

## Economic Citizenship: Variations and the Threat of Globalisation

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By the middle of the nineteenth century the liberal economic rights to own property, make contracts and to work – in the sense of choose one's occupation – were regarded as basic civil rights throughout much of Western Europe and North America. By the end of the same century the gradual enfranchisement of the propertyless allowed these civil rights to be augmented and indeed qualified by variously configured rights to collective organisation and bargaining. The latter rights 'created ... secondary system[s] of industrial citizenship' (Marshall, [1949] 1994; see also: Black, 1984; Katznelson and Zolberg, 1986; van der Linden and Price, 2000) which were then used in conjunction with political rights to establish equally variously configured sets of social and other economic rights during the twentieth century (Esping-Andersen, 1990; Mann, 1993; Stephens, 1979). In other words, economic rights have been both basic and central to the development of citizenship. It is therefore both unsurprising and particularly disturbing that they are the rights that are most directly threatened by the neo-liberalism that purports to guide the current moves in the direction of globalisation.

Given the space available, it is not possible to discuss the full range of economic rights, especially because I wish to argue

comparatively. For this reason, and also because, up to now at least, they have been the major point of articulation within the overall system of economic rights, I will focus on the 'secondary system[s] of industrial citizenship' and the variable nature of the collective labour rights that underpin them.<sup>1</sup> This said and precisely because of their articulatory function, I will relate collective labour rights back, so to speak, to property and contractual rights and forward to social rights, at least in a schematic fashion. More specifically, I will relate the development of labour rights both back to the changing nature of the relations of possession, control and title that define the internal structure of property ownership, and forward to the social rights that have in some ways compensated labour for the limited nature of the constraints on property owners in capitalist societies.<sup>2</sup>

The point I wish to emphasise is that contemporary labour rights and therefore the forms of economic citizenship vary greatly. Thus, without explaining the origins of this typology (but see Woodiwiss, 1998: 48), they may take the form, primarily but never exclusively, of liberties (as in the American case), immunities (as in the British case), powers, for example, to take issues to various adjudicatory or policy-making bodies (as in the

Australian, French and many Western European cases), or claims to, for example, certain labour standards, job security and social entitlements (as in the Japanese, Singaporean and, again, many Western European cases).

These different forms of labour rights relate to the three dimensions of property rights in the following ways:

- (a) They may alter the balance with respect to the economic possession of the means of production to labour's advantage by granting certain liberties to bargain over the terms of employment, and/or by inscribing certain claims within the conditions governing the hiring of labour and therefore the validity of the employment contract. The latter are generally referred to as 'labour standards' and include rules governing the payment of wages, rest periods, and holidays. Such aspects of collective labour law may also affect possessory power pertaining to the permissibility or otherwise of the closed shop. Finally, the promulgation or inscription of such liberties and/or claims may or may not also be accompanied by the granting to labour of participative powers of one kind or another with respect to the setting of such standards.
- (b) They may alter the balance with respect to political or disciplinary control of the means of production to labour's advantage in three ways: first, by granting certain liberties to bargain over the conditions of employment and/or by inscribing certain claims within the employment contract in the form of those aspects of 'labour standards' that refer to workplace rules; second, by limiting the contract's purview through specifying certain additional liberties which may allow its temporary suspension for bargaining purposes; third, by specifying in workplace rules and/or the employment contract certain claims that allow for the exercise of powers of one kind or another which afford varying degrees of co-determination as

well as the adjudication of disputes by tripartite tribunals or mutually agreed third parties.

- (c) They may alter the balance with respect to title to the means of production to labour's advantage by granting certain liberties to bargain over ownership and/or by inscribing various claims within property, company and taxation law in order to achieve such as profit-sharing, employee share-ownership, nationalisation, and/or distribute social benefits of one kind or another. Again, the granting of such liberties and/or the inscription of such claims may or may not be accompanied by the granting of certain participative powers to labour at the enterprise and/or national levels.

Perhaps the best-known attempt to give a narrative form to or periodise the development of labour's economic rights and their relationship to the wider society is that produced by Franz Neumann in the 1920s and introduced to an English-speaking audience by Otto Kahn-Freund in the 1940s. According to Neumann and to Kahn-Freund (1944; see also Jacobs, 1986), labour law systems typically pass through three phases – repression, toleration and recognition – reflecting the developing but never complete equalisation of class balances.<sup>3</sup> As all who have used this periodisation have pointed out, if applied too mechanically it is an excessively evolutionistic as well as optimistic and even Anglo-centric narrativisation. Nevertheless, when shorn of its teleological associations and as I will show below, it remains useful as a means of summarising the nature of and the differences between particular conjunctures.

In order to reduce the likelihood of repetition as well as to provide at least a tacit acknowledgement of certain critical differences with respect to levels of development, social structures and transnational conditions of existence, I will divide my highly schematic discussion of histories and systems into three groups: first, the early industrialisers (Britain, the United States and France); second, the first wave of 'late' industrialisers (Sweden, Canada, Australia,

and Japan); and third, the post-1945 industrialisers (Argentina and Brazil).

#### LIBERAL DEMOCRACY, SOCIALISM AND LABOUR RIGHTS

The first laws specifically applied to capitalist wage labour in Britain and its former colony the United States were the British Combination Acts of 1799 and 1800. Far from altering any of the employment balances to labour's advantage, and despite their provisions relating to compulsory arbitration (labour had no say in the choice of arbitrators), these Acts generalised some earlier, more narrowly targeted punitive statutes. Thus their desired effect was the prevention of combinations of labourers from organising and acting to enhance their positions with respect to possession and control and therefore undermining the prerogatives of title with respect to the disposition of any surplus arising from production. The partial repeal of the Combination Acts thanks to an 1825 Act in Britain and an 1842 decision by Massachusetts Justice Lemuel Shaw (*Commonwealth v. Hunt*) in the United States meant that what unions there were (there were far fewer in both countries in the second quarter of the nineteenth century than there had been in the first) no longer committed a criminal offence by their simple existence. However, not only did the increased tempo of industrialisation and recurrent recessions make it difficult for them to survive, but they also found that their freedom to bargain over wages and conditions made little difference to their possessory or control positions. This was because they lacked any legal means of exerting pressure on employers since picketing and striking, for example, were most often found by judges to instance the 'violence', 'threats', 'molestation', 'intimidation', or 'obstruction' still forbidden by the 1825 Act and the Massachusetts decision. Moreover, when unions did begin to reappear in the 1850s in Britain, individual strikers knew

that they could easily be prosecuted for breach of contract. Interestingly, this was not quite the case when unions reappeared in the 1870s in the United States where a rather different, newer and more obviously ideological fault, which I have termed 'breach of freedom of contract', had first to be invented (Woodiwiss, 1990b: 42ff., 89ff.) Contra Karen Orren (1991), this seems to have been necessary because of the more expansive meaning given to contractual freedom during the first three quarters of the nineteenth century in that much less feudal society.

However, the brief juridical hiatus that waiting on this development produced provided only some short-lived and cold relative comfort to American trade unionists. Their British counterparts were by then enjoying the new freedoms granted by the Trade Union Act (1871) and the Conspiracy and Protection of Property Act (1875), whilst they themselves were about to become the victims of 'government by injunction'. The British Acts for the first time gave unions some financial security, positively sanctioned their non-violent resort to strikes and picketing, and therefore allowed them certain liberties to contest capital's possessory and control positions. Thus British labour law entered the phase that Kahn-Freund termed toleration in that labour was allowed to seek such alterations to the balances between itself and capital as its industrial muscle allowed. In the event such alterations were minimal because of a whole host of wider social-structural conditions that prevented labour from taking immediate advantage of its liberties. What is more, the liberties themselves soon lost much of their allure since under certain, far from rare conditions they could result in the bankrupting of a union. This was because of the judicial development of civil liability in tort with respect to trade disputes, as a result of which unions could be sued for damages by companies that suffered as a result of their actions.

However, by the time of the House of Lords' Taff Vale judgment of 1901, which confirmed the legality of such suits, the

wider social-structural conditions had changed still more but this time to labour's advantage. Unions had spread beyond their traditional constituency of skilled workers to organise many of the unskilled as well as the new category of the semi-skilled. But perhaps most importantly labour had become a political force that warranted respect. Hence the passage of the 1906 Trade Disputes Act, which initiated the phase of recognition not by the grant of any more explicitly or rigorously defined liberties but rather by the grant of immunities with respect to what would otherwise be regarded as actionable wrongs. Up to the present the alterations to local workplace balances between labour and capital produced by the resulting system of 'collective laissez-faire' have varied according to the scope subsequently allowed to the immunities. These variations have occurred according to a rhythm determined by labour's variable access to political power. They have also been accompanied by a similarly determined ebb and flow of statutory claims inscribed within individual employment contracts and government social policies as well as participative powers in national tripartite bodies. The latter, like the economically determined alterations, were largely restricted to possessory relations but did sometimes relate to proprietary relations when questions of taxation, nationalisation and privatisation were at issue.

By contrast, American labour law slipped back from a phase that has been characterised as one of 'reluctant tolerance' (Lieberman, 1950) to one of repression, thanks to the rise of the labour injunction in the last quarter of the nineteenth century. Although this device was made possible by very similar juridical developments to those which made a trade dispute a possible occasion of civil injury in Britain, it was more directly repressive in that to disobey such an injunction carried the threat of imprisonment for contempt of court, and it could be invoked during or even before a dispute took place rather than afterwards as in the case of the British tort

action. Thus when invoked it instantly negated all liberties, since as a judicial order to 'cease and desist' it had its effect at the level of control relations. This negation had particularly inequitable consequences because the constitutional backing that the American courts gave to their own law-making meant that they had been able to strike down any legislative efforts to inscribe any possessory claims in contracts of employment. Moreover, because of the wider social-structural differences between the United States and Britain – a narrowly based labour movement, an ethnically and racially divided labour force, and a minimal labour presence in politics – which also contribute something to the explanation for judicial supremacy, this assault on labour's liberties did not initiate the successful counter movement that it did in Britain.

In the absence of such a response, labour was left to make what use it could of its fragile liberties, which was not much. In contrast to Britain, these liberties were eventually explicitly defined but not because labour demanded this. Rather, they were a grudgingly accepted gift from a politically needy but neither socialist nor even labourist Democratic Party. Unsurprisingly, the courts rapidly restricted the ambit of the liberties that the Wagner Act (1935) had granted to the sphere of possessory relations. A rapidly produced doctrine of the 'managerial prerogative' meant that most control issues were non-negotiable, whilst labour's lack of political clout meant that few claims were statutorily inscribed within employment contracts. In addition, labour's non-socialist character meant that it sought few if any participative powers and title has seldom been a public issue even under the heading of taxation, since there was no demand for the state to distribute any more than a minimum of social benefits that is now fast approaching vanishing point. This said, title has proved to be a local or private issue in an increasing and now significant number of companies as they seek either increased capitalisation or escape from bankruptcy during recessions through the

establishment of Employee Share Ownership Plans (ESOPS). However, the legal enforceability of collective contracts, the fact that they include as bargained claims on the company many of the items that are statutorily defined social claims on the state in Britain, as well as no-strike and arbitration clauses, mean that the conditions under which even possessory liberties can be asserted through industrial action of any kind have become very limited – too much is at risk.

Startlingly, as Katherine Stone (1999) has made clear, the availability of union-negotiated claims on companies now excludes their recipients from access to the now apparently increasing quantum of statutorily established possessory claims. The latter are therefore not an automatically inscribed set of minima in all employment contracts to be improved upon through collective negotiation as is the case in Western Europe. Instead, they function as an incentive to de-unionisation and therefore to the sacrificing of any remaining collectively exercisable liberties to challenge even capital's possessory power.

Turning to France, one encounters a history where the central state plays a far more important role in societal governance than in either the United States or Britain. As a consequence the critical modality of employment relations is that of politics or control, whilst the critical modality of legal regulation is that of powers or what the French call 'police' rather than liberties or immunities either in themselves or as the source of claims in individual or collective contracts. What is significant in the present context is not so much that, as it happens, this has been to the benefit of labour as that morphologically the history of labour rights in France is more or less the mirror image of that of the United States. One sign and indeed a major facilitator of the greater role of the state in France is the codified and rational nature of the legal system. This, however, does not mean that a phase of toleration or indeed ambiguity is absent from the history of French collective labour

law any more than it is absent from the history of French industrial relations. Indeed the willingness and indeed inability or unwillingness of the state to exercise its power has meant that the history of French labour rights is a history of ambiguity.

Thus, although the period 1791 to 1864 may be clearly defined as one of repression, this does not mean that liberty of contract was sacrosanct. As Bernard Edelman (1979) has made particularly clear, private property is the core assumption of the Civil Code, and as Norbert Olszak (1999) has explained, this meant that for a long time there was no way in which collective action could be recognised as legal. This said, from the beginning the state allowed the possibility that if it so wished it could continue to exercise its power to inscribe certain claims in some individual contracts of employment where safety or some national interest might be at stake. It was also willing to delegate some of its powers to 'boards of masters and men' in order to regulate wages, which it did with widely varying degrees of success. However, even the state was not entirely free to decide on either the disposition or range of its power. And even after the commencement of the recognition phase in 1884, the courts refused to accept that terms agreed in the course of collective bargaining automatically applied to the individual contracts of those covered by the negotiations.

Because of labour's political weight, as in Britain and in contrast to the United States, and in the absence of a juridical solution, a legislative solution to this problem was provided by laws passed in 1906, 1919 and 1920 which in the end extended any benefits won in negotiations to the entire labour force of the enterprises concerned. As a result of the Matignon Accords negotiated under the Popular Front Government in 1936, the scope of negotiations and their applicability were both hugely extended so that they became sectorally and/or geographically binding. However, in 1938 the state reasserted its interest in the outcomes of such otherwise private negotiations in a way which paved

the way for the establishment of the Vichy government's corporatism.

In 1950, the 1936 system was restored and in 1971 it was given an even more robust foundation by the declaration that collective labour rights were at base individual rights. The latter change has given a new emphasis to local bargaining as the regional and sectoral institutions created by the delegation of state power have apparently atrophied or become moribund. In sum, looking backwards from the present, the French trajectory has been the reverse of that in the US; that is, it has been a movement from a public-powers-based system to a private-liberties-based one. This said, it is important to emphasise that the result is far short of convergence. The state-inscribed claims in American employment contracts and at the level of social policy remain far, far fewer and less significant than is the case in France or even Britain. And not the least of the reasons for this is that political or control relations have nowhere near the salience for employment relations in the United States that they continue to have in Western Europe despite all the neo-liberal-inspired efforts to re-privatise not just nationalised industries but economic life as a whole.

#### LATE DEVELOPMENT AND LABOUR RIGHTS IN THE 'WEST'

There has even been talk of such a re-privatisation in that most social democratic of countries, Sweden. Thus far, however, there is little sign of a significant restructuring of Swedish labour law. The history of this labour law if not the wider history of Swedish industrial relations does not include clear periods of either repression or toleration since trade unions only appeared after the promulgation of the 1866 Constitutions, which contained a general right to freedom of association. Thus Swedish unions were at no time regarded as either intrinsically criminal or, as in France, a legal impossibility, even though incitement to

strike was an offence. However, despite its absolutist past, its monarchical form and its codified legal system, the Swedish state was at first very reticent about both the exercise and the delegation of its power. Thus the state acted neither to legalise nor prohibit the industrial actions that can make freedom of association into a potent industrial weapon. Nor indeed did it pass much legislation to protect vulnerable workers. Consequently, employment relations revolved around the possessory dimension and legally labour's liberties were pitted against those of capital.

Even when the state did intervene in a significant way following the December Compromise of 1906 between the unions and the employers' association, it did so in the same reticent manner; that is, by passing the Mediation Act in which the state offered but did not require the acceptance of its good offices to aid the conflicting parties in coming to an agreement. Similarly, when the Arbitration Act was passed in 1920 it too provided for a voluntary process. State compulsion entered Swedish industrial relations in 1928 when a conservative government removed contract disputes from the private to the juridical domain through the Collective Contracts Act and the Labour Court Act. In 1932 the Social Democrats began their four uninterrupted decades in power. Not only did they refuse to repeal these two Acts but also in 1936 they passed the Collective Bargaining Act, which required new unions to register with the Social Welfare Board if they were to be granted negotiating rights. The quid pro quo for the unions' acceptance of the diminution of their liberties represented by the juridification of most aspects of industrial relations was twofold. First, the state established a comprehensive social welfare programme, and second, it sanctioned the negotiation in 1938 of the core text within the Swedish industrial relations system, the Basic Agreement. The net result was and remains a system of labour rights still focused on possessory relations wherein the state uses its power to inscribe certain minimal claims in

individual contracts and establish and maintain some rather substantial claims to social benefits, and enforces contractual agreements, whilst the parties are left free to use their liberties to bargain over the initial terms and conditions of the agreements.

In the postwar period these arrangements were augmented and indeed maintained by the state's further use of its power in a number of ways. First, in accordance with the Rehn Model of 1960, it pursued an 'active labour market policy' and so added certain claims to training and other support to the possessory equation. Second, through the Co-determination Act of 1976, it acted to allow some moves in the direction of the equalisation of control relations. And finally, through the establishment of union-administered, regional Wage Earner Funds it even allowed labour to encroach upon title (Abrahamson and Brostrom, 1980). Despite the minimal results of the last measure, much talk of economic crisis, an end to Social Democratic hegemony, and accession to the European Community, there has as yet been little movement in the direction of negotiations outside of the centralised structure established by the Basic Agreement. At present therefore, the Swedish labour law system remains uniquely favourable to the equalisation if not the dissolution of capitalist employment relations.

The evolution of Canadian labour rights provides an interesting contrast to that of Sweden in that, as in France, an initially similar post-recognition system based on powers and focused on possessory relations eventually gave way to one based on liberties. Canada remained a political colony until 1931, a legal colony for much longer, and shares a very long border and many economic links with the United States. It is therefore not surprising that the development of Canadian labour law shows many signs of British and American influence. Thus the same variably enforced repressive laws initially governed industrial relations in Canada as governed them in Britain and the United States. However, the transition to a regime of toleration occurred rather differently.

Initially, the British model was followed through the passage of legislation in 1872 and 1876, but the protection offered by the Canadian legislation was even more uncertain and its range more restricted. It was more uncertain because it was only available to registered unions and many refused to register, and its range was more restricted because it did not apply to 'public works' of many kinds. Moreover, no equivalent to the 1906 Trades Disputes Act was passed to nullify the legal reasoning that resulted in the British Taff Vale judgment of 1901. Instead, an element of recognition was added to an already hybrid regime of repression and toleration through the passage of a Conciliation Act (1900) and, more important, an Industrial Disputes Investigation Act (IDIA) (1907). These were intended to and indeed often did prevent any disruption that might lead to suits for damages by making an appeal to a tripartite tribunal available to any group (that is, not necessarily a unionised one) of ten or more employees. However, in contrast to the Swedish and French cases no negotiation, let alone industrial action, was allowed prior to the commencement of conciliatory hearings. Moreover, following the 1919 General Strike in Winnipeg, the limits of legal strike action were still further restricted and therefore the attractiveness of even such a disadvantageous conciliation system was increased by changes to the provisions relating to 'sedition' in the Criminal Code. Despite a 1925 British Privy Council decision that the IDIA was unconstitutional, which meant that somewhat varying versions of it had to be re-enacted in the individual states, this system remained in place until World War II.

The first significant American contribution to the development of Canadian labour thinking came as a result of the triumph at the 1902 Trades and Labor Congress of policies inspired by the American Federation of Labor concerning the preferability of sole bargaining rights over dual unionism and voluntary over compulsory arbitration. Eventually, legislation incorporating these preferences and modelled on the Wagner

Act, the Industrial Relations and Disputes Investigation Act (1948) in its federal and state forms, replaced the IDIA and instituted a regime premised on recognition. The liberties central to this regime, now somewhat more developed as the Labor Code (1970), were later both further entrenched by the presence of indirectly supportive articles in the Charter of Rights and Freedoms (1982) and, more importantly, augmented by the establishment of a far more elaborate array of social claims than in the United States. This said, many of the latter claims are currently threatened, and far more grievously than in Sweden or France, by an ongoing process of 'privatisation'. The Canadian labour movement remains far healthier than that of the United States (Weiler, 1983). However, it is interesting to speculate that it might have been still healthier if, contrary to American-inspired trade-union verities, the conciliation system had been underpinned by strengthened liberties, which would have allowed, for example, Swedish-style prior bargaining, instead of being replaced by such liberties. Under such circumstances, 'Big Labor' (that is, in the popular mind, sectional and striking labour) might not have become such a bugbear, control relations might have displaced possessory ones as the critical dimension of class relations because of the political sources and institutional density of a regime based on powers, and there might therefore have been less likelihood of the disestablishment of so many social claims.

Finally, Australian developments have been in very general terms structurally similar to those in Canada except that they exhibit a very different content and temporality. As another former British settler colony, the early history of Australian labour law reflected British developments very closely in all but two major respects. First, the pace at which British statutes were received varied greatly between the different colonies into which the continent had been divided. Second, because of the exigencies created by a generalised labour shortage, the individual labour law represented by Master Servant Law appears to

have been far more salient to the disciplining of labour than collective labour law for most of the nineteenth century. Thus, although collective labour law followed the same trajectory from repression to toleration as in Britain and Canada, individual employees seldom experienced this as a benefit since they continued to suffer the repressiveness of Master Servant Laws that remained effective and rather widely used until the 1890s. However, despite this unsupportive legal environment and the ravages of the Depression of the 1890s but largely because of the democratic political environment, unions not only established themselves as significant social institutions but also gained a very significant ally in the form of the Labor Party. With the sometimes ambivalent support of the unions, the Labor Party put its very considerable political weight behind the proposals for a compulsory arbitration system which were enacted from 1900 onwards. Thus recognition came to unions in Australia far earlier than in Sweden and in a far more effective form than in Canada. It took the form of the establishment of a 'powers-based' system at the Commonwealth (later Federal) and state levels which entitled unions, and only unions, to take or respond to a gradually broadened array of grievances over pay and conditions to conciliation and arbitration courts presided over by senior judges. This system only began to change in the 1990s when the Labor Party led by Paul Keating began to dismantle it in the name of a rapprochement with neo-liberalism supposedly made necessary by the competitive pressures attendant on globalisation.

#### LATE INDUSTRIALISATION, PATRIARCHALISM AND LABOUR RIGHTS

Since the concept of patriarchalism plays an important role in the remainder of the present argument, it is important that I explain what I mean by it. For Max Weber, patriarchalism

was one of the elementary forms of traditional authority:

[It] is the situation where, within a group (household) which is usually organised on both an economic and kinship basis, a particular individual governs who is designated by a definite rule of inheritance. *The decisive characteristic ... is the belief of the members that domination, even though it is an inherent traditional right of the master, must definitely be exercised as a joint right in the interests of all members and is thus not freely appropriated by the incumbent.* In order that this shall be maintained, it is crucial that in both cases there is a complete absence of a personal (patrimonial) staff. Hence the master is still largely dependent upon the willingness of the members to comply with his orders since he has no machinery to enforce them. Therefore the members are not yet really subjects. (Weber, 1978: 231, emphasis added).

For Weber, then, patriarchalism was a strictly hierarchical political structure justified by a familialist discourse and resting on an economy structured in part by kinship relations. Clearly, given the nature of contemporary state and economic formations, patriarchalism no longer has a political or economic referent. However, it seems to me that the discursive 'decisive characteristic' does have a referent. Thus I will use patriarchalism to signify a familialist discourse that, regardless of institutional context, both assumes the naturalness of inequalities in the social relations between people and justifies these by reference to the respect due to a benevolent father or father-figure.

As Sheldon Garon (1987) has pointed out, the law which initiated the postwar recognition phase and represents the core of the present Japanese labour law system, the Trade Union Law of 1949, owed as much if not more to a draft prepared by the Japanese Home Ministry's Social Bureau in 1925

than to the American Wagner Act as most previous writers on the topic have argued. In my view, the most striking consequence of this continuity which extends to the other labour laws that have defined the postwar system, notably the Labour Standards Law and Labour Relations Adjustment Law, is the significance retained by conciliatory institutions within the Japanese system of industrial relations. Thus, as in Sweden and although the system also rests on the grant of certain unambiguously specified liberties, it has become one based on powers and claims in its operation: above all, powers to require representation on the panels of the Labour Commissions that are the instruments of conciliation, as well as to refer disputes to such commissions. When combined with the broader social continuities between pre- and postwar Japan as well as the court system's preference for conciliation over adjudication, the net result has been the restoration of a transformed and very un-Swedish patriarchalism to Japanese labour law in the form of what I and others have termed *kigyoshugi* (enterprisism) (Woodiwiss, 1992: Ch. 5).

The entry of *kigyoshugi* into labour law has transformed the conception of the employment relationship in the private sector that was basic to both the New Constitution of 1946 and the 1949 Trade Union Law. That is, the American-inspired recognition of the different interests of capital and labour that was fundamental to the postwar legislation has been ever more confidently denied as the social and judicial commitment to the limited and hierarchical communitarianism of the company has grown. In a surprising and fascinating instance of transnationally inspired hybridity, it seems that, alongside *kigyoshugi*, arguments drawn from the Weimar Republic's social democratic labour law by lawyers acting for the unions played a significant role in helping the judiciary arrive at this commitment (Kettler and Tackney, 1996). In my terms, then, the period since 1949 has seen a striking reduction in the liberties of Japanese employees and unions as the

control dimension of the property relation has become ever more salient within large companies, and as an anyway very prescriptive legal framework has become more and more proscriptive. The same period has also seen these reductions compensated for not only by a small increase in powers (to participate in joint consultation fora, for example) but also by very substantial increases in claims to company welfare benefits, for instance, and, most important, to an apparently irreversible claim to 'lifetime employment'.

Restricted though the numbers concretely as opposed to nominally benefiting from these claims may be, it is nevertheless important to acknowledge that, thanks to the demand for consistency inherent in legal discourse under conditions of judicial independence, successful but as yet not fully tested efforts have been made to extend the legal entitlement to 'lifetime employment' beyond the confines of the large-scale corporate sector (Schregle, 1993; Sugeno, 1992: 65, 156). Thus, in the absence of a written contract to the contrary (still a very common state of affairs in Japan), the courts will generally find an implied promise to provide lifetime employment no matter what the size of the company. Moreover, the wider legal, social-structural and cultural supports that this doctrine possesses have thus far proved robust enough to sustain it through a prolonged recession and the continuing 'hollowing out' of the economy as production has been relocated to other and sometimes lower-waged countries. Of course, many companies have sought either to reduce their exposure to the doctrine's consequences by taking on far fewer 'regular' employees, or to avoid its consequences by offering inducements (not all of them pleasant, see Salgado, 1999) to those whom they would like to see take early retirement. However, the very fact that such measures have had to be adopted suggests both the legal strength of the position of young and mid-career regular employees and the wider ideological value of 'lifetime employment'.

However, if it is to be successful any attempt to maintain a meaningful form of

economic citizenship in a patriarchalist context has to be rigorously enforced, preferably by unions as well as by the state, and therefore to involve the maintenance of certain irreducible liberties as well as labour access to political power. Here again the Japanese case is instructive and indeed South Korea has recently followed Japan in this regard (Lee, 1998). In my view the most critical of these liberties and immunities are those that protect the freedom of ordinary employees to withhold their consent without having to choose 'exit' over 'voice' (Hirschman, 1970). In other words, where one has enterprise or 'in-house' unions, as in Japan, it is essential not simply that labour rights are fundamentally employee rather than union rights, but also that, again as in Japan (Woodiwiss, 1992: 142-4), they are continuously exercisable not only vis-à-vis employers but also vis-à-vis incumbent unions through employees exercising a 'liberty' to create a second or sustain a 'minority' union. So, from labour's standpoint and contrary to 'Western' labour's experience, the possibility of dual unionism should be seen in a positive rather than in a negative light – that is, where the efficacy of the negative labour rights represented by American-style employer 'unfair labour practice' provisions are reduced, as they invariably are where there are participative structures and/or enterprise unions, it is important that this be balanced by a strengthening or a broadening of a positive right to self-organisation on the part of all employees in order to prevent the suborning of unions (see also, Leader, 1992: Ch. 10).

#### POST-COLONIAL DEVELOPMENT, PATRIARCHALISM AND LABOUR RIGHTS

Brazil and Argentina may both be characterised as patriarchalist, albeit of a Roman Catholic rather than Confucian variety. Thus it is not surprising that there are some striking similarities with Japan in the ways in which their labour law systems have

evolved. However, there are also some equally striking differences because of their greater openness to 'Western' influences.

In Brazil during the first third of the twentieth century elements of repression and toleration co-existed within the labour law system. A sometimes unused repressive police power was combined with seldom enforced protective claims with respect to vulnerable workers. Under the Vargas regime unions with sole bargaining rights were legally recognised provided they fulfilled certain rigorous registration criteria. In return, they gained the powers associated with the right of representation on the benches of the tripartite Labor Court whilst their members gained the right to certain claims with respect to holidays and pensions as well as access to the Labor Courts. When the Vargas regime reconstructed itself on Italian fascist principles in 1937, the Labor Courts remained but strikes were totally forbidden. The unions were 'compensated' by the powers that followed from them becoming agents of political representation. The most significant of the compensations were a substantial share of the receipts of a state-imposed 'union tax' out of which unions were expected to meet various welfare claims from their members and, in 1939, a minimum wage law.

Despite Vargas' fall in 1945, little has changed formally since, although there have been significant changes in the way in which the system has been applied depending on the political complexion of the government. Many of the strikes that eventually forced a very marked liberalisation of the system's application in the 1980s, especially with respect to union autonomy, were organised outside of the 'official' unions because employees were dissatisfied with the latter's use of their powers and perhaps especially their use of the union tax with respect to the enhancement and enforcement of their claims.

Argentina's labour law system has also been indelibly marked by the patriarchal context within which it emerged. This context meant that political or control relations

rapidly gained pre-eminence amongst the ensemble of class relations as the society developed, with the result that the executive apparatuses of the state quickly became the principal location of state power and therefore object of political interest. In contrast to the Japanese and Brazilian cases but because of the relatively greater strength of the labour movement, by 1920 labour's private bargaining had gained the surprisingly positive support of a state executive which refused to deploy its repressive powers and instead provided sympathetic mediation and issued decrees favouring the labour interest. However, these gains were not juridified and institutionalised as powers or claims and proved to be very short-lived, with the result that a brief period of toleration rapidly gave way to a prolonged one of repression.

Recognition occurred only after a revived trade union movement had again succeeded in forging an alliance arising out of mutual need with elements of the executive. In 1946, the incoming Peronist government granted registered and therefore state-approved unions a combination of benefits (American-style sole bargaining rights and conditional support from the Labor Secretariat), specific liberties (organising and bargaining rights) and some vaguer participative powers. This system was legally formalised in 1953 but by then its dependence on state sponsorship had become clear, with the result that it became increasingly difficult for unions to exercise their liberties and their powers disappeared once they refused to become unquestioning clients of the executive. Succeeding periods of Peronist dictatorship, military repression, liberalisation, military repression, the restoration of Peronism, military repression, and beginning in 1983 liberalisation again have left the system remarkably unchanged formally. Instead, it has simply been in varying states and degrees of suspension. Ironically and tragically, in institutional if not industrial terms the unions have tended to do best during periods of repression, when they have become the repositories of oppositional sentiment. The result is that their

leaders have tended to become self-interested political brokers rather than effective economic negotiators, able to block the construction of a new system but unable to restore the old one.

### CONCLUSION

The preceding discussion makes it clear that, of the cases discussed, only the United States has a form of economic citizenship whose critical premise is a 'liberty', whilst other systems that are not only wholly justiciable but also far more effective in their contexts have been democratically approved and have as their critical premises either powers (Australia and France) or claims (Japan and Sweden). It also makes clear therefore that whilst the major failings of the less effective or otherwise flawed systems (Argentina and Brazil) relate to limitations on freedom of association, this does not necessarily mean that they should be reconstructed on American lines but most likely that the existing claims and powers – that is, what are referred to as social and economic rights in international human rights discourse – should be more effectively articulated with this 'liberty'.

The latter point seems to me to become all the more compelling once one recognises that the context within which we now have to think about labour rights is marked by two significant changes: first, a shift from possession to control as the critical dimension of employment relations; and second, the onset of a process of economic globalisation that has thus far been guided by a neo-liberalism that is intrinsically hostile to labour rights in general and to those configured in terms of powers and claims in particular. In order to bring out the significance of these changes, I would like to approach my conclusion by specifying the national and transnational context-dependency of the effectiveness of the various modalities of legal intervention in the capital/labour relation by comparing two

polar cases. In a 'Northern' economy (like that of the United States in the 1950s) composed primarily of medium-sized and/or first-generation corporate capitals, operating at the heads of commodity chains, within a protected market, and producing goods for which there is strong domestic demand, a traditional labour law system configured in terms of liberties and focused on possessory relations may often be sufficient to allow labour to secure some redress of the inequalities that are intrinsic to capitalist relations of production. Under such circumstances an employer possesses some autonomy and labour is free to attempt to take advantage of this. However, in a strongly dualistic 'Southern' economy (like that of Brazil and the South more generally today), wherein a large number of petty commodity producers and small capitals are organised by a small number of large capitals (many of which are transnationals), operating within an 'open' global market at the lowest level of the commodity chain, a traditional labour law system configured in terms of liberties is most unlikely to be adequate to secure labour's ability to seek a redressing of the imbalances in the employment relation. Although possessory relations may continue to be the most salient of the elements within the property relation to local capitals as such, the wider economic context and especially local capital's subordination to transnational capital means that the control relations that are most salient to transnational capital take effective precedence in the governance of the small enterprises and so render moot the effects of a labour law system based on liberties.

In sum, under the latter circumstances the local employer often possesses very little autonomy and so it is often beside the point that one has the liberty to attempt to force him or her to exercise it to labour's benefit. As in the case of many Northern main contractor/subcontractor relations too, if the exercise of such a liberty interrupts production, the corporation at the head of the commodity chain can readily reduce its orders or seek new suppliers and in this way render labour's local liberties and therefore the idea of economic

citizenship largely meaningless. The obvious solution from labour's point of view is that economic citizenship too should be globalised. At first sight this may seem to be a far less daunting task than the non-specialist might suppose, since not only have most labour rights already been globalised in the form of the conventions promulgated by one of the oldest global organisations, the International Labour Organisation (ILO), but also these conventions privilege no particular variety or configuration of labour rights. Thus the preamble to the ILO's constitution, which was written in 1918 and remains unchanged, reads as follows:

Whereas universal and lasting peace can be established only if it is based upon social justice;

And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement in those conditions is urgently required; as, for example, by the regulation of the hours of work, including the establishment of the maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of equal remuneration for work equal value, recognition of the principle of freedom of association, the organisation of vocational and technical education and other measures;

Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries ...

The problem with the conventions which now embody the rights prefigured in the preamble is that, whilst member states are undeniably under pressure to ratify them, there is no compulsion. Moreover, although they may be subject to criticism if they violate any conventions they have ratified, no significant sanctions can be imposed upon them. Thus it is profoundly ironic that the most serious effort thus far to address these weaknesses, namely the ongoing efforts to add what is known as the 'social clause' to the protocols of the World Trade Organisation (WTO), should also represent a perhaps even more serious assault on their potential global pertinence.

The proposed 'social clause', whose violation could result in the imposition of trade sanctions on offending states, consists of seven already existing ILO conventions that have been selected from a total of more than 180 such conventions and defined as 'core'. These seven conventions are those pertaining to: freedom of association and protection of the right to organise; the right to organisation and collective bargaining; forced labour; abolition of forced labour; discrimination in employment; equal remuneration; and the establishment of a minimum age for employment. Thus the problem is, as I have explained at length elsewhere (Woodiwiss, 2000), not so much that the efforts to introduce a 'social clause' have failed so far as that the proposed set of 'core labour standards' is inadequate to the task of securing economic citizenship within a global environment. This is because, reflecting the American origin of the proposed 'social clause', it emphasises the very liberties whose effectiveness globalisation has so dramatically reduced. Moreover, it is much easier for Western governments to ratify and locally enact the core standards than it is for Southern ones. This automatically and I am sure unintentionally presents many Southern societies in a bad light, which is not warranted if one takes into account their achievements across the full range of labour standards. Most Western societies have little trouble agreeing

that, for example, child labour, gender or racial discrimination in employment, and limitations on freedom of association are bad things that something can be done about, because of the existence of powerful or at least well organised pressure groups within them. By contrast, in many Southern societies not simply the absence of such groups but also sometimes the presence of antithetical but nevertheless valued cultural preferences make it very difficult to agree that such practices are bad, let alone that something should be done about them.

In other words, what may make it especially galling for some developed Asian as well as Southern nations and indeed employers to see themselves rhetorically disadvantaged in this way is the fact that the current core standards exclude the possibility of any reference to their achievements with respect to standards outside of the proposed core standards. These latter, as I have suggested above in my account of developments in Japan and elsewhere in my accounts of developments in Hong Kong and Singapore (Woodiwiss, 1998), are standards that are consistent with their values, and supported by their social-structural arrangements and generally mitigate the consequences of any derelictions with respect to the proposed core standards.

All that said, of course the securing of the liberties included in the proposed core should be part of any future effort to globalise economic citizenship, since they provide employees with the means to take part in the enforcement of their entitlements. However, as is re-emphasised by the fact that it is only in the inter-governmental context represented by the WTO that talk of labour rights carries any weight in global economic circles, the currently proposed set of core labour standards ought to be augmented by those that grant labour powers to participate in economic decision-making and/or recognise its compensatory claims. As the histories I have outlined above demonstrate, such powers and claims represent the means through which economic citizenship has actually been secured

in many societies. Moreover, the far greater economic security today of working people in those more developed societies where labour rights have been configured as powers and claims rather than as liberties alone suggests that the former are likely to be ever more widely recognised even in countries like Argentina and Brazil as the most effective means through which economic citizenship may be secured in a globalising economy. At the moment and ironically this effectiveness is most often recognised by those who are least supportive of the values underlying the idea of economic citizenship and who describe its consequences as 'labour market rigidities'. My point being that 'rigidity' and indeed 'inflexibility' do not simply suggest obstacles but also connote strength, resistance and the necessity of negotiation and/or democratic resolution if obstacles to competitiveness or whatever are to be overcome. In other words, they connote that demand for respect which has always motivated those who believe in economic citizenship (for a contemporary, sociological version of this demand see Twine, 1994).

## NOTES

1. The present chapter is an abridged and reworked version of a piece that was first written as a comparative sociological commentary on a series of studies commissioned by the International Institute of Social History (Amsterdam) and selected by Marcel van der Linden of the Institute and Richard Price of the Department of History, University of Maryland (van der Linden and Price, 2000). The other participants and their areas of expertise were as follows:

James Adelman (Argentina), Suzanne Fransson (Sweden), Sheldon Garon (Japan), Dale Gibson (Canada), Michel Hall (Brazil), Norbert Olszak (France), Raymond Markey (Australia), Gerry Rubin (United Kingdom), G.S. Shieh (Taiwan), and Katherine Stone (United States).

2. I owe this tripartite 'sociological' conception of the property relation to the work of Kelvin Jones (1982, pp. 76ff). I have defined the critical terms elsewhere (Woodiwiss, 1990a: 130–1) in the following way:

As I read Jones, by 'possession' he means the narrowly economic ability to determine the use or operation, as such, of the production process. By

'control', he means the ability or power to determine the actual deployment of means of production in the production process. Finally, what he means by 'title' refers to the signficatory basis upon which claims to any surplus may be made, and so it is not restricted to: 'the formal legal right to a claim upon a company or an estate but depends upon the sorts of calculations which govern the circulation of legal titles ... title involves the sort of calculations and conditions that govern the more general provision of finance, the socialisation of debt, the exchange of guarantees and the constitutional position of shareholders' (Jones, 1982: 77–8).

In addition, and critically, Jones also points out that whereas within small and medium-size enterprises the possessory relation is critical, within large corporate enterprises the control relation is critical. Thus, as I have explained elsewhere (Woodiwiss, 1990b: 272), where labour law systems do not include provisions relating to codetermination and/or title-sharing (e.g. the Swedish Wage Earner Funds), which means in most of the world outside of Western Europe, their pertinence is largely confined to a set of relations (possessory) that are of decreasing significance as loci of power within contemporary economies. Consequently, one may argue that the legal position of trade unions has been weakened throughout much of the world as much by the increasing irrelevance of extant labour law as by restrictive 'reforms'.

3. Both Neumann and Kahn-Freund also refer to a fourth phase of 'incorporation' or 'integration' (Kahn-Freund, 1981: 30 108–61; and see also Ramm, 1986) where the central institutions in the sphere of industrial relations are participative and include a central role for special labour courts. Although it would be inappropriate to fully justify this conclusion here, I have not sought to discern such a phase in the histories I am considering because I am not convinced that it can be clearly distinguished from that of recognition. Suffice it to say that I do not regard the presence of participative and judicial institutions as necessarily incorporative, let alone fascistic, in their effects since the wider social significance of the legal powers upon which they rest can vary greatly depending upon liberties and/or claims with which they are articulated as well as on the nature of the social context within which they are embedded – *vide* Sweden.

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