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On the Convergence of Labour Rights and Human Rights

Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards

New York: Human Rights Watch, 2000, ISBN 1-56432-251-3

www.hrv.org/reports/2000/uslabor/

Your Voice at Work: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work

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Note critique

Review Essay

On the Convergence of Labour Rights and Human Rights

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During the past decade a strong international consensus has emerged that holds that a set of core labour rights should be regarded as fundamental human rights. The consensus developed in the context of a worldwide debate over globalization and the rules under which that process is to develop in the new millennium. An effective set of trade rules came into existence in 1995 when the World Trade Organization was established. Those rules attracted much criticism from a multinational coalition of labour, human rights and environmental organizations who the media has come to refer to as Civil Society.

In response to this criticism, the established powers re-affirmed support (at the level of rhetoric at least) for a set of social standards that include freedom of association, recognition of the right to bargain collectively, and the elimination of forced labour, child labour and discrimination in employment. Organizations joining the consensus include the

Organisation for Economic Co-operation and Development, the World Trade Organization, and the International Labour Organization. The human rights character of core labour rights was also re-affirmed in the concluding documents of the World Summit on Human Rights and the World Summit on Social Development. Employer organizations joining the consensus include the International Organization of Employers and the International Chamber of Commerce.

The background to this consensus is briefly reviewed in *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards* whose major purpose is to consider, from a human rights perspective, the state of freedom of association in the United States. Broader implications of the consensus are considered in *Your Voice at Work*. Probably the keystone document of the new international workers' human rights consensus is the ILO's 1998 Declaration of

Fundamental Principles and Rights at Work. In that Declaration, members of the tripartite (labour, business and government) ILO pledged to "respect, to promote and to realize in good faith" the five core labour rights mentioned above. *Your Voice at Work* is part of the follow-up to that declaration.

The short conclusion of *Unfair Advantage* is that freedom of association exists on paper in the US but reality on the ground falls far short of the law's promise. Instead, workers are systematically denied their right to organize due to premeditated illegal behaviour by employers and the inadequacies of US enforcement, which "falls far short of its goals." Commonly workers who "try to form and join trade unions to bargain with their employers are spied on, harassed, pressured, threatened, suspended, fired, deported or otherwise victimized in reprisal for their exercise of the right to freedom of association."

To North American industrial relations academics this finding is hardly news. The inadequacies of US law and practice have been extensively documented over the years and *Unfair Advantage* adds to that documentation. The main empirical part of the project, which forms the basis of the book, is a set of case studies. One very interesting aspect of the cases is that they focus on the most vulnerable of workers in the United States—those with few skills and little education. HRW was particularly interested in immigrants, both legal and illegal. The HRW researchers found that these workers were often systematically exploited.

For example, South Florida is dotted with nursing homes. Certified nursing assistants (CNAs), many of whom are women immigrants, are the largest group of workers employed by those homes. Most CNAs are paid the minimum wage and receive very few benefits. Their work is the third most hazardous in the US after mining and

construction. Most nursing homes are understaffed and require mandatory overtime. As a result, according to HRW, "workers are frequently injured in lifting, pulling and pushing equipment, lifting and moving residents, and even in assaults by confused but still physically strong residents."

Nearly all of these workers are unorganized and in order to keep their "unfair advantage," HRW found that nursing home operators commonly engaged in illegal activities designed to thwart unionization. In one case, for example, a North Miami nursing home "resorted to massive unlawful means including repeated threats to cut pay and benefits if workers chose union representation."

The situation is even worse for those without legal papers. Most workers in the Washington State apple industry are Mexicans. Some of them are legal, but many are working without documents. According to HRW, "Low wages, intermittent work, dangerous pesticides, hazardous working conditions and inadequate medical attention make the lives of Washington apple industry workers precarious." In 1999, employers closed workers' barracks rather than comply with government housing standards. As a result "thousands of workers lived in forests and on riverbanks in cars, tents and cardboard boxes."

One worker in the industry interviewed by HRW described his company's tactics in response to a union organizing attempt. Company officials called a meeting of the relevant workers at which: "They talked a lot about dues and strikes, but they talked the most about the INS [Immigration and Naturalization Service]... because they know a lot of workers on the night shift are undocumented. I would guess at least half. They know that we are afraid to even talk about this because we don't want to risk ourselves or anyone else losing their jobs or being deported, so it

is a very powerful threat.” In short, the employer was willing to hire illegal aliens because they are very easily exploited. HRW documents several other examples of this phenomenon.

Among the uglier twists of the Washington apple case is the fact that “Mexico is the largest foreign customer for Washington State apples.” In other words, through their exploitation of Mexican immigrants Washington apple growers are able to price their apples low enough to undercut competitors in Mexico thereby probably hindering Mexican economic development.

In order to rectify the situation, Human Rights Watch makes several recommendations, few of which are original. Basically, like the American labour movement, HRW would like to see Canadian practice imported to the US. Among the proposals are interim reinstatement of workers victimized for union organizing, more access to the workplace for union organizers, tougher remedies against law breakers, card check certification, more rapid elections and faster resolution of election disputes, the restoration of NLRB budget cuts, the reversal of the permanent strike-breaker doctrine and first-contract arbitration. It would also like to see multi-employer bargaining units allowed, special protection for immigrants and the withholding of government contracts from companies that repeatedly violate workers rights.

There are two problems with this set of recommendations. First, they are unlikely to see the light of day because of US political realities. That is not a fatal flaw since one purpose of exercises like this is to change the political climate. The second problem is more basic. Even if, through some unlikely conjunction of events, the HRW proposals were to become law there is little reason to expect that the results would achieve a great deal.

If freedom of association and its derivatives—the right to bargain collec-

tively and the right to strike—are fundamental human rights then they ought to be enjoyed by all. But if the agenda for change recommended by HRW were to go into effect there is little reason to believe that the situation in the US would improve to a level much beyond that in Canada where most of the recommendations on its list are already in place. Since Canadian practice denies representation to about 80% of private sector workers, it is unlikely that the results in the US would be much better.

Although the Human Rights Watch report was written by Lance Compa, who has long advocated the expansion of respect for workers’ human rights in the United States, its substance was the result of internal negotiations. Several “liberal” employer representatives sit on HRW’s board and their opinions and preferences had to be factored into the final compromise.

I found particularly unfortunate HRW’s willingness to accept employer opposition to unions and collective bargaining as a legitimate incident of freedom of speech. While recognizing the many ways in which employers abuse free speech to subvert workers’ freedom of association, HRW “advocates more free speech for workers not less free speech for employers.” The phrase has a noble sound but one wonders if the framers of this report would take the same position were advocacy of forced labour, child labour or employment discrimination at issue.

To demonstrate its evenhandedness, HRW exclaims that “workers do not have a right to win an NLRB election.” Since winning an NLRB election is the only practical way to establish collective bargaining in the US, HRW apparently believes that employees have a right to exclude themselves entirely from collective employment decision-making. The report does not consider forms of representation other than conventional bargaining under existing US procedures or

the government's responsibility to ensure representation for all.

Although deference to employer authority is the norm in the United States (and in Canada), it is not consistent with the notion of collective bargaining as a human right. As I have argued in a recent paper, the right not to bargain makes about as little sense from a human rights perspective as a right to sell oneself into slavery, or a child's right to prostitute itself or a society's right to choose apartheid ("Choice or Voice: Rethinking American Labor Policy in Light of the International Human Rights Consensus." *Human Rights in the American Workplace*. J. Gross, ed. Ithaca, NY: Cornell University Press, forthcoming). In a democratic and human rights-loving society the persistence of arbitrary authority in industry is as problematic as the continuation of forced labour, child labour and discrimination in employment. Its abolition should be an urgent objective rather than a state benignly tolerated as legitimate.

One might expect the International Labour Organization to make a vigorous case for universal representation. Instead, in *Your Voice at Work* it makes the case timidly. The report is sub-titled *Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*. Its focus is freedom of association and the right to bargain collectively. The ILO is concerned that in the wake of economic globalization and the ascendancy of neoliberal economic policy "a significant representation gap has arisen in the world of work" and it believes that "it is important to close the representation gap that has developed in order to secure a voice for men and women in a changing world of work."

That is about as forceful as this report gets. It notes that even though political democracy has been gaining ground in the post-cold war era, "there is still a considerable degree of unease

with, and even outright hostility towards trade unions." The report hints that this is wrong and that employers ought to voluntarily recognize and bargain with representatives freely chosen by their employees, but nowhere do the report's authors clearly say that. Instead they invent murky concepts like "representational security" which "workers and employers need." What is representational security? It "is based on the freedom of workers and employers to form and join organizations of their own choosing without fear of reprisal or intimidation. It refers to the institutional means of representation that the realization of these principles and rights allow." Simple and straight-forward language is not a strong suit of this report.

Speaking of human resource management, the ILO says that it "can be fully compatible with freedom of association and collective bargaining, but some managers see it as a way to avoid independent collective representation by the employees. A unionized workplace can even be perceived as a sign of poor management." One might expect the next statement to be something like: "That attitude and the behaviour associated with it are out of line; policies intended to deny workers representation are incompatible with respect for collective bargaining as a human right." Instead the writers of the ILO report say blandly "And yet freedom of association is a natural corollary to freedom of enterprise."

To be fair, ILO officials have to choose their words carefully. Having to keep labour, government and business representatives simultaneously happy is a herculean task. On the other hand, one would certainly not expect such word mincing if the discussion topic was slavery, the exploitation of children or bigotry in the context of employment.

In the process leading up to the Declaration of Fundamental Principles and

Rights at Work, workers' representatives at the ILO pushed for effective enforcement procedures and employer delegates resisted. The employer representatives won. The follow-up procedure, which calls for annual reports by member countries, enhanced technical assistance by the ILO to countries desirous of getting in line with the principles underlying the core labour rights and the spreading of information about the Declaration, is "strictly promotional." This characteristic sets it apart from the procedures for the implementation of the World Trade Organization's negotiated rules, which are backed up by strong commitments by member nations to comply and trade sanctions if they do not comply. On the economic side, the global rules at this point in time have teeth, the social rules, however, are largely hortatory. Civil Society has a problem with the current imbalance. It was one of the factors that produced demonstrations at Seattle, Washington and Prague in recent years. It is an issue that is not likely to quickly disappear.

Perhaps the most significant aspect of the appearance of these two reports is the intermingling of industrial relations and human rights dialogue. Until recently the two communities had pursued their agendas separately and in isolation from one another. Although freedom of association has long been recognized as a human right, having been prominently mentioned in the Universal Declaration of Human Rights, the

human rights community has done little to promote or defend it, especially in the developed democracies.

At a recent conference in New York, the executive director of HRW, Kenneth Roth, explained this situation. Because freedom of association has existed on paper in countries such as the US for some time and because trade union movements were in place to defend and forward freedom of association it seemed natural for human rights groups to direct their attention elsewhere. For their part, trade unionists and institutions such as the ILO had their own agendas and language, which did not systematically or regularly make use of human rights notions or norms.

The appearance of these two reports indicates that the situation is rapidly changing. The results for the practice of industrial relations in North America may very well be significant. As things now stand, in both Canada and the United States collective bargaining is regarded as an ordinary political issue that one expects governments of the left to promote and governments of the right to restrict. If collective bargaining is accepted as a human right it attains a new moral character that casts a shadow on many of our established attitudes and propensities and calls out for fundamental labour policy reform. Our private sector representation gap is huge. If the ILO's plea that the gap be closed is taken seriously we have a long way to go.