin has gone so far to suggest that even thinking about alternatives to neo-liberalism is 'a daunting task'. R. Pollin, *Contours of Descent* (2005) at 173.

²⁰ On this, see generally C. Couch, *The Strange Non-death of Neoliberalism* (2011).

To make sense of the complex ways in which a particular set of beliefs becomes so seemingly pervasive, it is useful to begin by considering the general interpretive category of hegemony as developed by Gramsci. Hegemony was used by Gramsci to explain the means by which dominant classes legitimate their rule through the medium of ideology.²¹ Gramsci was interested in the ways in which the capitalist classes were able to accommodate and incorporate the interests and demands of diverse social groups through the acquisition of political legitimacy and the consent of the governed.²² Consent is generated primarily through the exercise of moral and intellectual leadership, that is, leadership which articulates an entire 'ethical-political' world view via an array of ideological and institutional practices.²³ Such consent must be cultivated continually through the dominant group articulating its own sectional interests in ways that take on a universalistic appeal. This is achieved in part through a number of self-consciousness "compromises" which take account of the interests and tendencies of the non-dominant ("subaltern") social groups as well as through particular forms of sacrifice of the immediate, short-term interests of the hegemonic bloc.²⁴

It is worth noting that, in contradistinction to Gramsci's approach, the predominant analysis of hegemony within legal literature is severed from its Marxist roots and recast within a post-structuralist framework.²⁵ For example, Sonja Buckel and Andreas Fischer-Lescano argue that Gramsci's grounding of hegemony in social class relations can no longer be sustained because 'the polycentrism of modern societal power relationships is based on specific situations of rule and exploitation interwoven with a plurality of multiple technologies of power and constituted together

²¹ A. Gramsci, *Selections from the Prison Notebooks of Antonio Gramsci* (Q. Hoare & G. Nowell Smith eds. and trans.) (1971) 57 (hereafter 'Gramsci'), at 258.

²² *Ibid* at 12.

²³ *Ibid* at 258.

²⁴ *Ibid* at 181-182.

²⁵ D. Litowitz, 'Gramsci, Hegemony and the Law' (2000) *Brigham Young University Law Review* 515, 536-539 (documenting the influence of postmodernism on Gramscian analysis within Critical Legal Studies)

with them'.²⁶ Against that view, this article is premised upon the idea that the materiality of class power remains *central* (as opposed to merely contingent) to understanding the production and reproduction of dominant ideological forms today.²⁷ This is particularly true with regard to neo-liberalism which, as David Harvey has convincingly argued, is best understood as a political project to reassert the class power of private property owners, businesses, financial capital and transnational corporations (TNCs) following the collapse of the post-Second World War 'compromise' between labour and capital.²⁸

2.1(a) Neo-liberalism: From National to Global Hegemony

Although neo-liberalism was originally 'a nation-state-level phenomenon' it soon developed in nature alongside 'structurally transformative transnational and globalizing developments'.²⁹ The paradigmatic shifts that have taken place within the global economy over the past thirty years have given rise to the phenomenon known as 'neo-liberal globalization'.³⁰ This has entailed three globalizing trends that have particular significance for the study of hegemony: (1) the emergence of a *transnational capitalist class* (TCC) that is increasingly autonomous from national state formations and is comprised of actors such as the owners and managers of TNCs and private finance

²⁶ Buckel and Fischer-Lescano, *supra* 10 at 442

²⁷ Space precludes a discussion of the shortcomings of post-Marxist/post-structuralist approaches to hegemony but there is an extensive body of literature that addresses this subject. See for example N. Geras, 'Post-Marxism?' (1987) *New Left Review* 163(1) 40-82; T. Eagleton, *Ideology: An Introduction* (1991) at 193-220; A. David Morton, 'A Double Reading of Gramsci: Beyond the Logic of Contingency' in A. Bieler and A. David Morton (eds), *Images of Gramsci: Connections and contentions in Political Theory and International Relations* (2006) 45-60

²⁸ D. Harvey, *A Brief History of Neoliberalism* (2005), at 12-19.

²⁹ Cerny, *supra* 19 at 2.

³⁰ The new global economy embodies three paradigmatic shifts: deregulation and computerization phasing out most significant geographic barriers to international capital mobility; the consolidation of the global productive capacity by TNCs that now act as hugely powerful and influential lobbyists at both the national and supranational levels; and the power of the transnational structures regulating the new global order, which exercise extraordinary leverage to implement neo-liberal reforms. C. Leys, *Market-Driven Politics* (2001) at 13-21.

institutions;³¹ (2) a *nascent global state* constituted by a network of international institutions whose function is to realize the interests of transnational capital and powerful states in the international system;³² and (3) a *neo-liberal transnational hegemonic bloc* made up of the TCC alongside an array of 'global civil society' and global governance institutions that has promoted, and to some extent consolidated, a hegemonic project of neo-liberal globalization.³³ For Neo-Gramscians therefore, Gramsci's analysis of power relations at the nation state level is transposed to the international realm and the question becomes how international institutions, organisations and alliances vie for hegemony in the context of World Order.³⁴ International institutions such as the United Nations (UN), WTO, IMF and World Bank help to produce and reproduce hegemony by legitimating the norms of the world order, co-opting elites from peripheral states and absorbing counter-hegemonic ideas.³⁵

To achieve hegemony, neo-liberal governance must be adaptive to critiques that emanate from 'counter-movements' which spring up in response to the dislocating effects of radical free market policies.³⁶ Hegemony is not simply an attempt to impose a top-down, unified and coherent theory onto a passive populace but rather an on-going process that requires and presumes the consent of the subordinate classes via an array of concessionary processes. In line with such analysis, it is generally recognised that neo-liberal globalisation has gone through two specific phases; 'the first as the shock-therapy associated with Reagan and Thatcher, Latin America, and the Soviet bloc, and the

³¹ See for example L. Sklair, *The Transnational Capitalist Class* (2001), W. Robinson, 'Social Theory and Globalisation: The Rise of the Transnational State' [2001] 30(2) *Theory and Society* 157-200.

³² B.S. Chimni, 'International Institutions Today: An Imperial State in the Making' (2004) 15 *European Journal of International Law* 1

³³ W. K. Carroll 'Hegemony and Counter-Hegemony in a Global Field' (2007) 1(1) *Studies in Social Justice* 36 at 36 & 38.

³⁴ R. Cox 'Gramsci, Hegemony and International Relations: An Essay in Method' in S. Gill (ed) *Gramsci, Historical Materialism and International Relations* (1993) at 49-66.

³⁵ *ibid* at 62-64.

³⁶ K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (2001).

second with the social market, Third-Wayism and the post-Washington consensus'.³⁷ At the level of World Order, the shift from the Washington Consensus to the Post Washington Consensus (PWC) could be interpreted as an attempt to facilitate the expansion of a hegemonic neo-liberal world order through incorporating *aspects* of the critique of the neo-liberal model into the governance framework of neo-liberal globalisation itself.³⁸

A noteworthy shift in the context of the PWC is the change in the lending practices of the IMF and World Bank from 'Structural Adjustment' to 'Poverty Reduction'. In 1999, the IMF and World Bank reformulated their much criticised SAPs as 'Poverty Reduction Strategy Papers' (PRSPs). In response to criticisms that previous structural adjustment programs were top down in nature and failed to adequately integrate pro-poor measures into their strategies, the more recent PRSP model purports to recognise the importance of *national ownership, participation and poverty reduction* and emphasises the need for 'broad based participation by civil society'.³⁹ In accordance with the PRSP approach, the World Bank maintains that 'complementary policies – particularly the provision of an effective social safety net – are... necessary to minimize adjustment costs and to help make trade reform work for the poor'.⁴⁰ However, poverty reduction is still primarily achieved through economic growth and this requires macroeconomic stability, privatization and liberalization.⁴¹ In the new PRSP

³⁷ B. Fine and D. Milonakis, "'Useless but True": Economic Crisis and the Peculiarities of Economic Science' (2011) 19(2) Historical Materialism 3 at 6.

³⁸ M. Rupert, 'The New World Order: Passive Revolution or Transformative Process?' in L. Amoore (ed), *The Global Resistance Reader* (2005) at 194-208.

³⁹ International Monetary Fund (IMF) 'Poverty Reduction Strategy Papers: A Fact Sheet' ><http://www.imf.org/external/np/exr/facts/prsp.htm><

⁴⁰ B. Hoekman, C. Michalopoulos, M. Schiff, and D. Tarr 'Trade Policy' in Jeni Klugman (ed), *A Sourcebook for Poverty Reduction Strategies, Volume II: Macroeconomic and Sectoral Approaches* (World Bank, 2002), at 33.

⁴¹ For critique of the PRSP process see; F. Stewart and M. Wang 'Poverty Reduction Strategy Papers within the Human Rights Perspective' In P. Alston and M. Robinson (eds), *Human Rights and Development: Towards a Mutual Reinforcement* (2005) at 456-457 (noting that key categories of participants such as parliamentarians, trade unions, women and marginalised groups have been excluded from the PRSP process); A. Ruckert, 'Towards an Inclusive-Neoliberal Regime of Development: From the Washington to the Post-Washington Consensus' (2006) 39(1) *Labour, Capital and Society*, 35-67; A. Ruckert, 'Producing Neoliberal Hegemony? A Neo-Grainsian Analysis of the Poverty Reduction Strategy Paper (PRSP) in Nicaragua' (2007), 79 *Studies in*

strategy the provision of social safety nets and other complimentary measures therefore become 'wedded in a marriage of convenience' with traditional neo-liberal economic policy prescriptions.⁴²

The shift to the PRSP strategy can be explained by reference to what Gramsci called *trasformismo*: the process whereby leaders and potential leaders of subordinate groups are co-opted into the dominant project in an effort to forestall the formation of counter-hegemony.⁴³ While the PRSP strategy and other PWC policies may have failed to create a strong hegemonic world order, particularly in the aftermath of the on-going financial crisis, they may have succeeded in co-opting and forestalling certain manifestations of popular political mobilisation and thereby disabling potentially transformative, self-empowering social movements.⁴⁴

2.2 Socioeconomic Rights, Counter-hegemony and *Trasformismo*

As noted in the introduction, it is generally thought that the relationship between socioeconomic rights and neo-liberal ideology is characterised by a number of discursive tensions, if not outright contradictions. Firstly, while neo-liberal discourse has regarded poverty and material deprivation as 'problems' to be addressed through technical solutions related to securing the macroeconomic conditions for economic growth, socioeconomic rights approaches raise the notion that certain forms of deprivation constitute 'violations' that give rise to binding obligations on States to take concrete steps towards ameliorating and reversing such deprivation.⁴⁵ Secondly, whereas neoliberalism has historically conceived of goods and services primarily as commodities to be

Political Economy 91 at 103; G. Dijkstra, 'The PRSP Approach and the Illusion of Improved Aid Effectiveness: Lessons from Bolivia, Honduras and Nicaragua' (2011) 29(1) Development Policy Review 111.

⁴² A. Cornwall and K. Brock, 'Beyond Buzzwords: "Poverty Reduction", "Participation" and "Empowerment" in Development Policy' (2005) United Nations Research Institute for Social Development, Program Paper No.10 at 8.

⁴³ Gramsci, *supra* 21 at 58-59.

⁴⁴ Ruckert, 'Producing Neoliberal Hegemony?' *supra* 41.

⁴⁵ P. Harvey 'Aspirational Law' (2004) 52 Buffalo Law Review 701, at 703-709 (arguing that socioeconomic rights constitute a counterweight to the utilitarian wealth maximization logic of neo-classical economics).

allocated privately through the market, a socioeconomic rights perspective regards those goods and services that are vital for human flourishing and dignity - or indeed basic survival – to be legal and moral entitlements allocated on the basis of human need rather than ability to pay.⁴⁶ Thirdly, whereas neo-liberalism normatively prescribes a ‘minimal state’ limited to upholding property rights and the rule of law, socioeconomic rights discourse conceives of the State as the duty holding entity tasked with ensuring the progressive realisation of universal access to healthcare, education, social security and so forth for its citizenry. In place of the ‘minimal state’, socioeconomic rights discourse invites the possibility of a ‘social state’ that plays a more pro-active role in distributing resources and regulating markets to ensure the material wellbeing and dignity of its population at large.⁴⁷ It is these discursive tensions that open up the possibilities for counter-hegemonic praxis to coalesce around the articulation of socioeconomic rights in opposition to neo-liberal globalisation.⁴⁸

Notwithstanding this, there is a rich collection of human rights scholarship that draws our attention to the fact that human rights discourse is a double edged sword in relation to its ability to contest power.⁴⁹ Whilst human rights tend to begin their existence as subversive challenges to dominant power structures, they are also more likely to become legitimisers of dominant power structures as they become cemented as sources of positive law (including public international law).⁵⁰ The inclusion of human rights in the UN Charter and International Bill of Human Rights after 1945 meant that they ‘were quickly appropriated by governments, embodied in treaties, made part of the stuff

⁴⁶ See for example Committee on Economic, Social and Cultural Rights (‘CESCR’) *General Comment No. 15: The Right to Water*, UN Doc. E/C.12/2002/11 at para. 11 (‘water should be treated as a social and cultural good and not primarily an economic good’) and para. 12(c)(ii) (‘water... must be affordable for all’).

⁴⁷ T.H. Marshall ‘Citizenship and Social Class’ in TH Marshall and T. Bottomore (eds) *Citizenship and Social Class* (1992) at 7.

⁴⁸ See generally L. White and J. Perelman (eds), *Stones of Hope: How African Activists Reclaim Human Rights to Challenge Global Poverty* (2011); B. Santos, *Towards a New Legal Common Sense: Law, Globalization and Emancipation* (2002) at 271; Buckel and Fischer-Lescano, *supra* 10 at 450-454.

⁴⁹ See e.g. M. Horwitz, ‘Rights’ (1988) 23 *Harvard Civil Rights-Civil Liberties Law Review* 393-406; C. Douzinas, *The End of Human Rights* (2000) at 1; U. Baxi, *The Future of Human Rights* (2002), at 40-41; B. de Sousa Santos, *Towards a New Legal Common Sense: Law, Globalization and Emancipation* (2002) at 257-280; B. Rajagopal ‘Counter-hegemonic International Law: rethinking human rights and development as a Third World strategy’ (2006) *Third World Quarterly* 767 at 768; Stammers, *supra* 11 at 3.

⁵⁰ Stammers, *ibid.*

of primitive international relations, swept up in the maw of an international bureaucracy'.⁵¹ Whilst neo-liberal doctrine and the ideal of socioeconomic rights appear to be in discursive tension, following a neo-Gramscian analysis it can be suggested that neo-liberal hegemony is achieved not through the imposition of a coherent and unified doctrine on social reality but rather through an on-going process of contestation that involves incorporating subaltern concerns into the hegemonic discursive framework through 'ever more refined but basically unchanged versions' of neoliberal governance.⁵² In short, the necessary reflexivity of a given hegemonic project coupled with the ambiguous relationship of rights discourse to power means that discursive tensions that appear to exist between the two cannot be taken as given facts and indeed discursive imbrication at the intersection of the two discourses is likely.

3. Socioeconomic Rights Co-opted

In this section, I will discuss three discursive frames through which socioeconomic rights under international law have been brought into closer reticulation with neo-liberal discourse. I label these frames: *socioeconomic rights as aspirations*, *socioeconomic rights as compensation*, and *socioeconomic rights as market outcomes*. In relation to the first two frames I focus primarily on the jurisprudence of the Committee on Economic, Social and Cultural Rights (CESCR), the main body responsible for monitoring State compliance with their obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁵³ In relation to the third frame I look beyond the UN human rights system and at how socioeconomic rights discourse has been appropriated more broadly in the UN, UN affiliated agencies and International Financial Institutions (IFIs) to demonstrate how critical ambiguities in the international legal framework for the protection

⁵¹ P. Allott, *Eunomia: New Order for A New World* (2001) at 287-288.

⁵² R. Peet 'Ideology, Discourse and the Geography of Hegemony: From Socialist to Neoliberal Development in Postapartheid South Africa' (2002) 34(1) *Antipode* 54 at 65.

⁵³ The International Covenant on Economic, Social and Cultural Rights (ICESCR), 993 UNTS 3, entered into force 3 January 1976

of socioeconomic rights can lead to discursive slippages in which the discourse is fully integrated into the neo-liberal hegemonic framework.

3.1 Socioeconomic Rights as Aspirations

Despite repeated proclamations of the indivisibility of all human rights, socioeconomic rights have always had a second class status in relation to their civil and political counterparts in the international framework of human rights protection.⁵⁴ Western Governments in particular have demonstrated much ambivalence, if not outright hostility, to the idea that socioeconomic rights give rise to legally binding obligations on States Parties.⁵⁵ Most notably, U.S administrations have historically resisted recognising the legally binding nature of socioeconomic rights, presenting arguments at the UN such as

At best, economic, social and cultural rights are goals that can be achieved progressively, not guarantees. Therefore while access to food, health services and quality education are at the top of any list of development goals, to speak of them as rights turns the citizens of developing countries into objects of development rather than subjects in control of their destiny⁵⁶

Such statements undoubtedly rest upon a neo-liberal conception of individuals as primarily producers and consumers entitled to secure their own access to material goods and services rather than being legally entitled to such goods vis-à-vis the State. However, such statements also exploit

⁵⁴ D. Marcus 'The Normative Development of Socioeconomic Rights Through Supranational Adjudication' (2006) 42 *Stanford Journal of International Law* 53-102

⁵⁵ H. Steiner, P. Alston and R. Goodman, *International Human Rights Law in Context: Law, Politics, Morals* (third ed, 2007) at 280-282

⁵⁶ Comments submitted by the United States of America, Report of the Open-Ended Working Group on the Right to Development, UN ESCOR, Commission on Human Rights, 57th Session, UN Doc E/CN4/2001/26 (2001) at para.8

the ambiguous international legal standards relating to socioeconomic rights. Whilst the ICESCR's twin treaty, the International Covenant on Civil and Political Rights (ICCPR),⁵⁷ requires States to adopt law and other measures to give effect to the rights in the Covenant and to ensure the provision and enforcement of remedies for breaches of the rights,⁵⁸ the obligations contained in article 2(1) of the ICESCR are clearly more qualified. In relation to socioeconomic rights the State need not act immediately but rather must 'progressively' realise such rights according to its 'available resources'. The formation of State obligations under article 2(1) is widely regarded in the scholarship to be unsatisfactory due to its 'convoluted phraseology and numerous qualifying sub-clauses' which seem to 'defy any sense of obligation... giving states almost total freedom of choice and action as to how rights should be implemented'.⁵⁹ The formulation of 'maximum of its available resources' has been described as 'a difficult phrase – two warring adjectives fighting over an undefined noun'⁶⁰ and the vague commitment on States to 'progressively realise' socioeconomic rights has been described as 'of such a nature as to be legally negligible'.⁶¹ The meaning of resources, the timescale permitted for realisation and the nature of legislative action required have historically been 'stumbling blocks to interpretation'.⁶²

The problems associated with the vague formulation of obligations contained in article 2(1) have been buttressed by the historic lack of enforcement mechanisms for the ICESCR. However, the initial absence of interpretative and enforcement mechanisms has been mitigated somewhat through the CESCR's utilisation of 'General Comments' and more recently by the adoption of the UN

⁵⁷ The International Covenant on Civil and Political Rights (ICCPR) 999 UNTS 171, entered into force 23 March 1976.

⁵⁸ ICCPR *ibid*, article 2(1)

⁵⁹ M. Craven, 'The Justiciability of Economic, Social and Cultural Rights', in R Burchill, D. Harris and A. Owers (eds), *Economic, Social and Cultural Rights: Their Implementation in United Kingdom Law* (1999) at 5

⁶⁰ R. Robinson, 'Measuring Compliance with the Obligation to Devote the "Maximum Available Resources" to Realising Economic, Social and Culture Rights' (1994) 16 *Human Rights Quarterly* 693 at 694

⁶¹ E. Vierdag 'The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights' (1978) 9 *Netherlands Year Book of International Law* 69 at 105.

⁶² C. Downes, 'Must the Losers of Free Trade Go Hungry? Reconciling WTO Obligations and the Right to Food' (2007) 47 *Virginia Journal of International Law* 619 at 626.

General Assembly of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR).⁶³ The OP-ICESCR allows the CESCR to receive and consider individual, group and inter-State communications claiming violations of socioeconomic rights contained within the Covenant.⁶⁴ Nevertheless, despite the OP-ICESCR's unanimous adoption, ratification by Member States has occurred at snail's pace.⁶⁵ This would indicate that Government ambivalence towards international judicial oversight of socioeconomic rights claims persists.

Furthermore, some critics have called into question the State Centric nature of the international human rights framework and asked whether it can adequately address the types of violations of socioeconomic rights associated with neo-liberal globalisation.⁶⁶ The traditional human rights paradigm imposes obligations on State Parties to respect, protect and fulfil the human rights of those subjects within their jurisdiction. However, the capacity to regulate certain aspects of economic and social affairs within their own borders has been significantly weakened by developments in the financial and commodity markets, the consolidation of global productive capacity by TNCs and the economic and ideological leverage of international lending institutions like the IMF and World Bank.⁶⁷ The policies of Northern States – ranging from their economic protectionism to their roles vis-à-vis international lending institutions in the imposition of structural adjustment – stand accused of undermining the socioeconomic rights of the poor in the Global

⁶³ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR), UN Doc A/63/435.

⁶⁴ OP-ICESCR *ibid*, articles 2, 8, 9 and 10.

⁶⁵ The OP-ICESCR was adopted unanimously by the UN General Assembly on 10 December 2008 yet it was not until the 5 February 2013 that the Protocol received its tenth ratification (from Uruguay) required for it to enter into force. It will enter into force on 5 May 2013. Whereas the OP-ICESCR only has ten parties, the First Optional Protocol to the ICCPR has 114. The United States and the United Kingdom, both key players in the context of neo-liberal globalisation, have not signed the OP-ICESCR.

⁶⁶ See e.g. G. Baker 'Problems in the Theorisation of Global Civil Society' (2002) 50 *Political Studies* 928-943; T. Evans & A. J Ayers, 'In the Service of Power: The Global Political Economy of Citizenship and Human Rights' (2006) 10(3) *Citizenship Studies* 289 at 295-299.

⁶⁷ L. Sklair, *Globalization: Capitalism & its Alternatives* (3rd ed, 2002) at 309.

South.⁶⁸ Whilst this has led some human rights advocates to argue for Northern States to be held accountable for 'extra-territorial' violations of socioeconomic rights, such calls have been consistently resisted by Northern States who argue that extra-territorial commitments under the ICESCR are, at best, moral obligations of a non-legal nature.⁶⁹

Given the disputed nature and extent of extra-territorial obligations in respect of socioeconomic rights, the CESCR has been guarded in its attempts to delineate the normative content of international obligations under the ICESCR. Whilst the CESCR describes a State's domestic obligations in terms of what a State is *required* to do and *must* do, a State's international obligations to respect, protect and fulfil the socioeconomic rights of individuals in third States are usually couched in terms of what a state *should* do.⁷⁰ The use of the deontic modality in relation to international obligations indicates that the CESCR are cautious about suggesting that there are legally binding extraterritorial obligations for socioeconomic rights in light of the fierce resistance to such inferences by powerful Western and Northern States. With regard to non-State actors such as

⁶⁸ T. Pogge, *World Poverty and Human Rights* (2002), at 15-20; R. Faini & E. Grill, 'Who Runs the IFIs?' (2004) Centre for Economic and Policy Research, Discussion Paper no.4666 at 21; M. Adouharb and D. Cingranelli. *supra* 8 at 135-149.

⁶⁹ See e.g. Commission on Human Rights, Summary Record of the 56th Meeting 22 April 2003, UN Doc E/CN.4/2003/SR.56, at para.49; Commission on Human Rights, Summary Record of the 51st Meeting 16 April 2004, UN Doc. E/CN.4/2004/SR.51, at para.84; Commission on Human Rights, Sixty First Session 10 February 2005, UN Doc. E/CN.4/2005/52, at para.76. For a critical analysis see M. Craven, 'The Violence of Dispossession: Extra-Territoriality and Economic, Social and Cultural Rights' in Baderin and McCorquodale (eds) *Economic, Social and Cultural Rights in Action* (2007) 71-88.

⁷⁰ See for example CESCR, General Comment 2, UN doc E/C.12/1990 para.9; CESCR, General Comment 12, UN Doc E/C.12/1999/5, para.36; CESCR, General Comment No. 13, UN Doc E/C.12/1999/5, para.56; CESCR, General Comment No. 15, *supra* 46, paras.33-36; CESCR, General Comment 18 (2005), UN Doc E/C.12/GC/18, para.30. There are a few exceptions to this general pattern. In its General Comment on the 'relationship between economic sanctions and respect for economic, social and cultural rights' the CESCR assert that the State and the international community '*must... do everything possible to protect at least the core content of the economic, social and cultural rights of the affected peoples*' of the country under sanction (emphasis added). General Comment 8, UN Doc E/C.12/1997/8, para.7. General Comment 15 and General Comments 14 and 18 (in relation to the rights to water, health and work respectively) all assert that States '*have to respect the enjoyment*' of the relevant rights of peoples in other countries. However, as members of international financial institutions - such as the IMF and World Bank - it is only asserted that they '*should pay greater attention*' to the protection of the relevant rights in their influencing of lending policies, credit agreements and international measures. CESCR, General Comment 15, *supra* 41, paras.31 & 36; CESCR, General Comment 14, UN Doc E/C.12/2000/4, para.39; CESCR, General Comment 19, UN Doc E/C.12/GC/18 paras.53 and 58.

TNCs and IFIs that are capable of adversely effecting socioeconomic rights of peoples in third states, the CESCR can only acknowledge that such entities are not directly bound by the ICESCR⁷¹ and are consequently restricted to encouraging them to ‘pay greater attention’ to socioeconomic rights concerns in the countries that they effect.⁷²

On the one hand the CESCR have, in the face of overwhelming evidence, felt the need to highlight the negative ramifications of economic globalisation and structural adjustment for the realisation of socioeconomic rights.⁷³ On the other, perhaps aware of the limits of their mandate within the State Centric UN human rights system, the CESCR have refrained from what could perhaps be regarded as ‘outlandish’ impositions of binding obligations which could suggest that routine procedures in the running of World Order constitute systemic human rights violations.⁷⁴ The remarks of former CESCR member (1997-2012) Eibe Riedel in a recent interview are telling in this respect: ‘the Committee should take great care not to overstep its role once the Optional Protocol is in force... It would be wise to choose micro-level issues first and keep away from macro-issues like extraterritorial application of ICESCR rights, or poverty generally, or environmental protection issues on a large scale. This would definitely frighten off many states from ratifying’.⁷⁵ To invoke Martti Koskenniemi’s parlance, the CESCR appear caught between the utopian universalism of human rights norms on the one hand and the apologist *realpolitik* of the State Centric international legal order they are embedded in on the other.⁷⁶

⁷¹ See e.g. CESCR, General comment 12 *ibid*, at para.20.

⁷² See e.g. General Comment 2, *supra* 62; General Comment 11, *supra* 62 at para.41; General Comment 13, *supra* 62 at para.60; General Comment No. 14, *supra* 62 at para.39; General Comment 15, *supra* 62 at para.60; General Comment 18, *supra* 62 at para.53.

⁷³ See Concluding Observations of the CESCR: Morocco (2000) E/C.12/1/Add.55 at para.38; Egypt (2000) E/C.12/1/Add.44 at paras.10 & 28; Algeria (2001) E/C.12/1/Add.71 at para.43; Venezuela (2001) E/C.12/1/Add.56 at para.8

⁷⁴ For a much more radical interpretation of extraterritorial obligations in regard to socioeconomic rights, see Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (2011), available at

<<http://www2.lse.ac.uk/humanRights/articlesAndTranscripts/2011/MaastrichtEcoSoc.pdf>>

⁷⁵ Quoted in I. Bantekas and L. Oette, *International Human Rights Law and Practice* (2013) at 217

⁷⁶ M. Koskenniemi *From Apology to Utopia: The Structure of International Legal Argument* (2005)

The upshot of all of this is that even after the ICESCR-OP comes into effect, many of the violations of socioeconomic rights associated with neo-liberal globalisation are likely to continue to exist outside of the bounds of binding international law. The generation of 'soft' law norms in relation to abuses of socioeconomic rights associated with neo-liberal globalisation alongside 'hard' law mechanisms associated with the international protection of private property interests raises profound questions about the function that socioeconomic rights law plays in the maintenance and contestation of World Order. As A. Claire Cutler argues, the global promulgation of non-binding voluntary codes (analogous here to the vague obligations associated with extraterritorial socioeconomic rights obligations) can be understood as a key component of the construction of neo-liberal hegemony: 'To the extent that juridification is taking a non-binding, 'soft' form of law, one must consider whether law is operating dialectically to juridify certain relations in hard legal disciplines (enforcement under WTO, NAFTA, the EU), and de-juridify others (corporate social responsibility; corporate environment and labour practices) in 'soft law' and voluntary legal regimes.'⁷⁷

When one considers that the property and investment rights of transnational capital are protected in 'exquisite detail' under extensive NAFTA, GATT and WTO regulations and articles⁷⁸ while social rights norms remain comparatively meagre and lack effective monitoring and enforcement mechanisms, it becomes easy to see how the latter become instruments of *trasformismo*: 'They are promoted as the efficient and rational means for giving globalisation a "human face", but this mythology conceals their nature as safety valves for capital'.⁷⁹ In other words, socioeconomic rights standards, and the promise they contain, can be marshalled to legitimate world order, but these

⁷⁷ A. C. Cutler, 'Gramsci, Law and the Culture of Global Capitalism' (2005) 8(4) *Critical Review of International Social and Political Philosophy* 527 at 537.

⁷⁸ Evans and Ayers, *supra* 66 at 293.

⁷⁹ Cutler, *supra* 77 at 539.

very same standards lack the 'bite' of hard law regimes to be able to mount effective challenges to the injustices associated with neo-liberalism.

3.2 Socioeconomic Rights as Compensation

At the 1994 annual report of the CESCR, a discussion was held with representatives of intergovernmental institutions and a number of non-government organisations (NGOs) on the question of the role of social safety nets as a means of protecting socioeconomic rights in the context of SAPs and transitions to free market economies.⁸⁰ The debate was sharply polarised between the representatives of the intergovernmental institutions and the NGO participants.⁸¹ The IMF representative defended the function of SAPs, arguing that they promoted the economic growth required for the realisation of socioeconomic rights.⁸² Whilst he acknowledged that these programs may have certain 'severe consequences' in the short term, they would prove beneficial in the long run and at any rate were preferable to the economic situation that debtor countries would experience if they were not to implement them.⁸³ Furthermore, he argued, appropriate social policies, and in particular temporary social safety nets, would be appropriate to mitigate the adverse impact of structural adjustment on the poor and other vulnerable groups.⁸⁴ Against this view, the representatives of the NGOs argued that social safety nets were an inadequate means to alleviate poverty in the context of structural adjustment.⁸⁵ It was argued that the structure of the SAP model itself was incongruous to the realisation of socioeconomic rights due to its focus on economic growth as an end in itself, its insufficient attention to broader social policies, the lack of democratic

⁸⁰ CESCR, Report on the tenth and eleventh sessions (2-20 May 1994, 21 November- 9 December 1994), UN Doc. E/C 12/1994/20, at paras.363-390.

⁸¹ *Ibid*, at para.390

⁸² *Ibid*, at para.373.

⁸³ *Ibid*.

⁸⁴ *Ibid* at para.373.

⁸⁵ *Ibid*. See e.g. para.384.

participation in how it is implemented and the lack of concern for the particular social needs of developing countries.⁸⁶

Philip Alston, the then Chairperson of the CESCR, underlined that there could be no trade-off of fundamental human rights in the SAP process but also noted the difficulties faced by a supervisory organ charged with the observance of human rights in establishing the degree of flexibility that was appropriate in regard to the fulfilment of human rights.⁸⁷ Whilst it should be noted that the purpose of the general discussion was to exchange views rather than to find answers to the questions raised, Alston's cautious remarks illustrate the limitations of the types of critical enquiry that can take place within the formal framework of human rights officialdom. The UN human rights system is premised on the understanding that the legal and political are entirely distinct categories and it is the function of its relevant human rights bodies to clarify, monitor and enforce the content of international legal norms whilst remaining neutral on questions of a political nature.⁸⁸ Hence, the CESCR has argued that, in terms of political and economic systems, the ICESCR 'is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or *laissez-faire* economy, or upon any other particular approach'.⁸⁹ Such a position is of course the orthodoxy in legal human rights discourse: human rights norms are able to regulate the political because they are 'objective' and stand above the domain of politics.

A neo-Gramscian account of World Order would call into question the ability of international law to genuinely be a politically neutral force and would rather argue that international law's role in creating, sustaining and contesting coercive and consensual social relations in the interlinked arenas

⁸⁶ Ibid, at paras.378-386.

⁸⁷ Ibid, at paras.365-367.

⁸⁸ See e.g. Office of the High Commissioner for Human Rights, *Human Rights and Trade*, 5th WTO Ministerial Conference, Cancun, Mexico, 10–14 September 2003, at 4.

⁸⁹ CESCR, General Comment No.3, UN Doc. E/1999/22, at para.8

of global political society and global civil society is inevitably a political exercise.⁹⁰ Therefore any suggestion of a politically neutral application of international law, on closer scrutiny, is likely to reveal latent normative biases. I want to suggest that the CESCR's dominant normative bias in relation to World Order can be characterised as an compensatory approach aimed at correcting or mitigating the perceived malfunctions of the existing international system. Such approaches open up the possibilities for socioeconomic rights to be discursively incorporated into the hegemonic framework of the Post Washington Consensus (PWC). It is important to stress at this point that my claim here is not premised upon any insight into the individual or collective preferences of members of the Committee, but rather the positions that are developed as a result of the institutional pressures that bring to bear within the context of the State-Centric international system.⁹¹

Although the CESCR has been critical of the impact of the SAPs/PRSPs on socioeconomic rights it has nevertheless asserted that it recognises 'that adjustment programmes will often be unavoidable and that these will frequently involve a major element of austerity'.⁹² The CESCR does not consider any of the trends and policies associated with neo-liberal globalisation – financialization, austerity, privatisation and deregulation – to be necessarily incompatible with the realisation of economic, social and cultural rights.⁹³ However, it argues that such tendencies, when taken together, must be compensated for by approaches which enhance the compatibility of those trends and policies with full respect for ESCR.⁹⁴ In short, the CESCR advocates 'adjustment with a human face'.⁹⁵

Here we witness a certain overlap between the language of the CESCR and the discursive framework of the PWC: both consider trends in neo-liberal globalisation to be 'inevitable' and both favour

⁹⁰ See e.g. Buckel and Fischer-Lescano, *supra* 10 at 445-450; Cutler, *supra* 10; Gramsci, *supra* 21 at 195-196, 246-247, 258 & 260.

⁹¹ See previous section.

⁹² CESCR, General Comment No.2 *supra* 70 at para.9.

⁹³ CESCR, 'Globalization and Economic, Social and Cultural Rights' UN Doc. E/1999/22-E/C at paras.2 and 3.

⁹⁴ *Ibid* at para.4.

⁹⁵ CESCR, General Comment No.2, *supra* 70 at para.9.

complementary measures to ensure that the interests of the poor are protected. Of course, there are also important differences between the CESCR and the discourse of the World Bank and other IFIs: the CESCR has human rights as the basis for its concern whereas the IFIs are primarily concerned with economic growth. Furthermore, the World Bank et al positively endorse neo-liberal macro-economic policies while the CESCR adopts a formally neutral position towards them. However, the supposedly neutral stance adopted by the CESCR in relation to neo-liberal policy prescriptions actually brings it into close discursive reticulation with the hegemonic paradigm of the PWC: rather than challenging the underlying trends in neo-liberal globalisation the CESCR argues that they should be compensated for with complementary measures designed to protect human rights. The approach of the CESCR is not therefore to articulate an alternative towards neo-liberal globalisation, but rather to recommend modifications of the dominant paradigm that make it compatible with human rights.

This raises the question of what function socioeconomic rights will play in relation to the current austerity drive in response to the financial crisis. On 16 May 2012 the CESCR published an open letter to State parties on economic, social and cultural rights in the context of the economic and financial crisis.⁹⁶ The statement observes ‘the pressures on many States Parties to embark on austerity programmes... in the face of rising public deficit and poor economic growth’ and notes further that ‘the Committee is acutely aware that this may lead many States to take decisions with sometimes painful effects’.⁹⁷ Whilst some retrogression in the enjoyment of socioeconomic rights is ‘inevitable’ it must be compatible with State obligations under the ICESCR. When austerity measures are introduced that negatively impact on socioeconomic rights it must be demonstrated that they are temporary, necessary, proportionate, non-discriminatory and do not impinge upon the minimum core content of socioeconomic rights.⁹⁸

⁹⁶ CESCR, ‘An Open Letter’ (16 May 2012), CESCR/48th/SP/MAB/SW (hereafter ‘Open Letter’) available at <<http://www2.ohchr.org/english/bodies/cescr/docs/LetterCESCRtoSP16.05.12.pdf>>

⁹⁷ Ibid, at 1.

⁹⁸ Ibid, at 2. See also Concluding Observations of the CESCR, Spain E/C.12/ESP/CO/5, para.8

The principles of necessity and proportionality require austerity measures adopted to be less detrimental to socioeconomic rights than any other policy or a failure to act.⁹⁹ This requirement is in line with the CESCR's non-retrogression jurisprudence which provides that there is a strong presumption of impermissibility for any retrogressive measures in relation to ICESCR rights. The burden is placed on the State Party to prove that all other alternatives were considered, the measure taken was justified in relation to the totality of the rights provided for in the ICESCR and in the context of the full use of the State party's maximum available resources.¹⁰⁰ Whilst this appears to be a robust presumption against the imposition of retrogressive measures, questions must be raised as to how effectively this principle will operate within a judicial setting. Many courts, particularly in the common law tradition, have demonstrated deference to the executive branch on matters of social and economic policy and generally avoid imposing positive obligations on the State.¹⁰¹ It is likely that courts will often be unwilling to challenge Government decisions to impose austerity measures as opposed to adopting alternative policies (i.e. economic stimulus packages) to address public deficit and poor economic growth.¹⁰²

The principle of non-discrimination requires States to take 'all possible measures, including tax measures, to support social transfers to mitigate inequalities that can grow at times of crisis and to ensure that the rights of the disadvantaged and marginalised individuals and groups are not disproportionately affected'.¹⁰³ This approach follows the CESCR's non-discrimination jurisprudence which requires that, *inter alia*, the objects of socioeconomic rights are available and affordable for all

⁹⁹ CESCR, 'An Open Letter', *supra* 96 at 2.

¹⁰⁰ See for example, CESCR, General Comment 13, *supra* 70 at para.45; General Comment 14, *supra* 70 at para.32; General Comment 15, *supra* 46 at para.19. See also ICESCR, *supra* 53, article 4 ('the State may subject [ICESCR] rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society').

¹⁰¹ S. Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (2008), at 93-98.

¹⁰² See discussion of *Hurley and Moore*, *infra* this section.

¹⁰³ Open Letter, *supra* 96, at 2.

and that poorer households are not disproportionately burdened with expenses.¹⁰⁴ Again, whilst the non-discrimination principle might appear to challenge the current logic of neo-liberal driven austerity given the disproportionate negative impact it is having on the poor,¹⁰⁵ it should be recalled that the PWC discourse of neo-liberalism is formally committed to policies designed to ensure that the poor do not bear the brunt of structural adjustment and austerity.¹⁰⁶ Whilst such commitments can easily be dismissed as empty rhetoric, it is important to bear in mind that austerity measures and neo-liberal policies can be combined with limited compensatory measures aimed at the poor and socioeconomic rights discourse can become an alibi in facilitating this process.

To provide an illustration of this point let us consider a case from 2012 in the United Kingdom. In *Hurley and Moore vs. Secretary of State for Business, Innovation and Skills* the claimants sought to challenge Government regulations that tripled the maximum chargeable rate for annual university tuition fees to £9000.¹⁰⁷ It was contended that the threefold increase in tuition fee rates was contrary to the right to education under Article 2 of Protocol 1 (A2P1) of the European Convention of Human Rights (ECHR)¹⁰⁸ and alternatively was contrary to that provision when read with Article 14 of the ECHR which prohibits discrimination in the enjoyment of Convention rights.¹⁰⁹ The claimants argued that these rights had to be read in light of the UK's obligations under the ICESCR which provides that 'higher education shall be made equally accessible to all, on the basis of capacity, by

¹⁰⁴ See e.g. CESCR, General Comment 14, *supra* 65 at para.12(b)(iii); CESCR, General Comment 15, *supra* 70 at para.27.

¹⁰⁵ The joint International Monetary Fund-World Bank Global Monitoring 2010 report estimated that by 2010 an additional 64 million people fell into extreme poverty as a result of the economic crisis alone. See World Bank and International Monetary Fund, *Global Monitoring Report 2010: The MDGs After the Crisis* (2010) at viii.

¹⁰⁶ See *supra* section 2.2.

¹⁰⁷ *R (Hurley and Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin)

¹⁰⁸ Protocol No.1 to the European Convention of for the Protection of Human Rights and Fundamental Freedoms, article 2, adopted 20 March 1952, entered into force 18 May 1954, 213 UNTS, ETS 9.

¹⁰⁹ European Convention for the Protection of Human Rights and Fundamental Freedoms, article 14, signed 4 Nov.1950, entered into force 3 Sept. 1953, 213 UNTS 221.

every appropriate means, and in particular by the progressive introduction of free education.¹¹⁰ It was submitted that tuition fee increases constituted a retrogressive measure and would discriminate against students from disadvantaged backgrounds because they were the most debt averse of potential university attendees.¹¹¹

The High Court rejected the claimants' submissions and upheld the Government's regulations. Lord Justice Elias suggested that whilst the ICESCR could be considered in relation to A2P1 it was not binding and under the ECHR States had a wide margin of appreciation in relation to charging fees at University level.¹¹² At any rate, the regulations were introduced in the context of public expenditure cuts which the Government considered necessary in order to restore public finances to a sustainable position.¹¹³ Furthermore given that article 2(1) of the ICESCR requires rights to be realised 'to the maximum available resources' Lord Justice Elias stated that 'it must be a serious question whether the UK is in breach of the provision'.¹¹⁴ In relation to the charge of discrimination against students from disadvantaged backgrounds, the Court accepted that it was likely that the increased tuition fees may deter some people from attending university. However, the Court did not find that there was evidence that this would have a disproportionate impact on students from lower socio-economic groups due to various measures which the Government put in place to increase university access to poorer students, particularly through creating a national scholarship program and increasing maintenance grants to students from low income families.¹¹⁵

What we witness in the *Hurley and Moore* ruling is the way in which the framing of *socioeconomic rights as compensation* and PWC neoliberal discourses converge and complement each other. The

¹¹⁰ ICESCR, *supra* 53, article 13(2)(c).

¹¹¹ *Hurley and Moore*, *supra* 107, [36-38].

¹¹² *Ibid* at [43] & [32]. Such statements reinforce the *socioeconomic rights as aspirations* frame discussed in the previous section.

¹¹³ *Ibid*, at [23].

¹¹⁴ *Ibid*, at [44].

¹¹⁵ *Ibid* at [51] & [52].

marketization and commodification of higher education is effectively given a human rights stamp of approval provided that some formal mechanisms are put in place to offset disproportionate impact upon poorer students. This framing of socioeconomic rights accepts the parameters of the present order and is entirely commensurate with the reproduction of existing structures and forms of power.

3.3 Socioeconomic Rights as Market Outcomes

It is within this third framing that socioeconomic rights become completely aligned with the neo-liberal hegemonic discursive formation. Much of the counter-hegemonic potential of socioeconomic rights discourse lies in its ability to subject the market to the primacy of human rights. Within this third framing of *socioeconomic rights as market outcomes*, the counter-hegemonic formation is inverted so that the market not only assumes primacy over human rights discourse, but becomes the means through which socioeconomic rights are attained. Upendra Baxi, analysing the impact of the materiality of neo-liberal globalisation on human rights discourse and praxis, suggests that the power of human rights has been appropriated by 'global capital', resulting in a shift towards a 'trade-related market friendly paradigm'.¹¹⁶ Within this alternate paradigm the 'promotion and protection of some of the most cherished contemporary human rights becomes possible only when the order of rights for global capital stands fully recognized'.¹¹⁷ Socioeconomic rights are thus reconceptualised as derivative of the rights of private businesses and TNCs. The corporate friendly reading of socioeconomic rights finds its expression in arguments such as the 'right to food (now reconceptualised by the Rome Declaration as the right to food security systems) is best served by the protection of the rights of agribusiness corporations';¹¹⁸ the right to water is best served by

¹¹⁶ U. Baxi, *The Future of Human Rights* (3rd ed, 2008) at 234.

¹¹⁷ *Ibid* at 257.

¹¹⁸ *Ibid*.

granting 'corporate rights to withdraw water globally for private profit'¹¹⁹ and the 'right to health is best served, in a variety of contexts, by the protection of the research and development rights of pharmaceutical and diagnostic industries'.¹²⁰

In addition to socioeconomic rights being derivative of the property rights of TNCs and private business interests, they are also dependent upon the creation of a neoliberal macroeconomic framework. As Robert Anderson and Hannu Wager, two counsellors to the WTO Secretariat, put it: 'Trade liberalization, by enhancing possibilities for voluntary exchange according to the principles of competitive advantage, creates wealth for all participants and thereby generate the resources needed for the fuller realization of... economic social and cultural rights'.¹²¹ Indeed, the core international institutions associated with neo-liberal globalisation – the WTO, the IMF and the World Bank – whilst resisting formally integrating concern for human rights into their constitutions, maintain that their overall significance for socioeconomic rights is a positive one. Hence, the World Bank states that '[t]hrough its support of primary education, health care and nutrition, sanitation, housing, and the environment, the Bank has helped hundreds of millions of people attain crucial economic and social rights'.¹²² The IMF also argues that 'by promoting a stable system of exchange rates and a system of current payments free of restrictions... the Fund contributes to providing the economic conditions that are a precondition for the achievement of the rights set out in the [ICESCR]'.¹²³ Finally, the WTO assert 'The opening of markets creates efficiency, stimulates growth

¹¹⁹ R. De Souza 'Liberal Theory, Human Rights and Water-Justice: Back to Square One?' (2008) *Law, Social Justice & Global Development Journal* 1 at 5.

¹²⁰ Baxi, *supra* 116 at 256.

¹²¹ R. D. Anderson and H. Wager 'Human Rights, Development and the WTO: The Cases of Intellectual Property and Competition Policy (2006) 9(3) *Journal of International Economic Law* 707 at 708.

¹²² World Bank, *Development and Human Rights: The Role of the World Bank* (1999) at 3.

¹²³ F. Gianviti, 'Economic, Social and Cultural Rights and the International Monetary Fund' (2002) available at ><http://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/gianv3.pdf>< at para.57.

and helps spur development, thereby contributing to the implementation of the fundamental human rights that are social and economic rights'.¹²⁴

In relation to specific socioeconomic rights we find an acceptance in the UN Food and Agriculture Organisation's *Voluntary Guidelines on the Right to Food*¹²⁵ that States should realise the right to food by subscribing to neoliberal prescriptions such as the need to 'ensure non-discriminatory access to markets',¹²⁶ 'prevent uncompetitive market practices',¹²⁷ 'be in conformity with WTO agreements',¹²⁸ 'benefit from opportunities created by competitive agricultural trade',¹²⁹ 'foster... food security... through a... market orientated... world trade system'¹³⁰ and operate 'within the framework of relevant international agreements, including those on intellectual property'.¹³¹ Indeed, during the negotiations on the Guidelines, Margret Vidar from the FOA Legal Council sought to assuage concerns that the right to food would constitute an unacceptable interference in market activity by assuring that '[t]here are numerous instruments for ensuring the realisation of food rights that do not conflict with market liberalisation and deregulation and the principles of efficiency'.¹³² At the recent World Water Forum held in France a ministerial declaration endorsed by 84 government ministers stated 'We commit to accelerate the full implementation of the human rights obligations relating to access to safe and clean drinking water and sanitation by all appropriate means as part of

¹²⁴ P. Lamy, 'Towards Shared Responsibility and Greater Coherence: Human Rights, Trade and Macroeconomic Policy' (2010) available at >http://www.wto.org/english/news_e/sppl_e/sppl146_e.htm<

¹²⁵ Food and Agriculture Organisation of the United Nations, *Voluntary Guidelines To Support the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security*, available at ><http://www.fao.org/docrep/meeting/009/y9825e/y9825e00.htm>< accessed November 1 2012

¹²⁶ Ibid, at Part 2, Guideline 4.2

¹²⁷ Ibid

¹²⁸ Ibid at Part 2, Guideline 4.4

¹²⁹ Ibid at Part 2, Guideline 4.6

¹³⁰ Ibid at Part 2, Guideline 4.7

¹³¹ Ibid at Part 2, Guideline 8.4

¹³² Vidar, cited in J. Germann, 'The human right to food: 'voluntary guidelines' negotiations' in Y. Atasoy (ed), *Hegemonic Transitions, the State and Crisis in Neoliberal Capitalism* (2009) at 138.

our efforts to overcome the water crisis at all levels.’¹³³ Appropriate means include the promotion of ‘strategic and sustainable financial planning, through an appropriate mix of contributions from water users, public budgets, private finance, bilateral and multilateral channels’.¹³⁴ Whilst such statements are incredibly vague, it is clear that they open the path to the privatization of water services and introduction or maintenance of user fees under the rubric of human rights.¹³⁵

The reframing of socioeconomic rights as market outcomes discursively incorporates them into the neo-liberal fold in a number of ways. Firstly, socioeconomic rights are completely subject to the logic of the market rather than the market being subjected the logic of human rights. Secondly, the holders of socioeconomic ‘rights’ are effectively reconfigured as market citizens (*‘homo economicus’*) whose rights consist of the opportunity to secure goods in the market place rather than have them as legal entitlements vis-à-vis the State. And thirdly, the obligation of the State shifts from the direct duty to ensure access to welfare goods and services to the duty to provide the framework in which individuals exercise economic freedoms to secure their own access to welfare goods and services. This framework is itself largely defined in terms of neo-liberal policy prescriptions although it is likely to contain compensatory mechanisms associated with the discourse of the PWC.¹³⁶

¹³³ The Ministerial Declaration of the 6th World Water Forum, 13 March 2012, para.3 Available at ><http://www.worldwaterforum6.org/en/news/single/article/the-ministerial-declaration-of-the-6th-world-water-forum/><

¹³⁴ Ibid, at para.29.

¹³⁵ Felipe Quispe Quenta, Bolivia's minister for water and the environment, denounced the declaration for failing to address the "social dimensions" of water policies and stated that ‘It is certainly important to strengthen and support local actions to protect and preserve water for the benefit of all those who will enjoy it in different uses, but a payment is not the way to do it... water cannot be turned into a business.’ Quoted in Claire Provost, ‘World Water Forum falls short on human rights, claim experts’ *Guardian* (London , 14 March 2013)

¹³⁶ E.g. the *Voluntary Guidelines on the Right to Food*, *supra* 125. In addition to articulating neo-liberal policy the *Guidelines* also stress that ‘states will take into account that markets do not automatically result in everybody achieving sufficient income at all times to meet basic needs’ (Part 2, Guideline 4.9) and that ‘State parties should, to the extent that resources permit, establish and maintain safety nets to protect those who are unable to provide for themselves’ (Part 1, Guideline 17).

4. Socioeconomic Rights and the Prospects for Counter-hegemony

From the above analysis, it can be argued that the language of socioeconomic rights has been incorporated into neo-liberalism's hegemonic project of 'global governance' to a significant degree. This might suggest that attempts to use socioeconomic rights discourse as a counter-hegemonic challenge to neo-liberalism will necessarily prove ineffectual. I would suggest however that this is not the case. Socioeconomic rights discourse under international law contains a number of potential counter-hegemonic frames: the presumption against retrogressive measures *can* be used to challenge the logic of austerity; the prohibition against discrimination *can* challenge privatisation measures that disproportionately impact on poor and marginalised groups; and the goal of progressive realisation of universal access to certain material entitlements condemns widespread poverty and material deprivation and opens up legal and other institutional channels to challenge them.

Of course, as this article has illustrated, these principles can be interpreted and enforced in such a way as to render them compatible with neo-liberal governance, but such risks of co-option exist in relation to all potentially counter-hegemonic discourses. To adapt a phrase from Patricia Williams, the problem here lies not with socioeconomic rights discourse itself, but rather with the 'constricted referential universe' that it operates within.¹³⁷ Battles for the meaning and realisation of human rights 'articulate the social conflicts and contradictions embedded in social life and are one of the many forms in which these struggles get played out in ways that reflect, albeit in complex and mediated fashions, the prevailing balance of forces'.¹³⁸ For Gramsci the construction of counter-hegemony 'is not a question of introducing from scratch a scientific form of thought into everyone's

¹³⁷ P. Williams 'Alchemical notes: reconstructing ideals from deconstructed rights' (1987) 22 *Harvard Civil Rights-Civil Liberties Law Review* 401 at 431.

¹³⁸ A. Bartholomew and A. Hunt "What's Wrong With Rights?" (1991) 9 *Law and Inequality* 1 at 13.

individual life, but of making 'critical' an already existing activity'.¹³⁹ Counter-hegemony cannot be constructed on a purely oppositional plane but rather entails 'the "reworking" or "refashioning" of elements which are constitutive of the dominant hegemony'.¹⁴⁰ Counter-hegemonic strategy would therefore entail articulating and re-articulating elements pertaining to the discourse of socioeconomic rights in ways in which they contest the neo-liberal hegemonic formation.

Whilst some have argued that human rights strategies may compete with, and preclude, other emancipatory programs,¹⁴¹ there is no reason to view the discourses that counter-hegemonic praxis can draw upon in terms of competing, either-or categories.¹⁴² Instead, socioeconomic rights discourse might be thought of as a component in a 'portfolio' of discourses aimed at contesting neo-liberal globalisation.¹⁴³ There are a number of global justice movements that employ socio-economic rights discourse in their struggles for alternative visions of globalization without *reducing* themselves to rights discourse. Three striking examples of such global movements include:

1. *The Food Sovereignty Movement*: In opposition to agricultural liberalization, embodied in the WTO Agreement on Agriculture and the North American Free Trade Agreement, a global movement comprised of small-scale farmers, pastoralists, fisher-folk, indigenous peoples, landless peasants, urban slum dwellers and others has coalesced around the ideas of food sovereignty and the right to food.¹⁴⁴ The international peasant movement *La Via Campesina* has organised with an array of non-governmental and civil society organisations in a number

¹³⁹ Gramsci, *supra* 21 at 330-331.

¹⁴⁰ A. Hunt, 'Rights and Social Movements: Counter-hegemonic Strategies' (1990) 17(3) *Journal of Law and Society* 309 at 313.

¹⁴¹ D. Kennedy, *The Dark Side of Virtue: Reassessing International Humanitarianism* (2004) at 4; W. Brown "'The Most We Can Hope For..." Human Rights and the Poverty of Fatalism' (2004) 103(2/3) *South Atlantic Quarterly* 451 at 461-462.

¹⁴² O. Miroso and L.M Harris 'Human Right to Water: Contemporary Challenges and Contours of a Global Debate (2011) 44:3 *Antipode*, 932 at 933.

¹⁴³ *ibid*

¹⁴⁴ See for example W. D. Schanbacher, *The Politics of Food: The Global Conflict Between Food Security and Food Sovereignty* (2010)

of global settings, including at parallel events to the UN's World Food Summit and at the annual World Social Forum gatherings.¹⁴⁵ Such movements have developed the notion of Food Sovereignty, which they define as 'the right of peoples to healthy and culturally appropriate food produced through ecologically sound and sustainable methods, and their right to define their own food and agriculture systems'.¹⁴⁶ The Food Sovereignty model, which has been integrated into the constitutions of a number of States in the Global South, is presented as an alternative to the corporate dominated neo-liberal model of agricultural development.¹⁴⁷

2. *The Public Health Movement*: A global public health movement, spearheaded by HIV/AIDS activists from sub-Saharan Africa, Brazil and elsewhere in alliance with international organisations such as *Médecins Sans Frontier* and the Third World Network, has mobilised around constitutionally and internationally enshrined articulations of the right to health to challenge the intellectual property rights of pharmaceutical corporations as protected under the WTO Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement and other regional and bilateral trade agreements.¹⁴⁸ Right to health based strategies have not only been utilised to allow States to make greater use of TRIPS flexibilities (e.g. in relation to compulsory licensing and parallel importing of medicines) but also to push for alternative models of medical research and development that are orientated towards health needs rather than the commercial interests of pharmaceutical TNCs.¹⁴⁹

¹⁴⁵ For a selection of documents prepared by the International Planning Committee on Food Sovereignty see <<http://www.foodsovereignty.org/Resources/Archive/Forum.aspx>>

¹⁴⁶ Declaration of the Forum for Food Sovereignty, Nyéléni 2007, available at <<http://www.nyeleni.org/spip.php?article290>>

¹⁴⁷ W. Bello, *The Food Wars* (2009), at 125-149

¹⁴⁸ D. Matthews, *Intellectual Property, Human Rights and Development* (2011)

¹⁴⁹ See e.g. Letter to ask World Health Organization to Evaluate New Treaty Framework for Medical Research and Development, available at <<http://www.cptech.org/workingdrafts/rndsignonletter.html>> : T. Pogge, 'Human Rights and Global Health: A Research Program' (2005) 36 *Metaphilosophy*, 182

3. *The Water Justice Movement*: For over a decade social movements from around the world have been resisting the privatisation and commercialisation of water.¹⁵⁰ A global movement has emerged that has challenged corporate private sector involvement in the supply of water services and has been arguing for and putting into practice alternatives that are inclusive, participatory, democratic, equitable and sustainable.¹⁵¹ A central plank of campaigning strategy for many of these movements has been to push for the recognition of the right to water in both domestic and international law. A target of the global water justice movements has been the World Water Forum (WWF) which meets every three years. Critics accuse the WWF of being a corporate-led, profit-motivated organization that refuses to acknowledge the human right to water.¹⁵² At each WWF summit, activists from all over the world gather to protest as well as organize parallel summits in which alternative visions of water governance are articulated and related to the realization of the right to water.¹⁵³ Whilst there is diversity in the water justice movements, they share the belief that water is a common good and therefore must not be treated as a private commodity to be bought, sold or traded for profit.¹⁵⁴

The precise nature of the relationship between the invocation of socioeconomic rights and the discourses of food sovereignty, public health and water justice (all of which of heterogeneous

¹⁵⁰ J. E. Castro 'Neoliberal Water and Sanitation Policies as a Failed Development Strategy: Lessons from Developing Countries' (2008) 8 *Progress in Development Studies* 63 at 68, 73 & 76.

¹⁵¹ M. A. Manahan, G. Zanzanaini & C. Campero 'Future of Water Movement Session: A Summary (2012) available at <<http://www.fame2012.org/en/2012/04/10/future-of-water-movement/>>

¹⁵² Miroso and Harris, *supra* 142 at 942-944.

¹⁵³ *Ibid*

¹⁵⁴ For a collection of international declarations declaring that water is a fundamental human right and common good that cannot be commodified see <http://www.sierraclub.org/committees/cac/water/human_right/>

discourses themselves) is complex and beyond the scope of this article but it will suffice to note here that there is no *a priori* conflict between socioeconomic rights and other emancipatory discourses.¹⁵⁵

If it is accepted that all potentially emancipatory discourses operate in a complex environment with other discourses (including neo-liberal ones) and can therefore be transformed and co-opted into the service of extant power relations, the focus of the question about the potential of socioeconomic rights shifts from a theoretical discussion of discourse to a concrete discussion of *agency*, or what Neil Stammers terms the ‘creative social praxis’ of counter-hegemonic social movements.¹⁵⁶ Nancy Fraser has identified the formation of ‘subaltern counterpublics’ as central to counter-hegemonic strategy.¹⁵⁷ These consist of ‘parallel discursive areas where members of the subordinated social groups invent and circulate counter discourses, which in turn permit them to formulate oppositional interpretations of their identities, interests and needs’.¹⁵⁸ Whilst the UN and national and international courts might constitute tactical arenas of struggle for subaltern movements, they may be limited in their capacity to offer truly counter-hegemonic strategies because of the institutional pressures that are brought to bear in those settings.¹⁵⁹ It is within

¹⁵⁵ For a detailed analysis of the relationship between food sovereignty and the right to food see M. Windfuhr and J. Jonsen, *Food Sovereignty: Towards democracy in localized food systems* (2005). For the role the right to health has played in contesting international intellectual property norms see Matthews, *supra* 148 at 210-218. For an analysis of the relationship between the right to water and other water justice discourses see Miroso and Harris, *supra* 142.

¹⁵⁶ Stammers, *supra* 11 at 33-39

¹⁵⁷ N. Fraser, ‘Rethinking the Public Sphere: a Contribution to the Critique of Actually Existing Democracy’ Baker (ed), *Post Modernism and the Re-reading of Modernity* (1992) at 84.

¹⁵⁸ *Ibid.*

¹⁵⁹ In relation to the UN, Baxi notes a tendency in which ‘human rights standards and norms, which are products of diplomatic and international civil service desire within the ever-expanding United Nations system, lend themselves to a whole variety of foreign power and global corporate uses and abuses under the cover of ‘international consensus’. Baxi, *supra* 49 at 9. Ran Hirschl suggests a tendency for courts to play a role in advancing ‘a predominantly neo-liberal conception of rights that reflects and promotes the ideological premises of the “new global economic order” – social atomism, anti-unionism, formal equality, and “minimal state” policies’. R. Hirschl, *Towards Juristocracy – The Origins and Consequences of the New Constitutionalization* (2000) at 163. See also P. O’Connell, ‘The Death of Socioeconomic Rights’, 74(4) *Modern Law Review* (2011) at 532 (arguing that the socioeconomic rights jurisprudence of apex courts in Canada, India and South Africa points towards an underlying trend of an ‘atomistic, “market friendly”’ reading of human rights).

counterpublics that subaltern movements can engage in what Gramsci termed a ‘war of position’:¹⁶⁰ a process which ‘slowly builds up the strength of the social foundations of a new state’ by ‘creating alternative institutions and alternative intellectual resources within existing society’.¹⁶¹ It is noteworthy that the food sovereignty, public health and water justice movements discussed above have not limited their activism to ‘official’ legal and institutional channels but also formed and participated in alternative institutions within the domain of transnational civil society. The World Social Forums, the Permanent People’s Tribunals and the Bolivian Alliance for the Peoples of Our America (ALBA) are also examples of counter-institutions that have invoked the discourse of socioeconomic rights in their contestation of neo-liberalism.¹⁶²

Finally, it might be asked: what exactly does socioeconomic rights discourse bring to the table when it comes to contesting neo-liberal globalisation? Perhaps part of the reason for the use of rights talk in such counter-hegemonic articulations is the role played by rights in the process of *universalisation*, i.e. in the re-articulation of the particular interests of a social grouping or class as the universal interests of all of humanity through moral and ideological leadership.¹⁶³ The re-articulation of particular needs, interests or wants as ‘rights’ that inhere to individuals or collectives on the basis of their belonging to ‘humanity’ rather than a more particular category marks a passage from the ‘sectional’ to the ‘universal’ plane upon which the construction of hegemony *and* an alternative counter-hegemony takes place.¹⁶⁴

¹⁶⁰ Gramsci, *supra* 21 at 238-239.

¹⁶¹ Cox, *supra* 34 at 53

¹⁶² See: B. De Sousa Santos ‘Beyond Neoliberal Governance: The World Social Forum as Subaltern Cosmopolitan Politics and Legality’ in B De Sousa Santos and C. A. Rodriguez-Garavito eds *Law and Globalization from Below: Towards a Cosmopolitan Legality* (2005) at 29-63; For an account of the Permanent People’s Tribunal see <http://www.internazionaleleliobasso.it/?page_id=207&lang=en> ; M. Al Attar & R. Miller ‘Towards an Emancipatory International Law: the Bolivian Reconstruction’ (2010) 31(3) *Third World Quarterly* 347-363.

¹⁶³ For critical accounts of the role that rights and international law play in universalization strategies see: Hunt *supra* 140 at 321; D. Kennedy ‘The Critique of Rights in Critical Legal Studies’ in W. Brown and J Halley (eds) *Left Legalism/Left Critique* (2002) at 188; M. Koskenniemi ‘International Law and Hegemony: a Reconfiguration’ (2004) 17(2) *Cambridge Review of International Affairs* 197-218.

¹⁶⁴ Gramsci, *supra* 21 at 181-182

Whilst the category of the *universal* has come under attack from certain quarters of post-colonial and post-structuralist scholarship as an imperialist ideal that seeks to impose European provincial ideals on the Global South, there has also been a revival of scholarship that seeks to defend a variant of normative universalism as a language of collective identity, resistance and transformation.¹⁶⁵ Neo-liberal capitalism has been truly universalised – from austerity Europe to the debt ridden Global South. In response to the hegemony of neo-liberalism, a viable counter-hegemony, spanning South and North, needs to draw together ‘subaltern social forces around an alternative ethico-political conception of the world, constructing a common interest that transcends narrower interests situated in the defensive routines of various groups’.¹⁶⁶ I would suggest that rights discourse – understood as necessarily constantly in flux and the object of political contestation – can play an important role in a counter-hegemonic universalization strategy. Socioeconomic rights discourse gives priority to the goal of universal access of every individual to sufficient access to the goods and services required for human dignity regardless of the ability to pay. It also suggests a level of responsibility to ensure the attainment of these goods, traditionally placed upon the State but not necessarily debarring wider interpretation. For these reasons socioeconomic rights discourse retains the power to both condemn the present and serve as a vehicle to construct an alternative.

5. Conclusion

This article has drawn upon a Gramscian analysis of hegemony to suggest that the binary opposition often assumed in relation to neo-liberalism and socioeconomic rights cannot be sustained. Neo-liberal hegemony is both reflexive to counter-challenges and incorporative of them. A neo-liberal account of socioeconomic rights discourse has thus emerged which frames socioeconomic rights

¹⁶⁵ See for example V. Chibber, *Postcolonial Theory and the Spectre of Capital* (2013) at 202-206.

¹⁶⁶ W. K. Carroll ‘Hegemony, Counter-hegemony, Anti-hegemony’ (2006) 2(2) *Socialist Studies* 9 at 21.

variously as aspirations, compensation and market outcomes. The fact that the discourse of socioeconomic rights is open to such appropriation, despite being widely regarded as antithetical to neo-liberalism, underscores the need for a fuller theorization of the strategies to be deployed that will minimise the risk of socioeconomic rights being co-opted and the strategies required to ensure that they retain their critical, subversive and emancipatory potential.