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THE CONSTITUTIONALIZATION OF LABOUR RIGHTS¹

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I THE LINK BETWEEN LABOUR RIGHTS AND HUMAN RIGHTS

I will begin with an existential question: why am I here? Why is someone with a special interest in labour rights appearing in a speakers' series devoted to human rights?

Yes, it's true: workers are human; they are not commodities; they are not factors of production. People with an interest in human rights should therefore be as interested in the oppression of workers as they in the oppression of people of colour or women or disabled people. But labour rights and human rights are not easily collapsed into a single category. Labour rights have historically been framed as collective, human rights as individual; labour rights are class-based; human rights claim to be universal in their justification and application. Labour rights have generally been vindicated through economic and political action; human rights have been advanced through cultural and social change and, more recently, through litigation. Labour has tended to assert its rights at the level of the workplace and the nation state; human rights movements in recent years have tended to be trans-national. And a point of some importance: labour rights have tended to be marginalized in the shaping of the new global economic order, while human rights have been embraced by adherents of the Washington consensus as both a precondition and consequence of global capitalism.

¹ An earlier version of this lecture was presented at the University of Glasgow on 20 November 2009, and a final version is expected to be published in the *Modern Law Review* in 2010.

Now one further complication: people in many countries, including the United Kingdom, have come to regard trade unions as selfish and irresponsible and their political allies — Labour and Social Democratic parties — as well past their sell-by date. Anyone who harbours such a view of the political and industrial wings of the labour movement is likely to balk at inscribing labour rights in the lexicon of human rights. And to make matters even more difficult, such views are sometimes held by members of groups that were historically excluded from labour markets or relegated to their margins, but now invoke human rights laws to vindicate their rights against both employers and unions. At the very least, one might say, establishing the affinity of human rights and labour rights is both a conceptual and a political challenge.

Nonetheless, the discourse of labour rights has swung sharply in the direction of human rights. Why? For negative reasons and positive ones as well. The negative reasons are these: workers no longer identify themselves as producers but as consumers; labour has therefore lost its *raison d'être* as a class-based economic and political movement. Moreover, changes in labour markets and modes of production have also robbed it of much of its former economic power, while globalization has made its national focus increasingly anachronistic. As a consequence of these and other developments, workers in most advanced democracies confront greater individual insecurity and loss of collective agency than they have in decades. Hence the shift of labour advocacy in the direction of human rights. Aligning itself with the cause of human rights will (it is hoped) broaden the base of the labour movement and rebuild its alliance with other progressive forces; engaging with the discourse of human rights will renew its intellectual energy and refresh its message; and adopting the legal and constitutional strategies of its sister movement will enable labour to secure solid protections for workers comparable to those that human rights advocates have won for all citizens over the past half-century.

What will this mean in practice? Human rights movements are deeply committed to constitutionalism. On the one hand, we have seen the adoption of a number of impressive constitutional texts including conventions and charters on human rights

adopted by the UN, the EU and other trans-national regimes, as well as the Canadian Charter of 1982 and the UK Human Rights Act of 1998. On the other, there has been a great surge of legislation, implementing these constitutional texts and a spectacular outburst of litigation by citizens asserting and vindicating their rights. If workers' rights — to organize, to bargain, to strike, to receive a living wage, to enjoy decent working conditions, to have a voice in workplace decisions, to be treated with respect — if all of these rights were reconceived as human rights, they too could be constitutionalized; and they too would be robustly protected. That at least is the hope.

So in answer to the question “why am I here”: I am here to examine this turn in the discourse of labour law.

II THE RIGHTS-BASED LITIGATION-DRIVEN JURIDICAL MODEL OF CONSTITUTIONALISM

To restate: the great ambition of labour rights advocates today is that workers' rights should also be constitutionalized: that they should be entrenched in the country's basic law; that no law should be able to derogate from them; and that they should be justiciable: workers denied their rights should be able to secure legal redress. The results would be transformative (these advocates argue); the costs would be minimal; the world would be a better place.

This rights-based, litigation-driven juridical model of constitutionalism is not the only one on offer; I will mention several alternatives shortly. However it is a model that beguiles labour advocates, as it does many progressive thinkers and legal scholars who believe in the transformative potential of law. They imagine that litigating constitution rights will somehow succeed in balancing capitalism's equation of unequal power, ensure social justice and put material flesh on the dry, legal bones of the liberal-democratic state. And now I have to admit, if you haven't already guessed: I am an advocate of labour rights; I am a progressive; and (I hope) I am a scholar: but I am not beguiled.

The rights-based, litigation-driven juridical model of constitutionalism is found in its purest form in America, whose fundamental law guarantees freedom of association, assembly, expression and procedural due process. These guarantees might, in principle, have been interpreted as protecting the right of workers to join unions, engage in industrial action, and be dismissed only on notice and for cause. But of course they were not. The result — advocates of constitutionalization claim — is that in America union membership in the private sector has fallen to about 8% — its lowest level in 100 years; that strikes are an endangered species; and that workers are still presumed to be employed “at will” and subject to dismissal without notice or recourse. All of this is true, but does it follow that if labour’s rights under the constitution had been acknowledged and protected, the lot of American workers would be better than it is?

Let’s look at some international comparisons. A number of European countries that have entrenched labour rights in their constitutions. Workers in those countries seem to enjoy higher living standards, greater job security and more influence over their working lives than do American workers. But does this prove that constitutionalization produces better outcomes for workers? Or merely that countries where there is widespread political and social support for decent treatment of workers are more likely than others to constitutionalize arrangements designed to produce those outcomes? This much, however, we do know: in few, if any, European countries is U.S.-style rights-based constitutional litigation used to effect fundamental changes in workers’ protections or in labour market policies.

Canada provides another instructive comparison. In a startling recent series of decisions, Canadian appellate courts have held that under our Charter of Rights and Freedoms, workers have the right to associate in unions, to call on their employers to bargain in good faith with that union, to engage in industrial action to protect their interests, and to be protected against legislative attempts to restrict those rights or to override collectively bargained agreements. The courts have also ruled that the industrial torts and the common law of wrongful dismissal must be reconfigured to accord with Charter principles. Is this not proof-positive that constitutionalization of

workers' rights will revive labour's flagging fortunes?

Time will tell, but my own prediction is that — the Charter notwithstanding — ten or twenty years from now, Canadian union membership and power will have declined not grown; that Canadian workers will enjoy lower, not higher, wages; that their jobs will be more, not less, precarious; and that the social safety net that protects them against the vicissitudes of the labour market will have fewer strands and more holes. If I'm right, if the Charter fails to protect labour rights in the real world, I now add, it will be true to form: all the available empirical evidence suggests that its potential to bring about social transformation in other domains — including human rights — has been greatly over-estimated.

How can this be? Rights-based constitutional litigation ought in principle to be the most efficacious way to ensure that employment relations are fair in both a substantive and procedural sense.

Alas, in practice litigation is unlikely to alter the deep structures of society and economy that relegate workers to a subordinate role in their relations with employers. There are many reasons why this is so:

- because constitutions typically limit state — not private, corporate — power;
- because labour rights are necessarily couched in general language that can easily be read down;
- because judges often comprehend labour rights less well and value them less highly than those of other interest groups;
- because litigation is expensive, slow and often inaccessible to individual workers or their representatives;
- because evidentiary and procedural rules generally make constitutional litigation unsuitable for the resolution of open-ended conflicts of social interests;
- because remedies that might fundamentally transform labour's situation would require a redistribution of wealth and power that courts lack the capacity to

design, a mandate to initiate or the means to implement;

- and because by pursuing their recourse within the existing constitutional framework, workers would be implicitly agreeing to abstain from using their economic and political power in ways that would radically alter that framework — a Faustian bargain they might well come to regret.

III ALTERNATIVE MODELS OF CONSTITUTIONALIZATION

However, as I mentioned earlier, the rights-based litigation-driven juridical model of a constitution is not the only one available. Many states — in both the global North and the global South — have dealt with labour rights in their constitutions, often in language that is merely symbolic or evocative rather than tightly prescriptive. However, some of these constitutions specify that legislation should be enacted to regulate employment relations, that the state should strive to achieve just labour market outcomes, or that employers and workers should collaborate in the management of enterprises. But oddly, while these states have “constitutionalized” labour rights in similar ways, they seem to end up adopting very different laws and policies, constructing very different labour market institutions and achieving very different degrees of industrial peace, social justice and national prosperity. In fact, one is struck by the total disjuncture between the constitutional model adopted to protect labour rights, on the one hand, and actual workplace and labour market outcomes on the other. Rather, outcomes seem almost wholly attributable to other factors: national demographics and endowments, national histories and cultures, and above all, the forces of national and international political economy.

I want to say a word specifically about the United Kingdom which, as you know, exemplifies a unique model of constitutionalism. Traditionally the British “constitution” was understood merely as “that which constitutes” the polity. It comprises a miscellany of charters and declarations, statutes and common law rules, invented traditions and unwritten conventions that define the composition and functions of Parliament, the judiciary, the executive and the Crown, as well as relations amongst them and with citizens. Litigation was at best marginal to this constitutional model. In

this sense, it was a political constitution, rather than a juridical one. Moreover, its effects on labour rights were, at best, indirect. For example, the advent of a universal electoral franchise facilitated the rise of the Labour Party and, after 1945, the introduction of the welfare state and other labour market interventions.

However, things have changed somewhat. The British constitution is no longer strictly a political constitution; it has become more of a rights-based juridical constitution, on the American model. The Human Rights Act 1998 now gives juridical force to, though it does not yet fully entrench, an array of human rights. However, since most of the rights enumerated in the 1998 Act deal only peripherally with labour rights, this shift has so far had little direct impact on workplace relations.

But the United Kingdom has not only a new juridical constitution bolted onto the side of its old political constitution. It may also have acquired, almost unnoticed, an economic constitution. The concept of an economic constitution enjoyed brief prominence in Weimar Germany during the interwar period, and was advanced in this country by Otto Kahn Freund, a former Weimar labour court judge and the leading British labour lawyer of his time. The essence of the Weimar ideal was that workers and employers should be constitutionally guaranteed a direct role in shaping labour law at every level from the enterprise to the region to the sector to the national parliament, with a view to creating an “autonomous” system of labour law. Kahn Freund’s goal was much the same, but his approach differed. He maintained that in the UK, it was not constitutional guarantees but “the abstention of law”— what he called the principle of “collective laissez faire” — that gave workers and employers a protected space within which to establish wages and working conditions through collective bargaining. This principle was “constitutional” in the sense that it constituted the fundamental premise of British industrial relations.

But though quintessentially “British” — in the sense that it was unwritten, organic, imprecise, and non-justiciable — Kahn Freund’s laissez faire version of the “economic constitution” ultimately gave way to the dense regime of substantive and procedural law

that now regulates British workplaces. Like the political constitution, the economic constitution of the United Kingdom is today in part inspired and mandated by Europe; but it is also driven by changes in British politics, society, law and economic life, and by perceived or desired shifts in the balance of power in British labour markets. Alas, after a half century of intense encounters with these more explicit forms of constitutionalization, many British workers are worse off, in a relative sense, than they were when Kahn Freund's idea of an economic constitution was ascendant. Alas it isn't sufficient that that labour rights are in some way "constitutionalized": what counts is the content of those rights, the institutions and processes through which they are protected, and especially the political economy in which they are meant to be realized.

Once again, I want to make brief mention of Canada. Our political and economic constitutions do not mention "labour" specifically. However, in assigning jurisdiction over labour matters to the provinces rather than to the federal government, the courts relied on constitutional language that gave the provinces the right to legislate concerning "matters of a merely local and private nature" and those involving "civil [that is, contractual] rights". This characterization of labour matters has had important practical effects: it forestalled the emergence of national labour standards and labour market institutions; it prevented the federal government from implementing international labour standards without provincial consent; and it helped to dissolve the national labour movement into a dozen relatively weak and sometimes warring provincial movements. But its greatest effects have been symbolic: if labour rights involve "merely local" or "private" or contractual issues, how can they be regarded as issues that fundamentally divide the polity, give rise to debates over the maldistribution of wealth and power, or engage the soaring rhetoric of the Charter. In other words, Canada's political and economic constitutions contradict its juridical constitution, the Charter.

This contradiction is unlikely to be resolved in favour of the Charter, especially in light of what amounts to the entrenchment of neo-liberalism in Canada's political and economic

constitutions. I have in mind Canada's integration into a North American economic space dominated by the United States; its commitment to monetarist policies administered by an autonomous central bank; its fiscal practices that make the welfare state unaffordable; and an array of legal and practical constraints that make unworkable (not to say unthinkable) most forms of regulation, including the regulation of labour markets.

Next, I want to say a word about the "constitution of the enterprise". A good deal of research and debate in recent years has focussed on how workers are integrated (or not) into the governance of the enterprise. Here I'll make special reference to North American experience which admittedly lags far behind the experience of many European countries which, in turn, lags far behind the ideal-type of worker participation that is supposed to prevail in those countries.

In North America, we have seen four models of enterprise constitutions, four experiments in enterprise governance that were all ostensibly designed to protect workers' interests:

- the collective bargaining model which attempted to endow "citizens at work" with formal rights of association, voice and due process analogous to those they enjoy in the broader society;
- the "stakeholder" model which mandated management decision-makers to address the best interests not only of shareholders but also of workers, customers, suppliers and others foreseeably affected by corporate action;
- the "human capital" model whose rationale of enlightened self-interest was meant to persuade employers to treat workers as valuable assets worthy of investment in the form of good working conditions, benefits, amenities, training and, especially, trust; and
- the "worker capitalist" model which reminded workers that their pension and other benefit funds made them significant members of the shareholding class, with a stake in the success of predatory capitalism.

As things turned out, all four of these North American experiments in “constitutionalizing” labour’s role in workplace governance failed. They did so in part because they sought to reform workplace governance without taking into account the aggressive form of liberal market capitalism that prevails in North America, and in part because they neither acknowledged nor addressed the internal political economy of the enterprise itself. The constitution of the enterprise, it turns out, cannot be reformed in isolation from the juridical, political and economic constitutions of the state. Or in another formulation: varieties of capitalism give rise to varieties of workplace constitutions, not vice versa.

IV CONSTITUTIONALIZING THE GLOBAL WORKPLACE

Capitalism, however, operates not only within but across national borders. Deep regional economic integration has been achieved in Europe; North America has gone some way down that path; and regional trade regimes have begun to emerge in South America, Asia and Africa. The question is: will it be possible to entrench labour rights in whatever passes for the constitutions of these regional regimes?

Based on the European experience, one should not be too optimistic. Even the EU, which leads the world in this respect, has been oddly diffident about entrenching collective labour rights in its “constitution”. NAFTA has been even more diffident, though it has adopted a so-called side-agreement, the North American Accord on Labour Cooperation, whose protection for labour rights can most charitably be described as “minimalist”. And so far as I know, none of the other regional trade regimes has come close to entrenching labour rights, except in a nominal sense. It is hardly surprising, then, that the WTO with its global, rather than regional, mandate has resolutely resisted making compliance with labour rights a condition of doing business in the world economy.

What about the International Labour Organization? Almost 200 conventions have been promulgated by the ILO; states that adopt these conventions are obliged, under the ILO charter, to implement them. In addition, the ILO has identified a core of labour rights whose implementation is required of states even without adoption, simply by virtue of their membership in that organization. And finally, ILO conventions have clearly influenced national laws and constitutions by osmosis as well as by explicit adoption. But does all of this confer quasi-constitutional status on the labour rights articulated by the ILO?

Based on the behaviour of many ILO member states, including some advanced democracies, one would have to say not. However at the same time one must acknowledge the severe practical problems of entrenching labour rights in global workplaces.

These workplaces often form part of a transnational value chain linking corporations based in the advanced economies with widely-dispersed partner firms, subsidiaries and arm's-length suppliers. It is therefore often difficult for workers to identify their ultimate employer. Second, given that operations can be moved relatively freely to different sites along the value chain, or off-loaded entirely, employers are easily able to escape both legal constraints imposed by national governments and pressures generated by unions or social movements. Third, "constitutionalization" implies that workers will have the right to participate in the development of norms governing their own terms and conditions of employment. However, their ability to do so is radically constrained because they are located in different countries, speak different languages, are regulated by different laws, have different (or no) traditions of concerted action, experience different material circumstances and social environments and may not even realize that they share a common employer.

These are all formidable barriers to constitutionalizing employment relations in global enterprises. And let me add one more: the workers most in need of protection are often located in the countries of the global south, where labour standards are likely to

be lower than in the global north. However, attempts to project labour standards from north to south are almost certain to be regarded as a threat to the comparative advantage of developing countries, if not outright neo-colonialism.

So: the constitutionalization of labour rights in the global context is almost unthinkable. And yet, despite the absence of a global constitution, of global labour legislation, of a global labour inspectorate or a global labour movement, there is some evidence that labour rights are taking hold in places where they never existed before. Under attack from unions, social movements and political opponents, governments of the home countries of global corporations try to persuade or pressure those corporations to behave decently when they operate abroad. To some extent as well, acceptable labour standards become imbricated in corporate policies, practices and routines of work that are disseminated outward from the head office to all the elements of the global enterprise. And finally, to some extent ideas about labour rights — like ideas about sport, style and sex — just percolate across borders, at both the grassroots and the elite level; through the media and by word of mouth; and with both positive and negative consequences.

I mention these promising developments — in today's vernacular, “green shoots” — in order to suggest that perhaps constitutions are sometimes created from the bottom up rather than the top down, that they may result from an accidental concatenation of unrelated events rather than from the deliberations of august assemblies, that they may be shaped by practical struggles in particular domains rather than by the comprehensive designs of legal architects.

V CONCLUSION

I have framed this last observation as a commentary on the constitutionalization of labour rights in the global economy. But now, in conclusion, I will suggest that it applies as well to domestic constitutions. I return to my earlier juxtaposition of formal juridical constitutions and political, economic and enterprise constitutions.

Clearly states can adopt juridical constitutions; they can entrench labour rights; they can make those rights justiciable; they can authorize citizens to sue to defend their rights; and they can authorize the courts to award them remedies. In fact, this sort of constitutionalization proceeds at a manic pace: since 1789 national constitutions have had a median life span of 17 years, and an average life span of less than half that. But what does this sort of constitutionalization signify? Do we really imagine that each new constitution brings fundamental change to the state that adopts it? that rights made justiciable thereby become effective in the real world? that citizens and workers) endowed with those rights will actually be empowered? that courts that acquire remedial powers can and will attempt to use them to realign the deep structures of economy and polity? and that if they do so, they will succeed in transforming global capitalism and making the world safer for workers?

I have asked what appear to be four distinct questions, but are all really variations on a single theme: scepticism about rights-based, litigation-driven juridical models of constitutionalism. I conclude by offering in place of scepticism four hypotheses that are, in my view, entirely plausible:

- the constitution that counts is the “real” constitution that expresses, normalizes, legitimates and therefore reinforces actual-existing relations of power;
- in the event of conflict, the “real” constitution will prevail over juridical constitutions;
- strategies designed to produce significant change through constitutional litigation will prove to be disappointing for labour advocates and, in the long run, for human rights advocates as well; and
- workers with an inclination and capacity for collective action will find a way to vindicate their “rights” whatever the juridical constitution might say or however the courts might rule.

I hypothesize, therefore I am.