THE NEW DISCOURSE OF LABOR RIGHTS: FROM SOCIAL TO FUNDAMENTAL RIGHTS?

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Social rights are like paper tigers, fierce in appearance but missing in tooth and claw.[1]

I INTRODUCTION

In *The Great Transformation*, the political economist Karl Polanyi showed how during the Industrial Revolution British "society protected itself against the perils inherent in a self-regulating market system."[2] Polanyi's "double movement" captured the dynamic relationship between market expansion and social institutions. First published as World War II was ending, *The Great Transformation* also provided a way of understanding the relationship between Keynesian economic expansion and the emergence of the welfare state. Today, it can be used to explain the increased interest in social rights, which has been "one of the side effects of globalization."[3]

Supra-national trade agreements combined with and supported by neo-liberal values and political arrangements have resulted in the transformation of the welfare state and an emphasis on the market as the best mechanism of distribution and of service provision. The shift from a Fordist to a digital economy has restructured global and local

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1. Bob Hepple, *Enforcement: The Law and Politics of Cooperation and Compliance*, *in* SOCIAL AND LABOUR RIGHTS IN A GLOBAL CONTEXT 238 (Bob Hepple ed., 2002).

2. KARL POLANYI, THE GREAT TRANSFORMATION 76 (Beacon Press, 1957).

3. Simon Deakin, *Social Rights in a Globalized Economy*, *in* Labour Rights as Human Rights 25 (Philip Alston ed., 2005).

labor markets and has led to increasing inequality.[4] According to the World Commission on the Social Dimension of Globalization, an independent and representative group that was established in 2002 by the International Labour Organization (ILO) in order to find a common ground on the question of the social dimension of globalization, a problem with the current process of globalization is that it is

> generating unbalanced outcomes, both between and within countries. Wealth is being created, but too many countries and people are not sharing in its benefits. They also have little or no voice in shaping the process. Seen through the eyes of the vast majority of women and men, globalization has not met their simple and legitimate aspirations for decent jobs and a better future for their children.[5]

The renewed emphasis on social rights in the mid-1990s was part of the movement to recognize the social dimension of globalization and to re-embed the labor market in society. It is another example of Polyani's double movement.

The language and logic of human and social rights is increasingly being used in the field of labor law. The ILO's 1998 Declaration of Fundamental Principles and Rights at Work and the European Union's 2000 Charter of Fundamental Rights[6] are two of the most prominent examples of the characterization of labor rights as fundamental rights at the international and supranational level. In Canada, unions have attempted to persuade the Supreme Court of Canada that key collective labor rights—such as trade union representation and collective bargaining—are fundamental rights.[7] The central challenge to the expansion of markets via globalization

4. Judy Fudge & Rosemary Owens, *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms*, *in* PRECARIOUS WORK, WOMEN, AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS 4 (Judy Fudge & Rosemary Owens eds., 2006).

5. WORLD COMM'N ON THE SOCIAL DIMENSION OF GLOBALIZATION, INT'L LAB. ORG., A FAIR GLOBALIZATION: CREATING OPPORTUNITIES FOR ALL x (2004), *available at* http://www.ilo.org/public/english/wcsdg/docs/report.pdf.

6. For a full text of the Charter with explanatory notes, see Charter of Fundamental Rights of the European Union, Dec. 18, 2000, 2000 O.J. (C 364/1), *available at* http://www.europarl.europa.eu/charter/pdf/text_en.pdf.

7. DEREK FUDGE & JOHN BREWIN, COLLECTIVE BARGAINING IN CANADA: HUMAN RIGHTS OR CANADIAN ILLUSION? (2005); ROY ADAMS, LABOUR LEFT OUT: CANADA'S FAILURE TO PROMOTE COLLECTIVE BARGAINING AS A HUMAN RIGHT (2006). This attempt to persuade the Canadian Supreme Court that collective bargaining is constitutionally protected was recently successful. *See* Health Services and Support—Faculties Subsection Bargaining Association v. British Columbia (2007) SCC27. For a discussion of that case, see Judy Fudge, *The Supreme Court of Canada and the Right to Bargain Collectively: The Implications of the Health Services and Support Care in Canada and Beyond*, IND. L.J. (forthcoming 2007).

and neo-liberalism has been "the struggle for social rights, not least labor standards, in pursuit of freedom."[8]

Neo-liberalism has discredited the welfare state and the new economy has accelerated the breakdown of the traditional firm, which was the basis upon which unions were organized in developed non-socialist countries after World War II. This transformation in political ideology and economic reality has had a profound impact on the traditional supports for labor rights. Laws that protected and promoted trade unions have been undermined as the economy and the structure of enterprises have changed or have been refashioned to promote competition via individual contracting. As Boaventura de Sousa Santos explains, "the disembedding of the economy from society brought about by neo-liberal globalization, which reduced labour down to a mere factor of production, has curtailed the possibility of labour to sustain and be a conduit for the enjoyment of the rights of citizenship even in the core countries."[9] With the decline of the traditional vehicles for social rights, such as the welfare state and collective bargaining, Simon Deakin has observed, "legal and constitutional mechanisms are increasingly being used to assert social claims."[10] Law's prominence is a distinctive feature of the contemporary discourse of social rights.

This article explores the emergence of the new discourse of labor and social rights in the world of work and focuses in particular on how this discourse is being used in the European Union (EU) and the ILO. I argue that this new normative language is an example of Polyani's double movement in that it responds to the need to re-institutionalize the employment relationship in light of economic restructuring, the breakdown of the standard employment relationship, and the challenge to traditional forms of collective representation.[11] The new discourse of labor rights also involves a realignment of the relationship between social rights and the market, and a reconceptualization of the juridical nature of social rights.[12] However, this new discourse is both indeterminate and contested. To support

8. Lord Wedderburn, *Common Law, Labour Law, Global Law*, *in* SOCIAL AND LABOUR RIGHTS IN A GLOBAL CONTEXT 54 (Bob Hepple ed., 2002).

9. BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION 480 (2d ed. 2002).

10. Deakin, *supra* note 3, at 52.

11. ALAIN SUPIOT, BEYOND EMPLOYMENT: CHANGES IN WORK AND THE FUTURE OF LABOUR LAW IN EUROPE (2001).

12. Deakin, *supra* note 3, at 39; Brian Langille, *Core Labour Rights—The True Story*, *in* SOCIAL ISSUES, GLOBALISATION AND INTERNATIONAL INSTITUTIONS: LABOUR RIGHTS AND THE EU, ILO, OECD AND WTO 89 (Virginia A. Leary & Daniel Warner eds., 2006), *reprinted from Core Labour rights – The True Story (Reply to Alston)*, 16 EUR. J. INT'L L. 409 (2005).

my argument I examine the idea of social rights relating to work from three perspectives—genealogical, conceptual, and normative. I begin by sketching the lineage of labor and social rights starting with T.H. Marshall's influential conception in the aftermath of World War II and ending with the contemporary discourse. This part provides a genealogy of the conventional narrative about the history of civil, political, and social rights that emphasizes their relationship to each other.[13] The purpose of this genealogy is to illustrate the extent to which the new language of labor and social rights is a response to the new phase of market expansion associated with globalization and neo-liberalism. The third part shifts focus to examine elements in the new discourse of labor and social rights, especially the increased prominence of law and the conventional typology of different kinds of rights. Here I use labor rights to illustrate some of the weaknesses of the conventional typology. However, instead of offering a new typology of different types of rights, in the fourth part I offer a taxonomy of the different dimensions of labor and social rights, which concentrates on the juridical nature of social rights in the EU. The emphasis is on showing the different juridical forms—constitutional, legislative, and policy—that social rights can and do take. In the final part, I provide a brief discussion of the normative basis of the new discourse of labor and social rights at the EU and ILO, which invokes the work of Amartya Sen, especially his concept of capability. The article concludes by considering whether the "new rhetoric of social rights as embodied in institutions such as the ILO Declaration of Fundamental Rights and Principles at Work (1998) and the EU Charter of Fundamental Rights (2000) match the reality of the new world of market regulation and growing global inequality."[14]

II. THE GENEALOGY OF LABOR AND SOCIAL RIGHTS

Polanyi's insight, as described by Guy Standing, was that "every period of economic reconstruction, associated with major technological change and the renewed pursuit of flexibility, has

13. The genealogical approach that I adopt here is one that traces the line of descent of the concept of social rights from T.H. Marshall. It does not provide a history of the social forces that led to the emergence and institutionalization of social rights. For a similar use of a genealogical approach see also Simon Deakin, see *supra* note 3, and Judy Fudge, *After Industrial Citizenship: Market Citizenship or Citizenship at Work?*, 60 RELATIONS INDUSTRIELLES 631 (2005). This type of genealogical approach was used to great effect by Nancy Fraser & Linda Gordon, *A Genealogy of 'Dependency': Keyword of the U.S. Welfare State*, 19 SIGNS 309–36 (1994), who acknowledge their indebtedness to Raymond Williams, and their modification of Michel Foucault's genealogical approach.

14. Hepple, *supra* note 1, at 2.

eventually induced a counter-movement to provide new systems of social protection compatible with new structures and processes."[15] Polyani argued that government intervention in the economy was the inevitable outcome of "weaknesses and peril" inherent in the self-regulating market.[16] However, while government intervention is inevitable, the form that this intervention takes is not. The nature of the system of protection depends upon both the kind of economic restructuring that is occurring and the balance of political forces; for example, the poor laws of the industrial revolution in the 1830s had a much more coercive edge than the welfare state associated with the Fordism production regimes of advanced capitalist countries from the mid-1940s to the early 1980s.[17]

During the period after World War II, social rights were instituted as part of a wider effort to regulate the labor market and to re-forge the links between family life and the economy. Social rights were part of a broader discourse about citizenship and the market, which is best captured in T.H. Marshall's influential account of the evolution of modern citizenship, which was published in 1950. The welfare state of the mid- to late-twentieth century gave rise to a specific conception of social rights, one that was based on a model of social citizenship that was built upon the platform of employment.[18]

Marshall identified three distinctive elements of citizenship entitlements: civil, political, and social, which corresponded to distinctive sets of rights. According to him,

> [t]he civil element is composed of the rights necessary for individual freedom – liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, and the right to justice. . . . By the political element, I mean the right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body. . . . By the social element, I mean the whole range, from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in society.[19]

15. GUY STANDING, GLOBAL LABOUR FLEXIBILITY: SEEKING DISTRIBUTIVE JUSTICE 50 (1999).

16. POLYANI, *supra* note 2, at 145.

17. *See* SIMON DEAKIN & FRANK WILKINSON, THE LAW OF THE LABOUR MARKET; INDUSTRIALIZATION, EMPLOYMENT, AND LEGAL EVOLUTION (2005); ANTONELLA PICCHIO, SOCIAL REPRODUCTION: THE POLITICAL ECONOMY OF THE LABOUR MARKET (1992).

18. Deakin, *supra* note 3, at 34.

19. T.H. MARSHALL, CLASS, CITIZENSHIP AND SOCIAL DEVELOPMENT: ESSAYS BY T. H. MARSHALL 78 (Anchor Books 1965) (1964), *reproduced in* CHRISTOPHER PIERSON & FRANCIS G. CASTELLS, THE WELFARE STATE 32 (Cambridge: Polity Press, 2000).

The three categories of rights with different institutions corresponded to different stages in the development of the modern state. Civil rights, an eighteenth century achievement, enabled workers to free their labor from the ties of the land, and provided a basis for the exchange of property and ideas. The common law and courts were the institutional foundation of civil rights, which were profoundly individual in character, and their fundamental value was liberty. The extension of the franchise in late nineteenth century Britain marked the era of political citizenship and added democracy to liberalism's core values. Parliament and local governments provided the institutional supports for political rights, which made those exercising political authority accountable to the majority of the people. Social rights are the distinctive contribution of the Keynesian-welfare state, fusing citizenship rights "onto the welfare state form and an ever-widening net of social policies that provided each citizen with a modicum of economic security and opportunities for social mobility."[20] A central feature of social rights is the decommodification of labor through the existence of a social safety net and labor standards that ameliorate the harshness of the market. Public services, typically delivered by a government bureaucracy, and trade unions were the institutional platforms for social rights and equality was the core value.

A distinctive feature of social rights is that they address "the inherent contradiction in liberal democracies between the promise of citizenship equality and the harsh inequalities generated by capitalist markets."[21] Social rights contemplate a redistributive role for the state and include "a prevailing standard of living and a reduction of the inequalities associated with the market through state provision of some economic goods and services, including education and social services."[22] Marshall regarded social rights as an invasion of status into contract and the penetration of social justice into the market.[23] This dimension of social rights leads to possible conflicts with civil rights, and it is the exercise of political rights that gives social rights their authority and legitimacy.[24] The conflict between different generations of rights combined with social rights' dependence on the exercise of political rights helps to account for the problematic legal

20. Janine Brodie, *Citizenship and Solidarity: Reflections on the Canadian Way*, 6 CITIZENSHIP STUD. 377, 378 (2002).

21. *Id*. at 380.

22. J.M. BARBALET, CITIZENSHIP RIGHTS, STRUGGLE AND CLASS INEQUALITY 6 (1988).

23. DEAKIN & WILKINSON, *supra* note 17, at 344.

24. BARBALET, *supra* note 22, at 20.

status of social rights, a conflict that is most pronounced in common law liberal democracies.

Social rights have a much more ambiguous legal status than either civil or political rights. Unlike civil rights, social rights are rarely justiciable, and if they are, courts have tended to be suspicious of them. According to Simon Deakin and Brian Wilkinson, a striking feature of the British social legislation during the height of the welfare state was "how few justiciable legal rights it conferred upon individuals, either as workers or recipients of social security."[25] They also note that Marshall supported the absence of a clear legal framework of social rights. Social rights were based upon the "superstructure of legitimate expectations" in a society, and they depended upon a system of public provision and required some form of collective financing. They were based more upon public policy and union negotiation than upon legal entitlement.

Although the United Kingdom's system of collective laissez-faire and occupational rights was an extreme example of social rights built upon an extra-legal base, during the post-war period human rights were generally divided into different types with different legal statuses.[26] According to Ivan Hare, even the 1948 *Universal Declaration on Human Rights*, which contains both civil and social rights, "reads like two distinct documents which have been rather inelegantly stuck together."[27] The distinction between civil and political rights, on the one hand, and social and economic rights, on the other, deepened with the Cold War, and in 1952 the United Nation's General Assembly passed a resolution to divide the rights proclaimed in the UDHR into two separate covenants. The *International Covenant on Civil and Political Rights* (ICCPR) and the

25. DEAKIN & WILKINSON, *supra* note 17 at 343. It is important to note the extent to which Deakin and Wilkinson consider law to be identified exclusively with justiciable rights and not with legislation.

26. The UDHR was part of a global enabling framework established during the post war period that was part of an effort to create a global economic system premised on the unimpeded flow of capital. Drawing on the lessons of inter-war protectionism and nationalism, at the 1944 Bretton Woods Conference, the International Monetary Fund and the World Bank were formed, and in 1947 the General Agreement on Trade and Tariffs was created. The United Nations was the political foundation of the global economic order and the UDHR was its statement of fundamental principles. *See* MICHELINE R. ISHAY, THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA 211 (2004); GARY TEEPLE, THE RIDDLE OF HUMAN RIGHTS 19(2004).

27. Ivan Hare, Social Rights and Fundamental Human Rights, *in* SOCIAL AND LABOUR RIGHTS IN A GLOBAL CONTEXT 153, 154 (Bob Hepple ed., 2002).

International Covenant on Economic, Social, and Cultural Rights (ICESCR) were adopted in 1966, and came into force in 1976.[28]

Not only were the rights enumerated in the two Covenants different, with the ICCPR emphasizing autonomy and the ICESCR stressing reciprocity, so too were the obligations placed upon the states and the means of enforcing them.[29] Civil and political rights were regarded as individual legal rights against the state; they were justiciable in that individuals could complain to an authoritative adjudicative body that their rights have been violated and obtain some sort of remedy. By contrast, economic and social rights were regarded as programmatic, subject to progressive implementation, and requiring positive state action. The different conceptions of these two groups of rights triggered a debate about the juridical nature or "justiciability" of socio-economic rights; that is, their enforceability in the courts or other adjudicative tribunals. The initial classification of the ICESCR as promotional and non-justiciable led to its "theoretical marginalization in the international human rights system," and this marginalization was compounded by political developments.[30] The Council of Europe, which was founded in 1949, also treated civil and political rights differently from social and economic rights, and like the ICESCR, social rights were (and are) not directly justiciable.[31]

Social rights were the foundation of welfare states, and they were both inspired by and inspired international labor law.[32] Labor rights were first recognized at the international level when the ILO was

28. ANTHONY WOODIWISS, HUMAN RIGHTS 102–06 (2005); *see* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XX1), 21 UN GAOR, (Supp. No. 16) 52, UN Doc A/6316, 99 U.N.T.S. 171 (Dec. 16, 1966) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XX1), 21 UN GAOR, (Supp. No. 16) 52, UN Doc A/6316, 993 U.N.T.S. 3 (Dec. 16, 1966) [hereinafter ICESCR].

29. Signatories to the ICCPR are supposed to guarantee that the rights contained therein are immediately enforceable and they are "obliged to adopt . . . such measures as may be necessary to give effect to the rights." ICCPR, *supra* note 29, art. 2(2). Although it is very complicated and there are very limited remedial powers, the ICCPR procedures allow individual complaints to pass to a committee of experts. By contrast, a signatory to the ICESCR is required to "take steps, individually and through international assistance and co-operation . . . to the maximum of its available resources, with a view to achieving progressively the full realization of rights . . . by appropriate means, including . . . the adoption of legislative measures." ICESCR, *supra* note 28, art. 2(1). There is no individual complaint mechanism under the ICESCR, and oversight was purely political until a supervisory committee was established in 1985. *See* HENRY STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 126 (1996) ; WOODIWISS, *supra* note 28, at 103–06; TEEPLE, *supra* note 26, at 19–20.

30. MARY DOWELL-JONES, CONTEXTUALISING THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHT: ASSESSING THE ECONOMIC DEFICIT 3(2004).

31. Jeff Kenner, *Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility*, *in* ECONOMIC AND SOCIAL RIGHTS UNDER THE EU CHARTER OF FUNDAMENTAL RIGHTS 1, 2 (Tamara Hervey & Jeff Kenner eds., 2003).

32. CHRISTINE KAUFMANN, GLOBALIZATION AND LABOUR RIGHTS: THE CONFLICTS BETWEEN LABOUR RIGHTS AND INTERNATIONAL ECONOMIC LAW 51 (2007).

founded in 1919, during a period of profound labor unrest in many countries. They were seen as workers' rights and their role was to promote social justice and to provide minimum standards to workers as protection against the increased competition that was likely to occur with the expansion of international trade.[33] However, in 1944 the constitutional objectives of the ILO were reviewed in light of the atrocity of "[c]oncentration camps, in which not only genocide but also forced labour was rife. . . . In this context, workers' rights came to be viewed as human rights; they stemmed from a recognition of human dignity."[34] After World War II, the principle that labor is not a commodity, which was part of the *1944 Declaration of Philadelphia*, became part of the ILO's constitution and freedom of association and collective bargaining were recognized as fundamental rights.[35] In 1946, the ILO became the first specialized agency of the United Nations and in 1948 the UDHR recognized the freedom of association and the right to join trade unions as fundamental. Labor rights were explicitly recognized within the ICESCR.[36]

The political and economic basis for social rights began to be undermined in the 1970s, and by the 1980s, the Keynesian welfare state was in a deep and irrevocable crisis.[37] Neo-classical economics, which came into ascendancy in the 1970s, called into question the utility of Keynesian policies, and Milton Friedman, Robert Nozick, and Frederick Von Hayek questioned the normative foundations of the welfare state, emphasizing individual civil rights as the route to human freedom. The ideological challenge to the welfare state was

33. Philip Alston, *'Core Labour Standards' and the Transformation of the International Labour Rights Regime*, *in* SOCIAL ISSUES, GLOBALISATION AND INTERNATIONAL INSTITUTIONS: LABOUR RIGHTS AND THE EU, ILO, OECD AND WTO 7–8 (Virginia A. Leary & Daniel Warner eds., 2006). First published as *'Core Labour Standards' and the Transformation of the International Labour Rights Regime*, 13 EUR. J. INT'L L. 457 (2004).

34. TONIA NOVITZ, INTERNATIONAL AND EUROPEAN PROTECTION OF THE RIGHT TO STRIKE: A COMPARATIVE STUDY OF STANDARDS SET BY THE INTERNATIONAL LABOUR ORGANIZATION, THE COUNCIL OF EUROPE AND THE EUROPEAN UNION 99 (2003).

35. *Id*. at 95–123.

36. *See* Patrick Macklem, *The Right to Bargain Collectively in International Law: Workers' Rights, Human Rights, International Rights?*, *in* LABOUR RIGHTS AS HUMAN RIGHTS 61 (Philip Alston ed., 2005); Jo Hunt, *Fair and Just Working Conditions*, *in* ECONOMIC AND SOCIAL RIGHTS UNDER THE EU CHARTER OF FUNDAMENTAL RIGHTS 46, 50–51 (Tamara K. Hervey & Jeff Kenner eds., 2003); KAUFMANN, *supra* note 32, 34–44. The ICCPR also recognizes the freedom of association in Article 22.

37. Robert Howse, Brian Langille & Julien Burda, *The World Trade Organization and Labour Rights: Man Bites Dog*, *in* SOCIAL ISSUES, GLOBALISATION AND INTERNATIONAL INSTITUTIONS: LABOUR RIGHTS AND THE EU, ILO, OECD AND WTO 158 (Virginia A. Leary & Daniel Warner eds., 2006). Howse, Langille, and Burda refer to the post-war accord as a form of "embedded liberalism," which signals their use of Polanyi's understanding of the labor market as a socially embedded institution and acts as a conceptual framework for understanding labor rights.

reinforced by the economic transformation that destabilized the Fordist production regime. Globalization, which was spurred by digital technologies, combined with neo-liberalism to undermine both the sovereignty of the nation state, which traditionally has been the main author of social welfare and labor legislation, and the traditional goals of labor protection and enhancing workers' agency through democratic participation.[38]

Deeper economic integration across national boundaries placed constraints upon the ability of elected governments to develop and to implement policies that are at odds with the central tenets of neo-liberalism. Promoted by such international financial institutions as the International Monetary Fund (IMF) and the World Bank, neo-liberalism emphasized international free trade, deregulation (especially of labor markets), and privatization.[39] Along with the Organization for Economic Cooperation and Development (OECD), these institutions blamed labor market rigidities for poor economic performance and especially for unemployment. They advocated a largely decentralized structure of bargaining and workplace norm setting within a market governed greatly by the property and contract rights of employers.[40] They also urged countries to switch from passive labor market policies, such as unemployment insurance, to more active policies that involve workfare. Social rights were subordinated to civil rights and their scope contracted as their traditional institutional supports, trade unions and the welfare state, were weakened. Moreover, because they were not seen as engaging fundamental civil or political rights, social and labor rights were especially vulnerable to legislative retrenchment.

Globalization and neo-liberalism have set in motion their own double movement. The gulf between social justice and international economic agreements has increasingly become a cause for concern, as it is perceived to be a source of social and political instability. However, proposals to link social clauses to trade agreements were rejected as they raised concerns from developing countries that such

38. Harry Arthurs, *Labour Law without the State*, 46 UNIV. TORONTO L.J. 1 (1996); Adelle Blackett, *Global Governance, Legal Pluralism and the Decentred State: A Labor Law Critique of Codes of Conduct*, 8 IND. J. GLOBAL LEGAL STUD. 401 (2001).

39. Guy Standing, *Brave New Words? A Critique of Stiglitz's World Bank Rethink*, 31 DEV. & CHANGE 737 (2000); KERRY RITTICH, RECHARACTERIZING RESTRUCTURING: LAW, DISTRIBUTION AND GENDER IN MARKET REFORM (2002).

40. Kerry Rittich, *Rights, Risk, and Reward: Governance Norms in the International Order and the Problem of Precarious Work*, *in* PRECARIOUS WORK, WOMEN AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS 31 (Judy Fudge & Rosemary Owens eds., 2006).

clauses were a form of disguised protectionism. In this context, the ILO has become "a social mediator in the process of globalization."[41] At the United Nations' World Summit for Social Development in Copenhagen in 1995 and the World Trade Organization Conference in Singapore in December 1996, world leaders reaffirmed the important role of the ILO with regard to basic workers' rights.[42] In 1998, the International Labour Conference issued the *Declaration on Fundamental Principles and Rights at Work* and its follow-up, which is known as the *Social Declaration*.[43] Like the 1944 Declaration of Philadelphia, the Social Declaration and its follow-up imposes a constitutional obligation that does not depend upon voluntary acceptance and it recognizes that social justice and economic progress are inextricably linked.[44]

The *Social Declaration* identifies four categories of fundamental rights at work: freedom of association and the effective recognition of the right to effective collective bargaining; elimination of forced and compulsory labor; effective prohibition of child labor; and elimination of discrimination in employment and occupation. At the same time, as the ILO has limited what it counts as core labor rights, it has also elevated them to the status of human or fundamental rights. This characterization emphasizes the universal nature of the standards selected as core rights and is intended to liberate them from analysis solely in economic terms.[45] These rights are grounded in respect for human dignity and can no longer be trumped by economic efficiency; they "go to the essence of human dignity at work, touching upon bedrock values of freedom and equality."[46] According to the official story, the rights listed in the *Declaration* are regarded as core because they are essential for workers to engage freely in the market, and they are procedural rather than substantive in that they restrict the nature

41. NOVITZ, *supra* note 34, at 104.

42. Brian Langille, *The ILO and the New Economy: Recent Development*, 15 INT'L J. COMP. LAB. L. & INDUS. REL. 229, 240–41 (1999); Eddy Lee, *Globalization and Labour Standards: A Review of the Issues*, 136 INT'L LAB. REV. 173 (1997); NOVITZ, *supra* note 34, at 102–06.

43. Int'l Lab. Org. [ILO], *Declaration on Fundamental Principles and Rights at Work and its Follow-Up*, *supra* note 6. See the very different assessments of the process leading to the Social Declaration and what the Declaration signifies. Alston, *supra* note 33; Langille, *supra* note 12.

44. BOB HEPPLE, LABOUR LAWS AND GLOBAL TRADE 59 (2004); NOVITZ, *supra* note 34, at 104; GEORGE TSOGAS, LABOR REGULATION IN A GLOBAL ECONOMY 34 (2001).

45. Langille, *supra* note 42, at 41; Lee, *supra* note 42, at 181; NOVITZ, *supra* note 34, at 105.

46. Anne Trebilcock, *The ILO Declaration on Fundamental Principles and Rights at Work: A New Tool*, *in* THE ILO AND SOCIAL CHALLENGES OF THE 21ST CENTURY: THE GENEVA LECTURES 105, 107 (Roger Blanpain & Chris Engels eds., 2001).

of contracting but they do not impose outcomes.[47] The justification of core fundamental rights "which treats economic and social policies as mutually reinforcing, marks a significant shift from the priority given in earlier ILO conventions to matters which were believed to have a direct effect on economic competitiveness, such as hours of work, night work, unemployment and minimum wage."[48] Moreover, the follow-up provides a promotional mechanism for achieving the fundamental rights, rather than supervisory procedures for ensuring compliance.[49]

As the traditional vehicles for labor and social rights—trade unions and the welfare state—have lost their luster, labor and social rights have been cast in the language of international human rights.[50] Patrick Macklem explains "while labour rights as workers' rights operate primarily to protect the domestic rights of workers from international competition, the normative significance of labour rights in international human rights law lies in the universality of the interests they seek to protect."[51] There has been a shift in the normative and conceptual grammar from that of international labor standards to that of international rights.[52] Casting labor rights as international human rights transforms "the legal matter at hand into a moral one – the moral and unjust denial of human dignity" and places them on a new symbolic plane.[53]

The fiftieth anniversary of the UDHR in 1998 provided an impetus to the discourse of international human rights.[54] A conception of labor rights as "international rights—as instruments that possess the potential to vest the international legal order with a measure of normative legitimacy by attending to state and non-state action that international law otherwise authorizes in the name of economic globalization or transnational production" is gaining ground.[55] The task of international labor and social rights is to mitigate the distributional and social consequences of this phase of market expansion.[56]

47. Francis Maupain, *Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights*, 16 EUR. J. INT'L L. 439 (2005); Langille, *supra* note 12, at 120. This claim is, as we shall see in Section IV, controversial.

48. HEPPLE, *supra* note 44, at 59.

49. KAUFMANN, *supra* note 32, at 73–74.

50. DE SOUSAS SANTOS, *supra* note 9.

51. Macklem, *supra* note 36, at 70.

52. Langille, *supra* note 12, at 422.

53. DE SOUSAS SANTOS, *supra* note 9, at 483; Alston, *supra* note 33, at 20.

54. Kenner, *supra* note 31, at 14.

55. Macklem, *supra* note 36, at 63.

56. *Id*.

The most significant recent step in the constitutional recognition of social rights was the proclamation of the Charter of Fundamental Rights of the European Union in Nice in 2000. There is no attempt to subordinate social rights to civil, political and economic rights or to hive them off. According to Jeff Kenner,

> the Charter's proclamation of indivisible values and its express reference to solidarity alongside dignity, equality and freedom, sends a clear message that the EU institutions, when carrying out their obligations, will be bound to take note of the more elevated position that economic and social rights now occupy. [57]

The solidarity rights that the Charter contains go beyond the core rights in the ILO's Social Declaration to include substantive rights or standards.[58] They not only include central labor rights such as the right to consultation, collective bargaining, strike, protection against unfair dismissal, and fair and just working conditions, they also encompass "social security and assistance, health care, and access to services of general economic interest."[59] However, it is the "EU's historical trajectory [that] has placed workers' rights in a more central position than is typically the case."[60]

The chief obstacle, however, of these new international labor and European rights is their lack of direct legal effect—they are not enforceable by the traditional method of individual complaints that are adjudicated.[61] The ILO has adopted a promotional mechanism to monitor member state recognition of the *Social Declaration,* instead of utilizing the existing supervisory machinery.[62] The method of enforcing social rights in the European Union—the Open Method of Coordination (OMC)—is in many respects similar to that provided in the ILO follow-up—since it is based on benchmarking and peer pressure.[63] The Charter is a proclamation by the European

57. Kenner, *supra* note 31, at 15.

58. Alston, *supra* note 33, at 40–41.

59. Sandra Fredman, *Transformation or Dilution: Fundamental Rights in the EU Social Space*, 12 EUR. L.J. 41, 56 (2006).

60. Claire Kilpatrick, *New EU Employment Governance and Constitutionalism*, *in* LAW AND NEW GOVERNANCE IN THE EU AND THE US 125 (Gráinne de Búrca eds., 206).

61. NOVTIZ, *supra* note 34, at 228.

62. HEPPLE, *supra* note 44, at 59–60.

63. JOEL F. HANDLER, SOCIAL CITIZENSHIP AND WORKFARE IN THE UNTIED STATES AND WESTERN EUROPE: THE PARADOX OF INCLUSION (2004); DIAMOND ASHIAGBOR, THE EUROPEAN EMPLOYMENT STRATEGY: LABOUR MARKET REGULATION AND NEW GOVERNANCE (2005); Janine Goetschy, *The Employment Strategy and European Integration*, *in* FIVE YEARS EXPERIENCE OF THE LUXEMBOURG EMPLOYMENT STRATEGY 96 (David Foden & Lars Magnusson eds., 2003) [hereinafter Goetschy, *Employment Strategy*]; Janine Goetschy, *The European Employment Strategy, Multi Level Governance and Policy Coordination: Past, Present, and Future*, *in* GOVERNING WORK AND WELFARE IN A NEW ECONOMY: EUROPEAN AND AMERICAN EXPERIMENTS 59 (Jonathan Zeitlin & David Trubeck eds., 2002) [hereinafter

Parliament, Council, and Commission, and does not establish any new power or task for the Commission or member states of the Union, or modify the powers or tasks defined by the Treaties.[64]

These new labor and social rights are very different from those that emerged with the welfare state. Bob Hepple identifies four features of "the new dawn of social and labour rights."[65] First, these new labor and social rights depart from Marshall's traditional conception of social rights in that that they are no longer opposed to the market, but rather they are seen as integral to efficient and competitive markets. Social rights are conceptualized as a form of institutionalized capabilities that enable people to participate effectively in the market.[66] Second, social rights no longer impose positive obligations on the state to intervene and provide services or benefits but rather function as interpretive norms and principles of institutional design. Third, the law's role in achieving social rights is being redefined. There is a movement away from establishing standards, which are enforced by sanctions to providing procedural rights to groups and individuals to participate in substantive standard setting and to monitor compliance. Fourth, the emerging structure of rights does not presuppose a contract of employment. The ILO's conception of decent work is far wider than the domain covered by the standard employment relationship and Fordist labor law. A group of experts appointed by the European Commission have recommended moving "beyond employment" in formulating policy responses that will guarantee decent work for all workers.[67]

Goetschy, *European Employment Strategy*]; Kerstin Jacobsson, *Soft Regulation and the Subtle Transformation of States: The Case of EU Employment Policy*, 14 J. EUR. SOC. POL'Y 355 (2004); David M Trubek & James Mosher, *New Governance, Employment Policy, and the European Social Model*, *in* GOVERNING WORK AND WELFARE IN A NEW ECONOMY: EUROPEAN AND AMERICAN EXPERIMENTS 33 (Jonathan Zeitlin & David Trubek eds., 2003); Kilpatrick, *supra* note 60, 121.

64. Kenner, *supra* note 31, at 14; Fredman, *supra* note 59, at 56.

65. Bob Hepple, *Introduction*, *in* SOCIAL AND LABOUR RIGHTS IN A GLOBAL CONTEXT: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 1, 15 (Bob Hepple ed., 2002).

66. Deakin, *supra* note 3; DEAKIN & WILKINSON, *supra* note 17; Simon Deakin & Jude Browne, *Social Rights and Market Order: Adapting the Capability Approach*, *in* ECONOMIC AND SOCIAL RIGHTS UNDER THE EU CHARTER OF FUNDAMENTAL RIGHTS 27 (Tamara K. Hervey & Jeff Kenner eds., 2003); SUPIOT, *supra* note 11.

67. SUPIOT, *supra* note 11; *see also* Amartya Sen, *Work and Rights*, 139 INT'L LAB. REV. 119 (2000).

III. TROUBLING THE CONVENTIONAL TYPOLOGY: THE PLACE OF LABOR RIGHTS

With globalization and neo-liberalism, the discourses of human and social rights have become entwined and the courts have taken on an increased prominence.[68] De Sousa Santos observed that "the double failure of democratic and welfare features of the state, which has been associated with the legislature and executive, has induced a dislocation of the legitimacy core of the state from the legislature and executive to the judiciary."[69] In the new discourse of labor and social rights discourse, these rights are seen as having an equivalent juridical status to civil and political rights.

However, the idea that labor and social rights should have equivalent juridical status to civil and political rights is far from problem free. Simon Deakin and Jude Brown identify two general sets of issues that need to be addressed.[70] First, why is it necessary to characterize labor and social entitlements as rights? What Marshall described as labor and social rights operated through social provision (services provided directly by government) and social regulation (collective bargaining and legislation), not via legal entitlement. Second, what is the link between social rights and the market, which is based upon civil rights? Marshall regarded the relationship as contradictory, and for that reason, social rights have been treated as subordinate to civil rights. In this part, I will begin to address these questions by examining the traditional typology of rights in order to see how it deals with labor rights.[71]

A. The Conventional Typology

The conventional typology tends to emphasize the difference between civil and political rights, on the one hand, and labor and social rights, on the other. According to Mary Dowell-Jones, "theorists have traditionally explained the perceived separateness of

68. John Tweedy & Alan Hunt, *The Future of the Welfare State and Social Rights: Reflections on Habermas*, 21 J.L. & SOC'Y 288, 289 (1994); Judy Fudge, *Legally Speaking: The Courts, the Market, and Democracy*, 19 SUP. CT. L. REV. 111 (2003); DAVID HARVEY, SPACES OF GLOBAL CAPITALISM: TOWARDS A THEORY OF UNEVEN GEOGRAPHICAL DEVELOPMENT 50–51 (2006).

69. Boaventura De Sousa Santos, *Law and Democacy: (Mis)Trusting the Global Reform of Courts*, *in* GLOBALIZING INSTITUTIONS: CASE STUDIES IN REGULATION AND INNOVATION 253, 276 (Jane Jenson & Boaventura de Sousa Santos eds., 2000).

70. Deakin & Brown, *supra* note 66, at 28.

71. Here, I am talking about rights in the legal, rather than the ethical sense. For a discussion of human rights from the ethical perspective see Amartya Sen, *Elements in a Theory of Human Rights*, 32 PHIL. & PUB. AFF. 315 (2004).

civil and political, and socio-economic rights by categorizing human rights into 'generations' based on theoretical origin and historical antecedence."[72] Civil and political rights are first generation rights deriving from the eighteenth century enlightenment theories of natural rights, whereas social rights are of a much more recent vintage (the twentieth century) and less stable heritage (socialism). Dowell-Jones explains "this classification creates an impression of there being a certain hierarchy at the heart of the international human rights system – that socio-economic rights are a later graft onto the 'pure' liberal theory of rights, which exudes shades of incompatibility between the two groups of rights."[73]

The difference in the nature of the obligations imposed by the different types of rights is seen as justifying their different juridical status. Civil rights are regarded as fundamental, universal, individual, absolute, and negative (in the sense that they are directed against the state and do not require the state to provide resources). They apply equally to everyone, and they are justiciable or enforceable in the courts. By contrast, social rights are seen as imposing different types of obligations, either positive obligations on the state to provide services or negative and positive obligations on private actors. They can be individual or collective and they may require that people be treated differently. They impose conditional and indeterminate obligations that are programmatic in nature.[74] Historically, social rights lacked a clear juridical status, and Marshall did not expect courts to play a predominant role in articulating social claims.[75]

Three broad (and overlapping) reasons are offered to justify why labor and social rights are not justiciable.[76] The first is that they require positive action by the state; that is, they require the state to commit resources rather than simply enjoin the state to stop certain activities or interventions. They also require that the state positively interfere with the activities of private actors by imposing obligations to bargain collectively or to pay a minimum wage. Jeffrey Jowell has opposed the constitutional recognition of social rights on the ground

72. DOWELL-JONES, *supra* note 30, at 14.

73. *Id.*

74. Kenner, *supra* note 31, at 3; BARBALET, *supra* note 22, at 68; TEEPLE, *supra* note 25, at 39; Hare, *supra* note 27, at 165; Asbjørn Eide, *Economic, Social and Cultural Rights as Human Rights*, *in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 9 (Asbjørn Eide, Catarina Krause & Allan Rosas eds., 2d ed. 2001).

75. BARBALET, *supra* note 22 at 30.

76. Dennis M. Davies, Patrick Macklem & Guy Mundlak, *Social Rights, Social Citizenship and Transformative Constitutionalism: A Comparative Assessment*, *in* LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES 511, 513–21 (Joanne Conaghan, Richard Michael Fischl & Karl Klare eds., 2002).

that "it is not the function of the constitution to predetermine the allocation of resources of the distribution or redistribution of wealth, or the proper place of the market."[77] The second is that "[s]ocial rights are often characterized as vague in terms of the obligations they mandate, progressive in terms of the steps required for their realization, and complex and diffuse in terms of the interests they protect."[78] Third, the separation of powers is invoked to justify the different juridical status of social rights. Courts are seen as lacking the institutional capacity to make the detailed budgetary assessments necessary to determine whether the state has allocated sufficient funds to particular classes of persons.

Each of these reasons has been discounted as a justification for a *sharp* separation between civil, political, labor, and social rights. All rights give rise to both positive and negative obligations and these obligations protect certain interests and not others.[79] Moreover, it is possible to define standards and to define social rights in a way that provides sufficient determinative content for an adjudicative setting.[80] Finally, all constitutional adjudication plunges the judiciary into the realm of social policy, and the courts have enormous flexibility in developing remedies that are attentive to the separation of powers.[81]

Yet, despite convincing attempts to highlight the artificiality of the distinction between different types of rights, either social rights are not included in state constitutions or, if they are, they "normally enjoy weaker legal enforcement."[82] There are two main reasons for the different juridical status of civil and political rights, on the one hand, and labor and social rights, on the other. The first has to do with private power, and especially the role of the market, and the second relates to public power, in particular the relationship between the different institutions of the state. The distributive labor and social rights of the welfare state interfere with the market, which is based upon civil rights, and this conflict needs to be addressed if social rights

77. Jeffrey Jowell, *Is Equality a Constitutional Principle?*, 47 CURRENT LEGAL PROBS. 1 (1994), *quoted in* Hunt, *supra* note 36, at 49.

78. Davies, Macklem & Mundlak, *supra* note 76, at 518.

79. Hare, *supra* note 27, at 159–66; Davies Macklem & Mundlak, *supra* note 76; Sandra Liebenberg, *The Protection of Economic and Social Rights in Domestic Legal Systems*, *in* Economic, Social and Cultural Rights: A Textbook 55, 58–60 (Asbjørn Eide, Catarina Krause & Allan Rosas eds., 2d ed. 2001); Kenner, *supra* note 31, at 3; Hunt, *supra* note 39, at 47.

80. Davies, Macklem & Mundlak, *supra* note 76, at 518–19; Kenner, *supra* note 31, at 4; Liebenberg, *supra* note 79, at 60–61.

81. Davies, Macklem & Mundlak, *supra* note 76, at 519–20; Liebenberg, *supra* note 79, at 58.

82. Gráinne de Búrca, *The Future of Social Rights Protection in Europe*, *in* SOCIAL RIGHTS IN EUROPE 1–2 (Gráinne de Búrca and Bruno de Witte eds., 2005).

are to be given an equivalent legal status to civil rights. Moreover, "if social rights are to be fully constitutionalized, its proponents will have to justify the shift in power from the political to the judicial branch on questions of competing public interests and state expenditure: questions which remain at the core of political debate in most democracies."[83]

B. Classifying Labor Rights

Labor rights trouble the traditional typology of rights, which breaks them into three categories or generations—civil, political, and social.[84] In part, this is because there are different kinds of labor rights that correspond to different categories of general rights. However, even once their general character is determined, labor rights have distinctive elements (their collective nature and their application to the market) that require the traditional typology of rights to be revised and a new approach to classifying rights be developed.

Colin Crouch's definition of industrial citizenship captures a broad range of different types of labor rights. Industrial citizenship is

> the acquisition by employees of rights within the employment relationship, rights which go beyond, and are secured by forces external to, the position which employees are able to win purely through labour market forces. . . . These rights cover such matters as: individual rights to a safe and healthy working environment; to protection from arbitrary management action; to certain entitlements to free time; guarantees of some protection of standard of living in the case of inability to work as a result of loss of employment, poor health or old age; collective rights to representation by autonomous organizations in relations between employees and employers.[85]

A complete list of labor rights would include also equal status rights such as the rights not to be subject to discrimination on the basis of race or sex. Thus, labor rights include *collective* civil and political rights as well as social rights available to individual employees.

83. Hare, *supra* note 27 at 181.

84. Blackett characterizes labour rights as "straddling the divide." *See* ADELLE BLACKETT, COMM'N OF CANADA, REDRESSING RACIAL INEQUALITY THROUGH SOCIAL AND ECONOMIC RIGHTS? REFLECTIONS ON CENTRE MARAICHER EUGENE GUINOIS: INDIVISIBILITY AND DECENT WORK (2006). She notes that in part the ILO was able to avoid the civil/social rights divide by adopting detailed conventions that were treated as indivisible.

85. Colin Crouch, *The Globalized Economy: An End to the Age of Industrial Citizenship?*, *in* ADVANCED THEORY IN LABOUR LAW AND INDUSTRIAL RELATIONS IN A GLOBAL CONTEXT 152 (Tom Wilthagen ed., 1998).

Most labor rights fit within the general category of social rights. The bulk of them are recognized within the ICESCR.[86] However, there is some overlap with the traditional civil rights such as freedom of association and freedom from discrimination found within the ICCPR.[87] Collective labor rights have proven to be the most difficult to categorize.[88] They fit uneasily into Marshall's threefold classification of the different elements (or stages) of citizenship.[89] In fact, Marshall relegated collective labor rights, which he considered the distinctive feature of industrial citizenship, to the category of a secondary right outside the core triad of civil, political, and social rights. He described trade union rights and collective bargaining rights as a "supplement to the system of political citizenship" and a means for "enabling workers to use their civil rights collectively."[90] Marshall saw the rights of workers as operating in a parallel form of industrial citizenship outside governmental institutions, rather than a true form of citizenship guaranteed by the state.[91]

Nevertheless, Marshall's characterization of collective labor rights as a secondary form of civil rights is contentious. Although collective bargaining requires an acceptance of market exchange, it modifies the units entering the exchange so that associations or combinations of workers rather than individual workers enter into agreements over wages and conditions with employers.[92] Industrial citizenship entails the collective use of civil rights in order to assert claims for social justice, and it cannot be reduced to an individual civil right, although individual civil rights are crucial for the emergence of trade unions.[93] Collective labor (traditionally known as industrial) rights are qualitatively different from civil rights, which are inherently individualistic; "trade unions can only function properly if the rights of their individual members are subordinate to the rights of the

86. ICESCR, *supra* note 28, art. 7 (providing the "right to just and favourable conditions of work"); *id.* at art. 8 (guaranteeing the right to blong to a union and the right to bargain collectively and to strike); *id.* at art. 9 (guaranteeing the right to social security, including social assistance); *id.* at art. 11 (providing the right "to an adequate standard of living"); *see* Hunt, *supra* note 36, at 50–51.

87. *See* ICCPR, *supra* note 28, art. 22 (providing "freedom of association"); *id.* at art. 26 (providing freedom from discrimination).

88. Asbjørn Eide & Allan Rosas, *Economic, Social and Cultural Rights: A Universal Challenge*, *in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 3, 4 (Asbjørn Eide, Catarina Krause & Allan Rosas eds., 2d ed. 2001).

89. BARBALET, *supra* note 22, at 22; Carl Gersuny, *Industrial Rights: A Neglected Facet of Citizenship Theory*, 15 ECON. & INDUS. DEMOCRACY 211 (1994).

90. Marshall, *supra* note 19, at 104.

91. Ron McCallum, *Collective Labour Law, Citizenship and the Future*, 24 MELB. UNIV. L. REV. 41 (1998).

92. BARBALET, *supra* note 22 at 24.

93. *Id.* at 23.

collectivity."[94] Trade unions have historically been the vehicles for transforming civil rights into social rights.[95]

Collective labor rights have been recognized by the ILO and by United Nations in the ICESCR, which suggest that they are regarded as a type of social right.[96] However, some aspects of collective rights are also protected as basic human or civil rights. The ICCPR provides that everyone has the right to freedom of association, including the right to form and join unions. While the Human Rights Committee, which hears complaints under the ICCPR, initially was reluctant to interpret the provision to include collective bargaining and the right to strike, it has begun to move in the direction of recognizing collective labor rights.[97] Moreover, both the European Court of Justice and the Canadian Supreme Court have recognized a limited collective dimension for labor rights under more traditional constitutional guarantees of civil and political rights.[98] However, despite these tentative steps to recognize collective labor rights as fundamental freedoms that are justiciable, typically they are regarded as social rights and, as such, not to be enforced by courts.

Marshall's characterization of industrial citizenship as a parallel system outside government institutions is limited to a particular period in British history (from the end of World War II to the mid-1970s) when collective *laissez-faire* reigned supreme and it does not characterize the regime of industrial citizenship generally.[99] A key feature of industrial citizenship is that workers' rights are enforced by the state and do not depend simply upon market power.[100] Labor rights have typically been given legal effect through legislation even if they have not been recognized as fundamental civil rights by the

94. *Id.* at 26.

95. *Id.*

96. Collective bargaining is considered to be a fundamental right by the ILO. It is included in the Constitution and is the subject of a number of conventions (see Convention 98 for example). NOVITZ, *supra* note 34, at 95–123; TSOGAS, *supra* note 44, at 94–113. Article 8 of the ICESCR protects the right to form and join trade unions and the right to strike, and in recent years the Committee on Economic, Social and Cultural Rights has consistently interested Article 8 as including the right to engage in collective bargaining. Macklem, *supra* note 36, at 71.

97. Macklem, *supra* note 36, at 72–74.

98. For a discussion of the European Court of Justice decisions see Keith Ewing, *The Implications of Wilson and Palmer*, 32 INDUS. L.J. 1 (2003); Bernard Ryan, *The Charter and Collective Labour Law*, *in* ECONOMIC AND SOCIAL RIGHTS UNDER THE EU CHARTER OF FUNDAMENTAL RIGHTS 67, 71 (Tamara K. Hervey & Jeff Kenner eds., 2003). For a discussion of the Canadian cases, see Judy Fudge, *Labour is Not a Commodity: The Supreme Court of Canada and the Freedom of Association*, 67 SASKATCHEWAN L. REV. 25 (2004).

99. McCallum, *supra* note 91. Bob Hepple identifies one of the problems with Marshall's conception of industrial citizenship as a parallel system to political citizenship is that it suggests that collective bargaining is a delegation of authority from the state. *See* Bob Hepple, *The Future of Labour Law*, 24 INDUS. L.J. 303, 317 (1995).

100. Barbalet, *supra* note 22, at 22–27; Crouch, *supra* note 85.

courts. Moreover, in some jurisdictions labor rights are entrenched in national constitutions.[101]

The material scope of labor rights is different from that of civil, political, and social rights since these rights do not impose obligations on private actors or civil society. Labor rights, by contrast, extend political and social rights into the market. Thus, they apply horizontally to private actors and they may conflict with individual contract and property rights.[102] Trade unions not only have to subordinate individual members' rights to the rights of the collective, when striking they infringe employers' rights of property and contract.[103] This conflict requires that different rights be ranked.

Although the material scope of labor rights is wider than that of civil and political rights, which are directed primarily against the state, their personal scope is narrower. The traditional domain of labor rights has been employment and not legal citizenship in general, as is now the case with civil and political rights. The welfare state was based upon a male-breadwinner, female-caregiver model and labor rights were designed to support the industrial citizen who was in a standard employment relationship. Because the scope of labor rights, as well as social rights relating to income security, was limited to employment, industrial citizenship did not extend to women who performed socially necessary, but unpaid, work in the household.[104] In this way, labor rights and the social rights associated with them were gendered.

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101. Many European countries such as France, Greece, Italy, Portugal, and Spain, recognize labor or social rights in their national constitutions. The Italian Constitution recognizes the right of all citizens to work, to have a fair wage and to receive assistance if they are unable to work. CONSTITUZIONE [COST.] [Constitution] arts. 4, 36 & 38 (Italy). The Portuguese Constitution specifically outlines the "Rights, Freedoms and Safeguards of the Workers" in Chapter III. CONSTITUIÇÃO DA REPUBLICA PORTUGESA [Constitution] arts. 53–57 (Port.). For various national Constitutions, see International Constitutional Law, http://www.servat.unibe.ch/law/icl/index.html (last visited Aug. 14, 2007); *see also* RICARDO MARCENARO FRERS, LABOR IN LATIN AMERICAN AND EUROPEAN CONSTITUTIONS (2004).

102. Langille, *supra* note 12, at 120. Langille describes the ILO's core labor rights in the Social Declaration as "rights which can be directly denied by others actions in the market. These direct violations by others can be removed by restricting these actions of others." However, it is important, as Bob Hepple notes

> [not] to treat the market and the private law of contract and property as a state of nature into which legal institutions intrude. . . . . [L]abour markets are themselves social institutions structured by law and . . . these laws can be made to reflect a different set of social values from those drawn solely from economic self-interest.

HEPPLE, *supra* note 44 at 262.

103. BARBALET, *supra* note 22, at 26; Hepple, *supra* note 99, at 317.

104. Fudge, *supra* note 13, at 10–11; Ann Shola Orloff, *Gender and the Social Rights of Citizenship: The Comparative Analysis of Gender Relations*, 58 AM. SOC. REV. 303, 307–08 (1993).

IV. A TAXONOMY OF LABOR AND SOCIAL RIGHTS

The brief discussion of labor rights indicates that the traditional typology cannot accommodate the complexity and the interdependence of different types of rights. However, instead of revising this typology or developing a new one, the approach I take in this part is to develop a taxonomy of the different dimensions of rights in light of developments in the EU. This taxonomy of the dimensions of rights is designed to illuminate their juridical nature.

A. The Breakdown of the Traditional Typology

1. Type of Obligation

The traditional dichotomy between different types of rights in terms of the different obligations that they impose—negative obligations to refrain from acting or interfering, positive obligations to act—has given way to "a trichotomy of obligations to respect, protect, and fulfill."[105] The obligation to respect requires that the state refrain from interfering in the liberty of an individual in order to satisfy her or his right. This obligation captures the negative aspect of rights, and it can protect individual and collective rights. The obligation to protect involves the state in the regulation of interaction between private individuals and actors. The state must provide appropriate protection of an individual's rights against infringement by another individual, and resolve any conflicts that may arise in the exercise of rights. This obligation explains why the material scope of rights is horizontal (applies to relationships between individuals) as well as vertical (applicable to relationships between the individual and the state). According to Asbjørn Eide, "this protective function of the state is the most important aspect of state obligations . . . with regard to economic, social and cultural rights, and it is similar to the role of the state as protector of civil and political rights."[106] The obligation to fulfill captures the programmatic dimensions of labor and social rights, and it incorporates both an obligation to facilitate and an obligation to provide. The obligation to fulfill by facilitation takes many forms, whereas the obligation to fulfill through provision is akin to what is conventionally understood as positive right.[107] The argument that civil and political rights do not require the expenditure

105. DOWELL-JONES, *supra* note 30, at 28.
106. Eide, *supra* note 74, at 24.
107. *Id*. at 23.

of resources, whereas social rights do, is only tenable in situations in which the focus of social rights is on the obligation to fulfill, and civil and political rights are observed on the primary level of the duty to respect. However, as Eide notes, some civil rights require state obligations at all three levels, and most economic and social rights can be safeguarded by non-interference and the duty to protect.[108]

2. Personal Scope

Another important dimension of labor and social rights is their personal scope. Typically, the method by or platform upon which the right is acquired determines its personal scope.[109] For example, rights that are acquired by virtue of citizenship are, generally speaking, broader than those that obtain on account of occupational or employment status; however, the two are closely linked.[110] As Standing notes, historically the welfare state citizenship rights "have omitted the need for care and the need to give care "and thus, like employment, have tended to be biased against recognizing women's contribution through unpaid labour and granting them full citizenship status."[111] Alain Supiot identifies four concentric circles of the personal scope of social rights: universal social rights that provide guarantees irrespective of contribution; rights based on unpaid work (care for others, training, volunteer work); occupational activity or professional status; and employment.[112]

3. Individual or Collective

Related to the question of personal scope is whether the right is individual or collective. Civil rights conventionally are viewed as inherently individualistic. Although most social rights and many labor rights are individual, several important labor rights are collective, such as freedom of association, collective bargaining, and collective action such as strikes. The paradigmatic forms of collective labor rights can only function properly if the rights of the collective supersede the

108. *Id*. at 24–25.

109. GUYLAINE VALLEÉ, TOWARDS ENHANCING THE EMPLOYMENT CONDITIONS OF VULNERABLE WORKERS: A PUBLIC POLICY PERSPECTIVE 2–3 (2005), *available at* http://www.cprn.com/documents/35588_en.pdf; Brian Langille, *Labour Policy in Canada—New Platform, New Paradigm*, 28 CANADIAN PUB. POL'Y 133 (2002).

110. A conception of paid work or productive relations would broaden the scope of social and labor rights beyond employment, but it would still exclude women's unpaid and socially valuable reproductive labor.

111. STANDING, *supra* note 16, at 349.

112. SUPIOT, *supra* note 11, at 55.

individual.[113] Moreover, there is no individual analogue for a collective right. The Supreme Court of Canada has recognized

> that the collective is 'qualitatively' distinct from the individual: individuals associate not simply because there is strength in numbers, but because communities can embody objectives that individuals cannot. For example, a 'majority view' cannot be expressed by a lone individual, but a group of individuals can form a constituency and distil their views into a single platform. Indeed, this is the essential purpose of joining a political party, participating in a class action or certifying a trade union.[114]

4. Material Scope

The material scope of labor and social rights describes whether the obligations are horizontal or vertical, and typically is determined by the type of obligation imposed. Most constitutional rights have a vertical application; they apply to the relationship between the state and the citizen/subject. However, some rights, especially those that impose an obligation to protect, have a horizontal status and apply to the relations between private actors.[115]

5. Juridical Status

The legal role of social rights in Europe demonstrates that the juridical status of labor and social rights transcends the simple question of justiciability.[116] Antoine Lyon-Caen identifies four other "legal modes of action of rules": 1) orienting the interpretation of other rules; 2) justifying rules, mechanisms, or institutions; 3) controlling the generation of norms; and 4) controlling the organization of the public service.[117] This expansive view of the legal role of labor and social rights is a response to the limits of the human

113. BARBALET, *supra* note 22, at 26.

114. Dunmore v. Ontario (Attorney General), [2001] 3 S.C.R.1016, ¶ 16.

115. The public/private distinction is one device that is used to determine the material scope of the application of constitutional rights in Canada. PETER HOGG, CONSTITUTIONAL LAW OF CANADA 526–28 (2005).

116. For an excellent discussion of justiciability as only one aspect of the broader issue of implementation and enforcement of social and labor rights in the next constitutional context of the European Union, see Brian Bercusson, *Social Rights and Labour Rights under the EU Constitution*, *in* SOCIAL RIGHTS IN EUROPE 169 (Gráinne de Búrca & Bruno de Witte eds., 2005).

117. Antoine Lyon-Caen, *The Legal Efficacy and Significance of Fundamental Social Rights: Lessons From the European Experience*, *in* SOCIAL AND LABOUR RIGHTS IN A GLOBAL CONTEXT 182, 186 (Bob Hepple ed., 2002); *see also* Nicholas Bernard, *'A New Governance' Approach to Economic, Social and Cultural rights in the EU*, *in* ECONOMIC AND SOCIAL RIGHTS UNDER THE EU CHARTER OF FUNDAMENTAL RIGHTS 247, 256 (Tamara K. Hervey & Jeff Kenner eds., 2003).

rights paradigm, which conceptualizes rights as individual and complaints-based, and focuses primarily on judicial enforcement.[118] The individualization of rights ignores "both the value of social interaction and the ways in which breaches of rights operate in a collective and institutional way."[119] Moreover, complaint-based enforcement through the courts is not a good way to deal with systemic problems, nor does it provide a broad-based dialogue involving all the relevant interests.[120]

B. A Shift from Regulation (Hard Law) to Governance (Soft Law)?

The traditional legal approach of specifying standards and outcomes through legislative edicts has, according to Gunther Teubner, generated a regulatory trilemma and provoked a crisis for the law.[121] In his view, society is composed of semi-autonomous social subsystems—such as the religious system, the legal system, and the industrial relations system, for example. In modern societies, these subsystems are now so complex that they have become uncoupled and can no longer communicate with each other. Thus, it is harder for the state to use law to intervene to regulate social life. Legal rules have become simply ineffective as they fail to have an impact on social life. Moreover, with the proliferation of substantive social rights, formal (process-based) rationality has given way to substantive or goal-based rationality, in which the state through law defines goals, selects norms, prescribes action, and implements programs. Teubner explains that this shift tends to rigidify the social sphere and limit the autonomy of individuals and groups. Law, understood as a form of command and control regulation, is seen as lacking responsiveness, which may subvert desirable practices by making impracticable demands. Finally, he notes that the enforced inclusion of political criteria within legal rules undermines the legitimacy and integrity of law by undermining its coherence and autonomy.

Commenting on developments in the EU, Alain Supiot has remarked on a shift in the form of legal governance: "the law is relinquishing the job of establishing substantive rules, but is instead

118. Fredman, *supra* note 59, at 48.

119. *Id*.

120. Bernard, *supra* note 117, at 266–67.

121. Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 L. & SOC'Y REV. 239 (1983). For a discussion, see ASHIAGBOR, *supra* note 63, at 217—25. By contrast, DE SOUSA SANTOS, *supra* note 9, at 57—61, claims that the crisis of the modern welfare state is not legal but political.

concentrating on affirming principles and laying down procedures."[122] Teubner identified this as reflexive law, which is the solution that he offered to the regulatory trilemma. Instead of imposing distributive outcomes and interfering with private action, what reflexive law does is structure bargaining and provide a steering mechanism for relations of self-regulation in the different social subsystems. Reflexive law differs from formal law and substantive law in its proceduralist orientation and its minimal substantive content.[123]

The concept of reflexive law is both descriptive and normative; it aims to explain how the legal system relates to other subsystems, such as the economy or the industrial relations system, and to offer guidance "on the appropriate form of regulation in a complex and uncertain environment."[124] Ralf Rogowski and Ton Wilthagen emphasize the extent to which the legal system is dependent upon social actors in other subsystems for the efficacy of its norms and forms of regulation: "reflexive law reminds legal intervention that it is dependent upon self-regulation within the regulated systems . . . a sophisticated labour law approach tries to 'regulate' not only through 'performance' but though influencing centres of 'reflexion' within other social subsystems."[125] Used as a description of how law works, reflexive law emphasizes the need for legal interventions "to underpin and encourage autonomous processes of adjustment, in particular by supporting mechanisms of group representation and participation" rather than intervening by "imposing particular distributive outcomes."[126] But reflexive law goes beyond a simple exercise in delegating rule-making authority to self-regulatory mechanisms and

122. Alain Supiot, *Governing Work and Welfare in a Global Economy*, *in* GOVERNING WORK AND WELFARE IN A NEW ECONOMY: EUROPEAN AND AMERICAN EXPERIMENTS 388 (Jonathan Zeitlin & David Trubek eds., 2003).

123. Teubner, *supra* note123; Gunther Teubner, *Juridification: Concepts, Aspects, Limits, Solutions*, *in* JURIDIFICATION OF SOCIAL SPHERES: A COMPARATIVE ANALYSIS IN THE AREAS OF LABOR, CORPORATE, ANTITRUST AND SOCIAL WELFARE LAW (Gunther Teubner ed., 1987); GUNTHER TEUBNER, LAW AS AN AUTOPOETIC SYSTEM 66 (1993); ASHIAGBOR, *supra* note 63, at 217—20; JOHN PATERSON, REFLECTING ON REFLEXIVE LAW, IN LUHMANN ON LAW AND POLITICS: CRITICAL APPRAISALS AND APPLICATIONS 13 (2006); David Doorey, *Who Made That? Influencing Foreign Labour Practices Through Reflexive Domestic Disclosure Regulation*, 43 OSGOODE HALL L.J 353, 368—72 (2005).

124. Catherine Barnard, Simon Deakin & Richard Hobbs, *Reflexive Law, Corporate Social Responsibility and the Evolution of Labour Standards: The Case of Working Time* 2 (ESRC Centre for Bus. Res., Univ. of Cambridge, Working Paper No. 294, 2004), *available at* http://www.cbr.cam.ac.uk/pdf/wp294.pdf.

125. Ralf Rogowski & Ton Wilthagen, *Reflexive Labour Law: An Introduction*, *in* REFLEXIVE LABOUR LAW: STUDIES IN INDUSTRIAL RELATIONS AND EMPLOYMENT REGULATION 7 (Ralf Rogowski & Tom Wilthagen eds., 1994).

126. Catherine Barnard & Simon Deakin, *'Negative' and 'Positive' Harmonization of Labor Law in the European Union*, 8 COLUM. J. EUR. L. 389 (2002).

involves an attempt to use "legal norms, procedures and sanctions to 'frame' or 'steer' the process of self-regulation."[127]

With the emphasis on reflexive law, there has also been a shift from hard to soft forms of regulation, from rigid to flexible forms of regulation, and from law to guidelines and policy. In the context of EU law, Nicholas Bernard describes how "[d]issatisfaction with command and control modes of regulation have led to a move away from the traditional 'community method' [of directives and complaints to the European Court of Justice] in favour of techniques of governance relying on softer and more flexible instruments."[128] The adoption of the "open method of coordination" (OMC) as the means of achieving the European Employment Strategy expressed in Lisbon in 2000 signifies the EU's move toward the exemplary form of "soft" law when it comes to employment policy.[129] The OMC uses an administrative mechanism and not a judicial method of enforcement, and there are no sanctions that can be invoked against a Member State for failing to meet an objective. The elaboration and implementation of employment policy revolves around the setting of guidelines, benchmarks, and indicators at the European level, their translation into national policies, and the periodic monitoring of such implementation, mostly by means of peer review.[130] The second strand of the Employment Strategy (translation into national policies) involves action by Member States, which are obliged to report annually, in National Action Plans for Employment, on the principal measures taken to implement employment policy in light of the Union's broad economic policy guidelines and the Employment Guidelines. The National Action Plans provide the information upon which the EU and Member States evaluate a particular Member State's progress in achieving the EU employment guidelines.[131] What the OMC does is establish processes and methods, but not outcomes. According to Sandra Fredman, "instead of a stark dichotomy between justiciable rights and untrammeled policy, the OMC harnesses the active participation of Member States, co-ordinated by EU institutions."[132] The European Charter of Fundamental Rights, with its labor and social rights, plays an important role within this soft and

127. Catherine Barnard, Simon Deakin & Richard Hobbs, *Fog in the Channel, Continent Isolated: Britain as a Model for EU Social and Economic Policy?*, 34 INDUS. REL. J. 35 (2002).

128. Bernard, *supra* note 117, at 254.

129. ASHIAGBOR, *supra* note 62.

130. Goetschy, *European Employment Strategy*, *supra* note 63, at 72; Jacobsson, *supra* note 63, at 357; Trubeck & Mosher, *supra* note 63, at 47; ASHIAGBOR, *supra* note 63.

131. ASHIAGBOR, *supra* note 63; Goetschy, *European Employment Strategy*, *supra* note 63.

132. Fredman, *supra* note 59, at 51.

reflexive law context by providing the normative content for steering the OMC process.[133] Bernard suggests that this process may provide a better route for achieving labor and social rights than the judicial route.[134]

However, simply because social rights are not directly justiciable does not mean that there has been a shift from hard to soft law for governing employment relations. Claire Kilpatrick emphasizes the idea of hybridity to capture the full range of tools and objectives for governing employment relations. She concludes that the "ultimate fate of the EU Charter of Fundamental Rights, and especially the social rights in it, demonstrates that what counts as 'hard' enforceability in a polycentric constitutional setting is a complex and highly contested issue."[135]

C. Legal Form and Substanive Norms

This taxonomy of legal or juridical dimensions of labor and social rights illustrates the wide array of different forms and techniques of law. Mandatory rights, default rules, soft law, and other aspects of regulatory technique are available.[136] However, despite the proceduralist or reflexive shift in its form, recent developments in the EU indicate the continuing importance of the normative content of law. Self-regulation or pure proceduralism without safeguards, which typically take the form of standards that are imposed from above, run the risk of abuse in unequal power relationships.[137] According to Ulrich Preuss

> [t]here are good reasons to assume that [the] proceduralization of rights would entail the establishment of a competitive market at the institutional level of interest articulation and aggregation with all its well known consequences. It would privilege those interests and groups which dispose the resources necessary for efficient organization and politicization and hence disfavor those segments of the population which 'depend heavily on the regard of their fellow citizens because they do not have the power to pursue their interests efficiently.[138]

For this reason, Diamond Ashiagbor notes, "Teubner also describes reflexive law as structuring bargaining relations so as to *equalize*

133. *Id.* at 60.
134. Bernard, *supra* note 117, at 263.
135. Kilpatrick, *supra* note 60, at 127.
136. DEAKIN & WILKINSON, *supra* note 17, at 352.
137. ASHIAGBOR, *supra* note 63, at 219.
138. Ulrick Preuss, *The Content of Rights and the Welfare State*, *in* DILEMMAS OF LAW IN THE WELFARE STATE 151, 170 (Gunther Teubner ed., 1986).

power."[139] Thus, it is crucial to look at the normative content of the new labor and social rights.

V. CAPABILITIES—THE NEW NORMATIVE GROUND FOR LABOR AND SOCIAL RIGHTS

A normative recalibration of the content of labor and social rights has accompanied the shift in the form of law. Joel Hander notes that in the EU a more dynamic notion of equality centered on capacities and empowerment has replaced a static notion of equality centered on material resources.[140] Social rights have conventionally been understood as claims to resources in the form of income, services, or employment.[141] Their role was redistributive, and they conflicted with the logic of the market, and, to a certain extent, with civil rights. Recently, several scholars have suggested that the work of economist and philosopher Amartya Sen can provide a better normative basis for labor and social rights for the ILO and for the EU.[142] His conception of equality of capabilities is offered as a replacement for equality of resources and redistribution as the normative goal and metric of labor and social rights.[143] One of the virtues of the concept of capabilities is that it makes social rights compatible with the market and with civil rights.[144] This is a very important feature. According to Deakin, as "social rights in this juridical sense of the term have grown in importance, the issue of their reconciliation with civil and political rights, and with market-oriented guarantees of economic participation, has become more pressing."[145]

139. ASHIAGBOR, *supra* note 63, at 219; *see also* PATERSON, *supra* note 123, at 14–26.

140. HANDLER, *supra* note 63, at 238.

141. Jude Brown, Simon Deakin & Brian Wilkinson, *Capabilities, Social Rights and European Market Integration*, *in* EUROPE AND THE POLITICS OF CAPABILITIES 205, 205 (Robert Salais & Robert Villeneuve eds., 2004).

142. SUPIOT, *supra* note 11; EUROPE AND THE POLITICS OF CAPABILITIES (Robert Salais & Robert Villeneuve eds., 2004); Langille, *supra* note 12; BRIAN LANGILLE, INT'L INST. FOR LABOUR STUDIES, WHAT IS INTERNATIONAL LABOUR LAW FOR? (2005), *available at* http://www.ilo.org/public/english/bureau/inst/download/langille.pdf; Brown, Deakin & Wilkinson, *supra* note 141; DEAKIN & WILKINSON, *supra* note 17; Deakin, *supra* note 3. They rely on the following work by AMARTYA SEN, COMMODITIES AND CAPABILITIES (1999) [hereinafter SEN, COMMODITIES]; AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999) [hereinafter SEN, DEVELOPMENT].

143. Brown, Deakin & Wilkinson, *supra* note 141, at 209. However, it is important to acknowledge that policies and/or rights that are designed to implement the capabilities approach (which Sen is very clear to emphasize simply provides *a* metric for, and not a social theory of, justice) may be redistributive.

144. Deakin, *supra* note 3, at 56, 60; Brown, Deakin & Wilkinson, *supra* note 141, at 210; Supiot, *supra* note 14.

145. Deakin, *supra* note 3, at 60.

This section focuses on two recent attempts to use Sen's work as the normative basis for labor and social rights. Langille has explicitly invoked Sen's idea of freedom and his concept of capability as the normative basis of fundamental labor rights.[146] His characterization of fundamental labor rights as primarily procedural rests on a thin conception of capabilities. By contrast, Jude Brown, Simon Deakin, and Frank Wilkinson's characterization of capabilities, which they develop in detail in their discussion of social rights and the European Union, is much thicker, and they emphasize the institutional dimension of capabilities. Different conceptions of capabilities help to explain why it is so difficult to characterize the new labor and social rights discourse as either a reflection of, or a response to, neo-liberalization and globalization.

In a spirited defense of the conceptual coherence and normative salience of core labor rights and the ILO's Declaration of Fundamental Principles and Rights at Work and its Follow-up, Langille invokes the traditional distinction between procedural and substantive rights and Sen's conception of freedom to explain why there is no trade off between social justice and labor rights on the one hand and economic progress and the market on the other.[147] He begins from the premise that the basic objective of labor law is to address the bargaining power disadvantage of workers in the contracting process, and describes the two ways that law responds to this problem—intervention that rewrites "the substantive deal (mostly by statute) between workers and employers" and procedural protection that protects "rights to a fair bargaining process."[148] Langille explains that the "distinction between labor standards and labor rights is fundamental and sounds in the basic conceptual map that labor lawyers use to frame and justify their field."[149] Labor standards intervene directly into the market and impose substantive outcomes such as limits on hours of work or minimum wages. Labor rights, by contrast, provide employees with procedural rights that

146. Langille, *supra* note 12, at 118.

147. "I believe that Amartya Sen has provided the intellectual leadership in the effort to map this new understanding of the idea of development and the true relationships between social justice and economic progress." LANGILLE, *supra* note 142, at 9. Langille's argument starts from the premise of inequality of bargaining power. It makes two distinctions between different types of legal rights, invokes Sen's notion of capability and freedom as a normative ground, and makes one empirical claim (that there is not a trade off between economic grown and collective bargaining). For other defenses of the ILO's strategy of core rights and hierarchy of fundamental rights with procedural ones at the top, see Maupain, *supra* note 47.

148. Langille, *supra* note 12, at 428—29.

149. *Id.*

permit them to associate for bargaining collectively. According to Langille,

> the ethic of substantive labour law is strict paternalism and the results are standards imposed upon the parties whether they like it or not. The ethic of procedural labour law is freedom of contract and self-determination – what people call industrial democracy – and its result are basic rights which it is believed lead to better, but self determined, outcomes.[150]

According to prominent officials within, and consultants to, the ILO, this distinction between substantive standards and procedural rights underlies the ILO's Declaration. The four core fundamental rights and freedoms are, according to Langille, "best conceived as a set of restrictions on the rights of the other party to the bargain as to who it will bargain with, while saying nothing in the abstract about the substantive outcome of any bargain."[151] Although Langille acknowledges that this set of procedural rights (or "set of constraints") is "not a guarantee of justice," he claims "the fact that these core rights do not guarantee just outcomes, that is they are a subset of necessary if not sufficient conditions for such outcomes, not a conceptual problem—it is rather part of the grammar of procedural regulation of the bargaining relationship."[152]

The normative salience of this conceptual distinction is that the core rights are directed at eliminating well known types of workplace unfreedom that deny workers' human dignity.[153] Langille claims that "core labour rights are treated with suspicion by human rights promoters precisely because they are seen to rest upon the neo-liberal terrain . . . [it] is too narrow, too formal, too procedural, not substantive, too market friendly, too much at home with a libertarian's emaciated conception of an adequate account of the normatively significant."[154] However, instead of seeing procedural rights as part of the ascendancy of neo-liberalism, he asserts that it is important to understand the relationship between these rights and other substantive rights and freedoms. He claims that Sen, and his

150. *Id.* at 429.

151. *Id.* at 431. Christopher McCrudden and Anne Davies make the same point about the compatibility between the core rights and freedom of contract. See Christopher McCrudden & Anne Davies, *A Perspective on Trade and Labour Rights*, 3 J. INT'L ECON. L. 43, 51 (2000).

152. Langille, *supra* note 12, at 118.

153. *Id.*

154. *Id.* at 432. According to Langille, in Sen's "work on 'capability' theory and in his accessible presentation of his ideas in his book *Freedom as Development* he has . . . exploded our convenient way of thinking about our current problems." *Id.*

theory of capability, has exploded the conventional idea that there is a trade off between labor rights and economic prosperity.[155]

Instead of elaborating on Sen's conception of capability, Langille discusses Sen's conception of freedom and how it links to core rights. He refers to Sen's admonishment to distinguish between ends and goals and to remember that the goal is human freedom, by which he "means the real capacity for human beings to lead lives which we have reason to value."[156] He also emphasizes Sen's insight that different types of human freedoms, such as social, economic, and political, interact in complex mutually supportive ways. Labor rights and the market are valuable precisely because both institutions contribute to human freedom. Langille concludes that

> on a view of human freedom as the end and the key means the core rights sound in what labour law theory has long known – that while there is much room for and need of other laws and institutions to make for a just workplace, the most valuable legal technique (instrumentally and as an end in it self) has always been, and is, to unleash the power of individuals themselves to pursue their own freedom.[157]

Langille's attempt to provide a new grounding for labor rights in Sen's conception of freedom and capabilities does not address some crucial issues. Although he dismisses the comparison, his distinction between procedural and substantive labor rights mirrors the conventional distinction between civil and social rights.[158] Later he claims that Sen's conception of freedom "dissolves the old distinction between formal and substantive notions of freedoms."[159] While Sen's conception may do this, Langille's insistence on the fundamental grammar of labor law and its distinction between procedural labor rights and substantive labor standards tends to have the opposite effect, especially since the former, which are a species of civil rights, have a fundamental constitutional status and the latter, which are more akin to social rights, do not. While it is important to emphasize the values of self-determination and participation in a procedural approach to core rights (and this is the strength of Langille's contribution), an important question remains: can these values be

155. *Id.*
156. *Id.*
157. *Id.* at 120—21.
158. Alston, *supra* note 13, at 39—42; Langille, *supra* note 12, at 115. In chapter 5 of *Development as Freedom*, Sen discusses the relationship between the market and other social institutions, and he cautions that the "far-reaching powers of the market mechanism have to be supplemented by the creation of basic social opportunities for social equity and justice." SEN, DEVELOPMENT, *supra* note 142, at 143.
159. Langille, *supra* note 12, at 432.

achieved in light of the current distribution of rights and entitlements? This has been a core dilemma of the liberal state and for labor law; procedural rights need to be backed up by substantive commitments since a purely procedural understanding of core labor rights runs the risk of abuse of power in unequal bargaining situations.

Moreover, Langille's characterization of core labor rights as purely procedural is contentious. For example, for women the right to be free from discrimination requires more than procedural rights that impose "constraints on the other party's freedom to contract with whom it pleases,"[160] and requires substantive rights in order to be effective. Maternity leave and benefits, a shorter standard work week, pay equity, minimum wages, and positive obligations to accommodate women's domestic responsibilities are as important as prohibitions on discrimination if women are to achieve equality of capabilities.[161]

Langille's use of the notion of fundamental grammar, which is the basis for some key distinctions that he makes between different types of rights, is also problematic. All we are told is that this grammar is different from the historical record and that it is linked to labor law theory.[162] However, precisely what labor law theory it is linked to is not clear. Feminist and critical studies theorists of labor law argue that the distinction between procedural rights and substantive labor standards is not as crisp or as timeless as Langille and industrial pluralist theories of labor law suggest.[163] In his discussion of the distinction between fundamental rights and detailed legislation that implements such rights, Langille claims "there is a basic 'grammar' of the right [to freedom of association]; which is a core set of restrictions and entitlements that any account of the right must respect."[164] However, given that his sole example of the fundamental grammar of the right of freedom of association is limited to prohibiting the killing of trade unionists, it appears that the semantic content of the new discourse of labor rights is minimal. It may be that there is a

160. *Id.* at 430.

161. BLACKETT, *supra* note 84; Judy Fudge & Leah Vosko, *By Whose Standards? Re-Regulating the Canadian Labour Market*, 22 ECON. & INDUS. DEMOCRACY 327 (2001).

162. LANGILLE, *supra* note 142, at 8.

163. For feminist approaches to labor law, see Kerry Rittich, *Feminization and Contingency: Regulating the Stakes of Work for Women*, *in* LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES 117 (2002); Judy Fudge & Leah Vosko, *Gender, Segmentation and the Standard Employment Relationship in Canadian Labour Law and Policy*, 22 ECON. & INDUS. DEMOCRACY 271 (2001). For critical legal studies approaches to labor law, see Karl Klare, *Critical Theory and Labor Relations Law*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., 3d ed. 1998); Katherine Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1590.

164. Langille, *supra* note 12, at 105.

fundamental grammar to labor law theory and to the right to freedom of association, but it will take more than assertion to establish its existence, especially in light of the evidence that these matters are controversial.[165]

A final concern is the individualistic emphasis of Langille's conception of fundamental labor rights. Although he stresses the normative significance of freedom of association and collective bargaining, he discusses them in terms of individual rights and their compatibility with the freedom of contract. Deakin specifically identifies the difficulty or danger that Sen's approach to capabilities, which focuses exclusively on the individual and the real, or effective, choices that are available to each person, poses to both the right to collective action and the principal institutions of the welfare state: collective bargaining, social insurance, and progressive taxation.[166] Although Sen recognizes the importance of institutions in advancing freedom, he pays less attention to the role of institutions and groups in limiting the freedom of another.[167]

However, the problem is not so much with Sen's concept of capability, but rather in assuming that the concept of capability provides a complete theory of social justice. Sen is very clear to acknowledge that

> although the idea of capability has considerable merit in the assessment of the opportunity aspect of freedom, it cannot possibly deal adequately with the process aspect of freedom, since capabilities are characteristics of individual advantages, and they fall short of telling us about fairness or equity in the processes involved, or about the freedom of citizens to invoke and utilize procedures that are equitable.[168]

A normative theory of social choice is needed to supplement Sen's theory of capabilities. As Ingrid Robeyns points out, we also get "quite divergent normative results, depending upon which social theories we add to the capabilities framework."[169] Different social theories provide different accounts of the individual, social, and

165. See Macklem's discussion of the international human rights law regarding freedom of association and collective bargaining. He notes, however, that recent developments in international labour law reveal an enhanced protection of the right to bargain collectively. Macklem *supra* note 36, at 82.

166. Deakin, *supra* note 3, at 59—60.

167. Sandy Fredman expressed this criticism of Sen in our discussions of the idea of capabilities.

168. Sen, *supra* note 67, at 336.

169. Ingrid Robyens, *Sen's Capability Approach and Gender Inequality: Selecting Relevant Capabilities*, *in* AMARTYA SEN'S WORK AND IDEAS: A GENDER PERSPECTIVE 63, 69 (Bina Aggarwal, Jane Humphries & Ingrid Robeyns eds., 2005).

environmental conversion factors that transform individual endowments into substantive opportunities that people enjoy.[170] Sen's account does not tell us much about either the distribution of power in a society or the type of deliberative mechanisms needed to determine the set of human functionings that a society values.

Despite the limitations to the capabilities approach, its strength is that it provides a bridge between the market (and the civil law rights of contract and property) and social rights. Jude Brown, Simon Deakin, and Frank Wilkinson "explore the potential for linking the economic notion of capabilities to the juridical conception of social rights."[171] They emphasize the market-creating role of social rights. They explain that on Sen's account it is not only the commodities that an individual has control over that are important for determining that individual's welfare, "the capability of that individual to achieve a range of functionings with the commodity also has to be considered."[172] A capability is a type of freedom to achieve a number of different things a person may value being or doing. Central to this conception of capability is the idea of conversion factors, which are the characteristics of an individual's person, society, and environment. According to Brown, Deakin, and Wilkinson,

> personal characteristics, in this sense, could include an individual's metabolism or their biological sex; societal characteristics could include social norms, legal rules and public policies (such as norms which result in social discrimination or gender stereotyping, or legal interventions to offset these phenomena) and environmental characteristics could refer to climate, physical surroundings, technological infrastructure and legal-political institutions.[173]

The idea that Brown, Deakin, and Wilkinson pursue "is that social rights be understood as part of the process of 'institutionalizing capabilities', that is to say, as providing mechanisms for extending the range of choice of alternative functions on the part of individuals."[174] Social rights operate as conversion factors that seek to enhance the real choices for individuals. They also suggest that the "'procedural' orientation of social law, evident in the EU with the OMC and in the constitutional recognition of freedom of association and collective bargaining, forms a bridge to the idea of a social choice procedure of

170. *Id*.; *see also* Martha C. Nussbaum, *Capabilities as Fundamental Entitlements; Sen and Social Justice*, *in* AMARTYA SEN'S WORK AND IDEAS: A GENDER PERSPECTIVE 35 (Bina Aggarwal, Jane Humphries & Ingrid Robeyns eds., 2005).

171. Brown, Deakin & Wilkinson, *supra* note 141, at 205.

172. *Id*. at 207.

173. *Id*. at 209.

174. *Id*. at 210.

the kind which Sen sees as providing the most appropriate basis for the achievement of equality of capability."[175] Thus, they identify two categories of social rights: "(1) social rights as immediate claims to *resources* (financial benefits such as welfare payments) and (2) social rights as particular forms of *procedural* or institutionalized interaction (such as rules governing workplace relations, collective bargaining and corporate governance)."[176] The first category of social rights can be seen as claims to commodities that can be converted by individuals into functionings. These are such traditional social rights as sick and maternity pay. The second category of social rights is social conversion factors, such as collective bargaining and trade unions. These procedural rights, which support collective provision and collective mechanisms, are the means by which institutional environments can be shaped to ensure that all individuals can convert their endowments into a range of possible functionings.[177] According to Simon Deakin,

> the primary *function* of social rights is to provide the conditions for substantive market access on the part of individuals, thereby promoting individual freedom but also enhancing the benefits to society of the mobilization, through the market, of economic resource. In terms of *form,* social rights are constructed around a particular combination of substantive and procedural norms.[178]

The idea of capabilities that Deakin and his colleagues elaborate provides for a much more robust set of social rights, which include substantive labor rights such as the right to a minimum wage and maternity pay, than Langille's core fundamental labor rights.[179] In part, this is a consequence of the scope of Langille's endeavor—which was to provide a justification for the ILO's core labor rights. Although he acknowledges the significance of substantive labor rights, he simply does not think that they ought to have a fundamental status.[180] It is not clear the extent to which Langille sees labor rights as simply a form of civil and political rights, and in this way compatible with the market, or whether he considers them a species of social

175. *Id*. at 211.

176. *Id*.

177. *Id*. at 212—13. Brown, Deakin and Wilkinson emphasize the significance of collective provision and collective mechanisms in order to counter-act the individualistic tendency of human rights.

178. Deakin, *supra* note 3, at 60.

179. Supiot's conception of social rights also encompasses substantive and procedural rights. SUPIOT, *supra* note 11, at 227—28.

180. Langille, *supra* note 12, at 117, 121. Langille does not indicate what substantive rights are necessary, nor does he explain why they should not be accorded the status of fundamental rights. Sen, by contrast, is clear that state action and social provisioning are necessary for social justice. *See*, SEN, DEVELOPMENT, *supra* note 142, at 169, 249—81.

rights that has a market-creating function. The significance of Brown, Deakin, and Wilkinson's conception of social rights is that they show that social rights, even those that are directly redistributive, function in the same way as civil and political rights.

Sen's concept of capabilities provides a framework for debating which labor and social rights ought to be considered fundamental rather than a justification for a particular set of rights. It needs to be supplemented by a theory of social choice, deliberative mechanisms, and a social theory about power in order to provide a full account of social justice and human rights. However, the appeal of the capabilities approach is that it links the normative ground of social rights (human freedom) directly to the welfare goal (market efficiency) by providing both a metric and a substantive value. The key concern is overcoming a conception of rights shared by Hayek and Marshall—that social rights conflict with the market. However, the danger with this approach to providing a normative ground for social rights is that it cedes a great deal of the moral terrain to the market. As Hugh Collins points out, conceiving of social rights as market enabling may create a greater risk that social rights will be traded off against other welfare values. He cautions that

> at the very least, we need to be better convinced that the strategy that has so successfully augmented the moral force of civil and political rights by appeals to notions of human dignity, citizenship, social inclusion and solidarity should not also be applied to advocacy of social and economic rights.[181]

Thus, it is also important to consider the other values, such as democracy and solidarity, which along with distributive justice, provide the normative foundation of decent work.

VI. CONCLUSION

Are fundamental labor and social rights a bulwark that protects the few remaining remnants of the welfare state from neo-liberalism or are they an individualizing force that undermines more solidaristic forms of social cohesion?[182] The answer to this question is not a foregone conclusion. Institutional economists and lawyers tend to treat norms as a solution to coordination problems rather than acknowledge that they reflect collective forms of power.[183] From the

181. Hugh Collins, Book Review, 35 Indus. L.J. 105, 109 (2006) (reviewing SIMON DEAKIN & FRANK WILKINSON, THE LAW OF THE LABOUR MARKET: INDUSTRIALIZATION, EMPLOYMENT AND LEGAL EVOLUTION).

182. These are Deakin's antimonies. Deakin, *supra* note 3, at 25.

183. ASHIAGBOR, *supra* note 63 at 28-32.

latter perspective, which recognizes that "globalization is about the redistribution of power towards the interests of finance and industrial capital,"[184] the role of social rights is a political question. As this article has shown, there is nothing intrinsic in the legal form or normative content of labor and social rights that makes them incompatible with a market economy or the institutions of a liberal democracy. Thus, the crucial question is what social forces are capable of restoring a minimum balance between the economic rights of global capital and the labor and social rights of working people on an international level?[185]

184. Guy Standing, *Global Governance: The Democratic Mirage?*, 35 DEV. & CHANGE 1065, 1072 (2004).

185. Supiot, *supra* note 122, at 397.