CHAPTER 50

ECONOMIC RIGHTS

K. D. EWING

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I. Introduction

Constitutions are ideological texts.[1] Like any other document, they reflect the moment when they were drafted, the values of their authors, and the purposes they are to serve. To this last end, they thus reflect the type of society for which they are designed, and the anticipated role of the state in that society. Liberal democracies of various stripes require different kinds of constitutional texts than do social democracies of various stripes, though clearly there will be many common features in constitutional texts of whatever stripe. Liberal constitutions such as those of the United States, however, are designed principally to limit the power of government, and to regulate public rather than private power. In doing so, they elevate principles

[1] For a nice—if now implausible—expression of this, see *Gujarat Steel Tubes v Its Mazdoor Sabha* 1980 AIR 1980 SC 1896:

> The Constitution of India is not a non—saligned parochial parchment but a partisan of social justice with a direction and destination which it set out in the Preamble and Art 38 . . . ours is a mixed economy with capitalist mores, only slowly mobilizing towards a socialist mores. (Krishna Iyer J at 1908–9)

developed initially by the common law, principles said by the historian Christopher Hill as having been designed to 'meet the needs of commercial society', so that 'men of property could do what they would with their own'.[2]

There is, however, a very different constitutional tradition often overlooked by common lawyers. This is the social democratic tradition, which prevails in mainly European jurisdictions, a tradition characterized by a more active state with duties underpinned by the constitution. It is also a tradition characterized by a desire to regulate the imbalance of power in private law relationships, notably the relationship between property and labour. To this end, social democratic constitutions may seek to underpin what has been referred to as the 'economic constitution', said to be 'the very key to the achievement of social democracy' itself.[3] Constitutions in this latter tradition will typically include two species of economic rights, the first being the rights of property traditionally to be found in liberal constitutions, and the second being the rights of labour which traditionally are *not* to be found in liberal constitutions.

In addressing these matters in this chapter, the main concern is with rights of labour rather than with rights of property. It is the idea of labour rights as constitutionally protected economic rights that gives rise to most difficulty and incredulity in the common law world, a response which is surprising in view of the widespread embrace of such rights outside English-speaking jurisdictions, of which many common lawyers appear to be profoundly ignorant. It is also the case that at the present time in our global economic development, it is the rights of labour rather than the rights of property that are especially vulnerable, and especially in need of constitutional and any other form of protection that may be available. Moreover, it is the economic rights of labour rather than the economic rights of property that are currently flying on the magic carpet of the international human rights movement, following important decisions of the European Court of Human Rights (ECtHR) in particular.

In a neoliberal global economy, however, there may be an air of unreality about any suggestion that labour rights can be fully and effectively protected by national constitutions. Apart from the legacy of ideology and the growing influence of human rights, the third voice in this conversation is the voice of economic orthodoxy in an open and competitive global economy where social, economic, and political power is moving in the direction of transnational corporations and global financial institutions, beyond the capacity of national governments to confront. Constitutional commitments to labour rights were a reflection of a public policy and an economic orthodoxy that emphasized the need for secure employment rights, high labour standards, and a powerful voice for organized workers. Then, economics, politics, and law ran with the same grain. Now, employment rights, labour standards, and organized workers are not so much an instrument of economic policy, as its victim.

II. Economic Liberalism

Principles of economic liberalism are embedded in the US Constitution, which protects economic freedom and private property in a number of ways. In the first place, Article 10(1) prohibits the states from making any law 'impairing the obligation of contracts', though it has been said that in practice this so-called 'contracts clause' is a 'specialised and limited restriction on state government regulation', violated

[2] Christopher Hill, *Intellectual Origins of the English Revolution* (1972), 256.

[3] See Ruth Dukes, 'Constitutionalising Employment Relations: Sinzheimer, Kahn-Freund and the Role of Labour Law' (2008) 35 *Journal of Law and Society* 341.

> only when the state acts unilaterally to avoid its own contractual obligations, or to retroactively modify the contractual arrangements between particular private entities, and there is not a sufficient public interest justification for the state's doing so.[4]

More significant then is the Fifth Amendment which provides that no one is to be 'deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.' This is an altogether more important provision, though it does not appear to impose a serious brake on government power.[5]

The Fifth Amendment has been said to preserve the right of eminent domain, the courts accepting that property may be taken in the public interest provided that compensation is paid. In some cases, government regulation that affects the use of private property may also constitute a taking for these purposes, with compensation to be paid as a result.[6] In addition, the Fifth Amendment's limits on the federal government are to be found in the Fourteenth Amendment's limits on the states. This latter prohibition on depriving 'any person of life, liberty, or property, without due process of law' has been said to have come into being 'primarily' to protect African-Americans from 'discrimination'.[7] Mr Justice Black continued by saying that 'while some of its language can and does protect others, all know that the chief purpose behind it was to protect ex-slaves.'[8]

But despite its origins, judicial developments have taken the due process clause well beyond what could conceivably have been contemplated when it was drafted. Perhaps the most famous indication of this is *Goldberg v Kelly*[9] where the Supreme Court held that welfare benefits could be withdrawn from recipients by state authorities only if the latter first gave a full hearing to the individuals in question. It was not enough that there was an informal pre-termination review or a right of appeal after the event. This, however, was not a view universally supported, with Mr Justice Black writing for the minority that it 'somewhat strains credulity to say that the government's promise of charity to an individual is property belonging to that individual when the government denies that the individual is honestly entitled to receive such a payment.'[10]

But notwithstanding developments such as *Goldberg v Kelly*, the US Constitution is a one-sided bargain. There is no provision for the economic rights of workers or labour unions,[11] for whom constitutional law is as much a threat as a protection. It will be recalled that in the *Lochner* line of cases the starting point for the Court was that 'the general right to make a contract in relation to his business' was 'part of the liberty of the individual protected by the Fourteenth Amendment'.[12] Problems of inequality of bargaining power were later brushed aside on the ground that

> it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.[13]

[4] See Robert A. Sedler, 'United States', *International Encyclopaedia of Laws, Constitutional Law*, vol 8 (2005), para 401, and the cases cited at paras 497–500.

[5] Ibid para 396.

[6] Ibid paras 391–6.

[7] *Goldberg v Kelly* 397 US 254, 276 (1970).

[8] Ibid.

[9] 397 US 254 (1970).

[10] Ibid 276.

[11] See *National Federation of Postal Clerks v Blount* 325 F Supp 879 (1971) (no constitutionally protected right to strike).

[12] *Lochner v New York* 198 US 45, 57 (1905).

[13] *Coppage v Kansas* 236 US 1, 22 (1914).

So in the interests of freedom of contract and infused with principles of economic liberalism, the Court struck down a New York statute setting maximum hours for bakery and other workers.[14]

The Court also struck down a Kansas statute prohibiting employers from offering employment on the condition that the applicant agreed not to join a trade union, the Supreme Court citing with approval a passage from the Supreme Court of Kansas:

> In this respect the rights of the employer and employee are equal. Any act of the legislature that would undertake to impose on the employer the obligation of keeping in his service one whom, for any reason, he should not desire, would be a denial of his constitutional right to make and terminate contracts and to acquire and hold property. Equally so would an act the provisions of which should be intended to require one to remain in service of one whom he should desire not to serve.[15]

True, the progeny of *Lochner* was eventually overturned by the Supreme Court just in time to protect a number of New Deal initiatives—including the National Labor Relations Act—from suffering a similar fate.[16] Nevertheless, the threat of constitutional law to workers' economic rights did not disappear completely, with the statutory rights of workers now having to coexist alongside—and be applied consistently with—other constitutional norms.

In the hands of powerful and determined employers, the latter could be used gravely to weaken the economic rights of workers in individual cases. So although the National Labor Relations Act survived constitutional challenge, it must nevertheless yield to unspecified property rights of the employer. In *NLRB v Babcock & Wilcox Co*,[17] it was held by the US Supreme Court that

> an employer may validly post his property against non-employee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message …[18]

According to the Supreme Court, 'Organization rights are granted to workers by the same authority, the National Government, that preserves property rights', and 'Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other.'[19]

III. The Weimar Legacy

As already suggested, there is another legacy. Constitutions may exist not only to restrain the state, but also to require the state to extend defined values or principles into what in some systems might be regarded as the private realm. Such measures serve two related ends. The first is to enrich political democracy in the belief that there can be no democracy without equality; and the second is to extend democratic principles from the political to the social and economic spheres. In the second generation of modern constitutions, a socialist or social democratic or social market function often informs and is sometimes clearly expressed in the text of

[14] *Lochner v New York* (n 12). Also *Adkins v Children's Hospital* 261 US 525 (1923): District of Columbia statute setting minimum wage rates for women.

[15] *Coppage* (n 13), 23.

[16] See *West Coast Hotel Co v Parrish* 300 US 379 (1937) (reversing *Adkins* (n 14), to uphold Washington State minimum wage law), and *NLRB v Jones and Laughlin Steel Corp* 301 US 1 (1937) (upholding National Labor Relations Act).

[17] 351 US 105 (1956).

[18] Ibid 112–13.

[19] Ibid 113.

the document itself. Historically, the best known example of such an arrangement is the Weimar Constitution,[20] with its constitutional-ization of social and economic rights; its constitutional ambition to create an 'economic constitution', and its formal engagement of economic actors in the political process.[21]

In making detailed provision for economic rights, the Weimar Constitution provided that 'the economy has to be organized based on the principles of justice, with the goal of achieving life in dignity for everyone', and that 'within these limits the economic liberty of the individual is to be secured' (Art 151). The same article recognized the freedom of trade and industry. Like the US Constitution, the Weimar Constitution also made provision for economic rights, relating to both contract and property. Freedom of contract was said to be the foundation of economic transactions (Art 152), while property was said to be 'guaranteed by the constitution' (Art 153). A takings clause allowed for expropriation, but only in accordance with law, in the public interest, and on the payment of compensation (Art 153), though alternative provision could be made by law. Guarantees were also made for the right of inheritance, with the state's right to any property of the deceased to be determined by law (Art 154).

As might be expected, the Weimar Constitution expressly anticipated the possibility of expropriation of private property. This was first to ensure adequate housing and, secondly, for reasons of economic management. Thus, real estate was to be supervised to prevent abuse and to secure housing for German families (especially for those with large numbers of children), while land could be expropriated for this and other purposes (including food production) (Art 155). Similarly, provision was made for the nationalization of enterprises, though the power could be used only 'if the rules relating to expropriation were followed, and the principles relating to compensation were not violated'. The Constitution also provided that the Reich could 'join in the administration of economic enterprises or syndicates or may order the states or communities to do so'. The Reich could otherwise assume a decisive influence in the running of such enterprises (Art 156).

But as well as contract, property, and inheritance, the Weimar Constitution also famously recognized the rights of labour. Article 157 provided that 'Labour enjoys the special protection of the Reich', which would 'provide uniform labour legislation'. Specific provision was made for 'the right to form unions and to improve conditions at work as well as in the economy', rights 'guaranteed to every individual and to all occupations' (Art 159). All agreements and measures limiting or obstructing this right were declared 'illegal' (Art 159). Provision was made in the Constitution for a comprehensive system of social insurance 'in order to protect motherhood and to prevent economic consequences of age, weakness and to protect against the vicissitudes of life' (Art 161), and support was declared for 'an international regulation of the rights of the workers, which strives to safeguard a minimum of social rights for humanity's working class' (Art 162).

So far as the 'economic constitution' is concerned, Article 165 provided that 'Workers and employees are called upon to participate, on an equal footing and in cooperation with the employers, in the regulation of wages and working conditions as well as in the economic development of productive forces.' There then followed a great deal of detail about enterprise works councils, district work councils, and the Reich works council, 'in order to fulfil the economic tasks and to execute the socialization laws in cooperation with the employers'. This is in addition to District economic councils and a Reich Economic Council, 'to be organized in such a way, that all important professions are represented according to their economic

[20] See <http://www.zum.de/psm/weimar/weimar_vve.php>.

[21] See Dukes (n 3).

and social importance.' The Reich Economic Council would have the right to consider all proposed legislation before being presented to the Reichstag, and a right to initiate legislation even against the wishes of the government. Article 165 was intended to create 'a pyramid structure' of economic councils and works councils, which would serve in their operation to democratize the economic sphere. With its authority to consider and propose legislation, the Reich Economic Council would straddle both the economic and the political spheres.[22] That said, Kahn Freund records that bodies such as the Reich Economic Council were never intended to be 'ultimate decision-making bodies'. He continued:

> They were to be subordinate to the political sphere, only consultative and therefore innocuous. They would be consulted on all matters concerning the economy, but not on questions of foreign policy and other non-economic matters. There, the state would be autonomous.[23]

For Kahn Freund and others, it was thus essential that

> there was an autonomous political sphere in which decisions would have to be made by political organs, that is to say, by a democratically elected parliament, and by a government, supposed to depend on Parliament and giving orders to a civil service.[24]

But although famous for its attempt by constitutional law to cover the economic sphere, the Weimar Constitution was just as famously the subject of excoriating criticism, not least by those who had been most disappointed by its failure to resist capture by the national socialists. Notable among the critics was Kahn Freund who argued that many of these 'beautifully-worded Articles were nothing but sententious platitudes, binding no one, least of all the legislator, and soon to be characterized by the courts as "merely programmatic announcements" without any legal value.'[25] Some of the provisions relating to the 'economic life' were said to 'bear the imprint of unreality',[26] while such 'real' achievements of the Weimar Republic as there were 'might have been attained without such deceptive pronouncements'.[27] Kahn Freund made an exception for the provisions relating to the rights to organize and collective bargaining as set out in Article 165(1).[28] As for the rest, it remained a 'dead letter'.[29]

IV. Social Democracy Renewed

According to Kahn Freund, the Weimar Constitution was 'inspired by an almost fetishistic belief in the efficacy of constitutional arrangements', reflecting 'a pathetic faith in the effectiveness of institutions and formulated codes'.[30] But whatever the limitations of the Weimar system, the end of the Second World War was a period in which intellectual opinion and political orthodoxy was strongly in favour of (social and) economic rights. This is seen in the powerful restatement of principle in the International Labour Organization's (ILO) Declaration of

[22] I am grateful to Dr Ruth Dukes for this point, and for additional points in the text.

[23] Dukes (n 3), 202.

[24] Ibid.

[25] Otto Kahn-Freund, 'The Weimar Constitution' (1944) 15 *Political Quarterly* 229, 230.

[26] Ibid, referring here specifically to Art 151.

[27] Ibid 231.

[28] Ibid. These were destined 'to play a decisive role in the history of the German republic, and to form the basis of its noteworthy system of labour law.' He was later to refer to the 'Alice in Wonderland' nature of Art 165(2)–(5): Otto Kahn-Freund, *Labour Law and Politics in the Weimar Republic* (Roy Lewis and Jon Clark eds, 1981), 201.

[29] Ibid.

[30] Ibid 230.

Philadelphia of 1944, in the proposal from Roosevelt for a 'second bill of rights' for the United States, and in the work of intellectuals like Georges Gurvitch in France (advocating a Bill of Social Rights to secure the 'jural negation of all exploitation and domination, of all arbitrary power, of all inequality, of all unjustified limitation of liberty of groups, collectivities, and individuals'),[31] and T.H. Marshall in England (charting a great historical progression from civil to political to social rights).[32]

These forces helped to shape national constitutions, many of which in the post-war era were to bear the heavy imprint of ideology, and in some cases heavily pregnant with social democratic or socialist rhetoric. Italy, for example, is 'a democratic republic based on labor' (Art 1) (sic). Not only that, but it is 'the duty of the republic to remove all economic and social obstacles that, by limiting the freedom and equality of citizens, prevent full individual development and the participation of all workers in the political, economic, and social organization of the country' (Art 3), while according 'to capability and choice', every citizen has 'the duty to undertake an activity or a function that will contribute to the material and moral progress of society' (Art 4). This in turn led to a full chapter of economic rights in the constitution, which at the time was probably the most comprehensive in West European states.

But if these social democratic constitutions were to bear the heavy imprint of ideology, they were also to bear the imprint of liberal pragmatism that informs at least one strand of social democratic thinking.[33] And like the Weimar Constitution, they too reflect the fact that in a democracy, constitutions must be an instrument of government for all the people, and instruments for progressive rather than revolutionary change. So in Italy the right to free enterprise is recognized, provided that it is not conducted contrary to the public interest, or in a way that 'harms public security, liberty, or human dignity'. It is also recognized, however, that Italy may be a mixed economy in the sense that 'economic goods may belong to the state, to public bodies, or to private persons'. So while private ownership is recognized and guaranteed by law, private property may be expropriated in accordance with law provided that compensation is paid (Art 42).

It has been emphasized by Cartabia in a valuable exposition of the Italian 'economic constitution' that the property rights protected therein are 'conditioned by social rights and interests', which it is said helped to establish what were 'precise and peculiar features' in relation to other mixed economies. Thus, Article 41 also provides that 'public and private economic activities may be directed and coordinated towards social ends', while Article 42 also provides that private property may be regulated by law 'to ensure its social function and to make it accessible to all'. Cartabia further points out, however, that these arrangements have not prevented the adaptation of 'economic and social relations to political transformation', including most recently an 'extensive programme of privatisation'. The main instrument of state intervention appears to have been through the medium of state-owned private companies, a form of intervention being said to have reached 'extremely high levels'.[34]

What emerges here is the presence of some fairly liberal principles in a social democratic wrapping: the right to private property, and the right to compensation if the property is appropriated. Although there is a formal recognition of free enterprise, there is also a notable formal

[31] Georges Gurvitch, *The Bill of Social Rights* (1945), 71.

[32] Thomas H. Marshall, *Citizenship and Social Class* (1950).

[33] See Eduard Bernstein, *Preconditions of Socialism* (Henry Tudor ed and trans, 1993): social democracy the 'legitimate heir' to liberalism (147).

[34] See Valerio Onida et al, 'Italy', *International Encyclopaedia of Laws, Constitutional Law*, vol 5 (2005), paras 467–71.

recognition of the social function of private property. Similar themes emerge in the three European constitutions that were created in the 1970s, with even the most conspicuously ideologically committed text nevertheless making what is by now the standard commitment to 'the right to private property and to its transfer during lifetime or by death'. The Portuguese Constitution also swims with the conventional tide by providing that while private property may be expropriated, this may only be done in accordance with law and on the payment of fair compensation (Art 62). Indeed, Portugal also now provides for the privatization of property that had been taken into public ownership under earlier regimes.[35]

If we turn finally to the Nordic countries, here too there is full recognition of property rights, in some cases going beyond the corresponding recognition of labour rights. Although property may not be forfeited in Norway (Art 104), this is subject to an exception where expropriation (of movable or immovable property) is necessary in the interests of the state, in which case compensation is payable. In Finland, the constitutional protection of property has been widely interpreted to cover intellectual property as well as unemployment and welfare benefits (s 15).[36] Apart from the wide scope of the property protected, the constitutional guarantee is violated by regulation that makes private property useless or valueless to the owner. In terms of special protections of private property, the Danish Constitution makes the usual provision about expropriation, but provides remarkably that

> Where a Bill relating to the expropriation of property has been passed, one-third of the Members of the Parliament may within three week-days from the final passing of such Bill demand that it shall not be presented for the Royal Assent until new elections to the Parliament have been held and the Bill has again been passed by the Parliament assembling thereupon.

V. Workers' Rights

So far as economic rights are concerned, it is in relation to the economic rights of labour that social democratic constitutions make what is their most distinctive contribution. Two types of labour rights are to be found in constitutional texts, notably individual and collective rights (or in the latter case individual rights that in practice may only be exercised collectively). The former deal with the rights of workers, the latter with the rights of trade unions. So far as workers' rights are concerned, these have a number of distinguishing features, one of which is that they are *contingent and promotional*, and now probably beyond the capacity of any single state to deliver. They are *contingent* in the sense that the French Constitution proclaims that 'every individual has the duty to work and the right to employment', while the Portuguese Constitution recognizes that 'all have the right to work' and imposes a duty on the state to implement policies of full employment (Art 58).[37]

An alternative way of expressing the responsibility of the state for securing work for all is to be found in the *promotional* provisions in countries like Spain where 'special emphasis will be placed on the realization of a policy aimed at full employment' (Art 40), or in Denmark where 'efforts should be made to afford work to every able-bodied citizen on terms that will secure

[35] On privatization generally see Terence Daintith and Monica Sah, 'Privatisation and the Economic Neutrality of the Constitution' [1993] *Public Law* 465.

[36] Ilkka Saraviita, 'Finland' in *International Encyclopaedia of Laws, Constitutional Law*, vol 3 (2009), para 534.

[37] According to the US Department of Labor, in June 2011 unemployment in France stood at 9.3 per cent, and in Portugal at 12.2 per cent: see <http://www.bls.gov/ilc/intl_unemployment_rates_monthly.htm#Rchart2>.

his existence' (s 75). Similarly in Italy, where the Republic 'recognizes the right of all citizens to work', and 'promotes such conditions as will make this right effective' (Art 4); and Greece. where the Constitution recognizes that 'work is a right', but then provides that the state must seek 'to create conditions of employment for all citizens' (Art 22). Less urgent is Finland where public authorities are required to 'promote employment' and 'strive to secure the right to work for everyone' (s 15), and the Netherlands where it is the 'concern' of the authorities to 'promote the provision of sufficient employment' (Art 19).[38]

Apart from being contingent on factors beyond the control of any nation state, economic rights of workers are characterized also by being inevitably *opaque and open-textured*. This is true of those provisions that deal with wages. In Norway, for example, 'it is the responsibility of the authorities of the State to create conditions enabling every person capable of work *to earn a living* by his work' (Art 110). In Italy in contrast, 'workers are entitled to remuneration commensurate with the quantity and quality of their work, and in any case *sufficient to ensure* to them and their families a free and honorable existence' (Art 36). All Spaniards have a right 'to a *sufficient remuneration to satisfy their needs* and those of their family' (Art 35). In Belgium, there is another variation on the theme, with the right to dignity embracing 'the right to just working conditions and *equitable remuneration*' (Art 23), while in Portugal, there is a guarantee of remuneration that will ensure a '*respectable livelihood*' (Art 59(1)(a)).

What is striking about these provisions is that constitutions typically prescribe a right not to a *minimum* wage, but to a *living* wage (Norway), a *sufficient* wage (Italy and Spain), or a *fair* wage (Belgium). But in doing so they do not determine the principles by which wage levels are to be set, and generally leave the matter to be fixed by Parliament or others. It is also striking that not all the foregoing countries have a statutory minimum wage. Indeed this is true not only of Norway and Italy of the countries mentioned, but of other countries in the social democratic tradition, including Sweden and Denmark. In the case of Italy, however, the constitutional obligation is met in part by a requirement that workers should be paid in accordance with the most relevant collective agreement,[39] while in Sweden there is a very strongly established principle that wages should be determined by autonomous collective bargaining between employers and trade unions.

The fact that not all social democracies make constitutional provision for wages highlights a third aspect of economic rights of workers. This is the rather *incomplete* treatment of these rights in the constitutions of social democratic regimes, the treatment thus sometimes appearing rather random. A full catalogue of such rights is to be found in international treaties, notably the European Social Charter of 1961 which addresses the right to work, the right to just conditions of work, the right to safe and healthy working conditions, the right to a fair remuneration, the right to organize, and the right to bargain collectively (including the right to strike). But no social democracy covers anything like the same ground, with the possible exception of Portugal where the constitution covered the right to work, the rights of workers (covering pay, working conditions, rest, and recreation), and job security (Arts 53, 58, and 59).

[38] In none of these countries has the state been able to secure full employment on a consistent basis, with the US Department of Labor reporting unemployment levels in June 2011 running at 21 per cent (Spain), and 7.2 per cent (Denmark): ibid. The country with the least urgent duty coincidentally has the lowest level of unemployment, with the Netherlands being said to have unemployment levels of 4.2 per cent: ibid.

[39] See Tiziano Treu, 'Italy' in Roger Blanpain (ed), *International Encyclopaedia of Labour Law and Industrial Relations*, vol 7 (2010), 90.

Indeed, Germany makes little provision for the employment relationship,[40] while Denmark, Norway, and Sweden make no contribution to substantive rights beyond that already referred to.[41] The Netherlands provides that rules for the protection of workers and co-determination 'shall be laid down in an Act of Parliament' (Art 19), while Greece similarly provides that 'general working conditions are determined by law and are supplemented by collective agreements' (Art 22). Although France recognizes a right to work, the bulk of the Constitution's economic rights relate to freedom of association. Otherwise, a full catalogue of social rights can be constructed, but only by asking for contributions from each jurisdiction, including a right to paid holidays (with working time to be regulated by law) (Italy); a right to 'just working conditions' (Belgium); the promotion of workplace safety (Spain); and a right not to be unfairly dismissed (Finland).

VI. Trade Union Rights

In contrast to the individual rights discussed above, collective rights are those rights which relate to the arrangements for participating in economic decisions, that is to say in the enterprise, or in the branch or sector of the economy in which the individual is engaged, or otherwise in relation to workplace issues. Institutional arrangements of this kind are normally built around the practice of collective bargaining whereby trade unions acting on behalf of workers negotiate terms and conditions of employment. In social democracies this does not mean enterprise-based bargaining that affects only the workers in the enterprise in question, the trade union acting as an agent or as a representative of the workers concerned. Rather, as already suggested it means branch or sector-wide bargaining in which the trade union acts in a regulatory or de facto legislative capacity, negotiating terms and conditions of employment for workers across an entire sector.

In some countries, these agreements may be extended by legislation—or by other means—to employers who are not members of the associations which conclude the agreements. Where regulatory collective bargaining of this kind takes place, collective bargaining density may be as high as 98 per cent (as in Austria), compared to liberal democracies such as Canada (33 per cent) and the United States (11 per cent) where a different form of collective bargaining takes place.[42] Although social democratic constitutions do not typically set out in great detail the machinery of the 'economic constitution', they do nevertheless underpin it with strong trade union rights of a kind unfamiliar in the liberal democracies of the common law world. These include the right to organize in a trade union (there can be no bargaining unless there is organization on both sides), a right to bargain collectively, and a right to strike (there can be no bargaining without a sanction in the event of impasse).

This role of *collective bargaining* is recognized in a number of constitutions, notably in France where the preamble to the 1946 text not only provides that individuals have the right to defend their interests by trade union action, but that 'every worker shall participate through his delegates in the collective arrangement of work conditions, as well as in the running of the firm.' Drafted at about the same time, the Italian Constitution recognizes not only that trade

[40] Though see Manfred Weiss, 'The Interface Between Constitution and Labour Law in Germany' (2005) 26 *Comparative Labor Law and Policy Journal* 181.

[41] Sweden does deal with the right to strike, dealt with below, and Norway makes provision for co-determination.

[42] See ETUI, 'Collective Bargaining', available at <http://www.worker-participation.eu/National-Industrial-Relations/Across-Europe/Collective-Bargaining2>.

unions have a legal status, but that they may 'negotiate collective agreements having compulsory value for all persons belonging to the categories to which said agreements refer' (Art 39). There is no comparable provision in the German Basic Law drafted also at that time, but such arrangements are embedded in the foundations of the state in the post-war era, and there is a suggestion that the right to bargain collectively is implied by the constitutional guarantee of freedom of association.[43]

The pivotal role of collective bargaining in social democratic constitutions is reflected by its recognition in more recent texts, including those of Greece, Spain, and Portugal. The first provides that the 'general conditions of work shall be determined by law and supplemented by collective agreements arrived at by free collective bargaining' (Art 22), the second that the 'law shall guarantee the right to collective labor negotiations between the representatives of workers and employers, as well as the binding force of agreements' (Art 37), and the third that 'trade unions have the power to conclude collective agreements, though it is also provided that the rules governing the power to make collective agreements as well as the scope of these agreements is to be determined by law' (Art 56).[44] The right to bargain collectively is recognized in Belgium (Art 23) (along with the right to information and consultation), though not in the revised Swedish Instrument of Government.[45]

Perhaps curiously, the *right to strike* appears to be more widely recognized in European social democracies than the process of collective bargaining of which it is an essential feature. In many cases it is expressly recognized (France, Italy, Sweden, Portugal, Spain, Greece), but in others it has been created by the courts as being a consequence of the right to freedom of association (Germany and Finland).[46] Beyond that, there are differences in terms of 'ownership' of the right: in some cases (Germany, Greece) it is expressed as the right of the union, whereas in other cases (Portugal, Spain) it is expressed as the right of the individual worker. There are also differences as to the substance of the right, though most of the constitutional texts (Italy, Spain, Greece, Sweden) allow limits to be imposed by law.[47] In the case of France, the courts have imposed limits on an otherwise unqualified right,[48] while in Portugal the right is stated to be unlimited.

The right to strike is thus widely but not universally recognized by the constitutions of social democratic societies, the Netherlands being a notable exception. In an important decision of the Hoge Raad,[49] however, domestic effect was given to the right to strike as expressed in the European Social Charter of 1961. By Article 6(4) this provides that the High Contracting Parties undertake to recognize 'the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike . . .'. The Dutch Constitution recognizes the binding effect of treaties that have been approved by Parliament (Art 93), with the result that domestic law is not applicable if it conflicts with such a treaty (Art 94). In giving domestic effect to Article 6(4) of the Social Charter, the Court was incorporating into domestic law the provisions of a treaty that was a highpoint of the social democratic consensus in post-war Western Europe.

[43] Manfred Weiss, 'The Interface Between Constitution and Labour Law in Germany' (2005) 26 *Comparative Labor Law and Policy Journal* 181.

[44] The Portuguese Constitution also guarantees trade unions the right to participate in the preparation of labour legislation, the management of social security institutions, the monitoring of the implementation of economic and social plans, and to be represented on bodies engaged in the harmonization of social questions (Art 56).

[45] Despite the great importance of collective bargaining as a regulatory procedure in the Nordic social democracies, there is no recognition of it in any of the national constitutions.

[46] In the case of Germany, by a decision of the Federal Labour Court in 1955 (on which see Manfred Weiss and Marlene Schmidt in Roger Blanpain (ed), *International Encyclopaedia of Labour Law and Industrial Relations*, vol 7 (2010), 203); in the case of Finland also by judicial decision (see *Viking Line v ITF* [2005] EWCA Civ 1299, [2006] IRLR 58, at para 26).

[47] In the case of Italy, there is no 'law', the scope of the right being left to the courts to determine: see Michele Ainis and Temistocle Martines, *Codice Costituzionale* (2001), 295–304. In the case of Spain, there is no law made since the Constitution took effect, the position being governed in part by a royal decree made shortly after the end of the Franco era, much of which was ruled unconstitutional by the Constitutional Court on 8 April 1981.

[48] See M. Forde, 'Bills of Rights and Trade Union Immunities—Some French Lessons' (1984) 13 *Industrial Law Journal* 40.

VII. Economic Rights and the 'New Democracies'

Although the economic rights provisions of the Weimar Constitution were not adopted by the German Federal Republic, it is said that the Weimar legacy continued more clearly in the Constitution of the former DDR in 1949. The latter, however, was revised in 1968 and again in 1974, the 1974 Constitution proclaiming a 'socialist state of workers and farmers', 'under the leadership of the working class and its Marxist-Leninist party'. Revised in the same era, the Constitution of the USSR (1977) marked the 'epoch-making turn from capitalist to socialism'. It was based on the principle of 'democratic centralism' (Art 3), in which the Communist Party of the Soviet Union (CPSU) operated as the 'leading and guiding force of the Soviet society and the nucleus of its political system, of all state organisations and public organisations' (Art 6). Special provision was made for trade unions and others to participate 'in managing state and public affairs, and in deciding political, economic, and social and cultural matters' (Art 7).

This is not the place to engage with arguments that the Soviet Constitutions 'have existed to maximize the legal authority of a revolutionary government and the unbounded exercise thereof', or with claims that the constitution was otherwise 'machinery or decoration'.[50] For present purposes, it is enough to note that when these constitutional arrangements were transformed in the USSR and a number of other countries after 1989, there was little evident desire in most of these countries to adopt an unequivocal liberal constitutionalism of the kind encountered in the United States or elsewhere, however much free enterprise and liberal democracy may have been admired. Not only is Russia said to be 'a social state' (Art 7), but the same is true of Bulgaria (Preamble) and Romania (Preamble), while Hungary (Preamble), Poland (Art 20), and Slovakia (Art 55) are declared to be social market economies, and yet other 'new democracies' demonstrate some commitment to social justice.

Given their recent history, it is unsurprising that these counter-revolutionary states should embrace economic rights of various kinds, including rights of entrepreneurship and rights relating to private property. As to the former, the Republic of Bulgaria is based on 'free economic initiative', in which the state 'shall establish and guarantee equal legal conditions for economic activity to all citizens and corporate entities by preventing any abuse of a monopoly status and unfair competition and by protecting the consumer' (Art 19). Similarly, 'Hungary recognizes and supports the right to enterprise and the freedom of competition in the economy' (Art 9),[51] while in Slovakia everyone has 'the right to engage in entrepreneurial or

[49] *NV Dutch Railways v Transport Unions FNV, FSV and CNV* [1988] 6 Int Lab Reps 57.

[50] Samuel Edward Finer, *Five Constitutions* (1979), 29.

[51] For a critical account of some of the problems this has created in adapting to a new political order, see András Sajó, 'How the Rule of Law Killed Welfare Reform' (1996) 5 *East European Constitutional Review* 31.

other gainful activity' (Art 35). While the foregoing are hymns to the virtues of free enterprise, Poland at least has a the measure of its vices: 'Public authorities shall protect consumers, customers, hirers or lessees against activities threatening their health, privacy and safety, as well as against dishonest market practices' (Art 76).

So far as property rights are concerned, the new constitutions typically seek to offer what is by now the conventional guarantee: recognition of the right to private property, with compensation to be paid in the event of expropriation in the public interest. There is a sense in which these guarantees are drafted with a greater sense of purpose than in earlier constitutions and with a stronger sense of protection. In the case of Poland, forfeiture may take place only with judicial approval (Art 46), while in Hungary the Constitution emphasizes that 'expropriation shall only be permitted in exceptional cases, when such action is in the public interest, and only in such cases and in the manner stipulated by law, with provision of full, unconditional and immediate compensation' (Art 13). There continues to be recognition that some property may be owned by the state, as in Slovakia, 'to meet the needs of society, the development of the national economy, and public interest' (Art 20).

In all of these cases detailed provision is made for labour rights, in some cases in much greater detail than in any of the social democracies already referred to. The most ambitious is perhaps Slovakia, which provides that 'employees have the right to equitable and adequate working conditions', and that the law guarantees, 'the right to remuneration for work done, sufficient to ensure the employee's dignified standard of living', 'protection against arbitrary dismissal and discrimination at the place of work', the protection of health and safety at work, the longest admissible working time, the regulation of working time (including rest periods and holidays), and the right to collective bargaining (Art 36). But with few exceptions, all of these countries make express provision for trade union freedom (including the right to strike), albeit that it is the freedom of a different kind of trade unionism than the one previously encountered.

But although mimicking social democratic constitutionalism, it is to be noted that in most of the so-called 'new democracies', the institutional infrastructure of social democracy is not as fully developed as in the countries of Western Europe. Trade union membership tends to be lower (and in some case much lower),[52] while collective bargaining is more likely to take place at enterprise rather than sectoral level. Collective bargaining density thus tends to be low, especially when compared to most of the EU15 (with the exception of the United Kingdom).[53] It is also the case that constitutional guarantees of trade union rights (including the right to strike) have not prevented successful complaints being made from some of the 'new democracies' to the ECtHR (Russia),[54] the Social Rights Committee of the Council of Europe (Bulgaria),[55] and the ILO (Bulgaria, Hungary, Poland, Romania, Russia, Slovenia, in 2011 alone).[56]

[52] ETUI, 'Trade Unions', available at <http://www.worker-participation.eu/National-Industrial-Relations/Across-Europe/Trade-Unions2>.

[53] ETUI, 'Collective Bargaining' (n 42).

[54] *Danilenkov v Russia*, ECtHR App no 67336/01, 30 July 2009.

[55] Case No 32/2005, *European Trade Union Confederation (ETUC), Confederation of Independent Trade Unions in Bulgaria (CITUB), Confederation of Labour 'Podkrepa' (CL 'Podkrepa') v Bulgaria*: available at <http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC32Merits_en.pdf>.

[56] ILO, 98th Session, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 4A) (2011).

VIII. Economic Rights and Liberal Democracies

These difficulties in reaching and maintaining international minimum standards on economic rights is by no means a problem unique to the constitutional law of 'new democracies'. Nevertheless, we can only marvel at the optimism of at least some in the 'new democracies' to establish countervailing sources of power to the power of the state, and the awareness of the need to establish balanced sources of private power, features also on display in the new South African Constitution (though here too with a contestable impact). So what about the long-established liberal democracies in the predominantly English-speaking world? These are the constitutions built expressly (or impliedly in the case of Canada) on property rights. Could they be persuaded to embrace the economic rights of labour? If so how could this be done? And why?

It is true of course that at subnational level in some of these countries we encounter some commitment to economic rights. A good example of this in the United States is the state constitution of New York, with its glorious embrace of the principle that 'labor is not a commodity' (s 17), while Canada offers a good example in the form of the Quebec Charter of Human Rights and Freedoms, with its right of every worker to 'fair and reasonable conditions of employment' (s 46). There have also been political moves in some liberal democracies to expand human rights protection to include economic rights, most notably in Canada where the ill-fated federal and provincial intergovernmental Charlottetown Accord in 1992 proposed amending the constitution to include provisions for a social and economic union. These—non-justiciable policy objectives—would include protection for the right of workers to organize and bargain collectively.[57]

Attention in Canada has long since switched from the political arena to the courts, though at first blush the courts seem to be mining a shallow seam. As we have seen, liberal constitutions in the common law tradition were initially hostile to the economic rights of workers and their organizations, though some (but not all) have since been persuaded to occupy a position of tolerance. But it is a long way from tolerance to protection, especially when that protection would require a creative and expansive interpretation of civil and political rights relating to freedom of association. Could such a right be strong enough to include the freedom not only *to be* in association with others, but also the freedom *to act* in association with others? And if so, could such a guarantee be read to include the right to organize in a trade union, the right to bargain collectively, and the right to strike? And by what standard would the substance of any such right be determined?

In an appeal from Trinidad and Tobago in 1970, the Privy Council famously provided one answer: the right to freedom of association for a trade union member means no more than the right to be a member of a trade union.[58] Although taking an approach not quite this narrow, in its equally famous 'labour trilogy' in the 1980s, the Supreme Court of Canada likewise held that the right to freedom of association did not include a right to bargain collectively or a right to strike; but that even if it did, the restrictions in these cases would be permitted by section 1 of the Charter, which allows reasonable restrictions to be imposed on Charter rights.[59] In a

[57] Consensus Report on the Constitution, Final Text, 28 August 1992. We can only speculate on whether the Canadian courts would have developed such non-justiciable principles as courageously as their Indian counterparts, on which see this volume, Chapter 49.

[58] *Collymore v Attorney General of Trinidad and Tobago* [1970] AC 538.

[59] For an account of these cases, see T.J. Christian and K.D. Ewing, 'Labouring under the Canadian Constitution' (1988) 17 *Industrial Law Journal* 73.

more recent 'labour trilogy', however, the Supreme Court of Canada has changed its mind, and held in the first of these cases that the denial of collective bargaining rights to agricultural workers was a violation of the Charter right to freedom of association, emphasizing the potentially collective dimension to the Charter.[60]

This is a development that requires some explanation, and cannot be understood as a sudden embrace of strong social democratic values. What does stand out, however, is an example of the growing influence of international human treaties in the work of regional and national courts. In a decision reflecting closely the approach of the ECtHR a year later,[61] the Canadian Supreme Court said in the second decision of the recent trilogy that 'the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified.'[62] For this purpose, the Court referred specifically to three treaties, namely the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and ILO Convention 87, the last dealing with freedom of association and protection of the right to organize. To say the least, these were controversial benchmarks, none of which referred expressly to the right to bargain collectively, a matter dealt with separately by ILO Convention 98, which Canada has not ratified.

But although significant, this development should not be exaggerated. It is one thing to acknowledge international human rights treaties, but another matter to give effect to international human rights principles and norms, leading to doubts about whether the sow's ear of liberal constitutional liberty can ever produce the means necessary to produce the silk purse of social democratic equality. So although re-affirming its commitment to ILO principles in the third decision in the recent trilogy, the Canadian Supreme Court has settled on a definition of collective bargaining for the purposes of the principle of freedom of association that is unique to the SCC, and which falls some way short of the ILO principles to which it referred. According to the Court, 'the bottom line' is simply that workers 'are entitled to meaningful processes by which they can pursue workplace goals'.[63] As a result, the Court upheld legislation authorizing a diluted form of workplace representation that had already been condemned by the ILO supervisory bodies.[64]

IX. Back to *Lochner*?

The narrative so far leads tentatively in two directions. The first is the 'normality' of including both species of economic rights in national constitutions, despite the apparent retreat of social democracy in the global economy. Apart from the countries already discussed, this a feature of the major constitutional texts of South America (notably Brazil) and Asia (notably India). Moreover, new constitutions are more likely to embrace than reject economic rights of both species. The second (and more tentative) is that economic rights are beginning to be sustained

[60] *Dunmore v Ontario* 2001 SCC 94, [2001] 3 SCR 1016.

[61] *Demir and Baykara v Turkey* [2008] ECHR 1345 (K.D. Ewing and John Hendy QC, 'The Dramatic Implications of *Demir and Baykara*' (2010) 39 *Industrial Law Journal* 2). See also the *Viking* and *Laval cases* below.

[62] *Health Services and Support—Facilities Subsector Bargaining Association v BC* 2007 SCC 27, [2007] 2 SCR 391, para 70.

[63] *Ontario (AG) v Fraser* 2011 SCC 20, para 117.

[64] For the CFA, see Complaint against the Government of Canada presented by the United Food and Commercial Workers Union Canada (UFCW Canada), supported by the Canadian Labour Congress and UNI Global Union, Report No 358, Case No 2704, para 355.

by civil and political rights in systems where they are not otherwise fully included. Apart from the evolving developments to this effect in Canada, there are signs that even the British courts may be stirring.[65] To some extent this latter development can also be attributed to the enduring impact of social democratic values, to the extent that the developments in question are inspired by international treaties themselves monuments to the legacy of social democracy.

The traffic is not, however, all one way, with the spirit of *Lochner* worryingly surviving in a number of jurisdictions.[66] By some way the most serious of these threats is that presented by the European Court of Justice/Court of Justice of the European Union, particularly in relation to the social democracies of Western Europe. In the first of several recent cases, a Finnish shipping company (Viking Line) proposed to re-flag a vessel in Estonia, where it could take advantage of lower wages. Concerned about the impact that this might have on jobs and terms and conditions of employment, the Finnish Seamen's Union (FSU) objected and enlisted the support of the International Transport Workers' Federation (ITF), which in turn gave instructions to national affiliated trade unions not to deal with the Viking Line. The company brought proceedings in the English courts (London being the base of the ITF), alleging that the conduct of the ITF violated the EC Treaty, on the ground that it interfered with the company's right to freedom of establishment (Art 43).[67]

On a reference by the English Court of Appeal seeking guidance on a number of questions, the European Court of Justice (ECJ) responded in a quite unpredictable way, elevating the rights of business over the rights of trade unions.[68] Although accepting that the right to strike was a fundamental principle of EU law, the ECJ imposed a number of qualifications on the exercise of the right, which were consistent with neither the Finnish constitution, nor the principles of the ILO. A week later, the same court held in the parallel *Laval* case that a trade union could not take collective action against a Latvian building firm in order to compel it to observe Swedish collective agreements for workers it had posted to Sweden from Latvia.[69] Again, the right of businesses to freedom to provide services (EC Treaty, Article 49) took priority over the right to strike accepted as a fundamental principle of EU law and protected by the Swedish Constitution.

It is important to emphasize that because of the principle of the overriding supremacy of EU law, these decisions have direct effect in national legal systems, and take priority over even national constitutional arrangements. Indeed, it is already the case that both the FSU and the ITF settled an undisclosed sum in favour of the Viking Line, and that the Swedish unions were held liable by the Swedish Labour Court to pay damages to Laval,[70] in both cases for taking action that was apparently constitutionally protected and permissible under national law. It is true that the decisions impose qualifications (*Viking*) and restrictions (*Laval*) on constitutional (and other) rights only where the rights in question are being exercised in a transnational EU context, such as the relocation of a business or the posting of workers from one member state to another. But as the ILO Committee of Experts has pointed out:

[65] *RMT v Serco Ltd; ASLEF v London and Birmingham Railway Ltd* [2011] EWCA Civ 226 [2011] ICR 848.

[66] The best example of this recently in national law is *Ryanair v Labour Court* [2007] IESC 6, where the Irish Supreme Court held that legislation was to be 'given a proportionate and constitutional interpretation so as not unreasonably to encroach on Ryanair's right to operate a non-unionised company'. This is widely thought to have given corporations a constitutional right *not* to deal with trade unions, Ireland thereby elevating by means of constitutional law the rights of businesses above the rights of its citizens.

[67] *Viking Line v ITF* [2005] EWCA Civ 1299 and [2005] EWHC 1222 (Comm), [2006] IRLR 58.

[68] Case C-438/05 *Viking Line v ITF*, 11 December 2007.

[69] Case C-341/05 *Laval v Svenska Byggnadsarbetareforbundet*, 18 December 2007.

[70] Mia Ronnmar, '*Laval* returns to Sweden: The Final Judgment of the Swedish Labour Court and Swedish Legislative Reforms' (2010) 39 *Industrial Law Journal* 210.

> in the current context of globalization, such cases are likely to be ever more common, particularly with respect to certain sectors of employment, like the airline sector, and thus the impact upon the possibility of the workers in these sectors of being able to meaningfully negotiate with their employers on matters affecting the terms and conditions of employment may indeed be devastating.[71]

Well might Danny Nicol refer to *Viking* and *Laval* as the EU's '*Lochner* moment',[72] the ECJ having elevated an old ideology from the trenches of the common law, to the high plains of treaty interpretation, trampling on constitutional achievements along the way.[73] For although the EU proclaims to be a 'social market economy' which 'confirms its attachment to the fundamental social rights of workers',[74] and although it has impressively embedded a process of social dialogue in its lawmaking machinery,[75] social democratic ambitions nevertheless appear to have been contained. It is true that the EU Charter of Fundamental Rights recognizes the right to collective bargaining and action (Art 28). But it is also true that this is subject to the qualification that the right may be exercised 'in accordance with Union law and national laws and practices', a provision which post-Lisbon effectively entrenches the *Viking* and *Laval* doctrines in the constitutional DNA of the EU.[76]

Quite apart from the fact that the ECJ/CJEU has so conspicuously used a 'constitutional' text (the EU Treaty) to subordinate the rights of labour to the needs of property, *Viking* and *Laval* are all the more striking for the fact that they are so far out of step with the line of travel being pursued by the other European court, namely the ECtHR. In a number of cases decided after *Viking* and *Laval*, the ECtHR has held that the right to freedom of association in the European Convention on Human Rights (Art 11) includes the right to bargain collectively and the right to take collective action, in the former case at the standard set by ILO Convention 98.[77] In taking these steps, the ECtHR did so by having regard to developments both international and national, 'and to the practice of Contracting States in such matters'.[78] The developments in question included not only ILO Convention 98, but also the Council of Europe's Social Charter, and (ironically) the EU Charter of Fundamental Rights.

X. Conclusion

Historically, there has been a constitutional evolution in the treatment of economic rights in national constitutions, and from a comparative point of view the emergence of two different political traditions. The recognition of property rights transcends both liberal and social democratic constitutions, but in both property rights tend to be read widely. The inclusion of welfare benefits as a form of property, however, appears to vary in its implications, giving rise to procedural obligations in the United States, but in some cases to substantive expectations in

[71] ILO, 98th Session, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 4A) (2011).

[72] Danny Nicol, 'Europe's *Lochner* Moment' [2011] *Public Law* 308.

[73] It is notable also that although the ECJ in both *Viking* and *Laval* took into account ILO Conventions, it did do in a way that distorted their meaning.

[74] TEU, Art 3(3) and Preamble respectively.

[75] TFEU, Arts 154, 155.

[76] The TEU, Art 6 now provides that the Charter 'shall have the same legal value as the treaties'.

[77] See esp *Demir and Baykara v Turkey* [2008] ECHR 1345. An account of the other cases is to be found in Ewing and Hendy (n 61).

[78] *Demir and Baycara* (n 61), para 154.

the Council of Europe, even though in the latter case the jurisprudence may flatter to deceive.[79]

The economic rights of labour in contrast to the economic rights of property are associated with social democratic principles and the socialization of the private sphere. They represent a statement about how a society is to be governed in all of its aspects, rather than a statement about what a government may or may not do. Crucially, the constitutional rights of labour suited the prevailing economic orthodoxy at the time they were developed, one which emphasized the need to increase the spending power of workers, to stimulate demand for goods, to reduce unemployment and welfare dependency, and to alleviate distress and reduce the risk of social unrest.

These economic rights of labour sit uncomfortably in a new economic orthodoxy of open markets, transnational corporations, and free trade in an intensely competitive global economy. Now, wages and other terms and conditions are being squeezed to reduce prices, and jobs are being moved to reduce costs for the behemoths that now dominate economic and political life. In that context the constitutional protection of labour rights takes on a new role and a new responsibility, these entrenched rights running against the grain of an orthodoxy they seem so spectacularly ill-equipped to confront.[80]

Recent developments suggest that one challenge for the evolving purpose of labour rights as constitutional rights will be to ensure that such rights in national constitutions both meet and are permitted to operate at the minimum level set by international human rights instruments, and in particular at the level set by the ILO. Developments in places as diverse as the Canadian Supreme Court and the ECJ suggest that that while judges are willing to acknowledge these principles, there is not the same willingness on the part of all judges to engage with their substance. In the current climate, lip-service is hardly good enough.

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[79] *Stec v United Kingdom* [2006] ECHR 293; *R (RJM) v SSWP* [2008] UKHL 63, [2009] 1 AC 311.

[80] On which, see Harry W. Arthurs, 'Labour and the "Real" Constitution' (2007) 48 *Les Cahiers de Droit* 43.