

## **Labor Rights, Human Rights and**

### **A Critical Sociology of Law: Three Way Stretch**

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**ARGUING FOR A TRANSNATIONAL LABOR MOVEMENT INCREASINGLY POSES TRANSNATIONAL LABOR RIGHTS AS TRANSNATIONAL HUMAN RIGHTS. SOCIOLOGICALLY, HOW CAN SUCH TRANSNATIONAL LABOR RIGHTS BE SECURED BY INSTITUTIONS AT A GLOBAL LEVEL? MOVING FROM HUMAN RIGHTS TO TRANSNATIONAL SOCIAL RIGHTS? A SEEMING APORIA BETWEEN THE CONCEPTS OF LABOR RIGHTS AND HUMAN RIGHTS CAN BE DIALECTICALLY MEDIATED BY THE TRADITION OF A CRITICAL SOCIOLOGY OF LAW IN YIELDING A CRITICAL SOCIOLOGY OF RIGHTS.**

Labor rights and human rights differ as concepts and as movements. Human rights discourse has often been problematic for labor rights. Human rights seem to be universalizing in their justification and application of procedural protections for individuals *vis à vis* states. Labor rights are associated with a sense of reciprocal solidarity; they are tied to a universalizing class consciousness and commitment to workplace democracy as the centerpiece of social democracy. Thus labor rights are not only protective, they are as well facilitative. And unlike, labor rights, human rights do not question fundamental economic relations.

Labor rights are a sub-class of social rights. For T. H. Marshall (1950), social rights – beyond civil rights and political rights – are understood as taming market forces as an essential condition for a just society. Specifically, how to give workers a human rather than a purely market identity. How to give humans full membership in society. In so doing, Marshall does not make a case for subverting capitalism. However, social rights represent modifications imposed upon the class system on the grounds that the obligations of contract need to be constrained by claims of justification. Underlying social rights are not natural rights, but the equal social worth of each human being.

Social rights are not merely understood as Bismarckian social protections by a welfare state: not as entitlements for those who have failed. They are to be linked to a notion of reciprocal solidarity, rather than to administrative law. Rather they are to be understood as inclusive membership rights (Bryan Turner) where Habermas (1999) specifies “the inclusion of the Other” as a precondition for human mutual recognition and mutual care. In such intersubjectivity, one person – to paraphrase Cohen and Arato (1992) -- can put

himself or herself in the place of the Other, grasp the Other's latent need and manifest claims, as well as constitute or reaffirm commonalities or reciprocal solidarity. This is without – to recall Michael Walzer in *Spheres of Justice* (1984) – necessarily involving either the sharing or liking of the Other's values.

These membership competences are not – as Günther Teubner emphasizes – are not just another juridified set of collective rights to be administered. Rather they constitute a critical model navigating the normative foundational and institutional practices: critically evaluating norms amidst contractual governance regimes.

As opposed to the chimera of natural rights theory (e.g., Figgis, Gewirth), human rights, labor rights and social rights are institutional facts. They are claims to actualizable institutional practices assuring care and well-being in a society. They are claims grounded in a theory of rights as social constructivism as well as in the Declaration of the Rights of Man rootedness in humanity's potential.

To talk of human rights, labor rights and social rights is to speak of the social nature of human beings and the collective practices they create. Each can be understood as what Amartya Sen and Martha Nussbaum understand as rights to self development. There is a focus on the capability for people to act through institutionalizing practices – including policy practices – to promote the freedom and opportunity to seek after those public goods that each person feels will promote their own flourishing as a human being with human rights.. The social self cannot develop outside society's practices of distributive opportunity of life chances: which determine who we are and are able to be, who we might be.

For Rainer Forst (2012) – following Kant and Habermas – the ultimate criteria for human rights, labor rights and social rights are reciprocity and generalizability within power structures of justification, that is, legitimation. This presupposes the possibility of free and equal participation and adherence to policy procedures of deliberation and decision-making. There is, Forst argues, a grounding of justifying reasons in the normative space we as actors open up in the reciprocity and generalizability with which we justify our respective conditions in diverse moral contexts in relation to others affected. And how we orient ourselves in the restrictive space of reasons of several different social lifeworlds.

*A person is to be respected as someone who is worthy of being given adequate reasons for actions and norms that affect him or her in a relevant way. This involves the right to be respected as an independent social agent who at the same time codetermines the social structure of which he or she is a part.*

Human rights are not understood as birthrights but rather as claims for human dignity to be achieved through the struggle of social movements to construct context-transcending reference points to ground those engaged in critical reasoning and criticism of social norms. Dignity is not understood metaphysically. Rather, dignity is a social relational term that can only be ascertained by way of discursive justification: providing the justifying reasons that a person is to be worthy of being given adequate reasons for actions or norms that affect him or her.

Human rights are predominantly understood by Western societies as natural rights. However, developing societies meeting annually at The World Social Forum in Porto Alegre interpret human rights as social rights: procedural social rights to equalize opportunities and life chances; substantive social rights to attain equality of effect. Further, social movements manifest our capacity and capability to engage in the interrogation of justifying reasons.

For Iris Marion Young (1990), a right is (1) a relationship within a complex configuration of institutional arrangements; and further (2) a “subject position” of necessary valuational space. Rights are understandable as an ensemble of legitimations constituted discursively as interpretive schemes characterizing how we experience our structural positions within “the social.” A “right” is a capacity to engage in the interrogation of justifying reasons.

“Subject positions” themselves contribute discursively in response to structural positions within “the social.” We draw upon subject positions as legitimating claims in our experiencing structural positions within the social. We are not just bearers of supports; we are also actors who make claims employing signifiers of justification.

Following the arguments of Habermas in *Between Facts and Norms* (1992/1996), Rainer Forst argues that the only utopian perspectives we can “straightforwardly” maintain now are of a procedural nature, with emancipation located in a juridico-discursive order -- an argument with which Gilles Deleuze concurred. Argumentation forms -- and their manifestation in institutionalizing/ institutional practices -- serve as the vehicles by which we extend the institutionalizing dialogue of deliberative justification into the market place, into the laws, into governance.

The earlier *Frankfurter Schule* critical theorist Theodor Adorno spoke of traces and semblances of a tradition of discourse associated with an emergent practice of justification. These traces ghost the future. They draw on the categorical framing of a democratic imaginary in its historical struggles, in its immanent commitments.

In their recent book *The Idea of Labour Law* (2011), Guy Davidov and Brian Langille remind us of the powerful juridico-discursive tradition of the critical sociology of law (which we will refer to as CSL) associated with the Weimar labor lawyers. This is a tradition which sees labor law in its wider constitutional function regarding the defense of human dignity and human emancipation within the socio-economic sphere. It is rooted in the pluralist jurisprudence of associations of Otto von Gierke (1841-1921) and Harold Laski at the London School of Economics (1875-1950). This is a jurisprudence that starts with a pluralism of consociates constructing intersubjective forms of reciprocal solidarity as autonomous social law. It paralleled the institutionalist theory of labor law and labor unions by John R. Commons at the University of Wisconsin, Madison (1862-1945). These Weimar Labor Lawyers included Hugo Sinzheimer (1875-1945), Hermann Heller (1891-1933), and Franz Neumann (1900-1954) and Otto Kahn-Freund (1900-1979) who succeeded Laski in labour law at the LSE. Their movement in the sociology of law is being advanced in Germany by the third generation *Frankfurter Schüler* Günther Teubner (also holding Kahn\_Freund's LSE chair in labor law) as and the journal *Kritische Justiz*; as well as in Canada's Osgoode Hall Law School with Harry Arthurs and Peer Zumbansen.

CSL needs to be distinguished as a movement from the American Critical Legal Studies (CLS) movement (associated with Duncan Kennedy). As Roger Cotterrell (1987:212-213) has noted CLS seems primarily concerned with demystifying the claims of legal doctrinal rationality, and unconcerned either: (1) with understanding the role of legal doctrine as an unfolding rational structure or system; or (2) with constructively developing any "general theories about the nature of doctrine in its institutional contexts."

The Weimar Labor Lawyers assigned CSL an even more comprehensive task than the philosophy of law. Regulative values are not understood as being located beyond interaction – beyond experience. CSL emanates from the "constitutive" philosophical tradition of Hegel: which Georg Lukacs interpreted as the *Konstitutionsfrage* of *Sittlichkeit* (Collective Ethical and Legal Life) in the institutional practices of a civil society -- as the heart of the Frankfurt School Critical Theory of Society.

Contrary to Max Weber's own more neo-Kantian proceduralist turn – or for that matters Hans Kelsen's – this critical rules jurisprudence is not divorced from communicative/discourse ethics and is ultimately rooted in evolving practical reasoning in the social lifeworld. The legitimation of law and rights occurs not on the basis of natural law nor on abstract principles of markets, but on the basis of a procedural rationality which is continually institutionalized in practice.

**CSL is a theory of justification legitimation grounded in actors' valuation of what is justified. Habermas and Forst understand valuation as grounded in the right to justification. This is a justification immanent within the mutual recognition of citizens connected to the socially bonding/ binding elocutionary force inherent in their informed and reasonable communicative interaction and deliberation.(See Baynes, 1995: 213-224.) Human rights and labor rights as social rights ought to involve processes of reaching a mutual understanding: ought to involve warranted claims as part of a reciprocal solidarity.**

**Labor rights and human rights as social rights, are justifications/legitimations based on standards that are neither external or extrinsic, but are articulated in what Gillian Rose (1984) aptly labeled the Court of Reason and the procedures institutionalized within it. There all claims, legitimations, and justifications are tested against the validity claims of rational argumentation**

**The institutionalizing practices of the claims of labor rights and human rights reflect the discursive struggles of pluralist Social Subjects of Rights, rather than a Hegelian-Marxist notion of a Social Subject of Right. This is an understanding of the warranted assertions of social movements rather than some singular organized historical agent.**

**What makes CSL critical is its grounding of sociologic in ultimately categorical transcendent logic. As Gillian Rose (1984: 211) continues to argue, sociologic cannot relieve the categorical transcendental logic of the “unending” trial of reason” – the ultimate touchstone of critique by which institutional development can be analyzed.**

**Neil MacCormick and Ota Weinberger (1986) present an approach of “institutional normativism” (IN) that goes beyond Habermas’s procedural normativism and natural law/natural rights theory. IN focuses on institutionalizing warranted assertions that can be gleaned in institutionalizing practices. These institutionalizing practices are associated with social movements can be understood as “institutional facts.” They are the discursive manifestations of our valuative commitments to a substantive reordering within social movements: claims which can be appreciated as emergent “forms of life.” The focus is on traces and semblances of the stillborn, the unborn, or the not yet actualized institutionalizing practices.**

**These practices contain within them the claims of practical reasoning: that can be understood as a constellation of action-related arguments along an arc of subject positions. Ideas associated with these warranted assertions and institutionalizing practices are not to be bracketed out as they have been by Karl Mannheim-engendered sociology of knowledge. Rather they are to be subject to interrogation and rational reconstruction as forms of practical reasoning — to use the approach of Habermas and Forst. This is a critical**

approach to social movements which uncovers the normative potentialities made available by collective learning processes, and are scanned for realizability.

What are studied are governance rationales used in practices, rather than natural rights idealizations. These are studied not in terms of *apriori* categorical or procedural legitimation that precede cultural perceptions or legal meanings, but as *discursive theoretical terms* that come to be translated as institutionalizing practices.

We look beyond “interestedness” toward “committedness” – towards commitments and justifications involved in institutional and institutionalizing practices, understood – following MacCormick and Weinberger --as an ontology of institutional facts. These are unbracketed warranted assertions boiled off from their institutional and institutionalizing husks.

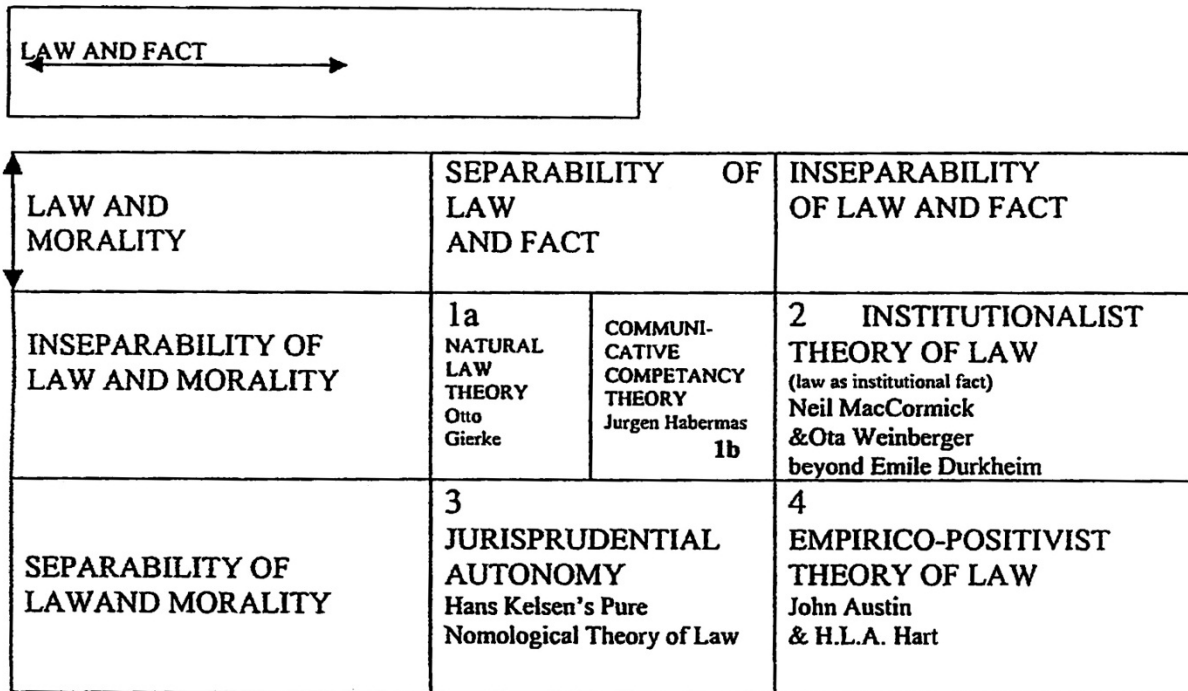
These commitments and justifications are understood as:

- derived from deliberation *as an effect* – as a discourse finds its own subjects;
- answering practical questions and testing the justificatory dialogic claims of an unredeemed predicate logic beyond a foundationalist procedural approach;
- arguments emergent and immanent within an arc of path-shaping – and not merely path-dependent – institutionalizing practices; and
- as intersubjectively justified/legitimated substance within its own internal principle – its own entelechies along its arc of subject positions. (Cf. LaTorre, 1990.)

A critical political sociology of social movements of the kind developed by Alain Touraine (1981) goes beyond the “applied” practical knowledge involved in the application of dominant justifications/ legitimations used by policy-makers. Rather, such a critical political sociology studies what people invariably do in those circumstances when they choose rather than comply and apply. In *The Arcades Project*, Walter Benjamin referred to these social movements as a *swelling*: that is, a displacing and superimposing of a threshold that occurs when confronting a seeming aporia.

Margaret Somers and Christopher Rogers (2006:460) pointedly observe that a critical sociology of rights (CSR) must navigate between normative regulation, foundationalism and the empirical political sociology of social movements. Like CSL, CSR poses critical junctures of contingent emergence – of warranted assertions of justification within a Court of Reason.

Following the institutional normativism (IN) of MacCormick and Weinberger above, we can pose the related CSR and CSL problematic as a grounding of critical theory between a discourse of justification and an ontology of institutional facts. In posing these aligned problematic, we can understand how they help mediate and transcend the aporia of labor rights and human rights. See Figure 1 just below.



A CSR must be understood with regard to the traditional Easton/Almond functional analysis framing (derived from Robert K. Merton) of *needs, of wants, of demands, and of claims*. CSR and any concept of human rights goes back to the level of *needs* and their justified remediations. This is what Bryan Turner (2006) labels the level of *vulnerabilities* and *exclusions*.

Turner argues that out of the *vulnerabilities* and *exclusions*, humans develop remedial and protective institutional practices of *care*. He starts from four foundational philosophical assumptions:

- the vulnerability of human beings as embodied agents;
- the interdependency and inter-relatedness of we humans;
- the general relations of reciprocity engendered by the intersubjectivity of the social lifeworld; and
- both the fragility and precariousness of social institutions, and the extent to which they are inclusive or exclusive.

Labor rights, social rights, and human rights are institutional facts. They are claims to actualizable institutional practices assessing care and well-being in society. CSR can be understood as a theory of agency following the Human Development and Capability Theory of Amartya Sen and Martha Nussbaum. As discussed above. Sen and Nussbaum provide an approach grounded in both a theory of human rights as social constructivism as well as in The Declaration of the Rights of Man rootedness in humanity's potential. Indeed, the International Labor Organization (ILO) is increasingly "seen as a law and development institution" (Langille, 2005:436).

Needs are to be recognized as claims that are to be institutionally mediated and adjudicated. Following Habermas's developing critical theory of the universal pragmatics of *Interaktion Kompetenz* in the 1980s -- and anticipating where Habermas was taking it -- Cohen and Arato (1992:383-384) pose this ultimate Hegelian rather than Kantian problem: the mutual recognition as the foundation of the *Sittlichkeit* of civil society. This is also the touchstone of the Weimar Labor Lawyers' CSL

We can establish that the principle of human rights as rights to participate in the development of our norms to protect and enable ourselves. This principle

- entails the requirement of mutual respect and of mutual aid when needed and practicable; and
- is a principle of reciprocal solidarity as well.

Hence a CSR is rooted in social movements and institutional/ institutionalizing practices responsive to need of capability, vulnerabilities, exclusions as well as both associationability and consequent memberships. And Günther Teubner connects CSR with CSL, and in so doing both mediates and transcends the two aligned approaches and the associated concepts of social law and social rights that constitute together the fulcrum.



**Social rights involve membership competences and mutual recognition for collectively providing social protection. These membership competences are not – Teubner emphasizes – merely another juridified set of collective rights to be administered. Rather they constitute a normative model – and indeed a critical model evaluating norms themselves – amidst nested transnational scales of contractual governance regimes. This is the *auctoritas* of groups’ self-regulatory practices of negotiation and cooperation.**

**Teubner demonstrates sociologically the impossibility of steering society from a single center of control without regressive de-differentiation within the complexity of the evolved division of labor.**

**Further, Teubner then links this sociology to procedurally establishing norms of membership rights and competences that democratically constitute participation in the decision-making practices of nested self-regulatory regimes.**

**Teubner (1997; 2004; 2007) and Zumbansen (2009) detail what Harold Laski AND Philip Selznick in the first half of the twentieth century referred to as autonomous private law and social law made by collective organizations of enabled group rights (heterarchy) rather than by state-centered regimes (hierarchy). This is a mixed regulatory landscape of hard law and soft law, private specialized courts and arbitration tribunals, and self-regulatory associational networks on the enterprise level. Hybrid contractual governance meshwork emerges – often between social subsystems. These are hybrid networks of standards and codes regulating not only traditional commercial enterprises and their labor relations, but as well: E-commerce, fund-raising chains, just-in-time systems. They are a meshwork of justifications. Attempts to constitutionalize membership competences and mutual recognition in the regulation of trade link corporate law to labor law, and then link both to human rights law. Montesquieu and Braudel redux.**

**We are witnessing in our globalized capitalism, the emergent formulation, codification and monitoring of transnational standards and protocols. These normative practices are elaborated and institutionalized not through collective bargaining between employers and employees, but by the discretion of corporations and increasingly international nongovernmental organizations (INGOs). As a result, there is a weakening of any sense of protective law regime as a transnational standard-setting challenges the power of regimes of domestic labor.**

**Labor regulation operates less through the sovereign power of states than through the dispersed multi-level meshwork in which there is a shift from the language of rights to the language of standards and corporate codes of social responsibility. These include standards of freedom from forced labor; as well as standards pertaining to maximum hours, freedom to work, vacations, minimum wages, safety and health. Both labor and human rights**

movements pressure transnational corporations to imbricate their corporate policies, practices, and routines which then “percolate across borders like green shoots” (Hepple, 2004; Arthurs, 2009).

Labor rights and human rights increasingly converge. There has been an increasing focus on labor rights in the transnational context by INGOs like Human Rights Watch, Amnesty International and Human Rights First. And there has been a blossoming of non-union transnational organizations like the Fair Standards Association, the Workers Rights Consortium and the International Labor Rights Forum.

The adoption of labor unions of human rights discourse and an interlinked “labor rights and human rights” agenda has been motivated by a union strategy to reverse a decline in membership, grow international members in organizing campaigns. And bolster both intellectual and political support. Human rights is the *lingua franca* of global struggles. (See Kolben:2010.)

There are tensions between labor rights trade union movements and human rights-oriented INGOs.

- Labor law discourse focuses on arguments about fairness and power, whereas human rights movements attempt to construct narratives that are universalizing and transcending *vis à vis* the grievances of everyday worklife.
- Labor unions have not always sought to achieve human rights and have excluded categories of peoples.
- As a result, INGOs have had to step into the void as advocates.
- INGO leaders have to increasingly accept a class basis of exploitation in the global economy, beyond masks of race and gender.
- Unions have to bring themselves beyond an exclusive goal of getting bigger pieces of the pie for their members.

On the other side, labor union leaders ask INGO leaders:

- Who elected you?
- To whom are you accountable?
- Who finances you?
- Don’t you recognize that some INGO objectives deflect or de-rail union organizing efforts?

Further, human rights INGOs are staffed with mostly privileged young people coming from elite schools and independent wealth subsidizing their relatively low pay. Labor

unions are substantially staffed by rank-and-file staff and labor lawyers committed to the inter-related labor and social democracy movements.

Human rights INGOs often have condescending relationships with union activists and show no appreciation of the organizing ideals of workplace democracy and co-determination (*Mitbestimmung* as institutionalized since the 1970s in Germany). Further, labor responsibilities involve more than appeals to principles; they involve intersubjective norm-creation, obligation, and self-regulation.

We are led to our ultimate puzzles:

*First*, can these two respective emancipatory social movements ally with each other as well as with information access movements to counter managerial modes of regulation on a scale not seen since the 1920s and 1930s? There is not only corporate self-management; there is also co-determination labor law practices involving workers and stakeholders.

*Second*, can we come to see labor rights as global membership rights? Not in a strong register of the right to have states create jobs? But in a lower key. One where labor rights in a globally interconnected network can secure the right to be treated fairly in the work-place and can ensure that minorities are not excluded from employment.

Here are some of the strategic institutionalizing practices that are being discussed in alliance efforts of trade unions and INGOs as both human development and capability as well as human rights movements. Both cannot ignore the underlying independent variable that is the international/transnational division of labor in its constraining forces on any concept of citizenship rights we can divine or create.

- Where union organization is not possible for a variety of reasons and causes – or has yet to be achieved – unions reserve the right to speak on workers’ behalf before the International Labor Organization (ILO).
- INGOs can assist in the organization of “informal workers” in cooperation with the trade union movement.
- Trade unions themselves have created their own auxiliary development INGOs. (See Figure 2 just below.)
- Trade unions and INGOs can form networks of normative regulation and advocacy that go beyond mere alliances of social movements in organizing workers, in getting the inclusion of “social clauses” in free trade regulatory constitutions, and in looking beyond the organization of workers as dues-paying members and tackling the problems of poverty.
- INGOs leaders need to accept class bases of exploitation in the global economy, as a determinant independent variable that goes beyond masks of race and gender.

- **Unions need to join INGOs in also adding “social clauses” to the World Intellectual Property Organization protocols to overcome the Trade-Related Aspects of Intellectual Property Rights (TRIPS) provisions of the World Trade Organization (WTO) that restrict poor countries’ access to medication and health research.**

**Ultimately, we ask:**

- **Can trade unions and INGOs work together ? :**
  - (1) To strengthen the negotiating capacity and capability of developing countries ?**
  - (2) To build social clauses recognizing the necessary polycontexturality of endogenous forces that envelop and impact any respective pact of commercial regulation?**
- **Can we reconnect social law, social rights, labor rights and human rights in a mediating and transcending transnational critical sociology of rights ?**

**FIGURE 2****DEVELOPMENT INGOs COLLABORATING  
WITH LABOR UNIONS**

ASSOCIATION QUEBECOIXE DES ORGANISME DE COOPERATION	<a href="http://www.aoci.qc.ca">www.aoci.qc.ca</a>
NORWEGIAN PEOPLE'S AID (NPA)	<a href="http://www.napid.org">www.napid.org</a>
SOLIDAR	<a href="http://www.solidar.org">www.solidar.org</a>
NEW ECONOMICS FOUNDATION	<a href="http://www.neweconomics.org">www.neweconomics.org</a>
IRASE (Brazil)	<a href="http://www.balancosocial.org.br">www.balancosocial.org.br</a>
CLEAN CLOTHES CAMPAIGN	<a href="http://www.cleanclothes.org">www.cleanclothes.org</a>
CORP WATCH	<a href="http://www.corp.watch.org">www.corp.watch.org</a>
ETHICAL TRADING INITIATIVE	<a href="http://www.ethicaltrade.org">www.ethicaltrade.org</a>
SOCIETAL ACCOUTNING/ SA 8000	<a href="http://www.sa8000.org">www.sa8000.org</a>
BUSINESS HUMAN RIGHTS	<a href="http://www.business-humanrights.org">www.business-humanrights.org</a>
CATALYST FORUM	<a href="http://www.catalystforum.org">www.catalystforum.org</a>
CIVICUS: WORKD ALLIANCE FOR CIVIC PARTICIPATION	<a href="http://www.civicus.org">www.civicus.org</a>
FAIR LABOR ASSOCIATION	<a href="http://www.fairlabor.org">www.fairlabor.org</a>
FREDRICH EBERT STIFTUNG (FES)	<a href="http://www.fes.de">www.fes.de</a>
FOCUS ON THE GLOBAL SOUTH	<a href="http://www.focusweb.org">www.focusweb.org</a>
GLOBAL ALLIANCE FOR WORKERS & COMMUNITIES	<a href="http://www.theglobalalliance.org">www.theglobalalliance.org</a>
INTERNATIONAL COOPERATIVE ALLIANCE (ICA)	<a href="http://www.coop.org">www.coop.org</a>
INTERNATIONAL FEDERATION OF WORKERS EDUCATION ASSOCIATIONS (IFWA)	<a href="http://www.ifwea.org">www.ifwea.org</a>
MAQUILA SOLIDARITY NETWORK (MSN)	<a href="http://www.maquilasolidarity.org">www.maquilasolidarity.org</a>
NATIONAL LABOR COMMITTEE FOR WORKERS & HUMAN RIGHTS (NLC)	<a href="http://www.nlcnet.org">www.nlcnet.org</a>
SELF-EMPLOYED WOMEN'S ASSOCIATION (SEWA)	<a href="http://www.sewa.org">www.sewa.org</a>
STREETNET	<a href="http://www.streetnet.org.za">www.streetnet.org.za</a>
WOMEN IN INFORMAL EMPLOYMENT: GLOBALIZING & ORGANIZING (WIEGO)	<a href="http://www.wiego.org">www.wiego.org</a>
WOMEN WORKING WORLDWIDE (WWW)	<a href="http://www.poptel.org.uk/women-ww/">www.poptel.org.uk/women-ww/</a>

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