

European Master's Degree
In Human Rights and Democratisation

Awarded Theses
of the Academic Year
2013/2014

"The satanic mill. Human rights
and the responsibility to counteract"

Thesis *by* Schrempf Tessa Antonia





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FOREWORD

The *European Master's Programme in Human Rights and Democratisation* (E.MA) is the first Master's course in human rights and democratisation launched and financed by the European Commission that later served as model for establishing other Regional Master's around the world. Since January 2013 these are all connected and managed by the *European Inter-University Centre for Human Rights and Democratisation* (EIUC) under the *Global Campus of Regional Master's Programmes* (GC).

E.MA is a one-year master's course aimed at preparing professionals to respond to the requirements of daily work in international organisations, field operations, governmental and non-governmental bodies, and academia. The programme offers an action and policy-oriented approach to learning about human rights, democratisation and international relations from legal, political, historical, anthropological, and philosophical perspectives. This interdisciplinary nature and wide-ranging scope of E.MA reflect the benefits of true European inter-university cooperation in human rights education. It is an interdisciplinary programme that reflects the indivisible links between human rights, democracy, peace and development.

During the first semester in Venice, students have the opportunity to meet in a multi-cultural environment and be taught by leading academics, experts and representatives of international and non-governmental organisations. During the second semester students relocate to one of the *participating universities* in the various EU Member States to follow additional courses in an area of specialisation of their own choice and to write their thesis under the supervision of the E.MA Director or other academic staff. After successfully passing exams and completing a Master's thesis, students are awarded the European Master's Degree

in Human Rights and Democratisation jointly conferred by a group of EIUC/E.MA universities.

Each year the E.MA Council of Directors selects five theses which stand out not only for their formal academic qualities but also for the originality of topic, innovative character of methodology and approach, and potential usefulness in raising awareness about neglected situations or issues and capacity for contributing to the promotion of the values underlying human rights and democracy.

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- Mihailescu, Laura, *Blasting into Fame. Female Terrorists Make a Statement*, Supervisor: Prof. Maria Teresa Beleza, New University Lisbon.
- Nurzia, Olivia, *Memory, Human Rights Films and Symbolic Reparations. A Case Study on the New Argentine Cinema*, Supervisor: Prof. Luz Maceira Ochoa, University of Deusto.
- Schrempf, Tessa Antonia, *The Satanic Mill. Human Rights and the Responsibility to Counteract*, Supervisor: Prof. Jan Klabbers, University of Helsinki.
- Storaas, Guri, *Surviving Independence. South Sudan's Contested Constitution-making Process*, Supervisor: Prof. Véronique Dudouet, University of Hamburg.
- Venturi, Denise, *The Prominence of the Body as an Instrument of Border Control. Assessing the Age of Unaccompanied Migrant Children in the European Union*, Supervisor: Prof. Marie-Claire Foblets, Catholic University of Leuven.

This volume includes the thesis *The Satanic Mill. Human Rights and the Responsibility to Counteract* by Schrempf, Tessa Antonia, and supervised by Prof. Jan Klabbers, University of Helsinki.

BIOGRAPHY

Tessa Antonia Schrempf holds a BA in International Development, a Magister Degree in Law (both from the University of Vienna) as well as an E.MA in Human Rights and Democratisation (EIUC Venice, University of Helsinki). Previously, Tessa has worked at an Austrian law firm, and done a number of internships including with the OSCE in Azerbaijan, the ECtHR in Strasbourg, the Austrian embassy in London and the

International Commission of Jurists in Brussels. She is a board member of the Centre for the Enforcement of Human Rights International (CEHRI) based in Vienna (Austria), an NGO for strategic human rights litigation. At CEHRI, Tessa focuses on anti-poverty litigation – an area she wishes to further develop academically and in practice.

ABSTRACT

This thesis argues that the free market doctrine and the institutional framework it requires create an environment that, while having a huge impact on people's lives, does not provide for externalities such as the realisation of human rights. Given that states have a primary responsibility to ensure people's *de facto* enjoyment of their human rights, governments have to reclaim fiscal space and assume a regulatory responsibility with respect to the market environment. This leads to restoring the primacy of the human being over that of the market. Human rights are considered to be a suitable vehicle to satisfy this need. In order to adequately respond to the complexity of the market environment, it is vital to revisit the state's human rights obligations. The approach suggested understands the market as one of the sources of deprivation that lead to human rights violations. In order to specify the state duties this may entail, this thesis argues for an alternative human rights theory, the "responsibility to counteract."

The feasibility of the responsibility to counteract is shown by briefly applying it to the financial and economic crisis in Europe in the early 21st century and tackles *inter alia* rising poverty, unemployment and inequality.

Like past editions, the selected theses amply demonstrate the richness and diversity of the E.MA programme and the outstanding quality of the work performed by its students.

On behalf of the Governing Bodies of EIUC and E.MA and of all participating universities, we congratulate the author.

PROF. FLORENCE BENOÎT-ROHMER
EIUC Secretary General

PROF. RIA WOLLESWINKEL
E.MA Chairperson

TESSA ANTONIA SCHREMPF

THE SATANIC MILL
HUMAN RIGHTS AND THE RESPONSIBILITY
TO COUNTERACT

Undoubtedly, labor, land, and money markets are essential to a market economy. But no society could stand the effects of such a system of crude fictions even for the shortest stretch of time unless its human and natural substance as well as its business organization was protected against the ravages of this satanic mill.

Karl Polanyi, 1957 [first published in 1944], p. 73.

First of all, I want to thank my parents, Alexia, Eberhard, and Günter, for their years of support throughout my studies. I could not have done it without you, and I am extremely lucky to have your unquestioned support. I particularly want to thank my mum for telling me how proud she is, and for always taking time for me.

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Finally, I want to thank my study colleague and friend Patrick for bearing with me during the entire process, from developing the idea to this thesis to some final proof readings. Your inputs are always highly appreciated.

ACHPR	African Commission on Human and People's Rights
BIH	Bosnia and Herzegovina
CEPEJ	The European Commission for the Efficiency of Justice
CoE	Council of Europe
CommDH	CoE Commissioner for Human Rights
CPRs	Civil and political rights
CSR	Corporate Social Responsibility
EC	European Commission
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECtHC	European Court of Human Rights
ESC	European Committee for Social Rights
ESCRs	Economic, social and cultural rights
EU	European Union
EU27	European Union as comprised of 27 member states
EU28	European Union as comprised of 28 member states
FCIC	Financial Crisis Inquiry Commission
FRA	Fundamental Rights Agency
FYROM	Former Yugoslav Republic of Macedonia
GDP	Gross domestic product
GNP	Gross national product
HRBA	Human rights-based approach
HRW	Human Rights Watch
ILO	International Labour Organisation
IMF	International Monetary Fund
NSA	Non-state actor
RTD	Right to development
TNC	Transnational Corporation
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
US	United States
VAT	Value added tax

THE SATANIC MILL

WB	World Bank
WFP	World Food Programme
WHO	World Health Organisation
WTO	World Trade Organisation

TABLE OF CONTENTS

7	Introduction
11	1. On Markets, Governments, and Human Rights
12	1.1. The Role of Government “in” the Market
12	1.1.1. Karl Polanyi and The Great Transformation
21	1.1.2. Adam Smith’s Moral Sentiments and the Wealth of Nations
25	1.1.3. Friedrich Hayek on The Road to Serfdom
28	1.1.4. Conclusion
29	1.2. The Role of Human Rights in the Market
33	1.2.1. Why the Market Is Blind to Human Rights
39	1.2.2. And Why Governments Choose to Be
43	1.3. Responsibilities and the Market Environment
47	1.3.1. The Responsibility to Counteract
54	1.3.2. Content of the Responsibility to Counteract
58	2. On the Application of the Responsibility to Counteract
60	2.1. The Crisis Environment
65	2.2. Human Rights in the Crisis Environment
74	2.3 The Responsibility to Counteract and the Crisis Environment
75	2.3.1. The European Convention on Human Rights
78	2.3.2. The European Social Charter
81	2.3.3. The Responsibility to Counteract Applied
85	Conclusion
87	Bibliography

INTRODUCTION

The world we live in today is richer than ever before in terms of the amount of financial capital it has accumulated¹. Yet, over 1.2 billion people live below the poverty line of 1.25 USD a day², with tendencies rising since the economic crisis and “poverty [being] more severe and inequality more deeply entrenched than a few years ago³.” In Sub-Saharan Africa, such people represent 48.5% of the population⁴. In the United States, inequality is continuously on the rise, with the wealthiest 1% having owned over a third of the nation’s wealth and “the top 0.01 percent of America’s households [having had] an income that was 220 times larger than the average of the bottom 90 percent⁵.” In Europe, the highest numbers of material deprivation or people at risk of poverty or social exclusion are those under the age of 18⁶. In 2011, almost 30% of Europe’s youth were at risk of poverty⁷, with material deprivation

¹ Despite the notorious difficulty of measuring this, different figures indicate that the gross domestic product (“GDP”; see World Bank, “WB”, statistics accessed via <http://data.worldbank.org/indicator/NY.GDP.MKTP.CD?display=graph>) and GDP/capita (see <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD?display=graph>) as well as global wealth (see e.g. World Bank, 2011, p. 30) have increased constantly over the past ten years. Since the industrial revolution, world growth has been rising, meaning that the global output rate has grown (see Piketty, 2014, pp. 72 ff. and table 2.1, p. 74).

² According to WB data of 2010, a total amount of 1,215 million people were living below the poverty line: <http://povertydata.worldbank.org/poverty/home/>.

³ United Nations, 2013.

⁴ WB data of 2010, accessed via <http://povertydata.worldbank.org/poverty/region/SSA>.

⁵ See Stiglitz, 2012, pp. 1 ff.; numbers reflecting the situation before the financial and economic crisis in 2007. After the crisis, the top 1% still counted a fifth of the national income, and recovered “reasonably well and relatively fast” in comparison to the rest of the population.

⁶ See statistics accessed via http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Material_deprivation_statistics_-_early_results.

⁷ See International Labour Organisation, 2013, p. 2.

amongst children rising throughout the on-going economic crisis⁸.

Every person's life is directly or indirectly linked with the phenomenon of the market, be it at work or when covering basic needs, in the education or health system or elsewhere. Bearing in mind the overwhelming presence of markets and their impact on human life, the role of the market requires scrutiny. Having regained popularity and replaced the Keynesian response to the Great Depression of the 1930s, free market ideas and practices experienced a "rebirth" in the 1970s and 1980s. Economists "promoted the doctrine that 'deregulation,' labor 'flexibility,' tax cuts for the wealthy, and unfettered free markets would produce unprecedented prosperity"⁹.

Looking at the situation we find ourselves in today, it seems fair to ask whether the market does actually live up to this standard? Is it really the best path to go in order to achieve all human aspirations, assuming that we know what they are? Why, then, does the market allow for a system in which 45% of deaths in children under five or a total of 3.1 million annually is caused by malnutrition¹⁰, while there is "enough food in the world today for everyone to have the nourishment necessary for a healthy and productive life"¹¹.

Numbers like these make one wonder how markets affect human well-being, including their impact on human rights, given that every affected individual is also a bearer of these inherent rights. It turns out that we live in a system that widens the economic gap instead of closing it; that allows 7 million people to fall victim to air pollution every year¹²; a system that takes from the poor and gives to the rich, and that fails to distribute the riches of this world and instead allocates almost 20% of the entire global wealth to 0.1% of the society¹³. If this is the system we live in, we must doubt that the market is best placed to achieve human well-being and ask: who is responsible?

The answer to this question, from a human rights perspective, would be: our states. But how can our states ensure our protection in a world

⁸ See statistics accessed via <http://epp.eurostat.ec.europa.eu/tgm/refreshTableAction.do?tab=table&plugin=1&pcode=tessi082&language=en>.

⁹ Block & Somers, 2014, pp. 1 ff.

¹⁰ See World Food Programme ("WFP"), <http://www.wfp.org/hunger/stats>.

¹¹ See WFP, <http://www.wfp.org/hunger/faqs>.

¹² World Health Organisation, <http://www.who.int/mediacentre/news/releases/2014/air-pollution/en/>.

¹³ Piketty, 2014, pp. 437 f.

that is dominated by the seemingly abstract “market phenomenon”? The present thesis deals with this problem by developing a human rights-based argument against the existing system of market primacy, thus seeks to answer the following question: is market regulation a responsibility of states if the environment created as a result of market primacy poses a threat to the fulfilment of human rights?

The central argument of this thesis is that a free market economy creates an environment that is blind to human rights, which is why governments have to assume their regulatory responsibility. It analyses this “market environment” with respect to its human rights implications and suggests an alternative approach to states’ human rights obligations, termed “responsibility to counteract.” Any of the above-mentioned problems can arguably be analysed under the framework suggested to ensure human rights-oriented policies rather than market-oriented ones, thereby restoring the primacy of the human being over that of the market. Introducing the “responsibility to counteract,” the present thesis suggests that human rights are the right vehicle for this development.

This thesis is divided into two parts. Chapter 1 aims at establishing the main theoretical framework, whereas Chapter 2 illustrates a possible application of the thesis’ main argument to the current economic crisis in Europe. I argue that markets are not systems beyond our control but rather explain how government plays a role in designing markets, therefore establishing an environment which may disable or enable “market forces.” These mechanisms are not concerned with individual lives and the human beings living them – or, using a different vocabulary, with externalities such as human rights. I argue, however, that states remain the primary duty-bearers for human rights in a market society. Accordingly, Chapter 1 outlines why states bear a responsibility to create an economic environment, which respects and promotes human rights. Chapter 2 applies this argument to the contemporary European economic crisis in order to illustrate a practical application of how human rights may oblige states to correct the potentially negative consequences of market forces¹⁴. Looking at the social and economic dimension of the crisis, I will examine what effects it has had on people’s

¹⁴ It is vital to point out that the suggested approach can be applied to a great variety of situations that include “market forces” in their interplay with governmental ones and human life. The focus on the crisis in Europe is merely an illustrative example, and there may well be others.

lives. In order to test the practicability of the approach suggested, I will then examine how the crisis has been dealt with under the system of the European Convention on Human Rights (“ECHR” or “Convention”) as well as the European Social Charter (“Charter”). Finally, I will look at whether and how the “responsibility to counteract,” as the alternative approach suggested in this thesis, allows for a broader understanding of human rights obligations, which arguably results in a “surplus” for human rights protection.

1.

ON MARKETS, GOVERNMENTS, AND HUMAN RIGHTS

While history and ethnography know of various kinds of economies, most of them comprising the institution of markets, they know of no economy prior to our own, even approximately controlled and regulated by markets.

(Karl Polanyi, 1957 [1944], p. 44)

This thesis presents its reader with a particular view of what a market is, as well as a view of what the “state” or “government” is. The definition of the relationship between the market and the state carries implications for the overall argument, which is why it is equally important to be aware of the existence of a plurality of theories on the meaning of these terms, as well as the respective relationships they may or may not hold. This first chapter aims at shedding some light on selected economic theories and goes into detail with regard to the work of Karl Polanyi. The overview of other theories serves two purposes. First, to anticipate the argument that this thesis ignores the existence of other approaches potentially leading to other results; and, secondly, to show that government always plays some role in the market. While the role(s) may differ, all economic theories ascribe role(s) to the state or government. The economic points of view discussed in this thesis make clear that notwithstanding the theory we choose, the self-regulating or entirely free market is a myth. Stressing the importance of government is central insofar as they assume a double function once human rights come into play: in terms of its human rights obligations, notwithstanding the approach adopted in respect to markets, the role of the state arguably is always to ensure the enjoyment of human rights in line with international standards. In this sense, this thesis seeks to analyse the notion of responsibilities under human rights law and introduces a human rights-based approach into the discussion on the role of the state in the market.

1.1. THE ROLE OF GOVERNMENT “IN” THE MARKET

Essential to the question of the role of government “in¹⁵” the market is the way the market is seen as such. The different theories available vary as to the role of the market and the government as well as their historic development. Three very different approaches have been selected in order to illustrate that all seem to find a common denominator: that government is important for the functioning of the economy. This point is vital because it shows that irrespective of our choice of theory, government is not obsolete. This holds true for the works of Karl Polanyi, who is known for his opposition to traditional economic thought and his emphasis on historic and cultural embeddedness of economies, as well as for the school of thought based on Adam Smith, who believed in individual self-interest as driving force of the economic system. In order to further broaden the ideological spectrum, this thesis then introduces the thoughts of Friedrich Hayek who is considered to be an extreme liberalist yet nonetheless acknowledges certain gaps the free market cannot close and where governmental action is necessary.

1.1.1. *Karl Polanyi and The Great Transformation*

In *The Great Transformation*, Polanyi examines the institutional and ideological foundations of the market society. The latter having emerged in the 19th century and ending “in a catastrophe” (namely two world wars and a global economic crisis), his work aims at explaining the “civilizational breakdown” society witnessed at that time¹⁶. Although analysed alongside historical events, his work is not meant to be a historical work in itself. Rather, it seeks to explain the emergence and structure of human institutions in the light of historical developments thus taking a holistic perspective and acknowledging the interdependence of the legal, economic and societal spheres.

Looking at historical developments, Polanyi draws a picture of markets as not having played a major role in economic thought for most of human history. He analyses the economic motives people have been

¹⁵ Although commonly, and probably by most people unconsciously, used, describing government as having a role “in” the market arguably presupposes a hierarchy. I do not presume that there is a hierarchy between the market and the state.

¹⁶ See Frerichs, 2014 (forthcoming), p. 24 of the manuscript.

led by throughout history and comes to the conclusion that “production for gain,” in his sense essential for our understanding of markets, only became relevant after the Middle Ages; prior to which, economic relations were important in order to sustain or obtain social status and relations¹⁷. Quoting Aristotle as having called the idea of production for gain limitless and “not natural to man,” he then describes this principle as the existence of a separate economic motive, which is distinct from the social relations that ought to provide for these limits¹⁸. Interestingly, Polanyi analyses that Aristotle was very advanced in his economic thinking by comparison to the time in which he lived. He describes Aristotle as being the first to have realised the true implications of a differentiation between the principles of “production for use” and “production for gain”:

Only a genius of common sense could have maintained, as he did, that gain was a motive peculiar to production for the market, and that the money factor introduced a new element into the situation, yet nevertheless, as long as money and markets were mere accessories to an otherwise self-sufficient household, the principle of production for use could operate¹⁹.

Economic systems always used to be organised along the same principles, namely redistribution, reciprocity and householding (or *oeconomia*). They were governed by either one or a combination of these principles, and institutionalised through social organisation with corresponding institutional patterns. Even in the Greek and Roman periods, production and distribution were both directed by a multiplicity of individual motives, not just that of gain, and were “disciplined by general principles of behaviour²⁰.” Up until after the Middle Ages, economies were governed by institutional patterns derived from the above-mentioned principles of redistribution, reciprocity and *oeconomia*, with markets playing no important role. However, from the 16th century onwards, markets gained importance and eventually became a main concern of governments in mercantile times. Yet, there was no sign of markets governing daily life in the way they do today²¹.

¹⁷ See Polanyi, 1957 [1944], pp. 43-46.

¹⁸ Ibidem, pp. 54 ff.

¹⁹ Ibidem, p. 54.

²⁰ Ibidem, p. 55. He describes gain as being “not prominent” among the motives found. Rather, individuals complied with the rules as a result of customs, law, magic, and religion.

²¹ Ibidem.

Regulation through the respective governments was extremely strict, to the extent of Polanyi saying that “[r]egulation and markets, in effect, grew up together²².”

Explaining what suddenly emerged as an increasingly important part of economic life and thought, he describes the market as a “meeting place for the purpose of barter or buying and selling²³.” These activities are dependent on a market pattern or mechanism in order to be able to produce prices. The market pattern, related to the motive of truck and barter, produces its own institution: the market. According to this logic, society must adjust to this system and thus be shaped in a way so the market system can function in accordance with its own laws and principles. This is only possible in a market society, with the market becoming the driving force behind the entire economy, which bears consequences for the society as a whole and results in a devaluation of the society to being merely an “adjunct to the market²⁴.” Consequently, in order to allow the functioning of the market, social relations are embedded in the economic system rather than the other way around, leading to market patterns and laws governing our entire system. Polanyi’s description of the reality the introduction of the market created still very much corresponds to the reality we live in, even though written over half a century ago.

Polanyi then turns to an extensive explanation of what he considers to be *The Great Transformation*: a transformation of such huge extent, encompassing not only the sphere of economy but deeply influencing society as well as politics. This transformation, initiated by the Industrial Revolution in Great Britain in the late 18th century, ultimately turned the world into the market society that is predominant today. In order to fully comprehend the changes society underwent during that period, we have to briefly engage with the developments this brought along. With the establishment of machinery for production, introduced by the merchants but ultimately requiring the factory-system to be set up, importance shifted from commerce to industry at the end of the 18th century²⁵. The big change industrialisation brought along for market-thinking was based on a set of assumptions, the main one being that

²² Ibidem, p. 68.

²³ Ibidem, p. 56.

²⁴ Ibidem, p. 57.

²⁵ Ibidem, pp. 74 ff.

order in the production and distribution of goods is ensured by price alone. The fact that production came to be organised in the form of buying and selling finally resulted in the creation of an “artificial” market economy²⁶.

Two basic points seem to be crucial in this respect. First, the understanding of industry at that time: markets were found to be best placed to regulate themselves, as well as the process of industrialisation²⁷. The three elements of production essential for industry were labour, land, and money. These three elements are, however, not solely economic entities. Understanding them as being reduced to the latter is overly simplistic, or, in Polanyi’s terms, fictitious: labour is human activity and not produced for sale but for other human reasons. It cannot be disembedded from life, as it is an inherent and indivisible part of human life. The same logic works with land, which equals nature and accordingly is not a product of human hand. Money is purchasing power and as such it is not produced at all but is a conduit for banking and finance. This shows that none of the three elements seen as essential for industry were produced for sale, which stands at odds with the basic idea of production for sale or gain. The commodity description underlying these three elements is purely fictitious yet actual markets are based on them²⁸.

The second point Polanyi makes in this context is directed at state policies: any policy that would interfere with the fictitious elements of industry would endanger the self-regulation of the system thus impair the functioning of the market – a belief that came to be one of the cornerstones of our economies²⁹. On the basis of these assumptions, the understanding of markets changed from them being regulated to self-regulating. This resulted in a complete transformation of the societal structure³⁰, including its institutions, and introduced a new principle: no arrangement or behaviour should be allowed to exist that can prevent the functioning of the market mechanism³¹. According to Polanyi, this view cannot be upheld: “To allow the market mechanism to be the sole director of the fate of human beings and their natural environment,

²⁶ Ibidem, p. 73.

²⁷ Ibidem, p. 72.

²⁸ Ibidem.

²⁹ See *ibidem*, p. 73.

³⁰ Ibidem, p. 71.

³¹ Ibidem, p. 73.

indeed, even of the amount of purchasing power, would result in the demolition of society³².”

Labour as a commodity was an essential need for the process of industrialisation, yet several difficulties came with this need during the English Industrial Revolution. In order to release labour to its full extent, it was necessary to “liquidate organic society³³.” Society, however, held the position of being a safety net preventing the individual from starving, irrespective of him or her having an income through labour³⁴. This resulted in grave poverty throughout English society and an interesting discovery: people only worked in order to survive in the absence of society, as the latter used to secure their survival. Industrialisation, for the first time in human history, forced measures to be taken in order to protect people from the effects of the market itself, resulting in a variety of laws supposedly protecting the English poor.

Notwithstanding the measures taken, payments to the people living in poverty had risen from approximately 400,000 GBP in 1696 to over 2 million GBP in 1796 and almost 8 million GBP in 1818 – meaning that payments increased twentyfold as industrialisation continued, whilst the population only trebled during the same period³⁵. The laws, which were introduced, attempted to curtail human suffering, yet the English continued to suffer. This was partly due to the fact that England preceded other countries in terms of economic development, making them pioneers in the field of industrialisation as well as the poverty it caused. Subsequent workers’ movements were further steps aiming at protecting people against the market and finally resulted in the establishment of unions³⁶.

Developments in continental Europe were of a different nature given that by the time industrialisation took place, namely half a century later, adjustment to the new techniques had become possible as a result of the imitation of English methods of social protection³⁷. In comparison to developments in England, the continental European workers escaped the “degrading pauperization³⁸.” Protection was thus not a necessary

³² Ibidem.

³³ Ibidem, p. 165.

³⁴ See ibidem, pp. 163 ff.

³⁵ Ibidem, p. 110.

³⁶ See ibidem, pp. 165 ff.

³⁷ Ibidem, p. 175.

³⁸ Ibidem.

measure resulting from the Industrial Revolution but rather in response to conditions in factories and the labour market in general, which led to the early establishment of legislation as well as social insurance. In both, England and continental Europe, social protection had very similar results: the “disruption of the market for that factor of production known as labor,” thus aiming at removing what was seen as a commodity of production from the “orbit of the market³⁹.”

In contrast to Europe, America experienced no resource scarcity in respect to the three elements of production. Until World War I, open frontiers allowed for the free flow of labour, with land being largely available. This meant the absence of a self-regulating market system, meaning that as long as conditions were stable, no protection of “the kind that only government intervention can provide⁴⁰” was necessary. This changed when America introduced Europe’s gold standard as common monetary currency thus linking domestic trade with that of the rest of the world and resulting in a need for social protection⁴¹.

In Polanyi’s understanding, society, economy and politics do not constitute separate spheres but are one system of interaction. This is reflected in his view on the effects industry and the market had in the wake of *The Great Transformation*. Expanding from the economic sphere to society, its supporters advocated for the separation of economy and politics, which resulted in two separate societal spheres in line with that division.

Society’s division from politics and its simultaneous integration in the economy are particularly interesting when looking at what is supposedly the driving force behind the market. Widely known under the term “market forces” and called the “market mechanism” by Polanyi, the market is operated through the principle of demand and supply, and regulated by price. In predominant market theory and the spirit of *laissez-faire* thinking, this mechanism has to be set free in order to be able to function in accordance with its own laws, meaning non-intervention through politics. This explains why, in line with the logic presented, the division of economy and politics was necessary for the realisation of the liberal project in the first place. History has proven, however, that the societal outcome of the market system has repeatedly

³⁹ See *ibidem*, pp. 176 ff.

⁴⁰ *Ibidem*, p. 201.

⁴¹ See *ibidem*, pp. 201 ff.

demanded regulation in order to be able to function in the interests of the society and of the human beings it is composed of, rather than to their disadvantage. Sketching the development of poverty alongside progressing industrialisation and free market economy, Polanyi shows that government intervention or respective laws have been used regularly to restrict the adverse effects of market mechanisms, thus showing that “social protection was the accompaniment of a supposedly self-regulating market⁴².”

While social protection is an important reason to regulate market mechanisms, it is not the only one. To exemplify this, Polanyi draws on the commodification of land alongside economic development, stating that “to isolate [land] and form a market out of it was perhaps the weirdest of all undertakings of our ancestors⁴³.” Land was included into the self-regulating world market in three steps: commercialisation of the soil; “forcing up of the production of food and organic raw materials” in order to supply a growing population; and, finally the extension of the created system of surplus production to overseas and colonies.

In order to eliminate people’s claims to their soil, people had to be detached from it. This went hand-in-hand with the view of people being individual units of labour rather than individual human beings. Only as a result of the commodification of land could it then be deployed to attain its highest economic potential. How this dislocation affected people and society depended on what measures were taken to regulate the process. In accordance with the available resources, this was more successfully done in continental Europe than in colonies and poorer regions⁴⁴. Polanyi draws special attention to the interconnectedness of society and land, therefore change or influence in either bears results for the other. In order to illustrate how security and safety are connected with the integrity of the soil and its resources, he creates a list. This list comprises “the vigor and stamina of the population, the abundance of food supplies, the amount and character of defense materials, even the climate of the country which might suffer from the denudation of forests, from erosions and dust bowls, all of which, ultimately, depend upon the factor land, yet none of which respond to the supply-and-

⁴² Ibidem, p. 202.

⁴³ Ibidem, p. 178.

⁴⁴ See ibidem, pp. 179 ff.

demand mechanism of the market⁴⁵.” Polanyi recognises that the influence of the market in society and nature may have drastic negative implications for both, as well as overall security. Regulatory measures are thus necessary not only in order to ensure social protection, but also to counter dangers for the environment.

Less evident from *The Great Transformation*, yet an important addition to the defence of market regulation is the role regulation plays for markets themselves. Depending heavily on competitive procedures and the mechanism of supply and demand, the functioning of the market has to be ensured by taking certain regulatory measures⁴⁶. Polanyi mentions the fact that regulation was accepted as long as its function was merely to “ensure the self-regulation of the market by creating conditions which make the market the only organising power in the economic sphere⁴⁷.” While dealing in more detail with the social and environmental dimension of regulatory measures, the self-containing function regulation has for markets is thus presupposed in Polanyi’s work.

In sum, Polanyi suggests that the full integration of society in the market is necessary for the functioning of a market economy, yet the functioning of the economy is not dependent on it being governed by markets. Thus, the subordination of society and the deregulation of markets are not essential to the functioning of our economy or the well-being of humanity. On the contrary, market regulation is necessary to ensure the functioning of the market and thus the entire system itself.

Wallerstein argues that the “totally free market functions as an ideology, a myth, and constraining influence, but never as a day-to-day reality⁴⁸.” One of the reasons for this is that while the motivation of the system⁴⁹ is the endless accumulation of profit, an entirely free market would make exactly that impossible. Capitalism, in the understanding of Wallerstein, needs *partially* free markets in order to function and to

⁴⁵ Ibidem, p. 184.

⁴⁶ This function is described in more detail in the theories of Adam Smith and Friedrich Hayek (see below, sections 1.1.2 and 1.1.3).

⁴⁷ Polanyi, 1957 [1944], p. 69.

⁴⁸ Wallerstein, 2004, p. 25.

⁴⁹ Immanuel Wallerstein is best known for his contributions to the so-called *Weltsystemtheorie* (*world-systems-theory*). This theory builds upon the idea that mankind has lived in different systems so far – the present one being that of a capitalist world economy (see below para. 1.2).

sustain itself⁵⁰. If the textbook-model of a large amount of buyers and sellers all being in possession of perfect information (about the costs of production) was a reality, the former would be able to bargain the sellers to a minimum of profit. With the maximisation of profit being the ultimate goal of the capitalist market-system, this would eventually render it unattractive to producers⁵¹.

This is why state interference is necessary to ensure the survival of the system, thus constituting a fundamental role in the determination of prices and profits. Wallerstein briefly mentions a number of actions states take in order to help sellers achieve a maximum of financial output, for example by creating quasi-monopolies⁵², patents, restrictions on imports and exports, tax benefits, subsidies, protectionist measures, by being a large-scale buyer of certain products itself, or by introducing restrictions to the means of production that bigger producers find easier to overcome. All of these actions show how states influence the functioning of the system by ensuring maximum accumulation through quasi-monopolies and oligopolies⁵³. The created quasi-monopolies cease to exist after a while, allowing new monopolies to be established and the old ones to move their capital to the production of other leading industries or products, making sure the cycle continues. This is only one example of how states' influences on the market are important in ensuring the sustainment of the system, yet it illustrates very well the plurality of possibilities and requirements of action.

It is vital to highlight the many roles market regulation or action plays in society, the environment, as well as in order to sustain the market system itself. It seems that *laissez-faire* economists are prepared to accept interventionist measures as long as they are necessary for the survival of the market, as long as it benefits the system and the promise of continuous growth. This may be illustrated by considering the works of Adam Smith, the "father" of modern economic thought, and Friedrich Hayek, a more contemporary economist and strict liberalist.

⁵⁰ This is supported by Hayek, who believes in competition being best placed to organise the economy (Hayek, 2001 [first published in 1944], pp. 51 ff) yet acknowledges its imperfection to a certain degree when allowing for governmental interference and institutional arrangements that ensure the functioning of the mechanism (ibidem, pp. 36 ff).

⁵¹ See Wallerstein, 2004, pp. 25 ff.

⁵² In certain circumstances, even Smith, being a strict opponent of monopolies, allows their creation in order to ensure the establishment of necessary institutions. The same applies to protectionist measures (see below p. 23 f).

⁵³ Wallerstein, 2004, pp. 24 ff.

1.1.2. *Adam Smith's Moral Sentiments and the Wealth of Nations*

Contemporary economic thought is largely believed to stem from Adam Smith, author of *The Theory of Moral Sentiments* (1759) and *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776). As a result of Smith being mainly associated with his second book, the typical discussion of Smith's work has focussed on economics. This has led to a number of shortcomings in the interpretation of his works, such as "recognising the plurality of human motivations [and] the connections between ethics and economics"⁵⁴. While a lot of time has been dedicated to resolving the "Adam Smith problem" – the view that his two works contradict each other – combinations of the two have come rather short in mainstream economic discussion. Reading both books together, it becomes clear that Smith had a much more subtle view on the world, going beyond that of the self-interested individual and a strict *laissez-faire* economy without interference.

The *Wealth of Nations* suggests self-interest to be the driving force behind human motivation. Self-interest also leads to the division of labour being the best tool to advance production, resulting in a society in which everyone is highly dependent on others and their skills. Indeed, the specialisation of labour requires us to rely on other people more than if we were to produce self-sufficiently:

He will be more likely to prevail if he can interest their self-love in his favour [...]. *It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest*⁵⁵.

It is the same self-interest that ultimately leads to growth or the wealth of nations, which is understood to be of benefit to the whole of society and able to fight poverty in a simple trickle-down mechanism⁵⁶. Every individual naturally strives to enlarge his or her own capital and this contributes to domestic industry without the individual being aware of it:

He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. [...] he intends only his own gain, and he is

⁵⁴ Sen, 2009, p. viii.

⁵⁵ Smith, 2008 [first published in 1776], p. 22 (emphasis added).

⁵⁶ Ibidem, pp. 8 ff.

in this, as in many other cases, *led by an invisible hand* to promote an end which was no part of his intention⁵⁷.

The emphasis on the individual's self-interest when acting in an economic capacity stands in seeming contradiction with the first sentence of *Moral Sentiments*: "How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it except the pleasure of seeing it"⁵⁸. This excerpt leaves room for several motivations to influence human behaviour, thus suggesting a combined reading of the two works. Indeed, as Sen notes, the revised editions of *Moral Sentiments* would support this⁵⁹.

Another common misunderstanding is Smith's use of the term "*invisible hand*." Commonly interpreted as a metaphor for the mechanisms at work in free markets which supposedly ensure a beneficial outcome for everyone, so long as the market is left to work on its own, Smith only used the term three times: once in each of his main works and once in a piece called *Astronomy*⁶⁰. Each use arguably has a different meaning. Looking at the quote from the *Wealth of Nations*, above, the invisible hand is understood as a "coordinator of the individual pursuit of self-love"⁶¹. Although the individual acts with the sole intention of maximising his or her own wealth and security, his or her actions are ultimately beneficial for society as a whole, as if lead by an invisible hand.

When employing the invisible hand in *Moral Sentiments*, Smith gives it a different meaning. The "proud and unfeeling landlord" consumes:

little more than the poor, and in spite of their natural selfishness and rapacity, [...] they divide with the poor the produce of all their improvements. They are *led by an invisible hand* to make nearly the same distribution of the necessities of life, which would have been made, had the earth been divided into equal portions among all its inhabitants, and thus without intending it, without knowing it, advance the interest of society [...]⁶².

Despite the unequal division of wealth, the actions of the rich land-

⁵⁷ Smith, 2008 [1776], pp. 291 ff (emphasis added).

⁵⁸ Smith, 2009 [first published in 1759], p. 13.

⁵⁹ See Sen, 2009, p. ix.

⁶⁰ According to Sedlacek irrelevant in this context yet described as "mystical, godlike power" (see Sedlacek, 2011, pp. 198 ff).

⁶¹ *Ibidem*, p. 199.

⁶² Smith, 2009 [1759], p. 215 (emphasis added).

lord are redistributive in a way that allows the poor to benefit from what he has. In both examples, human action is directed at other aims yet unintentionally bears positive results for society as a whole. Smith employs the invisible hand not as market forces ensuring prosperity, but “as a coordinator of the individual pursuit of self-love, as the collective hand of redistribution, and as a mystical, godlike power⁶³.”

Regarding governmental regulation, Smith is of the opinion that free competition is necessary to inspire industry and create wealth. Accordingly, government intervention is negative⁶⁴. Seeing three ways of interference with “perfect liberty” or freedom of the market, the main one is interference with free competition. This is illustrated by examples from continental Europe and contrasted with markets in England, the latter in turn not having been centrally regulated but subjected to rules ensuring that competition could endure. Elevating prices, this allowed people to increase their income and led to the benefit of everyone who took part in trade, ultimately enriching every town⁶⁵. In examining different existing regulations, Smith heavily criticises “[r]estraints upon the importation from foreign Countries of such Goods as can be produced at Home” as well as other trade restrictions⁶⁶, particularly alcohol from France. Importation restrictions of that kind were designed to secure a monopoly of domestic producers, ultimately dictating to people how to use their capital, and were generally unreasonable⁶⁷. Being an opponent of monopolies⁶⁸, Smith suggested that capital and industry should be left to “find out their natural employments⁶⁹.”

While his overall theory seems to point towards the unrestricted “liberty” of markets and their “natural order,” Book V of the *Wealth of Nations* acknowledges three “duties of the sovereign⁷⁰.” The first two duties comprise the protection of the people from threats from outside the country, that is, war, as well as from threats originating within the country or fellow members of the society. This leads to the need of the development of a justice system that would also secure private

⁶³ Sedlacek, 2011, p. 199.

⁶⁴ Smith, 2008 [1776], p. 117.

⁶⁵ See *ibidem*, pp. 123 ff.

⁶⁶ See *ibidem*, p. 303 and respective note on the text, p. 550.

⁶⁷ See *ibidem*, pp. 288 ff.

⁶⁸ See *ibidem*, pp. 300 ff.

⁶⁹ *Ibidem*, p. 294.

⁷⁰ See *ibidem*, pp. 393 ff.

property and contractual relations⁷¹. The third duty contains education and the establishment “of public works and institutions for facilitating the Commerce of the Society⁷².” Concrete requirements under this third category are very much in the spirit of the times, thus including mainly necessary infrastructure such as bridges and roads, as well as the protection of special branches of commerce. This applies in particular to the “extraordinary protection” for branches of the economy “carried on with barbarous and uncivilized nations⁷³,” also in order to secure property rights. More interesting than what was considered an institutional necessity at that time is that Smith allows higher taxation and even the establishment of certain monopolies to help the setup and sustainment of these institutions. This shows that he acknowledges a certain role for the state when the market fails to provide for a specific need. He even allows interference in direct contradiction to a principle he holds as dearly as the negative impact of monopolies. What is essential for Smith is that markets work. If this has to be ensured by regulation of a certain kind, he does not seem to counter such an idea. The fact that he supports necessary monopolies, property protection, or a system that ensures the reliance of contractual obligations and institutions such as patents⁷⁴, just to name a few, supports this argument.

Smith came to be largely understood as the father of modern economic thought, as a proponent of liberty in the sense of a free market with its “*invisible hand*” and the self-loving *homo oeconomicus*. Reading Smith in a more inclusive way, by looking beyond the first few chapters of the *Wealth of Nations*, he becomes a thinker who believed that while self-love may be a driving force sometimes, sentiments such as sympathy may be at work on other occasions. If Smith was present today, he would arguably urge the strict *laissez-faire* economist to have another look at the last few chapters of the *Wealth of Nations* and reconsider the role of government – even if this was only to ensure the functioning of the market.

⁷¹ Ibidem, p. 408.

⁷² See ibidem, pp. 413 ff.

⁷³ Ibidem, p. 417.

⁷⁴ See ibidem, p. 418 in support of patents for machines and books.

1.1.3. *Friedrich Hayek on The Road to Serfdom*

One of the economists building on the mainstream understanding of Smith's legacy and a strict defender of economic liberalism is Friedrich Hayek. First published in 1944, Hayek's work *The Road to Serfdom* is a political call on the world aiming to reinstall economic liberalism. Having a very particular yet interesting narrative on historical events and economic developments, Hayek explains how socialist ideas and government interference in areas not meant to be regulated, such as the economy, necessarily led to fascism and Nazism⁷⁵.

Economic freedom is a prerequisite for personal and political freedom. Socialist tendencies of regulation and planning restrict this freedom and finally lead to the enslavement of society as such. He explains this by arguing that social liberation went hand-in-hand with economic progress throughout history; there being "probably no class that did not substantially benefit from the general advance⁷⁶." The guiding principles underlying this process, namely that in ordering human affairs "we should make as much use as possible of the spontaneous forces of society, and resort as little as possible to coercion⁷⁷," were abandoned even though they had resulted in great success in the early 20th century. In subsequent socialist policies, the growth that had been achieved was taken for granted and no longer seen as the result of this policy of freedom. Instead, policies aiming at the institutional improvement of societies were introduced and replaced freedom with planning:

We have in effect undertaken to dispense with the forces which produced unforeseen results and to replace the impersonal and anonymous mechanism of the market by collective and "conscious" direction of all social forces to deliberately chosen goals⁷⁸.

These anti-individualistic, collective tendencies entirely changed the notion of freedom. True freedom in the sense of economic liberalism was substituted for socialism – led by chosen goals that society at large would benefit from as liberalism was considered too slow in the

⁷⁵ Hayek, 2001 [first published in 1944], pp. 12 ff.

⁷⁶ Ibidem, p. 17.

⁷⁷ Ibidem.

⁷⁸ Ibidem, p. 21.

production of general advances⁷⁹. While socialism was “promised to us as the Road to Freedom [it] was in fact the High Road to Servitude⁸⁰.”

Having been written and embedded in an abhorrent period of human history, Hayek’s notion of socialism has to be read in the light of World War II. Acknowledging the interconnectedness of political, social and economic developments, he tries to explain these by looking at the way policies have changed in, for example, Germany, Italy and the Soviet Union. The totalitarian tendencies discovered in those regimes are ascribed to the socialist ideas of the planning of society and the accompanying restriction of personal and economic liberty. Hayek defines the socialism in place as an aim as well as the means to supposedly achieve social justice, equality and security. In order to reach these aims, however, socialists employ policies corresponding to “the abolition of private enterprise, of private ownership of the means of production, and the creation of a system of ‘planned economy’ in which the entrepreneur working for profit is replaced by a central planning body⁸¹.”

In this sense, it is directly opposed to his idea of liberalism, that of the economy as well as the individual and society as a whole. The socialists’ “wrong” understanding of liberty would ultimately lead to serfdom rather than the aims socialism wants to promote. While opposing almost all forms of government that would restrict his notion of liberty, thus suggesting a free market economy, Hayek admits: “in no system that could be rationally defended would the state just do nothing⁸².” Not even Hayek as a strict economic liberalist denies the state a role in the economy. Rather, he is opposed to “central direction and organisation of all our activities” and in favour of governments creating a framework or certain conditions, under which individuals can organise themselves, thus ensuring success⁸³. He explicitly states that opposition towards this kind of central planning does not equate with a general *laissez-faire* attitude. On the contrary, he wants to install competition as being the driving force in the economic order. Therefore, it is necessary for governments to ensure this kind of competition can work. This entails

⁷⁹ See *ibidem*, pp. 24 ff.

⁸⁰ *Ibidem*, p. 27.

⁸¹ *Ibidem*, pp. 33 ff.

⁸² *Ibidem*, p. 40.

⁸³ *Ibidem*, pp. 36 ff.

the creation of a legal framework that allows competition to operate as well as the organisation of necessary institutions, such as money, channels of information and markets⁸⁴.

Apart from market-sustaining activities, a number of other planning activities are equally in line with an established competitive system. Hayek even acknowledges potential flaws or insufficiencies that competition might have. Whenever competition fails, there is need for the use of other methods that are capable of guiding economic activities:

The successful use of competition as the principle of social organisation precludes certain types of coercive interference with economic life, but it admits of others which sometimes may very considerably assist its work and even requires certain kinds of government action⁸⁵.

As long as competition is free to work, certain restrictions such as limits of permissible working hours or with respect to the use of poisonous substances are compatible with his ideas. He also admits to an “extensive system of social services⁸⁶” and emphasises that it may be impracticable to assume that competition and privately offered services will always be best placed to ensure social welfare. In this context, there may be a divergence between private calculations and ideas of welfare. Whenever this divergence appears, it is necessary to find other means than competition in order to ensure supply with the services that are needed. Public services in this sense are the protection of the environment, a certain infrastructure such as road signs, or to counter the effects of deforestation and pollution through factories⁸⁷.

In brief, Hayek opposes socialism interpreted as a total abolition of competition, and supports economic liberalism. Competition is, however, not capable of generating all needs of social welfare and protection, thus it may be necessary to provide for certain public services or goods in areas where competition fails. The same holds true for areas where it is simply impractical to rely on the competitive forces of the market system. Planning is thus permissible as long as it is “planning for competition, but not planning against competition⁸⁸.” This arguably

⁸⁴ See *ibidem*.

⁸⁵ See *ibidem*, pp. 38 ff.

⁸⁶ See *ibidem*, pp. 39 ff.

⁸⁷ See *ibidem*, pp. 40 ff.

⁸⁸ *Ibidem*, p. 43.

points to a contradiction in Hayek's work; a contradiction Oakeshott considered fundamental by describing the "main significance" of *The Road to Serfdom* as being "not the cogency of his doctrine, but the fact that it is a doctrine. A plan to resist all planning may be better than its opposite, but it belongs to the same style of politics⁸⁹."

1.1.4. Conclusion

As outlined above, government always plays a role in the economy. This essay presented three different economic theories which are in no way exhaustive but merely aim to illustrate that no matter which model is being adapted, all require a certain degree of government action. This is confirmed by Adam Smith, the "father" of modern economic thought, and Friedrich Hayek, who is said to be one of the "liberalist hardliners." Both of these thinkers' legacies are regularly used to show the need for free markets: for a *laissez-faire* economy without government intervention. The works presented above however clearly show that while Hayek had a strong tendency to reduce the role of government to a minimum, he did not deny it entirely. On the contrary, he and Adam Smith admitted that government action is necessary in areas where the market is not capable of providing for certain needs. Apart from promoting the functioning of the market and its competitive forces, government action is justified to ensure, for example, the redistribution of wealth, social systems, and standard setting for working conditions or environmental concerns. Thus, even for one of the strictest libertarians, government intervention is inevitable. This shows that the seemingly "absolute" *laissez-faire* economy frequently advocated for is unviable in its pure form.

Further, it simultaneously supports the argument that government always plays a role, and often must do in order to ensure the survival of the system. The concrete size or scope of this role then depends on the model chosen, and is closely connected with societal aspirations. If the sole goal of a society is the accumulation of wealth, or growth, then the concrete role of government will turn out quite differently from one where principles of justice and equity govern.

Building on the lowest common denominator that government must

⁸⁹ Oakeshott, 1967, p. 21.

act in the areas that markets are incapable of reaching, the next part shows that one of these areas is human rights. I will show that while having a vast influence on the lives of human beings, markets are not capable of taking human rights into account. This demonstrates that there is a need for governmental responsibility towards its citizens whenever markets interact with human life in a way that could adversely impact human rights. The basic understanding of states being the prime duty bearers in today's human rights discourse shows that responsibility to ensure human rights cannot differ depending on where a certain threat originates – be it government officials torturing a detainee, a new family law being discriminatory, or markets threatening human rights.

1.2. THE ROLE OF HUMAN RIGHTS IN THE MARKET

This section discusses the role that human rights play in a market economy. In order to establish whether the market takes human rights into account, we have to determine who the actors are when talking about “the market.” Does the market act by itself, following certain rules and principles, as suggested by the term “market forces,” or is it a system established by human and governmental action? And what is the role of the individual, given that it is his or her dignity that provides the original source of human rights?

An early example of the connection between markets and human rights can be found in Polanyi's explanation of the Speenhamland Law introduced in England in 1795 as a regulatory measure aiming at making up for the social destruction industrialisation was producing: “[L]abor was again protected, only this time from the working of the market mechanism itself⁹⁰.” Even though never officially enacted, the law served as some kind of minimum wage system, introducing “no less a social and economic innovation than the ‘right to live’⁹¹.” It acknowledged the danger of a full mobilisation of labour in England, thus introducing a system according to which financial aid was granted and calculated based on a scale dependent on the price of a bread loaf. This safety net, established in order to guarantee the survival of the

⁹⁰ See Polanyi, 1957 [1944], pp. 77 ff.

⁹¹ *Ibidem*, p. 78.

poor irrespective of their actual income, was abolished in 1834 – a development Polanyi calls the “withdrawal of the right to live⁹².” The law in times of *The Great Transformation* played an important role as a social instrument, especially in terms of the protection of the poor, yet in the context of Speenhamland it had severe negative outcomes. These “perverse effects” ultimately increased “the number of ‘working poor’ which had to rely on subsidies⁹³.” As a result, what was supposed to be the “right to live” led to grave poverty of the masses, “who almost lost their human shape in the process⁹⁴.”

Liberal economists took Speenhamland as a prime example to warn of the adverse effects government intervention would have and to push for deregulation⁹⁵. Speenhamland is interesting insofar as it was a law aimed at ensuring minimum economic and social security after an early realisation of the faults of the system introduced by industrialisation and the market society. The fact that the law failed to result in producing the security it was targeting merely meant that it was a wrong policy measure, not that there was no need for the instalment of measures ensuring people’s survival in the market system, which, as such, does not provide for this minimum security. This also shows that poverty and economic injustice were, from the beginning, issues developing with the organisation of society by market mechanisms, thus making it more evident that the problems this thesis is trying to tackle are a systemic issue.

The problems faced during the introduction of Speenhamland are just as present today, with poverty rates once again rising⁹⁶. The current economic crisis is a prime example showing that the neoliberal economic project has not worked – on the contrary, it has caused the societal gap to widen. The effects the crisis has had and is currently having on the most vulnerable of the global South and global North serve as painful evidence that “the formulation of economic policy and the realization of human rights [...] have, for too long, been divorced from one another⁹⁷.” Economic policies are directed at achieving economic growth, “underwritten by assumptions about the virtues of

⁹² Ibidem.

⁹³ See Frerichs, 2014 (forthcoming), p. 29.

⁹⁴ Polanyi, 1957 [1944], p. 82.

⁹⁵ See Frerichs, 2014, p. 29.

⁹⁶ United Nations, 2013.

⁹⁷ See Balakrishnan & Elson, 2011, p. 1.

the market⁹⁸.” If human rights concerns were present at all, then mostly carried by the idea of economic growth leading to more resources, a bigger cake, so to say. According to this logic, growth of the entire cake would make the single shares – including the one dedicated to the realisation of human rights – proportionally bigger. This overused metaphor of the cake illustrating the basic idea of how growth would benefit all instead of just the few favoured by the system, has proven not to result in the achievement of human rights. A bigger cake does not necessarily mean a trickle-down effect on people living in poverty, an increase in resources allocated to human rights matters, or the share allocated to redistributive measures to grow equally. The assumption that growth would automatically benefit all has proven wrong. The market system we live in does not provide for this mechanism – on the contrary, it punishes those who are not or cannot take part in the endless accumulation of capital.

Wallerstein’s analysis of what he calls the “modern world-system” understands this as being rooted in a capitalist world-economy originating in 16th century Europe and the Americas. A distinct feature of this system is that while having a world-economy, it does not include a unitary political structure. Rather, the underlying structure is designed by the division of labour and distinct in its feature as being a capitalist system. Capitalism, in this sense, is defined as giving priority to the *endless* accumulation of capital: the current system being the first to have introduced this notion of capitalism. The idea of endless accumulation is central to Wallerstein’s analysis, meaning that people as well as companies are “accumulating capital in order to accumulate still more capital, a process that is continual and endless⁹⁹.” By saying that the system *gives priority* to this kind of accumulation, he explains that the system provides for “structural mechanisms by which those who act with other motivations are penalized in some way, and are eventually eliminated from the social scene, whereas those who act with the appropriate motivations are rewarded and, if successful, enriched¹⁰⁰.”

⁹⁸ Ibidem.

⁹⁹ Wallerstein, 2004, p. 23.

¹⁰⁰ Ibidem. Hayek even admits that competition is “no respecter of persons” (Hayek, 2001 [1944], p. 105, see below section 1.2.1) and that chances are based on property and inheritance. This leads to an “inequality of opportunity”, the reduction of which is preferable as long as the impersonal character of the competition process can be maintained (Hayek, 2001 [1944], p. 106).

This also explains how growth has come to play such an important role in our societies and policies, being a prominent buzzword, which is the unquestioned ultimate goal. We live in a system that assumes endless growth or accumulation to be possible, and, above all, necessary to achieve all human aspirations. We live in a system, which assumes that growth will solve issues of large-scale poverty and structural injustices, thus focussing on growth rather than poverty and injustice.

This is important for the current discussion in two ways: first, as the system itself provides for mechanisms of exclusion rather than inclusion, thus cannot possibly make everyone benefit from the cake; and, secondly, because it results in human rights being pushed aside on the political level. Consequently, human rights are neither part of market mechanisms, nor are these deficits being balanced by the state as primary duty bearer responsible for ensuring the enjoyment of human rights. While the first is a structural issue, the second is a matter of policy or choice.

Joseph Stiglitz writes that “the market as such is not accountable, does not care for the people¹⁰¹.” While having huge power and impact on our lives, markets lack inherent moral character. In *The Price of Inequality*, Stiglitz explains the interplay between market forces and governmental policies. While market forces are considered a real phenomenon, they further inequality as they lack respect for moral considerations. The current economic crisis in the US is taken as a primary example of how market-generated inequality has increased and governmental policies supposedly balancing these negative outcomes of the market have done less and less¹⁰². While “market forces help shape the degree of inequality, government policies shape those market forces¹⁰³.” This view is compatible with the separation of the economic and the political spheres, as described by Polanyi.

The following discussion will briefly address why the market is blind to human rights, and why governments choose to be. I argue that on the economic level, this is created by, firstly, the market being driven by so-called “market forces” or “mechanisms,” namely the function of supply and demand, competition or the price mechanism. A specific understanding of the human being is central in this context. Secondly,

¹⁰¹ Stiglitz, 2012, p. xlv.

¹⁰² Ibidem, p. 110.

¹⁰³ Ibidem, p. 46.

the “commodification” of law as described by Sabine Frerichs arguably impacts on the role the law plays in a market economy, including human rights in their legal dimension. In reality, governmental policies are often inspired by the need for economic growth – a goal that normally goes hand-in-hand with *laissez-faire* markets and minimal government intervention.

1.2.1. *Why the Market Is Blind to Human Rights*

The idea of markets having no moral character, as voiced by Stiglitz, is also evident in the works of Polanyi. In fact, the entire dynamics explained in *The Great Transformation*, starting with the subordination of the society under the rules of the market and the subsequent breakdown of civilisation, strongly advocate for this understanding. The principle of the self-regulating market “required that the individual respect economic law even if it happened to destroy him¹⁰⁴.” The developments described by Polanyi resulted in the market being disembedded from the society and its institutions. “Market exchange is then no longer restricted by ‘human laws’ [...] but left to ‘the laws of Nature¹⁰⁵.’”

The lack of moral imperatives of the market is also acknowledged by Hayek, who argues that it is equally true for competition and justice that neither is a “respector of persons¹⁰⁶.” Reward in the economic arena depends on people’s capacities and their luck, and it is not foreseeable who will win or lose. In Hayek’s view, this, however, is an important feature of the functioning of the market and driving force of competition. Liberalism in this sense is always better than a planned economy, given that the latter would be a “system where it is the will of a few persons that decides who gets what” in contrast to “one where it depends at least partly on the ability and enterprise of the people concerned and partly on unforeseeable circumstances¹⁰⁷.” Hayek also admits that the system of free enterprise does not provide for equal chances for everyone. In this sense, there “is indeed a strong case for reducing this inequality of opportunity” as long as “the impersonal

¹⁰⁴ Polanyi, 1957 [1944], p. 85.

¹⁰⁵ Frerichs, 2014, p. 28.

¹⁰⁶ Hayek, 2001 [1944], p. 105.

¹⁰⁷ *Ibidem*, p. 106.

character of the process” is not destroyed through such action¹⁰⁸.

This admission of governmental responsibility in providing for at least some redistributive justice is interesting considering the overall tone in Hayek’s work. In the current context however, it is of greater importance to see that even Hayek acknowledged the faults of the market with respect to redistribution, equality of opportunity, and the widening inequality of the gap between rich and poor¹⁰⁹. Even from Hayek’s work, it is evident that the market is not the *non plus ultra* in every respect. On the contrary, many who take part in the economic “game” suffer a loss of income “despite hard work and exceptional skills.” Such examples of injustice deserve sympathy and support, meaning that governments have to provide for adequate countermeasures “to secure to them the continued receipt of their former income and to *shelter them from the vicissitudes of the market*”¹¹⁰.

Looking at the description of the price mechanism, i.e. supply and demand, it is evident that its basic function does not automatically involve or provide for moral considerations: “Neoclassical economics¹¹¹” relies on the interaction of consumers and businesses in competitive markets to achieve an efficient outcome, with “consumer’s ‘needs’ or ‘wants’ (but certainly not their rights) [being] measured by the utility of the goods and services they need as expressed by the consumer’s individual ‘revealed preferences’¹¹².” According to Arnott and Salomon, this makes it “immediately apparent that satisfying socio-economic rights using these neoclassical rules and structures alone is doomed to failure”; especially given that “reliance on the market ignores the rules, structures and norms of other important institutions such as the state, laws, communities and, importantly in the context of human rights and development, international organisations¹¹³.” Referring to Branco’s illustration of the right to water in developing countries, Arnott and Salomon sum up the reasons why the satisfaction of this basic right often fails when its availability and distribution are entrusted to the market:

¹⁰⁸ Ibidem.

¹⁰⁹ See ibidem, p. 134.

¹¹⁰ Ibidem, p. 127 (emphasis added).

¹¹¹ See Arnott & Salomon, 2014, pp. 46 ff. for a detailed explanation. This term is used simultaneously with mainstream economics.

¹¹² See ibidem, p. 47.

¹¹³ Ibidem.

[F]irst, the market does not express social preferences and suppliers are satisfied if they can find a price to sell the water available irrespective of who is excluded at that price; secondly, the market is anonymous and unaccountable and therefore disinterested in allocating rights to water; and thirdly, the market produces an inefficient social allocation of water between different users (for consumption, industry, agriculture) because a competitive market allocates water in accordance with the laws of economic efficiency¹¹⁴.

This example is used to explain how the market fails to translate human rights needs into the language or mechanism used in neoclassical economics: it “does not concern the distribution that best equates with justice, but simply the calculation of the arithmetic distribution which derives from the application of the principles of efficiency and rationality, regardless of any value judgment¹¹⁵.”

Irrespective of the inability to take moral considerations into account, the market mechanism is widely relied on. This has several implications in relation to the individual: first, the individual assumes a new, special role once society is subordinated to the market mechanism. As described above, Polanyi was particularly concerned with the commodification of labour, which, ultimately, results in the commodification of the human being. Secondly, the commodification of law, including human rights law, deserves some attention.

The role the individual has in a market society, or the way the market sees the human, is vital in order to understand why markets cannot function in accordance with human rights concerns. The commodification of labour resulted in the human being, as the primary source of the labour force, being commodified and ultimately governed by the price mechanism: “Subjecting labour to market forces, that is, the laws of supply and demand, would directly affect ‘the human individual who happens to be the bearer of this peculiar commodity’ – ‘the physical, psychological, and moral entity ‘man’ [or ‘human’] attached to that tag¹¹⁶.” This ultimately led to the individual in the market being reduced to a unit of work capacity and, simultaneously, the irrelevance of the human behind this work force. The dynamics of this commodification process and the social counter-movements described in *The Great Transformation* such as the Speenhamland Law mentioned

¹¹⁴ Ibidem, pp. 55-59, discussing Branco, 2009.

¹¹⁵ Arnott & Salomon, 2014, p. 47, quoting Branco, 2009.

¹¹⁶ Frerichs, 2014, p. 36, discussing Polanyi, 1957 [1944], p. 73.

above illustrate this problem. Consequently, human beings take a special, reductionist shape in the market mechanism: they are labour force, consumer and producer. Whereas the former corresponds to the stage of production, the other two are equivalent to the mechanism of demand and supply.

Individuals are divided into those who supply (producers) and those who buy (consumers). While the role of the producer is to attain greatest profit, that of the consumer is to receive goods and services at a favourable price. Running analogous to the textbook-example of supply and demand, this shows that even in their purchasing or producing function, human beings are reduced to what can be pictured on a graph. The relations of human beings in this reductionist understanding are regulated over the price function, just like supply and demand. This results in market forces regulating people's lives rather than the other way around. What is a social relation in the beginning becomes a mathematical diagram. Human beings have to be translated into simple economic roles such as labour force, consumer, or producer in order to fit in the economic function of supply and demand. Their inherent dignity as the original source of human rights has no room with the organising principles of the market. The purposes a human being serves in the market are those that the latter requires for its functioning, while the rest of human nature is largely ignored. The human is reduced to a commodity or a buyer or seller. "Certain intrinsic aspects of social [...] life are thus singled out to be traded on the market¹¹⁷." This has the effect that there is no room for considerations of morals, dignity, or of human rights in the market mechanism.

While human rights do not necessarily have to be understood in their legal form, the latter remains the most effective tool for their protection. The *commodification of law* as described by Sabine Frerichs is thus of particular interest in the current context. Building up on Polanyi's idea that society follows the logic of the market, she analyses the movement of law "between the poles of (juridical) justice and (economic) truth¹¹⁸." She argues that the "economisation" of the rule of law is paralleled by an "economisation" of the legal subject. The classical understanding of law underlies a process of "scientification" in accordance with the criteria

¹¹⁷ Frerichs, 2014, p. 35.

¹¹⁸ Frerichs, 2010, p. 231.

of modern economics. The construct of the individual rights-holder is essential for this understanding. He or she is an autonomous subject with rights, yet at the same time an impersonal object for the purposes of truck and barter. In turn, the individual undergoes two steps: a process of individualisation, followed by integration or cohesion. In this scenario, the law plays an important role. It works as a mechanism for social integration (in the market society) yet at the same time, provides the framework necessary for individualisation to go ahead. While law is being commodified, it serves as a commodifier at the same time¹¹⁹.

The process described by Frerichs has two important implications for the current discussion. First, the “legal subject is thus brought in line with the market citizen who [...] fits well into the market society¹²⁰.” This partly corresponds to the way the market sees human beings, but further develops this idea by including a legal dimension. The individual is reduced to being *homo oeconomicus* in the market mechanism, and simultaneously his status as legal subject is equally transformed in a way that makes him or her compatible with a commodified law, integrated in the market society. This development goes alongside the transformation of the classical state as a focal point of the rule of law into a state predominantly acting in the interest of an economic entity (“Wirtschaftsstaat”)¹²¹.

This transpires into the second implication of the commodification of law, namely for human rights law. The specific role that the law assumes in a market society transcends to the level of human rights protection through legal means. It has resulted in today’s predominantly individualistic view of human rights, and in the prioritisation of civil and political rights. While an extensive study of the notion of freedom (as supported by liberal economists) in contrast to the idea of liberty (as understood in human rights terms) would be very interesting, it exceeds the scope of this thesis. Briefly mentioned in the section on Hayek above, it becomes evident that freedom or liberty can take many forms. Hayek considers the “system of private property [to be] the most important guarantee of freedom¹²².” This applies to those who own property and especially to those who do not own property: property in the hands of

¹¹⁹ See *ibidem*, pp. 232 ff.

¹²⁰ *Ibidem*, p. 231.

¹²¹ See *ibidem*, pp. 245 ff.

¹²² Hayek, 2001 [1944], p. 108.

an individual means that nobody has power over them, and that we are free to choose what we want to do with our lives¹²³. While used as an ideological term in different theories and *Weltanschauungen*, freedom in market terms is entirely different to the freedom promoted by human rights. Individual freedom in the market society is understood mainly as autonomy and self-determination, yet strongly connotes freedom being instrumentalised for reasons of economic exchange. Individuals are free to do with their property as they wish, they are free to consume what they want and they are free to work and take part in the production process. Parallel to individual freedom runs the freedom of the market, that is, freedom from outer interference.

This development takes shape in the so-called *market-friendly approach to human rights*. This approach constructs a human rights theory that is fully compatible with the objectives of the market and economic globalisation. It prioritises civil and political rights (“CPRs”) over economic, social and cultural (“ESCRs”) ones, given that only civil and political rights are understood as real legal rights. In this context, the promotion of certain human rights is beneficial to the market and ensures its proper functioning. These include the “rule of law, an independent judiciary, a government that is free from corruption, a free flow of information and the opportunity of choice for the consumer etc¹²⁴.” ESCRs on the other hand are of a weaker legal status and thus more of an aspirational character. Their realisation is progressive and dependent on economic resources and growth, which is said to depend on choosing a free market economy. The state may provide for safety-nets to ensure some social protection but, ultimately, the surplus is expected to trickle down and thus benefit all. Companies may subject themselves to mechanisms of corporate social responsibility (“CSR”), which is considered a positive step, but they have no human rights obligations by nature and thus are not obliged to be socially responsible¹²⁵. It does not provide for incentives to combat poverty or social injustice. Rather, it acknowledges that markets will always have winners and losers, with the

¹²³ Ibidem.

¹²⁴ See De Feyter, 2005, pp. 28 ff.

¹²⁵ Ibidem. Please note that it is debatable, however, whether companies or the humans acting on their behalf have moral obligations to act responsibly. Also, some companies will be obliged not to violate human rights as a result of the obligation of governments to secure protection of those within their jurisdiction. Companies do, at the present stage, not have *a priori* human rights obligations towards citizens under human rights law.

latter not being entitled to the benefits of the process, which is necessary for competition to operate and the market to function. De Feyter condemns this approach as exactly what the human rights project is not about as it leaves “those excluded by the market and thus condemned to living in abhorrent conditions, to a life no marketer would wish to contemplate. Most importantly, human rights need to challenge the mechanisms on which exclusion is based¹²⁶.”

An increase in the privatisation¹²⁷ of legal institutions is another trend in the same direction, aiming to further integrate the law with the needs of the market. Examples in the legal sector are private security firms, private prisons and other forms of detention centres. The consequence of privatisation is that while the state remains the main duty holder of human rights obligations, the provision of these public goods or services is outsourced to an actor who does not *per se* hold these obligations. Instead, the private company will normally act in the interest of private gain rather than public responsibility. Specific regulations are necessary in order to clarify and establish obligations of the private providers in order to ensure human rights compliance. This, however, requires state action in order to be effective.

While markets are exclusive in nature, questions such as whether to privatise a public service or not are policy choices. This leads to the question of why governments as primary duty bearers choose to favour free markets and *laissez-faire* policies over human rights protection and social justice.

1.2.2. *And Why Governments Choose to Be*

Despite committing to the principle that human rights are the primary responsibility of governments at the UN World Conference on Human Rights in Vienna in 1993¹²⁸, human rights are not the primary concern when designing and implementing economic policies. A reason for this

¹²⁶ *Ibidem*.

¹²⁷ Privatisation in this sense can be understood as either the full transfer of ownership of a public company to the private sector, but is also referred to when management is outsourced while the respective infrastructure remains public property. A prominent example is the privatisation of water systems in several countries, resulting in more shortages and distributive problems as well as questions of human rights obligations of the state and the private provider in question. For a more detailed explanation see *ibidem*, pp. 196 ff.

¹²⁸ Vienna Declaration and Programme of Action 1993, part I, para. 1.

is the fact that in market economies, economic growth is largely believed to be the key to all human aspirations – at least at the popular policy level. Policies in neoliberal economies are judged in utilitarian terms, meaning that those policies reaching maximum utility are considered best. Utility, however, is defined as the growth of a country’s gross national product (“GNP”) – more growth equals better policies¹²⁹. Human rights indicators ordinarily have no place in this scenario. In addition to growth being considered the highest attainable goal it is largely presumed that market forces are best suited to achieve this growth¹³⁰. As shown above, the latter do not take human rights into account in their functioning either. This leads to a situation in which human rights are being ignored twice: by market forces as well as through respective policies. While markets are inherently incapable of respecting human rights given that their functioning does not provide for the necessary indicators, governments do have a choice. They can choose how to set their national goals. Just as they chose growth to be worthy of their maximum attention, they can choose to prioritise human rights.

The root of the problem seems to be a cost-analysis of the implementation of certain measures: “The substance (humans, nature) and symbols (law, money) of economic life [...] are then reduced to mere numbers in cost-benefit calculations¹³¹.” At the end of the day, policy steps that cost less but promise to bring maximum utility in the meaning of growth will be favoured in most cases. On the international scale, this choice is directly reflected in a state’s willingness to comply with international commitments. When facing the decision whether one should comply with a trade agreement or human rights obligations where the two are in conflict, the former will regularly be chosen over human rights. This is due to the definition of growth as ultimate goal, and closely connected to international developments: in the international arena, states are predominantly ranked according to their GDP, their credit rating and their level of external debt rather than the speediness of their criminal proceedings or their overall human rights compliance. Human rights do not pay the way international trade agreements do, and the economic and political cost of membership in trade agreements is usually higher than that of human rights non-compliance.

¹²⁹ See Balakrishnan & Elson, 2011, pp. 11 ff.

¹³⁰ *Ibidem*.

¹³¹ Frerichs, 2014, p. 39.

Another graphic example is the privatisation of public goods, services, and functions. Although briefly mentioned above in the context of the commodification of law, privatisation fits better in this category given that it requires a concrete policy choice by decision-makers of a certain nation-state. As described above, privatisation means the transfer of public property into private ownership or the transfer of certain tasks without a change in the ownership structure. As a result of privatisation, the state retreats as the actor responsible for the delivery of certain goods and services. Apart from private prisons and detention centres, a wide range of other areas of public infrastructure may be privatised, including for example the supply of water, electricity, gas, or the transport system. The change of focus from being a public good or service to a means of private accumulation make human rights concerns more pressing in those sectors once privatised. The goal of the provider is no longer equal distribution of the respective goods or services, but to attain financial gain or profit. This typical shift in focus is highly relevant whenever the good or service in question carries human rights implications for the people concerned¹³².

Cases such as the on-going privatisation of the water system in South Africa, or the recent decision on the privatisation of detention centres for migrants in Greece, illustrate the detrimental impact privatisation may have. According to De Feyter, it is important to put in place certain regulatory measures “to address the risk of human rights protection suffering as a consequence of the retreat of the state from the service delivery. Practice demonstrates that, in the absence of such regulatory action, the privatization of a human-rights-sensitive service very often leads to violations of the human rights of users who are of no commercial interest to the private actor¹³³.”

It is interesting to consider why a state would decide to outsource certain services to the likely disadvantage of human rights protection. Instead of keeping “human-rights-sensitive services” in the care of the state, they are commercialised. Looking back at the “growth-politics” mentioned above, this is not surprising. States are meant to benefit from privatisation processes as it creates revenues and simultaneously decreases public spending in these sectors. If state policies are measured

¹³² See De Feyter, 2005, pp. 196 ff.

¹³³ *Ibidem*, p. 197.

by their growth in GDP or current account balance, privatisation can be very positive.

Furthermore, economic globalisation “creates an international climate that encourages states to engage in privatisation (by providing a wide range of incentives for privatisation, such as debt relief, or development assistance)¹³⁴.” Recent examples of this are the adjustment programmes of the so-called troika composed of the European Commission (“EC”), the International Monetary Fund (“IMF”) and the European Central Bank (“ECB”) in the current economic crisis in Europe. The review of the *Second Economic Adjustment Programme for Greece*¹³⁵, for example, evaluates fiscal structural reforms. Under the headline “Privatising to boost efficiency in the economy and reduce public debt¹³⁶,” several steps taken by the Greek government aiming at further privatisation of a huge amount of public services are assessed. The overall outcome of the review in respect of privatisation is that while progress has been made, the overall speed of privatisation in Greece “remains unsatisfactory¹³⁷.”

Incentives to privatise are much higher than those promoting human rights, and states are usually ranked according to their GDP. This influences policies and policy choices in a way that the interests of the market will most likely be chosen over those of human rights protection because the market “pays” and human rights do not.

As shown above, markets are not primarily concerned with externalities such as human rights. It is true that the actors involved, such as transnational corporations (“TNCs”), may take human rights into account on a voluntary basis. However, the word “voluntary” suggests that human rights considerations are not part of the classical dynamics of market thinking. In short, one could say that markets are blind to human rights. This ties back in with government responsibility: states introduce laws and economic policies that shape the market, and states have human rights obligations they *should* be taking into account when following their daily business. This applies equally to the spheres of economy and market forces. Governments do, in this sense, have a dual role: they keep the state running by dealing with daily issues, passing

¹³⁴ *Ibidem*, p. 199.

¹³⁵ Third review of July 2013 of the *Second Economic Adjustment Programme for Greece* (European Commission, 2013).

¹³⁶ *Ibidem*, pp. 25 ff.

¹³⁷ *Ibidem*.

laws, drawing policy plans; yet at the same time, the state is the prime guardian of human rights. This dual role ought not to change if the government's policies target issues of economy and market.

Chapter 2 of this thesis will examine what economic and social implications the current economic crisis is having. The negative impacts of the crisis, the latter being a child of the system of market economy and closely linked with deregulation, offer further proof of the role granted to human rights in a market economy. Throughout the crisis, it has become extremely clear that the market system alone does not include human rights promotion or protection at its core, basic functioning. This is further evidence of the ignorance or "blindness" markets have to the basic values inherent to human beings.

1.3. RESPONSIBILITIES AND THE MARKET ENVIRONMENT

As shown above, states have a very complex relationship in regard to markets. In some cases, human rights violations may occur as a result of the market not taking human rights into account but rather operating in a system of market forces being blind to human rights, thus directly influencing human rights; while in other cases this may happen as a result of government action. A graphic example would be the austerity measures adopted during the economic crisis in many of the European states¹³⁸. The potential human rights infringements only appear as a result of the adoption of a certain measure, not as a direct result of market action.

Increasing globalisation makes it important to mention a third source of violations in the present scenario: international dynamics. The Westphalian notion of state sovereignty has been weakened through a number of developments, thus opening state borders up to international influence of various kinds. This may be the product of cooperation in an international organisation such as the United Nations or the World Trade Organisation ("WTO"), bilateral agreements between states, or created through dependencies based on the economic reality of different countries. Expanding beyond classical international law as the law between states, a growing number of non-state actors ("NSAs")

¹³⁸ See below Chapter 2.

are appearing in the global arena. This includes, for example, powerful TNCs as well as international civil society organisations. The weakening of sovereignty and increasing globalisation coupled with a multiplicity of actors make it more and more complex to differentiate between state policies and how they are influenced. The same holds true for the question of whether the state had room for manoeuvre in adopting a certain policy decision.

All of these factors contribute to the establishment and maintenance of a certain system, which, in turn, has an impact on people's lives. The increase in potential sources of violations of human rights makes the question of attribution of responsibility more difficult, thus resulting in demands to hold NSAs responsible, too. While these issues cannot be discussed in the present analysis, it is important to mention international dynamics in order to fully capture the complexity and multi-dimensionality of a possible infringement.

Closely connected with the question of who infringes human rights is the question of what obligations these rights give rise to. In order to be able to identify the obligations arising for states in their role as primary duty bearers, human rights theory has undergone two major phases. In accordance with the understanding of human rights having developed in three "generations" – civil and political rights, then economic, social and cultural rights and finally collective and solidarity rights – respective state duties were defined along these lines. CPRs were seen as imposing "negative obligations" of non-interference, whereas ESCRs were to be realised through the implementation of "positive" measures¹³⁹. Based on Karel Vasak's "generation theory" of the 1970s¹⁴⁰, this concept brought a number of problems, reinforced by the dividing dynamics of the Cold War.

In 1980, Henry Shue suggested an alternative understanding, one that would distinguish between types of duties rather than rights as such¹⁴¹. Shue dismisses the division of positive and negative rights with a seemingly inconspicuous sentence: "[A]lthough the goal is negative, the duties correlative to rights will turn out to include positive action¹⁴²." He points to the importance of what he calls *basic rights*, defined as

¹³⁹ See Nowak, 2012, pp. 269 ff.

¹⁴⁰ Ibidem, p. 279.

¹⁴¹ See Coomans, 2008, p. 752 and Shue, 1980, pp. 51 ff.

¹⁴² Shue, 1980, p. 19. For a more detailed analysis of the faults of the distinction between negative and positive duties, see ibidem, pp. 35 ff.

every human being's "minimum reasonable demands upon the rest of humanity¹⁴³." This understanding of basic rights points to those rights that are so essential that they constitute a precondition to the enjoyment or exercise of all other rights. The two categories Shue considers as basic rights are security rights and subsistence rights, the first category meaning physical security, and including justified demands not to be subjected to murder, torture, rape, assault, amongst others. Subsistence rights are rights that equally qualify as being basic, yet not involving aspects of physical security – such as a minimum of economic security. These include, for example, unpolluted air and water, housing, food, clothing and a minimum of preventive public health care, and focuses on the need to at least be able to survive¹⁴⁴.

This is interesting insofar as it clearly breaks with the distinction between positive and negative rights, and instead introduces the category of basic rights, which transcends the original division and attracts correlative duties. Duties are necessary in order to ensure the enjoyment of rights that are socially guaranteed, leading to the duty to develop and preserve effective institutions¹⁴⁵ which have to fulfil at least three functions: to *avoid* depriving, to *protect* from such deprivation, and to *aid* those who are being deprived nevertheless¹⁴⁶. This tripartite approach to three levels of duties while abandoning the idea of distinguishing between rights is based on the assumption that the "complete fulfilment of each kind of right involves the performance of multiple kinds of duties¹⁴⁷." This finally yet entirely breaks with the idea that a certain right has a single correlative duty. Instead, Shue establishes an understanding of basic rights as only being fully protected if all three types of duties are performed. Shue's idea of developing a typology of obligations is reflected in the universal, indivisible, interdependent and interrelated character of all human rights¹⁴⁸. Today, this approach is increasingly

¹⁴³ Ibidem.

¹⁴⁴ Ibidem, pp. 20 ff.

¹⁴⁵ Interestingly, Shue does not attribute duties to states as is usually done in human rights theory. Rather, he makes a moral argument for the full enjoyment of basic rights, thus enabling him to be more general in the allocation of duties. He states that all of the three duties must be performed, but they do not have to be performed by the same individuals or institutions – rather, society as a whole functions as the guarantor. This is also reflected in his definition of a moral right (ibidem, p. 13) and ultimately shows the need for institutionalisation to be able to effectively meet the needs of basic rights (ibidem, pp. 52 ff.).

¹⁴⁶ Ibidem, pp. 17 ff. and 51 ff.

¹⁴⁷ Ibidem, p. 52.

¹⁴⁸ As stated in the Vienna Declaration and Programme of Action 1993, para. 5 of the

recognised and has resulted in different levels of obligations, typically including a tripartite structure of obligations to *respect*, to *protect*, and to *fulfil* human rights¹⁴⁹. The obligation to *respect* demands states not to interfere with the enjoyment of human rights, whereas the second duty obliges the state to *protect* the rights-holder from an interference originating with an actor different from the state. The third category requires states to take necessary legislative, administrative, judicial, political and other positive measures to *fulfil* human rights¹⁵⁰.

This understanding of obligations is interesting in the light of the potential sources of a human rights infringement as described above – namely the market, the state or international dynamics. In the first example, with markets having a direct impact on a human rights situation, the state duty in question would be to *protect* the individual from the influence of this actor, the latter being different from the state. In the case of direct government action, the state has a duty to *respect* human rights in its policy. At the same time, government measures might only be taken as a result of preconditions established by a market economy. Thus it is important to acknowledge the duty to *respect* being somewhat embedded in a certain situation or environment, which may also include international dynamics. The same is essentially true for the third category of obligations, the duty to *fulfil*: a certain situation created by the economic system present in a certain state – with or without governmental interference – might require the government to take certain measures that make sure that everyone’s human rights are fulfilled. Examples for these active steps towards human rights realisation are social housing projects or employment programmes.

While at first it may seem clear what category of responsibility to assume, it is not all that clear anymore after careful consideration. Large-scale unemployment can be understood as a result of market forces not living up to the standards they were expected to reach by allocation of labour force through market mechanisms. International dynamics may or may not play a role in this. In taking action, the government then adopts certain legislative measures and at the same time actively opens programmes that try to support unemployed people in their search for employment. Does the respective government have a duty to *protect*

Preamble.

¹⁴⁹ See Coomans, 2008, p. 752.

¹⁵⁰ See Nowak, 2012, pp. 270 ff.

from market dynamics, to *respect* human rights in their legislation or to *fulfil* through programmes? Does the government have all of these duties at once? The answer will most probably be that all of these duties come into play and are in some way interconnected.

It becomes evident that the complexity of a certain situation might require a different treatment – or a different understanding of state duties. The popular tripartite approach seems very well capable of attributing responsibility as long as it is clear who the involved actors are and the state keeps playing a central role. Once this shifts by opening up to a multiplicity of actors such as the market or international dynamics, attribution and protection become more difficult thus endangering the full enjoyment of human rights. After all, the basic idea is that human rights entitle individuals to enjoy their rights – irrespective of the origin of an interference being a state or a non-state actor¹⁵¹. In this sense, it might be necessary to over-think state obligations¹⁵², or, as De Feyter puts it, “to adjust state obligations to a context where the role of the state as a social and economic actor is changing¹⁵³.”

1.3.1. *The Responsibility to Counteract*

As already seen, markets create a certain market environment which is not overly considerate of human rights as a result of which governments have a multiplicity of human right-based duties. In this complex environment, the attribution of responsibilities for human rights violations will naturally be more difficult and complex than in a situation that is composed of an individual affected by an act that is clearly identifiable as state action. I therefore suggest a much

¹⁵¹ Ibidem, p. 272. Please note that collective rights also play an important role in the human rights discourse.

¹⁵² This does not mean that the tripartite approach is without merit – on the contrary, the concept has proven to be extremely valuable for the attribution of violations, in an analytical sense. In some situations, however, a more encompassing approach might be necessary in order to ensure full realisation of human rights. I claim the environment created through interaction between states, markets and the international sphere to be one of these.

¹⁵³ De Feyter, 2005, p. 22. It is debatable whether the element of change is present in this research; globalisation adds a dimension, however markets and the role of the state in respect to them have been a constant issue. Personally, I find “change” more suitable in the context of globalisation and emerging novelties such as large-scale privatisation of public services, which is probably the context De Feyter envisages. For present purposes, this thesis understands the change mentioned as a change of focus or awareness shifting to markets as playing a role for the realisation of human rights.

broader notion of state obligations based on the assumption that with market dynamics, it is the complex interaction of market, government, and international mechanisms that establish a certain environment, which threatens human rights. Governments have to be aware of this differentiation, even if it seems minor at first sight, and then revisit their duties. Indeed, as Article 28 of the Universal Declaration of Human Rights adopted on 10 December 1948 (hereinafter “UDHR” or “Declaration”) provides:

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized¹⁵⁴.

Looking into the drafting process of Article 28, it was included at a relatively late stage. The purpose of this provision was to determine the scope of obligations the contracting parties would later have – a difficult task given the great variety of national social policies. It was particularly important in the light of economic and social rights to include an article providing for a framework towards their realisation, especially as the nature of such rights was considered to require a wide variety of implementation measures. When it became evident that the substantive articles would not include specific obligations, the inclusion of an article establishing the latter seemed increasingly important¹⁵⁵. On 10 June 1948, the working group in charge of drafting the respective provision presented a version of today’s Article 28 as a general principle entailing the right to a “good social and international order¹⁵⁶.”

The French delegation proposed their own version during the subsequent discussion, reading “Everyone as a member of society has the economic, social and cultural rights enumerated below, whose fulfilment should be made possible in every State separately or by international collaboration¹⁵⁷.” The following discussion contained contestations of the adjective good, as well as a discussion on the purpose of the article; namely, the inclusion of “duties” as they were missing in the substantive

¹⁵⁴ Article 28 UDHR.

¹⁵⁵ See Eide, 1999, pp. 598 ff.

¹⁵⁶ See Report of the Sub-Committee, on 10.6.1948, document no. E/CN.4/120, in Schabas, 2013 (hereinafter referred to as “travaux préparatoires”), p. 1826.

¹⁵⁷ Summary Record of the 67th Meeting of the Commission on Human Rights, on 10.6.1948, document no. E/CN.4/SR.67 of the travaux préparatoires, pp. 1835 ff. This proposal by René Cassin was later included at the beginning of the section dealing with economic and social rights (Eide, 1999, p. 599).

provisions. This was particularly true in respect of economic and social rights, however solely referencing this category of rights was widely considered to be contrary to the principle of indivisibility of human rights¹⁵⁸. The discussion on the inclusion of the word “good” was particularly interesting as it reflected ideological positions¹⁵⁹. Indeed, the lack of a global understanding of what a “good” social order meant, eventually resulted in “good” not being included in the article¹⁶⁰.

The reality underlying this discussion has not much changed. What most states would agree on today, and did during the drafting process of the UDHR, is that human rights protection requires an order in which their realisation is possible to the fullest extent – and that a certain notion of duties comes along with this requirement. This is best illustrated by René Cassin’s words at the meeting of the General Assembly on 9 December 1948. After pointing out that the Declaration had been written in the aftermath of World War II, corresponding to the great principles of 1789, and based on the four pillars (personal rights, relationships between man and his fellow men, public liberties and fundamental political rights, and economic and social rights)¹⁶¹, he turned to Article 28:

The final texts of the declaration welded those elements together, for they implied ties between the individual and society and affirmed the need of an adequate social and international order capable of ensuring that rights were

¹⁵⁸ Summary Record of the 67th Meeting of the Commission on Human Rights, on 10.6.1948, document no. E/CN.4/SR.67 of the travaux préparatoires, pp. 1835 ff.

¹⁵⁹ See Summary Record of the 72nd Meeting of the Commission on Human Rights, on 14.6.1984, document no. E/CN.4/SR.72 of the travaux préparatoires, pp. 1884 ff.; Summary Record of the 78th Meeting of the Commission on Human Rights, on 14.6.1984, document no. E/CN.4/SR.78 of the travaux préparatoires, pp. 1936 ff.; Summary Record of the 157th Meeting of the Third Committee, on 22.11.1948, document no. A/C.3/SR.152 of the travaux préparatoires, pp. 2750 ff. Today’s Article 28 was finally agreed on in its present form during the meeting on 22.11.1948, as Article 26 (see document no. A/C.3/364 of the travaux préparatoires, p. 2755).

¹⁶⁰ It has to be noted that most state representatives present either agreed that an order providing for the rights guaranteed by the Declaration was good in essence; or the other way around saying that a good social and international order would be necessary to provide for full realisation, thus stressing that the order envisaged was in fact good. This view was not shared by the representative of the Soviet Union, Mr. Pavlov, who was of the opinion that even if all the rights set out in the Declaration were realised, this did not mean that the resulting social and international order would necessarily be a good one; meaning that the establishment of formal equality did not result in the end in a division of society into “exploiters and the exploited”. See the discussion in Summary Record of the 157th Meeting of the Third Committee, on 22.11.1948, document no. A/C.3/SR.152 of the travaux préparatoires, pp. 2750 ff.

¹⁶¹ René Cassin, representative of France and member of the drafting committee in front of the UN General Assembly on 9.12.1948, document no. A/PV.180 of the travaux préparatoires, p. 3032.

respected; they provided safeguards or hope of safeguards, while at the same time also imposing certain limitations upon mankind¹⁶².

Eide's commentary on the UDHR provides further insight to what is meant by referring to a "social and international order." Article 28 demands the establishment of social and international conditions in a way that the equal enjoyment of all listed rights throughout the world is possible. "This would necessitate adjustments of political and economic relations, both within States ('social order') and between States ('international order'), and would be impossible without a corresponding modification of cultural traditions so that these give priority to the human rights system as a whole¹⁶³." While also calling Article 28 the "ultimate aspiration" of the Declaration, it is considered to be a vision achievable when pursued with determination. Understood in this sense, Article 28 has inspired normative activity as well as concrete action since it was included in the UDHR.

Eide also draws on the works of Theo van Boven, the latter having analysed that the UN has adopted a "structural approach": a process of connecting human rights with "major global issues, in efforts to find solutions for human rights concerns affecting the millions of deprived, dispossessed, discriminated against, and marginalized¹⁶⁴." Human rights are being linked to world-wide patterns and issues with the aim of identifying root causes as well as in order to assess human rights in certain contextual situations. Article 28 can be understood as "open-ended" and was designed to point to the tasks that have to be fulfilled if human rights are to be realised to their fullest extent. It aims at overcoming "political, economic and cultural obstacles to the enjoyment of human rights both at the national and international level," including world-wide economic and technological power relations given that poverty, for example, is embedded in these power relations¹⁶⁵.

In turn, Article 28 arguably envisages a broader approach than a tripartite of duties. Rather, it seeks to acknowledge that a certain national and international order is necessary to ensure the enjoyment of all human rights, which may include a change of the present order. Given the inclusiveness of Article 28 and the structural view it emphasises,

¹⁶² *Ibidem*.

¹⁶³ Eide, 1999, p. 597.

¹⁶⁴ *Ibidem*.

¹⁶⁵ *Ibidem*, p. 602.

it provides for a formidable basis for the suggested “environment-approach”: the idea that a complex interaction of several actors or forces results in the establishment of a certain overall environment, which then has implications for the lives of human beings.

Article 28 is not alone in suggesting a broader approach to the concept of state responsibilities. On the contrary, the inclusive view of the African Commission on Human and Peoples’ Rights (“ACHPR”) complements the theoretical framework envisaged with a practical example thus showing its relevance for theory as well as practice. In a case against Chad¹⁶⁶, the African Commission adopted a comparatively wide notion of state duties: the applicant organisation alleged a number of violations having taken place during the civil war, in particular the harassment of journalists, arbitrary arrest and illegal detention, killings, disappearances and cases of torture as well as two assassinations. Although this is not a comparable set of violations as argued for in this thesis, nor do we have a situation of civil war, the argumentation of the ACHPR is pertinent. The very brief judgment finds that there have been a number of very serious violations, yet it does not go into much detail as to the government duties in relation to the respective violations. It rather describes an overall situation, in which Chad has failed to protect the rights of the victims. This includes the national armed forces failing to intervene in killings and assassinations as well as a lack of investigations, and extends to situations where direct government involvement cannot be proven. The failure of the government was based on a more general level, namely the responsibility to secure the safety and liberty of its citizens. Chad was found in violation of the alleged rights as it “failed to provide security and stability in the country, thereby allowing serious and massive violations of human rights¹⁶⁷.”

The African Commission found that the civil war in Chad resulted in a situation of insecurity and instability, and it would have been the government’s duty to take measures against the prevailing situation in order to fully ensure the human rights of its citizens. As Chad failed to do so, it was found in violation of several rights. The basis of these violations was not a breach of, for example, a specific duty to protect someone. Rather, it was based on the existing overall situation and –

¹⁶⁶ ACHPR, *Commission nationale des droits de l’Homme et des libertés v. Chad*, communication no. 74/92, judgment of October 1995.

¹⁶⁷ *Ibidem*, para. 22.

what I shall term – a corresponding “failure to counteract.”

The general *responsibility to provide for security and stability* in one’s country as a whole (rather than specifically categorising violations of duties) corresponds to the notion of responsibility as prescribed by the African Charter on Human and People’s Rights (Banjul Charter). According to Article 1 of the Banjul Charter, states “shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them¹⁶⁸.” This wide notion of state duties is reflected and interpreted in the Chad case: “[I]f a State neglects to ensure the rights in the African Charter, this can constitute a violation, even if the State or its agents are not the immediate cause of the violation¹⁶⁹.”

As demonstrated above, the suggested approach is not that uncommon in theory or practice. The present thesis therefore argues for a wider approach, thereby breaking with the need of qualifying duties strictly according to *respect*, *protect* or *fulfil* requirements. It suggests a more inclusive, all-encompassing view based on the existence of a certain environment. Briefly looking back at the idea introduced by Henry Shue, this might be more in line with what he envisaged. While introducing the tripartite approach to the protection of basic rights as shown above, Shue highlighted that these duties are systematically interdependent. None of the three duties could be fully complied with without leaving loopholes if only invoked one by one. He also pointed out that these duties include the duty to design certain social institutions that would provide for the necessary enjoyment of basic rights – on all levels of obligations¹⁷⁰. The understanding of individualised obligations to *protect*, *respect* and *fulfil* somewhat departs from the interdependence Shue attributed to his tripartite understanding. In contrast, the approach suggested in this thesis can be of benefit to states wanting to live up to their responsibility to ensure human rights in a holistic manner, as it does not limit them to specific categories. Rather,

¹⁶⁸ African (Banjul) Charter on Human and Peoples’ Rights, adopted in June 1981, entered into force in October 1986.

¹⁶⁹ ACHPR, *Commission nationale des droits de l’Homme et des libertés v. Chad*, para. 20. Please note that the African Commission does not generally adopt this broad approach. The question whether this is due to a change in its understanding of state obligations or merely a result of sufficient arguments for direct attribution is beyond the scope of this thesis as well as the argument it seeks to establish.

¹⁷⁰ See Shue, 1980, pp. 60 ff.

it helps to acknowledge the existence of a certain volatile system in which human rights can only be fully realised by adopting a holistic approach to the duties of states.

Another benefit this approach offers is that it is generally open to different views or theories on the role of government in the market. Governmental action in respect to the market depends on how the state is seen in relation to the market, and accordingly shapes policy space when human rights concerns overlap with those of the market. Two factors, however, remain static: first, the role of the state as primary duty bearer; and, secondly, irrespective of the theory chosen, market mechanisms do not conduct human rights impact assessments. The latter remains an obligation of the state within a market environment.

As alluded to earlier, the state as the primary duty bearer is problematic in an increasingly interdependent, and interconnected and globalised society. The multiplicity of actors on the global scale and the varying power relation between states, as well as between states, NSAs, including TNCs and international civil society organisations, makes the situation more complicated. Sovereignty of states has *de facto* weakened as the global reality we live in increasingly influences policies and determines agendas. One possible criticism this thesis is open to is that it does not meet the reality of these changing power relations; such as that TNCs should be held accountable for human rights violations and that the nation-state is no longer the sole duty bearer for human rights. I fully agree that the system needs to be developed with respect to NSAs. However it is equally important not to forget that states are effective tools for ensuring human rights and that in today's reality, we have not yet arrived at a point where multi-duty-bearers can fully guarantee the realisation of human rights. Further, a prerequisite for international corporations to take responsibility is that there is an effective system of protection at the national level.

Irrespective of the theoretical framework chosen and notwithstanding existing international interdependencies, the environment-approach is suitable to address human rights duties of a state. The overall duty to ensure human rights compatibility within a volatile environment could be called the "duty to counteract." "Counteraction" should, however, not be misunderstood as trying to establish a duty to counteract the environment as such; this thesis does not necessarily seek to provoke a change of system. Rather it understands counteraction as, firstly, the realisation that the environment is of an adversarial or volatile

nature which is not conducive to the realisation of human rights; and, secondly, that states as the ultimate duty bearers should live up to their obligations thus ensuring against the adversarial effects of the environment. In this sense, states have an obligation to counteract negative effects as well as their root causes by offering preventive policies.

1.3.2. Content of the Responsibility to Counteract

The content of a state's duties in the light of the suggested approach will depend heavily on the concrete economic and political reality, steered by the needs of the rights-holders. This and the fact that the environment-approach rejects the idea of a specific set of duties being fixed beforehand make generalisation difficult. It is safe to assume that the overall duty would initially require the identification of the shortcomings of the market in respect to their human rights implications; and, secondly, to counteract the findings of this assessment in the interest of the realisation of human rights. This is in no way a weighing of duties but rather a necessary timeline given that reasonable policy decisions can only be made on the basis of an informed assessment of current needs including an analysis of the system in question.

The problems faced when trying to circumscribe the content of the suggested duty is similar to the issues discussed in connection with the right to development ("RTD") as first adopted by the Declaration on the Right to Development in 1986. The RTD has been designed as "a response to the call by developing countries for an international order in which effective international cooperation would reduce the perceived unfairness of the prevailing economic order¹⁷¹." It equally builds on Article 28 UDHR, with special emphasis on the *international* order¹⁷², and the provision's vision of respect for human rights depending not only on narrowly described obligations between individuals and states. Rather, Article 28 in this context is understood as a "multi-layered system of obligations which attach themselves to all societal relations at the national and international levels¹⁷³." By formulating development

¹⁷¹ Salomon, 2007, p. 50.

¹⁷² *Ibidem*, pp. 71 ff.

¹⁷³ *Ibidem*, p. 51.

in the language of human rights, the discussion was supposed to depart from development being regarded as a primarily economic topic, but rather to be understood as aiming at the creation of a national and international environment that would be beneficial to the realisation of human rights. The latter is understood as a holistic process, ultimately leading to the duty to formulate adequate participatory national and international policies. These would result in an improvement of the situation of the whole population through the equitable distribution of the benefits created therein. In addition, the RTD is seen as a tool to empower less powerful states interacting with the international community.

The notion of duties as envisaged by the right to development is similar to the suggested environment-approach insofar as it requires a structural approach to the realisation of human rights. The overall aim of both is to establish an economic and social order that is based on justice and equity rather than on poverty and dependencies. Key to this achievement is a multi-level approach taking into account national and international realities.

While both concepts are closely connected, especially given the theoretical understanding of a holistic realisation of human rights in the spirit for Article 28 UDHR, they are not entirely the same. The right to development focuses strongly on international cooperation and dynamics, whereas the environment-approach stays within the framework of state responsibility and seeks to adjust state duties to our contemporary reality. While primarily taking part on the national level, it acknowledges the international level as having an important influence but does not aim at attributing duties to the international communities. In addition, the responsibility to counteract explicitly introduces the market as an individual actor having a significant influence on the lives and realities of people. Another important difference lies in the definition of potential victims or vulnerable entities: The RTD focuses mainly on so-called “underdeveloped” countries and their population. The duty to counteract in contrast does not understand itself as being limited to specific inter-state power relations. On the contrary, the fact that markets are everywhere requires the acknowledgment of potential victims being anywhere and anyone – including economically prosperous states. Ultimately, however, both seek to establish arguments for the creation of a “juridical framework [...] for the failure of our international economic

arrangements to allow for an environment in which the human rights of all people can be met¹⁷⁴.”

One way the RTD-discourse dealt with the difficulty of formulating duties is the establishment of the “human rights-based approach to development” (“HRBA”) – or, as Salomon puts it, “rights-based economic growth”¹⁷⁵:

Considerations of equity, justice and respect for human rights are to determine the strategies for growth and the beneficiaries of it. Rights-based economic growth is meant to integrate fairness into the traditional process of expansion of wealth, and allocation of resources, focusing on distributional aspects i.e. ensuring minimum quality of life throughout the population, and widespread poverty reduction. A focus merely on aggregate growth as the poverty panacea has lost its power of persuasion¹⁷⁶.

Accordingly, the question to ask is whether the methods used to further economic growth are consistent with human rights and how they can function as an instrument that would also further the realisation of human rights. Growth and other economic reforms must not violate any human right, and they must specifically target vulnerable groups who experience an unequal level of opportunities while aiming for the elimination of injustice¹⁷⁷.

This view is very similar to the one urged for in this thesis. The overall duty of a state is to reflect in its economic and social policies that the achievement of human rights is an end in itself. State policies and market mechanisms, on the contrary, can only be a means for their very realisation.

As stated above, the responsibility to counteract will typically include the assessment of the specific environment, the formulation of concrete goals and the choice of strategy or policy in order to overcome the gap between the *status quo* and the desired outcome. As opposed to approaches that would, for example, measure growth in GDP, the point of reference for the assessment is always the individual in its human rights situation. In this sense, it bears resemblance to Nussbaum’s

¹⁷⁴ Ibidem, pp. 50 ff. and 55 ff.

¹⁷⁵ The HRBA to development seeks to integrate human rights standards and principles in process and outcome of development cooperations, as underlying principle as well as a goal of successful development. It also formulates the need for accountability mechanisms in respect to the cooperations and interventions.

¹⁷⁶ Salomon, 2007, p. 129.

¹⁷⁷ Ibidem, pp. 128 ff.

capabilities approach, where the central question for the assessment of certain societies and their level of “basic decency or justice” is: “What is each person able to do and to be?”¹⁷⁸ Instead of asking about “total or average well-being,” the capabilities approach thus asks what opportunities each and every person has.

Capabilities, in Nussbaum’s understanding, are “a kind of freedom”: “they are not just abilities residing inside a person but also the freedoms or opportunities created by a combination of personal abilities and the political, social, and economic environment¹⁷⁹.” According to the responsibility to counteract, it is this environment that has to be designed in a way that results in an enabling human rights situation for every individual – not just *de lege* but *de facto*.

¹⁷⁸ See Nussbaum, 2011, location 217 (kindle version).

¹⁷⁹ Ibidem, location 243. Nussbaum calls the combination of internal capabilities, that is, the characteristics of a person, plus the social, political and economic conditions in which a person is located “combined capabilities” (see ibidem, location 243 ff.).

2.

ON THE APPLICATION OF THE RESPONSIBILITY
TO COUNTERACT

The following chapter gives an example on how the theory established above can be applied. As mentioned above, the responsibility to counteract-approach can be applied to a great variety of situations all around the world. It could be, for example, a holistic answer to the question on how to combat poverty or an analysis of economic inequality. It can also be applied to very specific situations such as the on-going financial crisis in Greece, in the United States, or the establishment of a human rights-friendly economy in a specific country, irrespective of their state of development. In short, any situation that has several actors, including the market and the nation-state, as well as a certain impact on human life, could be analysed in respect to what the responsibility to counteract would entail in that specific framework.

I chose the financial and economic crisis of the early 21st century in Europe (“crisis”) for this purpose, given that it is the most recent example of blatant market effects. The reasons for this choice are simple. First, this choice of topic brings necessary limitations of time and space, namely the geographical borders of Europe¹⁸⁰, as well as a time restriction from 2008 until the present. Secondly, I am focusing on Europe because after establishing the complexity of the “crisis environment¹⁸¹” and the human rights situation created thereby, I will briefly look at the

¹⁸⁰ “Europe” in this sense may refer to the EU28 in the context of EU documents and reports. In the context of the ECtHR, the ESC or Council of Europe (“CoE”) data, it refers to the 47 member states of the Council of Europe, all of which are under the jurisdiction of the ECtHR and 15 of those having accepted the collective complaints procedure before the ESC (http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/Overview_en.asp).

¹⁸¹ “Crisis environment” refers to the environment created through different powers and actors contributing to the establishment of the said environment. This includes actors who contributed to the building up and eruption of the crisis, such as the market and international institutions, as well as national actors and the various responses to the crisis.

regional human rights protection mechanisms and their approach to crisis-related cases. Europe is unique given the protection mechanisms provided for, namely the European Court of Human Rights (“ECtHR” or “Court”) and the European Committee of Social Rights (“ESC,” “Committee”). Both have dealt with the current crisis to some extent, which invites to a brief analysis. This illustrative comparison then allows me to suggest approximate steps that the responsibility to counteract-approach would entail in this context, which is aimed at showing the surplus this approach would result in.

As mentioned above, the choice of example does in no way exclude other topics of application. Also, the fact that I apply the suggested approach to a crisis scenario does not mean that the scope of application is limited to other situations of crises, on the contrary, it should prove just as useful for application in any economic system. To fully anticipate further potential misunderstandings, the last confining remark has to be made with respect to Article 15 of the ECHR, derogation in time of emergency. The use of the term “crisis” in this thesis does not refer to Article 15, which enables state parties to, under certain circumstances such as war or other public emergencies, “take measures derogating from its obligations” under the ECHR. As defined above, the term “crisis” means the financial and economic crisis taking place in the early 21st century and does not refer to exception clauses in human rights treaties.

Since 2008, the world has been troubled with the biggest economic crisis since the Great Depression in the 1930s¹⁸². Also referred to as the “Great Recession” or the “Great Financial Crisis,” the crisis has negative impacts on the lives of vast amounts of people world-wide – ranging from severely rising unemployment over education, private savings, housing and pension systems to the privatisation of important public services including detention centres. Bearing effects for all ranges of societies world-wide, the crisis furthers the gap between most societal groups and has a particularly painful impact on poor and vulnerable groups of society, thus increasing economic and social injustice on the national as well as on the global scale.

The importance of government in the economy becomes even

¹⁸² See e.g. Conclusions of the report of the Financial Crisis Inquiry Commission (“FCIC”) of 2.10.2012, p. xv.

more evident when facing economic difficulties, such as the current economic crisis¹⁸³. In times of crisis, people, just as companies or the state budget, are more vulnerable to influences from their environment. This chapter is a tangible example of adopting the normative argument established in Chapter 1. It seeks to draw a picture of the economic and social effects the crisis has had on people in Europe, but also includes problems touching upon civil and political human rights resulting from the adversarial environment created by free market economies and their dynamics. Accordingly, there are two preliminary questions to answer: first, what is the crisis environment? and second, what effects does the crisis have on people's lives?

2.1. THE CRISIS ENVIRONMENT

There are said to be many reasons for the financial and economic crisis¹⁸⁴ and the way it turned out: the granting of mortgages to people unfit to pay them back and the subsequent bursting of the "housing bubble," largely unsupervised financial speculations and transactions by misuse of loopholes created in the international financial market, downwards spirals of unemployment, state bankruptcy and failing welfare systems with subsequent austerity measures. This thesis does not offer sufficient space nor do I have the capacities to solve the mysteries of the global financial and economic crisis, but it is important to briefly look at the causes of this crisis in order to be able to draw a picture of the crisis environment.

What started in the US in 2007, resulted in a world-wide crisis in 2008 and swept over Europe just as much as any other part of the world. Events in the US are said to have been predictable and culminated in the burst of the housing bubble that had built up through millions of people getting mortgages that were way above their financial capacities.

¹⁸³ While different time frames are indicated for the crisis, with developments in the US having started in 2007 and lasted until 2010, and those in Europe having commenced some time in 2008 and being arguably on-going, I consider this crisis to be still present. This is particularly true in respect to the economic and social impacts it has caused for vast amounts of people, as well as the governmental reactions that are now put in place and continue to affect them.

¹⁸⁴ While there are several understandings of the term "crisis," when employed in this thesis it refers to the financial and economic crisis that erupted in 2007/2008.

The US government subsequently appointed the Financial Crisis Inquiry Commission with the goal of investigating the causes of the crisis, resulting in a report issued in October 2011, the content of which seems to reflect the official position of the US government. The report sees the main causes for the crisis in “human action and inaction¹⁸⁵,” including “widespread failures in financial regulation” not caused by necessity but a lack in political will and ideological choice, failures of corporate governance and risk management, reckless institutions, excessive borrowing coupled with risky investments and lack of transparency and the government being ill-prepared. Interestingly, the report also mentions a “systemic breakdown in accountability and ethics” which resulted in a major decrease of public trust in the financial institutions¹⁸⁶.

Both dissenting opinions attached to the report find these explanations too broad. While Wallison and Burns identify the “*sine qua non* of the financial crisis [having been] U.S. government housing policy¹⁸⁷” which ultimately led to the deflation of said bubble, Hennessy, Holtz-Eakin and Thomas list ten essential causes of the crisis: credit bubble, housing bubble, non-traditional mortgages, credit ratings and securitization, financial institutions concentrated correlated risk, leverage and liquidity risk and risk of contagion as well as common shock, financial shock and panic and lastly the financial shock causing a crisis encompassing the entire economy¹⁸⁸. With the bankruptcy of the US-based investment bank Lehman Brothers in September 2008 and due to the tightly knit net of international finance, the crisis spilt over to Europe, resulting in “the steepest downturn on record since the 1930s¹⁸⁹.”

The occurrence of a crisis reinforces the arguments and governmental responsibilities argued for in Chapter 1 of this thesis. First, government action is even more urgent in times of crisis, the latter typically being a sign of the market not being able to even achieve market-intrinsic goals,

¹⁸⁵ Conclusions of the FCIC Report, p. xvii.

¹⁸⁶ See *ibidem*, pp. xvi-xxv.

¹⁸⁷ Dissenting Statement of Wallison and Burns to the FCIC Report, p. 444.

¹⁸⁸ See Dissenting Statement of Hennessy, Holtz-Eakin and Thomas to the FCIC Report, pp. 417 ff., and subsequent detailed explanation of these reasons for further information.

¹⁸⁹ See European Commission, 2009, pp. 8 ff. The seemingly official position of the EC locates the main causes for the crisis in the overall vulnerable state of financial institutions due to a “long period of rapid credit growth, low risk premiums, abundant availability of liquidity, strong leveraging, soaring asset prices” and real estate bubbles. The bursting of the housing bubble and subprime crisis in the US caused this vulnerable entity to collapse.

and even less so human rights standards; and secondly it worsens the environment in a way that governmental duties become more pressing than before, as the social situation of affected individuals deteriorates massively. At the same time, human rights seem to become more difficult to prioritise as governments are (as we have experienced throughout the crisis) primarily concerned with “saving the economy” or banks, rather than ensuring the achievement of human rights standards¹⁹⁰. This is somewhat ironic given that states with “an elaborate social and health protection system are also economically significantly better placed¹⁹¹” yet it illustrates the underlying ideological debate that is so scarcely mentioned in the US as well as the EU report.

The various root causes listed in those reports arguably show that with more regulatory action on the side of the states, “market forces” or other actors in the *laissez-faire* system could not have gotten to a point where, for example, speculations and derivatives or mortgages drive entire nations into bankruptcy. Market primacy and free market-ideology have significantly contributed to the world-wide crisis. This was confirmed by Margot Salomon at the GLOTHRO final conference in her keynote on market primacy and its implications for human rights. By pointing out the essential role markets have played and still are playing in the crisis, she emphasised that the 2008 crisis is a direct result of deregulation. A report by CoE’s Committee on Social, Health and Family Affairs on the social impact of the crisis reinforces this view, stating that “the crisis calls into question a number of assumptions [...] such as deregulation, the primacy of economic criteria in all aspects of life and overemphasis on profit and growth¹⁹².”

George explains the entirety of this ideological debate as well as its implications on the level of the events that are being described as having caused the crisis. With “market fundamentalism¹⁹³” as underlying dogma, “neoliberal doctrine, coupled with accelerating globalisation and a simple desire for maximum profits, favoured foreign investment

¹⁹⁰ This worrying prioritisation becomes particularly evident when looking at said EC report. Concerns that include human beings are employment-related and formulated on a very technical economic level, suggesting people being work force, consumer and as playing a role in the design of pension systems.

¹⁹¹ Council of Europe, 2009, p. 1.

¹⁹² Ibidem, p. 1.

¹⁹³ See George, 2010, pp. 26 ff. explaining the term as well as the ideological structure nurtured by Hayek’s school of thought.

wherever salaries were low in relation to worker's productivity¹⁹⁴." She draws a picture of a system in which decades of economic liberalisation, privatisation and deregulation in the quest for attracting capital as well as policies enabling tax avoidance and speculation have resulted in a massive redistribution of wealth, "from labour to the owners of capital¹⁹⁵." Referring to the housing bubble, she explains how artificially created stagnation of wages in the US (that disallowed people to participate in the overall financial gain) only created the need to borrow as much money as US citizens did¹⁹⁶.

Equally referring to the "bubble-problem," Foster and Magdoff's analysis of *The Great Financial Crisis* names one of the misunderstandings our economies are built on to be that of continuous growth. Rather, stagnation is the rule and growth the exception¹⁹⁷. With the "fetishizing of growth¹⁹⁸," the latter is being considered necessary. For economies to be able to maintain the myth of growth, constant economic stimuli of a greater magnitude than the last one are necessary. One kind of stimulus that is often used is the artificial creation of a bubble, which will boost the economy until it bursts and then require the creation of a new bubble¹⁹⁹.

This sketch of possible "root causes" shows that the true root of the problem seems to be of an ideological nature and strongly connected to what Sedlacek calls the "fetish of growth" and the accompanying assumption that free markets will achieve all human aspirations. Closely intertwined with these ideas is "all this debt-encouraging, transparency-discouraging, risk-promoting deregulation" that led to the crashes of our economic system²⁰⁰.

The picture drawn above shows the need to also look at the actors involved. On the national level, the situation created through the various power structures and influences involved is complex: first, the way markets operate and were left to operate has allowed the crisis to

¹⁹⁴ Ibidem, pp. 29 ff.

¹⁹⁵ Ibidem, p. 31. For a detailed description of the mechanisms employed, including the private interest in the creation of bubbles as well as issues such as the complicity of rating agencies, please see chapter "The Wall of Finance."

¹⁹⁶ See ibidem, p. 32, also explaining that "two-thirds of their increased spending went to higher bills for health care and energy."

¹⁹⁷ Foster & Magdoff, 2009, pp. 14 ff.

¹⁹⁸ See Sedlacek, 2014.

¹⁹⁹ Foster & Magdoff, 2009, pp. 17 ff.

²⁰⁰ George, 2010, p. 57.

develop into what it is today, including the accompanying ideological foundations as well as institutional entities of the market and financial system. A second layer contains the measures national governments decide to take, with the austerity programmes introduced in most European countries deserving special attention. These two groups of actors are well illustrated by the situation many banks found themselves in. First, the market system demanded banks to be left to themselves, to acquire increasingly more power, to do and lend as they please, and to speculate. Faced with bankruptcy of these banks, governments had to decide whether they would bail them out on public moneys or not, which is what most chose to do.

In addition to these two layers – the market and the state – we have another extremely influential and powerful group of actors comprised of the troika, the EU and other structures of global governance. The multiplicity of powers in this sphere is hard, maybe impossible to grasp, thus far beyond the scope of this thesis. The more obvious ones are the IMF, the WB and their monetary policies, as well as how the crisis has influenced bi- and multilateral international relations and other states. In order to illustrate the complexities of the crisis environment, with its interdependencies and power relations on the international level, the entity nicknamed troika provides for a good example. Composed of the IMF, ECB, and the EC, it deals with the financial difficulties of European member states by providing financial support in return of the borrowing countries committing to certain *Economic Adjustment Programmes* and the provisions therein. Interdependencies of the common currency, the euro, and the conditional lending programmes of the troika add up to the complexity of the crisis environment.

The construction of this crisis environment through a multiplicity of actors, be they individuals, or of an institutional or ideological nature, makes the complexity of this environment evident. Even more actors and ideas were added after the crisis had broken out, calling upon national governments but also entities such as the troika to act. Given the interconnectedness of national and international as well as human, institutional and ideological activities, the establishing of causal links or concrete “naming and shaming” on the side of the affected individual is arguably impossible. At the same time, it is necessary given that the crisis environment shapes people’s daily lives, to a more or less extensive degree, depending on how “hard the crisis hit” their country, and factors such as their social status and belonging, gender, age, etc. As

will be shown below, this influence is in no way neutral in its effects or who is being targeted, but is, first of all, of a mostly negative nature; and secondly focuses on those groups of society that are already more vulnerable and disadvantaged²⁰¹. At the end of the day, all of this carries massive implications for our human rights situation as a whole, not just by affecting selective rights but covering the full range of human and social life.

The present crisis is a human rights crisis. This manifests itself when looking at the devastating socioeconomic consequences²⁰² but has another dimension, namely the “underlying structural causes of the crisis which relate directly to failures to fulfil human rights²⁰³.” A human rights-based approach can challenge both of these dimensions. In addition, the complexity of the crisis environment created makes the need for a more inclusive, holistic approach evident. While there being a multiplicity of actors, final responsibility for people’s well-being at the present stage of how this world is organised lies with the nation-state. Only national governments have the potential power to call for and initiate regulation of the international financial system and the market in a way that ensures greater respect for their citizens. It is for this reason that we need a human rights approach that analyses the sources of violations in order to find adequate responses to the dangers faced, yet at the same time recognises that ultimate responsibility lies with the state. Thus, the “real-life complexity” of the crisis environment offers a good example to illustrate the surplus an inclusive environment-approach can have for the realisation of human rights.

2.2. HUMAN RIGHTS IN THE CRISIS ENVIRONMENT

Like in the market environment in general, human rights also come short in the crisis environment. Not only do they fall victim to the dynamics of the crisis, they also happen to be subordinate concerns of governmental policies when dealing with it – on the national as well

²⁰¹ This is unfortunate given that the crisis carried a “momentum for change,” which, for some reason, got overthrown by dynamics focusing on saving banks and restoring the system as it was, rather than accepting the failure and concentrating on the human face of the crisis.

²⁰² See para. 2.2.

²⁰³ Centre for Economic and Social Rights, 2009, p. 4.

as the international level. While policy responses to the crisis were first aimed at guaranteeing social protection, the re-establishment of financial stability and the stimulation of economic demand, European governments' focus shifted towards the reduction of budgetary deficits in 2010²⁰⁴:

What began as a meltdown of the global financial system [...] has been transformed into a new political reality of austerity which threatens over six decades of growing social solidarity, economic integration and human rights protection [...]²⁰⁵.

The crisis and subsequent policies such as austerity measures are currently affecting and are expected to have long-term effects on the entire spectrum of human rights, with a particularly negative impact on disadvantaged and marginalised groups of society. While social and economic human rights are exceptionally at risk given the austerity measures imposed, civil and political rights are equally affected. The following overview over the effects the crisis is having on the human rights situation in Europe is structured according to the rights in question, yet it is of utmost importance to bear in mind the interdependence and interconnectedness of all human rights.

The enjoyment of the right to work as well as rights at work have been the “first major casualty of the economic crisis and subsequent austerity measures²⁰⁶.” According to Eurostat²⁰⁷ estimates, 25,920 million people corresponding to 10.6% of the population were unemployed in the EU28 in February 2014, with the highest rates in Spain (25.6%) and Greece (27.5% in December 2013). In comparison to last year, unemployment increased in eleven member states²⁰⁸. Compared to the situation before the crisis – when a “period of steadily declining unemployment [had] started” and reached lows of 6.8% before a sharp rise in the wake of the crisis, having gone up by 7 million people²⁰⁹ – this shows how drastically the right to work is being affected. Age as well

²⁰⁴ See Council of Europe, Commissioner for Human Rights, 2013b, p. 15.

²⁰⁵ *Ibidem*.

²⁰⁶ *Ibidem*, p. 17.

²⁰⁷ As Eurostat is the EU's agency for statistics, the reproduced data refer to the EU28 unless stated otherwise.

²⁰⁸ See Eurostat, news release of 1.4.2014.

²⁰⁹ See statistics accessed via http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Unemployment_statistics on 15.6.2014.

as gender discrimination are equally problematic during the crisis. The employment rate amongst men in the EU28 is almost 12% higher than that of women, with female employment having been constantly rising until 2008 and remaining stagnant since the outbreak of the crisis²¹⁰. People under 25 have been hit disproportionately hard, with an average youth unemployment rate of 22.9% in the EU28 and numbers being shockingly high in Greece (58.3% in December 2013), Spain (53.6%) and Croatia (48.8% in late 2013)²¹¹.

Not only is long-term unemployment on the rise²¹², but working conditions of those actually having employment deteriorate, making the workplace less safe and healthy thus impacting on the physical and mental health of many. The weakening of workers' protection threatens the rights to collective bargaining and a fair remuneration, and leads to increased labour exploitation and related problems such as child labour, human trafficking and mistreatment of migrant workers²¹³. Describing the "economic and social costs of the adjustment programme [for Greece as having been] substantial²¹⁴," the UN Independent Expert Cephas Lumina points to the erosion of the right to a fair remuneration: A law adopted in Greece in 2012 in accordance with the adjustment plan resulted in a reduction of the monthly minimum wage in the private sector by 32% for workers under 25 and by 22% for those over 25, thus providing a minimum wage below the poverty level²¹⁵.

Simultaneously to the deterioration of the right to work and cutbacks in pension systems mentioned below, the right to an adequate standard of living is threatened. This includes a heightened risk of social exclusion, especially with marginalised groups of society such as migrants and Roma but also young and elderly people and women. The latter are particularly affected through culminating cuts in public-sector jobs, pensions and services, including various benefits and cuts in health services²¹⁶.

Regressive tax, less work opportunities and cuts in social services

²¹⁰ See statistics accessed via <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&language=en&pcode=tsdec420&tableSelection=3&footnotes=yes&dlabeling=labels&plugin=1> on 15.6.2014.

²¹¹ See Eurostat, news release of 1.4.2014.

²¹² See International Labour Organisation, 2013, p. 2.

²¹³ See Council of Europe, Commissioner for Human Rights, 2013b, pp. 17 ff.

²¹⁴ See United Nations, 2014, para. 40.

²¹⁵ See *ibidem*, paras. 34 ff.

²¹⁶ See Council of Europe, Commissioner for Human Rights, 2013b, p. 23.

resulted in a deepening of poverty throughout Europe²¹⁷, with child poverty rates being extremely distressing: “Children have been disproportionately affected by cuts in social, health and educational budgets and shrinking family benefits have led some children to experience destitution and nutrition problems²¹⁸.” Eurostat has recently started collecting data on material deprivation, measuring the amount of people severely affected by a lack of resources and aimed at a more detailed assessment of poverty-related issues as well as an early detection of trends of impoverishment. Provisional figures show that in 2012, 9.9% of Europe’s population suffered from severe material deprivation, an increase of 1% in comparison to the previous year, with tendencies in 2013 rising.

The worst numbers were found among people younger than 18²¹⁹, confirming the trend of young people being particularly at risk of social exclusion and poverty: in 2011, almost 30% of Europe’s youth were at risk of poverty or social exclusion²²⁰, compared to 24.3% of adults²²¹. Material deprivation amongst children increased from 20.9% in 2010 to 22.9% in 2012²²² and has been rising throughout the crisis²²³. In 2012, Bulgaria, Hungary and Romania counted more than 50% of their children being materially deprived. While deprivation rates decreased in Greece and Ireland until the outbreak of the crisis, both countries have experienced a drastic rise since then: Between 2007 and 2012, Greece’s rates moved from 20% to 34.8%. The rise in Ireland is even more dramatic. Having started at 13.9%, in 2012 31.6% of Ireland’s children experienced material deprivation²²⁴. This, unfortunately, is very suggestive for the impacts the crisis is having on the most vulnerable in the countries that were hit most intensely. Child poverty is particularly

²¹⁷ See *ibidem*, p. 18; and European Commission, 2012, pp. 25 ff.

²¹⁸ Council of Europe, Commissioner for Human Rights, 2013a, p. 2.

²¹⁹ See statistics accessed via http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Material_deprivation_statistics_-_early_results.

²²⁰ See International Labour Organisation, 2013, p. 2.

²²¹ See statistics for EU27 accessed via http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Children_at_risk_of_poverty_or_social_exclusion.

²²² See statistics accessed via <http://epp.eurostat.ec.europa.eu/tgm/refreshTableAction.do?tab=table&plugin=1&pcode=tessi082&language=en>.

²²³ Interestingly, the average amount of children living in material deprivation has been falling in the new EU member states over the period of 2005-2012. For details see reference above.

²²⁴ *Ibidem*.

worrying due to the long-term effects it may comprise²²⁵: children are less likely to succeed well in school, to grow up to their full potential, are at a greater risk of experiencing health problems, etc., thus ultimately child poverty affects the full enjoyment of a wide range of human rights. Throughout the crisis, the total number of people at risk of poverty or social inclusion has risen by over 6 million between 2010 and 2012²²⁶.

Rising poverty and decreasing opportunities for employment are closely connected with the right to education, another essential that fell victim to austerity measures. Respective budget cuts can be equated with “cuts in education subsidies and scholarships [as well as] school teacher’s salaries [affecting] the quality, accessibility and affordability of education and can also result in early school dropouts with long-term effects on the children concerned²²⁷.” Given that the risk of poverty is partly dependent on the education attainment level of the people concerned²²⁸, the overall human rights situation in Europe is gradually shifting towards becoming a vicious circle for those affected. The decrease of the level of education with a simultaneous increase of poverty is estimated to have particularly bad effects in Estonia and Bulgaria, but also in Ireland, Slovakia, Lithuania and Slovenia²²⁹.

Austerity measures and other effects of the crisis have heightened the risk of social unrest, with the EU having registered the most serious raise world-wide, amounting to an increase of 12% in comparison to before the crisis²³⁰. This is also portrayed by large-scale demonstrations and the subsequent repression of protests amounting to concerns with regard to the right to freedom of expression as well as freedom of assembly and excessive use of force against demonstrators²³¹. As a result of the adopted austerity measures, Spain experienced an increase of 50% in demonstrations from 2011 to 2012. From 2011 to 2013, several instances of excessive use of force – including beatings, extensive use of rubber bullets and other forms of ill treatment – infringing upon

²²⁵ Council of Europe, Commissioner for Human Rights, 2013b, p. 23.

²²⁶ From 118,085,000 to 124,488,000 persons between 2010 and 2012, see statistics accessed via http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&language=en&pcode=t2020_50&plugin=1.

²²⁷ Council of Europe, Commissioner for Human Rights, 2013b, p. 20.

²²⁸ European Commission, 2012, p. 24; especially when looking at future employment opportunities.

²²⁹ *Ibidem*, pp. 26 ff.

²³⁰ See International Labour Organisation, 2013, p. 3.

²³¹ Council of Europe, Commissioner for Human Rights, 2013b, p. 21.

demonstrators' physical integrity as well as their rights to freedom of expression and assembly were reported²³².

The crisis, subsequent austerity measures, and increased privatisation have reduced affordability of basic necessities such as food, housing and water. The right to food is particularly compromised through decisions to limit food subsidies, the latter having become a "common means of ameliorating the devastating effects of food scarcity and rising commodity prices on those living in poverty²³³." This is especially harmful at times of rising food prices (which are produced at the market)²³⁴, and specifically targets groups of society dependant on this form of immediate relief when facing food insecurity²³⁵. In addition to limitations of food subsidies, governments regularly fail to provide for adequate safeguards ensuring that minimum essential levels are reached nevertheless²³⁶. A recent study by Oxfam describes rising food poverty in the UK: notwithstanding its rank as seventh richest country in the world, "millions of families across the UK are living below the breadline." In 2013/2014, a total of 20,247,042 meals were given to people in food poverty. This is an increase of 54% compared to 2012/2013. This affects over half a million children in the UK and is closely connected with the limitations to social security introduced in 2013²³⁷.

The right to water is equally concerned. One of the conditionalities for lending imposed by the troika on Ireland, for example, is the introduction of charges for water²³⁸. Ireland has confirmed the establishment of a centralised authority for water, which fuels fears of future privatisation, which in turn could have devastating effects on the access to water and sanitation²³⁹. Similar concerns exist for Greece, where the adjustment programme includes privatisation plans of several public services including those for water and sanitation²⁴⁰. Consequences of deprivation of basic rights such as food and water are enormous, not

²³² See Council of Europe, Commissioner for Human Rights, 2013a, pp. 22 ff.

²³³ See United Nations, 2011a, p. 13.

²³⁴ Please note that speculations on food prices contribute to higher food prices, making nutritional meals less affordable.

²³⁵ See United Nations, 2011a, p. 13.

²³⁶ Council of Europe, Commissioner for Human Rights, 2013b, p. 19.

²³⁷ See Oxfam, 2014.

²³⁸ See International Monetary Fund, 2013, p. 26.

²³⁹ See <http://www.humanrights.ie/civil-liberties/the-right-to-water-and-privatisation-in-ireland/>, accessed on 16.6.2014.

²⁴⁰ See United Nations, 2014, para. 31.

only in terms of reduced health standards and higher poverty in general but also having long-term effects on children who are more likely to experience permanent setbacks in their development²⁴¹.

As a direct result of the collapse of the housing markets and adjustment policies, people experience difficulties in the realisation of their right to housing and closely connected property rights as well as reduced security of tenure²⁴². Coupled with rising unemployment, this has resulted in an increase of evictions due to people's inability to pay mortgages. In Spain, several tens of thousands are reported to have been evicted or facing eviction or foreclosure as a result of the burst bubble. Even after the repossessions, people remain indebted²⁴³. These problems have a "detrimental impact²⁴⁴" on children and their families. Due to high levels of stress, children's lives, including their health and education, are severely disrupted, resulting in frequent trauma and generally worse housing conditions or even homelessness²⁴⁵. Due to globalisation of the housing and real estate markets, cities become less affordable²⁴⁶. These developments resulted in an increase of homelessness in 15 out of 21 countries monitored since 2007, with the crisis being considered a key driver of homelessness in Greece, Ireland, Italy, Portugal, Spain and the UK. New groups of homeless people such as migrants, women, families and young people are emerging²⁴⁷.

As a result of the increasing deprivation of basic needs, increased poverty as well as setbacks with regard to social security and social protection, the right to health of many is at risk. Cuts in social insurance and health-related spending forming part of austerity measures are concurring with an increase in the demand of those services in order to help people fight the effects of the crisis²⁴⁸. The economic adjustment programme for Greece demands a maximum spending of 6% of the GDP for health²⁴⁹. This in combination with "job cuts in the public

²⁴¹ United Nations, 2009, para. 30.

²⁴² *Ibidem*, paras. 33 ff.

²⁴³ See e.g. Human Rights Watch, 2014, explaining effects of the bursting of the housing bubble, especially on vulnerable groups such as immigrants, children and women (as heads of households as well as victims of domestic abuse) in Spain.

²⁴⁴ Council of Europe, Commissioner for Human Rights, 2013a, p. 2.

²⁴⁵ *Ibidem*, p. 9.

²⁴⁶ United Nations, 2009, paras. 33 ff.

²⁴⁷ See Council of Europe, Commissioner for Human Rights, 2013b, p. 19.

²⁴⁸ *Ibidem*, pp. 18 ff.

²⁴⁹ *Ibidem*, p. 20.

health sector, increased fees and co-payments, the closure/merger of hospitals and health-care facilities, the reduction in the number of hospital beds and an increasing number of people losing public health insurance (mainly due to long-term unemployment) has undermined the availability of and access to quality health care, particularly for the poorest²⁵⁰.” The overall health situation in Greece has thus deteriorated significantly, having caused eradicated diseases such as malaria to resurface, and a 52% increase in HIV infections from 2010 to 2011. The latter is believed to stem significantly from unsafe injecting practices of young Greeks having turned to drug abuse as a result of unemployment²⁵¹.

Austerity measures in general have been linked with weakening mental health and an increase in substance abuse and suicide²⁵². The erosion of social protection mechanisms is particularly worrying given the disproportionately negative effects this is expected to have on vulnerable groups of society as well as the important role these systems play for safeguarding several economic and social rights during the crisis. Accordingly, states “run a much higher risk of excluding those most in need of support, which would violate human rights principles regarding non-discrimination and equality and undermine the obligation to prioritize the most vulnerable²⁵³.”

Another sensitive area is pension cuts. This is well demonstrated by looking at Ireland, where 60% of older persons’ incomes are guaranteed through pensions and other social transfers, reducing their risk of impoverishment from 88% to 9.6%. Reduction of pensions and simultaneous increases of the pension age can thus have a major impact on the material situation and risk of poverty of older people²⁵⁴. The European Committee of Social Rights found Greece in violation of the right to social security due to several modifications with the public and private pension system. The Committee concluded that Greece failed to demonstrate that “efforts have been made to maintain a sufficient level of protection for the benefit of the most vulnerable members of society, even though the effects of the adopted measures risk bringing about a

²⁵⁰ United Nations, 2014, para. 60.

²⁵¹ *Ibidem*, paras. 60 ff.

²⁵² Council of Europe, Commissioner for Human Rights, 2013b, p. 20.

²⁵³ See United Nations, 2011a, pp. 10 ff.

²⁵⁴ See United Nations, 2011b.

large scale pauperisation of a significant segment of the population²⁵⁵.”

The right to property is equally at risk throughout Europe, as a result of several developments such as the mentioned pension cuts, increased evictions and loss of housing as well as incidents such as the denial of access to banks and bank accounts as experienced in Cyprus in 2013. The ECtHR found Hungary to be in violation of the right to property in a case where a civil servant was dismissed and guaranteed a severance, which was subsequently subjected to an abnormally high tax-rate²⁵⁶. Generally, regressive tax rates, in particular with taxes such as VAT or sales taxes, may have a disproportionately harsh effect on the economically disadvantaged given the proportion these taxes represent in comparison to their income. This was reported by Estonia and Portugal, for example, and raises additional concern with regard to underlying principles such as non-discrimination and equality²⁵⁷. While being considered a potentially effective response to the problems faced during the crisis, regressive taxes “may represent an unequal added burden for those living in poverty or experience economic hardship²⁵⁸.”

The economic downturn has negatively influenced the functioning of justice systems across Europe since 2010²⁵⁹. In addition, recent policies are threatening the right to access to justice: as a result of budget cuts and measures of privatisation, with the latter opening the justice system up to interests of private gain and the price mechanism, this fundamental right is severely threatened through incorporation in the market. “Coupled with rising poverty and unemployment, people’s ability to seek redress becomes harder²⁶⁰.” This resulted in legal aid being “subjected to significant cuts in Germany, Ireland and the UK, restricting its availability to a more limited number of cases²⁶¹” and potentially bearing effects for the right to a fair trial. These dynamics are particularly worrying given the central role of access to justice not only

²⁵⁵ ESC, *Federation of Employed Pensioners of Greece (IKA-ETAM) v. Greece*, complaint no. 76/2012, decision of 7.12.2012.

²⁵⁶ ECtHR, *Gáll v. Hungary*, application no. 49570/11, judgment of 25.6.2013.

²⁵⁷ See United Nations, 2011a, p. 12.

²⁵⁸ See *ibidem*.

²⁵⁹ Council of Europe, CEPEJ, 2012, p. 10; the report mentions crisis-inflicted budget cuts between 2008 and 2010 in numerous CoE member states, including Albania, Estonia, Hungary, Ireland, Latvia, Romania, Serbia, Slovakia, FYROM, Greece, Czech Republic, Lithuania, etc.

²⁶⁰ See FRA via <http://fra.europa.eu/en/node/4980>.

²⁶¹ Council of Europe, Commissioner for Human Rights, 2013b, p. 21.

as a right in itself but also as a right guaranteeing that other human rights can be effectively enforced in practice. Growing poverty rates in Europe also bear negative consequences for people's access to justice given that "persons living in poverty face significant barriers that seriously impede or discourage them from seeking justice²⁶²." The obstacles mentioned by the UN Special Rapporteur on Poverty are numerous as well as complexly linked, including social, cultural and financial barriers but also structural and institutional obstacles²⁶³. Cuts in legal aid or the "outsourcing of justice" lessen accessibility thus further create marginalisation, which, in turn, has a negative impact on people's efforts when seeking justice.

This brief overview over some of the human rights effects the crisis environment is having on the population of Europe shows the immense negative impact of these dynamics. It also shows how adequate statements are when claiming that what started as a financial and economic crisis has now turned into a human rights crisis. The effects the crisis is having on people are highly interconnected, mutually reinforcing and touching upon all human rights, economic and social as well as civil and political ones. The burden of the crisis, of the adjustment programmes and fiscal measures such as austerity and privatisation plans is not shared fairly given that vulnerable and marginalised groups of society are disproportionately affected yet not having contributed to e.g. the speculative actions preceding the crisis. The increase of poverty levels in most parts of Europe, especially child poverty, is particularly drastic as well as highly indicative for the overall deteriorating human rights situation in the crisis environment.

2.3. THE RESPONSIBILITY TO COUNTERACT AND THE CRISIS ENVIRONMENT

This section is designed to briefly examine how and to what extent the European Court of Human Rights and the European Committee of Social Rights have dealt with cases involving the crisis. It then looks at what the contours of the responsibility to counteract approach would entail in the light of the broad scope of human rights-related problems faced in the crisis environment.

²⁶² United Nations, 2012, p. 7.

²⁶³ See *ibidem* for a more detailed explanation.

2.3.1. *The European Convention on Human Rights*

The ECtHR has so far dealt marginally with the crisis²⁶⁴. To date, it has found violations in four cases that are related to the crisis. Three cases against Hungary²⁶⁵ deal with two civil servants and a former employee of a state-owned company whose contracts were terminated through dismissal and agreement respectively. All three received severance payments of a certain amount, which were then subjected to extraordinarily high taxation introduced during the crisis and carried by the state's conviction that "in the midst of a deep world-wide economic crisis, additional burdens should be borne not only by the State but also by other market participants²⁶⁶." The Court found violations of all three applicants' rights to property. The measures taken by the Hungarian government were considered not to be proportionate to the aim pursued, the latter being described as a "sense of social justice of the population,' in combination with the interest to protect the public purse and to distribute the public burden²⁶⁷." On the contrary, the Court noted that the tax burden on the applicants in *N.K.M.*²⁶⁸ and *Gáll*²⁶⁹ were three times higher than the general personal income tax rate, "and this notwithstanding the fact²⁷⁰" that severance pay was specifically aimed at labour reintegration in times of unemployment. Further, the applicants and other targeted civil servants were found to be subjected to a disproportionate burden while most civil servants, including such in positions of leadership, as well as the majority of citizens generally did not contribute in the same way, thus constituting "an excessive and individual burden²⁷¹" on the applicants' side.

In a fourth case that was marginally related to the crisis, the

²⁶⁴ Please note that due to the ECtHR taking considerable time to examine complaints and a backlog of 89,450 cases (as of 31.5.2014, information accessed via http://www.echr.coe.int/Documents/Stats_pending_month_2014_BIL.pdf), as well as bearing in mind the fact that the crisis is a recent event, this is not unexpected nor does it reflect the amount of pending crisis-related cases.

²⁶⁵ ECtHR, *N.K.M. v. Hungary*, application no. 66529/11, judgment of 13.5.2013; ECtHR, *Gáll v. Hungary*; ECtHR, *R.Sz. v. Hungary*, application no. 41838/11, judgment of 2.7.2013.

²⁶⁶ ECtHR, *N.K.M. v. Hungary*, para. 28; ECtHR, *Gáll v. Hungary*, para. 28; ECtHR, *R.Sz. v. Hungary*, para. 27.

²⁶⁷ ECtHR, *N.K.M. v. Hungary*, para. 59.

²⁶⁸ *Ibidem*, para. 68.

²⁶⁹ ECtHR, *Gáll v. Hungary*, para. 67.

²⁷⁰ *Ibidem*.

²⁷¹ ECtHR, *N.K.M. v. Hungary*, para. 72.

Court found a violation of Article 10²⁷². The applicant, a reporter of the national broadcasting company, received information from an anonymous source about an alleged security leak of a governmental data platform, who subsequently provided her with leaked documents stating that crisis-induced austerity measures did not affect the highest-paid public officials. After a report by the applicant, the anonymous source also published documents via twitter, all of which resulted in a huge public response as well as criminal proceedings against the source. Subsequently, the applicant was asked to provide information on her source, which culminated in an allegedly unlawful search of her house and various memory devices including her computer. Finding Latvia to be in violation of the applicant's freedom of expression, the Court *inter alia* noted that the report of the applicant had contributed to the public debate insofar as it "was primarily aimed at keeping the public informed about the salaries paid in the public sector at a time of economic crisis²⁷³." This happened at a time while legislative amendments were being drafted to allow for the publication of such information.

The largest proportion of applications appears to be concerning the right to property and were declared inadmissible by the Court. This includes complaints of 23 applicants²⁷⁴ arguing that a change in the Latvian law regulating *inter alia* the amount of parental benefit received during the first year of parental leave thus amounting to a reduction of 50%, violated their rights to property, fair trial as well as family life. They further claimed the measures to be in breach of the principle of non-discrimination. According to the applicants, the law in question did not provide for a sufficiently long transition period thus violating their legitimate expectations to benefits. The contested regulations were adopted by Latvia as part of the austerity measures put in place in 2009 in response to the economic crisis and were considered an economic necessity as well as required in order to be able to sustain an effective social insurance system. The Court found the applications to be manifestly ill-founded and specified with respect to the right to property, that the measures taken were proportionate: Latvia experienced serious economic hardship at the material time and even though adopted

²⁷² ECtHR, *Nagla v. Latvia*, application no. 73469/10, judgment of 16.7.2013.

²⁷³ *Ibidem*, para. 97.

²⁷⁴ ECtHR, *Sulcs v. Latvia* (and 22 other cases, see list annexed to the judgment), application no. 42923/10, decision of 6.12.2011.

speedily, the measures taken did not interfere with the very essence of the right to property, namely the “right to receive a substitute for the loss of earnings²⁷⁵.”

In a case against Portugal, the applicants, two pensioners, suffered cuts of their pension entitlements (holiday and Christmas bonuses), which were installed as a result of the austerity measures²⁷⁶. The Court referred to a similar case against Greece²⁷⁷, where one applicant lost his pension bonuses and the second applicant’s salary was cut: in that case, the ECtHR had considered that the measures adopted had been in the general public interest given the exceptional nature of the economic crisis in Greece and the wide margin of appreciation with respect to economic and social policy. Invoking the right to property, neither of the applicants had claimed or demonstrated that their very subsistence was at stake due to the cuts, which is why the case was declared inadmissible. The argumentation in *Da Conceicao and Santos Januario* is similar to that in the case against Greece, thus referring to the exceptionality of the economic crisis in Portugal and the temporary nature of the measures imposed as well as the fact of the basic pensions remaining untouched and the cuts only applying to their social security benefits. The burden experienced by the applicants was thus not considered disproportionate and excessive, with Portugal acting within its margin of appreciation. Interestingly, the Court refers to the fact that the cuts in public spending were part of the adjustment programmes installed by the troika. The ECtHR directly quotes a big part of the respective assessment, concluding that the “very fact that a programme of such magnitude had had to be put in place shows that the economic crisis [...] and its effect on the State budget balance were exceptional in nature²⁷⁸.” Whilst being known for referring to other international courts and regulations, the fact that the Court utilised the adjustment programme as part of its proportionality test strikes as extraordinary given that the troika does not act in a human rights capacity and the ECtHR’s role of ensuring respect for human rights where other institutions fail to do so.

²⁷⁵ Ibidem, para. 31.

²⁷⁶ ECtHR, *Da Conceicao and Santos Januario v. Portugal*, application nos. 57725/12 and 62235/12, decision of 8.10.2013.

²⁷⁷ ECtHR, *Koufaki and Adedy v. Greece*, application nos. 57665/12 and 57657/12, decision of 7.5.2013.

²⁷⁸ ECtHR, *Da Conceicao and Santos Januario v. Portugal*, para. 25.

The Court further communicated one case to the Dutch government²⁷⁹ concerning a former employee of a private company who had suffered a decrease of work orders as a result of the economic crisis, which, after authorisation through a specialised governmental agency, led to the dismissal of the applicant. The applicant is complaining that the Dutch legislation denies him a judicial review of the decision authorising the termination of his employment contract, therefore breaching his right to a fair trial under Article 6 of the Convention.

2.3.2. *The European Social Charter*

In reference to the crisis, the ESC has dealt with a number of Greek cases concerning labour and pensioners' rights. In the first *GENOP-DEI and ADEDY v. Greece*²⁸⁰ case, the applicant associations complained that certain provisions of the laws adopted during the crisis were incompatible with Greece's obligations under the European Social Charter, *inter alia* one allowing for permanent contracts to be terminated during the probation period without any notice or severance pay. Referring to its own conclusions of 2009, the Committee reinforced its statement regarding the repercussions of the crisis:

[W]hile the “increasing level of unemployment is presenting a challenge to social security and social assistance systems as the number of beneficiaries increase while tax and social security contribution revenues decline,” by acceding to the 1961 Charter, the Parties “have accepted to pursue by all appropriate means, *the attainment of conditions* in which *inter alia* the right to health, the right to social security, the right to social and medical assistance and the right to benefit from social welfare services may be effectively realised²⁸¹.”

Considering that this ground rule applies equally to employment, the Committee stated that the creation of greater flexibility in employment as a measure against unemployment should not result in the deprivation of broad categories of employees of their fundamental labour rights²⁸². Accordingly, Greece was found in violation of its obligations with respect

²⁷⁹ ECtHR, *Stolk v. Netherlands*, application no. 63072/10, communicated on 18.12.2012.

²⁸⁰ ESC, *General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece*, complaint no. 65/2011, decision of 23.5.2012.

²⁸¹ *Ibidem*, para. 16 (emphasis added).

²⁸² *Ibidem*, para. 18.

to Article 4/4 of the Charter, the right of all workers to a reasonable period of notice for termination of employment.

In the second case of *GENOP-DEI and ADEDY v. Greece*²⁸³, the Committee found Greece to be in violation of Article 7/7 (the right of children and young persons to protection of a minimum of three weeks paid holiday per annum), Article 7/2 (the right to vocational training), Article 10/2 (providing for a system of apprenticeship training young people in their various employments), and Article 12/3 (the right to social security as a result of the failure not to progressively raise the latter to a higher level). The complaints concerned a law introduced in 2010 that allowed for the conclusion of “special apprenticeship contracts” between employers and individuals aged 15 to 18 “without regard for the main safeguards provided for by labour and social security law²⁸⁴”: This, for example, included a wage reduction to 70% of the minimum wage and 1% insurance coverage in case of sickness or accident, having “the practical effect of establishing a distinct category of workers who are effectively excluded from the general range of protection,” thus representing a deterioration of the social security scheme²⁸⁵. The contested law provided for a certain amount of maximum work hours per week depending on the age of the apprentice. Apprentices were, however, exempt from general provisions of labour law apart from those concerning health and safety at work²⁸⁶, leading to a serious lack of regulation in many relevant questions.

Again referring to its conclusions of 2009, the Committee argued that while measures may be taken to cut public expenditure and relieve companies’ costs, “such measures should not excessively destabilise the situation of those who enjoy the rights enshrined in the Charter²⁸⁷.” The Committee further found a violation of the right to a fair remuneration in the failure to provide for a remuneration system that ensures the enjoyment of a decent standard of living (Article 4/1), especially with respect to the principle of non-discrimination. The contested provision allowed employers to pay people newly entering the labour market and

²⁸³ ESC, *General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants’ Trade Unions (ADEDY) v. Greece*, complaint no. 66/2011, decision of 23.5.2012.

²⁸⁴ *Ibidem*, para. 8.

²⁸⁵ *Ibidem*, paras. 45 ff.

²⁸⁶ See reprint of the law in question in *ibidem*, para. 10.

²⁸⁷ *Ibidem*, para. 13.

aged under 25 a rate of 84% of the minimum wage thus taking no account of differences between the people that were concerned, and resulting in severe age discrimination and a decreasing standard of living.

In December 2012, the Committee found violations of the obligation to progressively raise the system of social security to a higher level (Article 12/3) in five cases brought by various pensioners' unions against Greece²⁸⁸. The complaints concerned provisions adopted by Greece in response to the crisis from May 2010 onwards that, according to the government, were necessary for the protection of the public interest resulting from Greece's grave financial situation and formed part of "other international obligations" deriving from the agreement met with the troika²⁸⁹. Modifying the entire public and private pension system, the laws provided for, *inter alia*, severe reductions regarding the amount of pensions, for example up to 40% on shares exceeding 1,000 € of pensioners under 55²⁹⁰. Bonuses were reduced or discontinued entirely, with a law that was in preparation during the proceedings allegedly preparing the ground for a full abolishment²⁹¹. Pensions of people with an occupation have been either suspended entirely for pensioners under 55 or reduced by either 50% or 70% for those aged 55 or more. In addition to these cuts, pensioners were required to pay social security contributions between 3 and 14% if their pensions were over 1,400 €, with supplementary charges applying to those under the age of 60²⁹². Whereas the reductions introduced did not amount to violations in themselves, the Committee found that the cumulative effect of the restrictions is "bound to bring about a significant degradation of the standard of living and the living conditions of many²⁹³." Further, the government failed to adequately assess the situation and conduct research

²⁸⁸ ESC, *Federation of Employed Pensioners of Greece (IKA-ETAM) v. Greece*, complaint no. 76/2012, decision of 7.12.2012; ESC, *Panhellenic Federation of Public Service Pensioners (POPS) v. Greece*, complaint no. 77/2012, decision of 7.12.2012; ESC, *Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) v. Greece*, complaint no. 78/2012, decision of 7.12.2012; ESC, *Panhellenic Federation of Pensioners of the Public Electricity Corporation (POS-DEI) v. Greece*, complaint no. 79/2012, decision of 7.12.2012; ESC, *Pensioners' Union of the Agricultural Bank of Greece (ATE) v. Greece*, complaint no. 80/2012, decision of 7.12.2012.

²⁸⁹ Para. 10 of all above decisions.

²⁹⁰ With pensioners aged 55 and over, shares exceeding 1,200 € were cut by 20%. More detailed regulations apply to auxiliary pensions and people in early retirement. See paras. 17 ff.

²⁹¹ See paras. 20 ff and 25.

²⁹² For a more detailed explanation of the laws in force see any of the relevant decisions, paras. 13 ff.

²⁹³ Para. 78 in ESC, *Federation of Employed Pensioners of Greece (IKA-ETAM) v. Greece*, and para. 74 in all other decisions.

in the effects of the measures taken as well as failed to demonstrate whether other, less intrusive measures, had been considered. Further, the Committee expressively noted that the fact that the government is under “other international obligations” requiring compliance does not “remove them from the ambit of the Charter²⁹⁴.”

Besides the collective complaints mechanism, the Committee’s state reporting mechanism deserves some mention. Based on the submitted reports, the Committee decides whether states have acted in conformity with the Charter. In 2012, the Committee found nine countries in breach of their obligation to pursue full employment policies as prescribed in Article 1/1 of the Charter: Albania, Armenia, BiH, Bulgaria, Georgia, Italy, Moldova, Slovakia and Turkey²⁹⁵. In 2013, the Committee examined states’ conformity with respect to the right to safe and healthy working conditions, health, social security, social and medical assistance as well as the right to benefit from social welfare services. In its conclusions regarding the UK, for example, the Committee found the state not to be in conformity with the requirements of the right to social security given that the minimum levels of state pension, of short-term and long-term incapacity benefit as well as that of job seeker’s allowance were “manifestly inadequate²⁹⁶.” The conclusions contain a short description of the situation with respect to a certain right in a country, an analysis of the respective policy steps including shortcomings and brief concluding remarks at the end. While not expressively dealing only with crisis-induced problems, the mechanism appears to be more holistic and examines state policies in the light of Charter obligations without reference to special cases, which allows the Committee to pass recommendations on the improvement of the situation of social justice in the targeted countries.

2.3.3. *The Responsibility to Counteract Applied*

In comparison to the approach adopted by the ECtHR, the ESC-system appears to provide for a more inclusive, systemic approach.

²⁹⁴ Para. 50 in ESC, *Federation of Employed Pensioners of Greece (IKA-ETAM) v. Greece*, and para. 46 in all other decisions.

²⁹⁵ Information accessed via the ESC database <http://hudoc.esc.coe.int/esc2008/query.asp?language=en> on 27.6.2014.

²⁹⁶ See ESC, 2014, pp. 17 ff.

This is illustrated by the Committee's argumentation in the collective complaints of various pensioners' unions against Greece when criticising the cumulative effects of the change in pension system and pointing to the failure of Greece to find alternative approaches of a less volatile nature. The emphasis put on the attainment of *conditions* providing for a system of social welfare and a healthy work environment in both *GENOP-DEI* and *ADEDY* decisions is another example for a structural view employed by the Committee.

The responsibility to counteract-approach is similar to what seems to be the ESC's perception of governmental obligations with respect to their policy choices yet goes beyond what was stated in the cases examined. The first difference to both systems is that the environment-approach refuses to accept the concept of the division of so-called negative and positive rights, or, in a different terminology, the categorisation into CPRs and ESCRs as well as the implications this differentiation bears. This distinction being exclusive, the environment-approach argues for more inclusion and interconnectedness of human rights given that an environment has effects on all rights, irrespective of their categorisation.

The example of the crisis allows for a more concrete view of what the responsibility to counteract approach could entail. In a first step, governments have to analyse the *status quo*, including questions on the actors involved, such as the market and the troika, and what environment this creates. A detailed and thorough analysis is vital for a sustainable response, as "the formulation of policy must take the source of deprivation into account"²⁹⁷. The environment-approach then balances between the difficulties arising from the definition and finding of a concrete source of violation and the lack of accountability that is likely to arise within the regular framework, and offers a response to the complexity of the interplay of different forces.

After a definition of clear goals, for example the sustainable recovery of a state and the people having experienced a crisis, or the reduction of child poverty and material deprivation that has so drastically increased, policies have to be adopted that have the potential to bridge the gap between the current and future environment. These steps can be of a different nature, with some being directly aimed at improving the current situation, for example by entering into agreement with energy

²⁹⁷ Shue, 1980, p. 51.

companies to reduce energy poverty and people being able to heat their homes sufficiently. Other steps will not be directed at human rights as such, but naturally have an influence on people's lives. These policies have to undergo a detailed *ex ante* and *ex post* human rights impact assessment to enable decision makers to choose the option that is least volatile and advances the enjoyment of human rights.

With respect to economic policy measures, it has been repeatedly stated that a focus on human well-being and human rights will enhance the economic situation in a sustainable, inclusive way²⁹⁸. This includes measures tackling economic and social inequality and poverty and will necessarily result in redistributive as well as regulatory measures aimed at balancing the incapacities of the market. Protective measures ending exploitation of marginalised and vulnerable groups in order to stabilise society as well as the economy it uses for daily exchange further contribute to a more prosperous overall environment; an environment putting the human being first by using a human rights-based approach to achieve this goal. In this sense, states have to reclaim their fiscal space to a certain extent thus contribute to a more humane national and global environment.

In contrast to the respect-protect-fulfil-approach, the environment-approach allows for a multi-faceted and realistic analysis with respect to the sources of human rights violations or impacts. The difference in understanding of state obligations makes the responsibility to counteract a holistic alternative to the accountability-problems faced through the conventional attribution of responsibility to only state actors. Thus it offers an option to respond adequately to the complexities faced, understands the market as a volatile actor with serious ethical flaws, and serves for a broader notion of what duties states have in the current crisis environment. The pressing need of such an approach is illustrated by the huge impact the crisis is having on human lives and the broad spectrum of human rights issues tackled. Looking at the situation in Greece, for example, with various troika-imposed adjustment programmes and conditionalities for lending in place, massive budgetary problems, serious cuts in public spending and large-scale privatisation as well as monumental unemployment rates, the potential lack of accountability of

²⁹⁸ See e.g. Council of Europe, 2009, p. 1 on the economic benefits of countries with an "elaborate social and health protection system"; United Nations, 2011a, summary.

international as well as national actors is evident. With a view to the root causes of the crisis, or, as Shue would put it, the sources of deprivation, it is clear that the responsibility to counteract in this context amounts to a responsibility to regulate the economy. Reclaiming control would permit the Greek government to act by restoring the situation in the country in a way that allows for a dignified life and a decent standard of living of the entire Greek society. Ultimately, this requires a shift in thinking by prioritising the human being, which, in turn, will diminish market primacy and accept the flaws of the system we seem to be upholding so desperately.

CONCLUSION

The events and systemic architecture culminating in the global financial and economic crisis of 2007/2008 as well as its immediate effects and related government responses show a need for refocusing on human well-being instead of solely economic growth. Throughout the economic crisis, people's situations have deteriorated, even in the supposedly prosperous and welfare-oriented European Union.

During one phase of the crisis, hand-in-hand with social movements and protests, there seemed to be will to find an alternative to the current system of a free market economy, or blatant neoliberalism. This is not the case anymore. Governments are adopting austerity measure after austerity measure, leading to a severe reduction of public spending or the welfare state yet simultaneously using this money to bail out banks, the latter being one of the fundamental causes of the crisis itself. The will for a systemic change seems to have lost most of its momentum, which is why it is vital to establish or argue for a mechanism that allows us to criticise the neoliberal market system with a strong voice; not via occasional protest or in an uncoordinated, ineffective way aimed solely at showing disagreement, but through the language of the equally global project of human rights. This thesis does not seek to point out how bad market economies are for the realisation of human rights, or how many people have been affected negatively throughout the crisis. Neither do I consider it to be a cry for drastic system change. On the contrary – it is a constructive argument that shows the necessity of market regulation through governmental policies, in order to build a counter-weight to the “dynamics of the satanic mill” that are, as history and current events have proven, blind to human rights.

In this sense, I agree with the former UN Special Rapporteur on the Right to Education that “[t]he *raison d'être* of economic and social rights

is to act as correctives to the free market²⁹⁹.” Looking at the impact the free market has had on CPRs as well as ESCRs and in the spirit of their interdependence, it seems fair to demand that the full range of human rights should act as correctives to the free market. Shifting the focus back to the human and away from the market necessarily means a stronger state taking human rights obligations seriously. Regulatory measures aimed at bridging this gap and “taming” the market are thus indispensable for the establishment of a human rights-enabling environment. This is a need the responsibility to counteract-approach arguably meets.

Summing up, the responsibility to counteract is a tool aimed at human rights-oriented policy-making that requires a detailed assessment of the current situation, the subsequent definition of goals and the formulation of options. The responsibility to counteract requires prioritising human well-being instead of market primacy. This act of prioritising is reflected in the choice for a specific policy after having assessed the different policy options. It is guided by the parameters of deciding in favour of the option having a minimal negative human rights impact as well as the maximum possible outcome for ensuring and furthering the realisation of human rights for all.

The surplus this approach offers was shown in briefly outlining its content and comparing it to the responses given by the ESC and the ECtHR. In comparison to those two systems, the responsibility to counteract is broader, focuses on available policy choices and seeks to ensure the best possible outcome with respect to an environment ensuring and furthering the realisation of human rights. In this sense, it recalls Article 28 of the UDHR:

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.

Irrespective of the economic model chosen, policies should refocus on human well-being rather than economic growth for economic growth alone does not ensure the achievement of the former. In aspiring to this, human rights are useful in many respects: as indicators as to the state of current individual and societal well-being; for standard- and goal-setting; and ultimately as an instrument or vehicle for bridging the gap between the current situation and our aspirations, in the fight against poverty and injustice and for a human rights-oriented economy.

²⁹⁹ United Nations, 1998, para. 7.

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