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The Social Contract Revisited

Transborder Labour Liberalization

A Path to Enforcement of the Global Social Contract for Labour

Karen E. Bravo

The Foundation for Law, Justice and Society in affiliation with
The Centre for Socio-Legal Studies,
University of Oxford

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Executive Summary

- The path to the framing, implementation, and enforcement of a global social contract that protects labour is the liberalization of labour from the constraints to which the transborder labour market is subject.
- The failure of international trade law to liberalize labour stands in stark contradiction to the liberalization of other fundamental economic inputs, and undermines the vision for a globalized world.
- The model of multilateral trade liberalization, which began at Bretton Woods, and to which much of the world is now committed, is focused on lowering barriers to the movement of goods, capital, services, and ideas. However, the liberalization of labour (and the consequent movement of human beings) is a neglected and feared aspect of multilateral and regional trade liberalization policies and initiatives.
- As a consequence, labour is hampered in its ability to operate in the global sphere, with a consequent negative impact on labour's ability to transpose domestic social contracts to the global sphere, or to enforce those global standards (such as International Labour Organization [ILO] conventions) that may already exist.

- The transnational labour market is characterized by the illegality and temporariness that are assigned by states to mobile and would-be mobile human providers of labour; yet the globalized transnational economy stimulates, and indeed demands, the movement of labour from one domestic economy to another.
- The disjuncture and disequilibrium arising from the interaction of international trade law and domestic immigration law, which seeks to barricade domestic markets from the entry of human transborder labour providers, are in conflict with the reality of transnational economic forces. Consequently, they foster illegal transborder movements that greatly increase the vulnerability to exploitation of would-be mobile human labour providers.
- Concepts of distributive justice require democratization of access to the benefits of trade liberalization through the mechanism of labour liberalization. The proposed liberalization of labour would make both the international human rights and multilateral trade regimes more consistent with human (and labour) rights ideals.

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Principles of distributive justice should determine the distribution of a society's assets. Ideally, both the powerful and less powerful should derive benefits, and the less powerful should not be made less well-off. It appears to me that the existing domestic social contracts constructed with the intent of protecting human labour providers have run out of steam and are not able to withstand, in current form, the transnational economic forces that assail them.

Local and domestic factors cannot adequately explain the conditions confronting labour in either developed or less developed economies. The forces of globalization — transborder economic and other trends — are such that domestic governments, standing alone, cannot control the effects on existing domestic contracts. Individual states cannot adequately provide protection for their nationals, including their labour providers.

Multilateral trade liberalization, although bringing with it such benefits as cheaper consumer goods and wider consumer choice through exposure of labour and capital to transborder competition has, perhaps irrevocably, altered the individual social contracts wrought by and within individual nation states. After the Industrial Revolution of the nineteenth century and the emergence of the 'working man' from the peasantry, collective action movements, social activists, and political processes created varying mechanisms aimed at protecting labour. In essence, through pensions and other contractual benefits, labour established some ownership rights in the fruits of its economic activity. Workplace safety laws and other labour protection standards (including anti-discrimination and other legislation) operated to adjust the power differential between labour and capital. Individual nation states

carved out their own social contracts based on local balance of power and cultural and historic factors, among others. However, in the search for a greater competitive edge, labour has been forced to relinquish many of the contractual rights it had won in the past. The legal protections that were part of the deal are often inadequately enforced by state authorities as they, too, attempt to bolster economic competitiveness.

This voluntary and involuntary relinquishment of protective mechanisms has been characterized as a 'race to the bottom': the idea that, in order to be competitive within a globalizing world, labour protection standards must be abandoned in order to attract globally mobile *capital* and all-important *jobs*. Pursuant to this view, the glorification of competition and the failure of the multilateral trading system to impose global labour, environmental, and other standards undermine the social contract created within individual states to the disadvantage of, among others, labour and the environment.

This horse — mandatory global labour standards — has left the barn. The resistance from defenders of individual state sovereignty and autonomy, and the diverse social, cultural, and historical experiences of individual states make agreement about and adherence to global standards a long-drawn-out and perhaps impossible endeavour. To the extent that labour standards are addressed as part of trade liberalization initiatives, deference has been and continues to be given to the existing (and often unsatisfactory) standards of participating states. Where cheaper labour and lower standards of labour protection are viewed as a participating state's comparative advantage and a key source of future fiscal prosperity, the imposition of mandatory

standards is unwelcome and repelled. If a global social contract that includes pro-labour protection mechanisms is to be created, the power of labour's economic role must no longer be ignored. Like capital, labour must be liberalized to act transnationally and participate in the creation of standards that protect it.

The contemporary transnational labour market: disequilibrium and exploitation

The contemporary model of globalization (the increasing interdependence and interconnection of the economies of individual states) is facilitated and, in large part, stimulated by multilateral trade liberalization. Through the mechanism of trade liberalization, economic forces and actors are unleashed to act transnationally and globally. Simultaneously, through active construction of both physical and intangible barriers, states and some vested interests oppose and encumber the transnational movement of labour. As a result, the multilateral trade liberalization undertaken through the World Trade Organization (WTO), as well as much regional trade liberalization, have neglected to liberalize labour. That neglect constrains the ability of labour (both individual labour providers and labour acting collectively) to participate actively in globalization as autonomous economic actors, thereby facilitating the exploitation of labour.

While the globalized transnational economy demands the movement of labour from one domestic economy to another, individual nation state domestic immigration law creates, and the near-silence of multilateral trade law maintains, obstacles to such movement. Yet restrictive immigration policies do not successfully constrain the flow of labour. The contrast between the economic incentives available in domestic and transborder markets has resulted and is resulting in the movement of labour responding to economic stimuli.

States, capital, and humans work within the interstices and gaps of applicable legal frameworks to supply the transnational labour market through the use of formal and informal programmes, 'illegal'

transborder movement, and bilateral agreements and arrangements. However, these means of access are too often narrow and exploitative carve-outs from the non-access default mode. The trading arrangements, formal and informal, between labour-rich sending countries and labour-poor host countries, rest upon a central premise: the transborder labour provider will always be a creature (national) of her home country. To that end, it is intended that the transborder labour provider should never achieve the status nor enjoy the rights of a national of the host country, and may not demand from the host country the rights and privileges that come with membership.

Permanent outsider status is maintained through the mechanism of imposed temporal restraints and barriers to transformation into or assimilation as part of the privileged host nation citizenry. The imposition of temporariness undermines the autonomy and agency of human labour providers. In addition, the human labour providers are intentionally cabined and constrained by dependence on employers for the continued legality of the labour provider's presence, retention of the sending state's unequal bargaining power and status, and limited access to the domestic civil rights regime of the host state.

Further, the legally prohibited movement leads to exploitation of labour in both origin and destination economies. The over-supply of labour (increased unemployment or underemployment) in State A drives down or freezes the wages offered to State A's labour. The owners of domestic capital are able to outsource production to cheap labour that is rendered immobile within the national borders of developing country destination states. The undocumented and quasipersonhood status of illegally mobile labour in State B, and *not merely* the *presence* of that labour, facilitates the exploitation of labour in State B and may drive down the wages of domestic labour there.

Inadequate trade liberalization and some consequences

Throughout the process of continual trade liberalization, the fundamental and mostly unspoken underlying concept of labour as an immobile factor

of production (analogous to immobile land) has not been institutionally challenged despite the attempts of some developing countries to raise the issue. The current model of trade liberalization allows and facilitates labour's exploitation as a factor of production while withholding from labour full autonomy to explore economic opportunity. Labour is conceptualized as subordinate to and/or subsumed within the production of goods and services. To create a rights-protective equilibrium in the transnational labour market, I contend that the economic nature of humans — their economic roles in the global and economic system — must be more fully recognized and facilitated. That recognition will require that human labour providers have the right easily to enter and exit individual domestic labour markets in response to economic stimuli.

Failure to liberalize labour betrays fundamental trade liberalization theory as well as classical and neoclassical economic theories. Pursuant to those theories, labour is one of the fundamental factors of production. (Labour, of course, differs from the other factors of production by virtue of its humanity and is more than a mere input into production.) Trade liberalization theory touts the welfare enhancing benefits that are to be gained through removal of barriers to the movement of both factor inputs (such as capital) and finished and unfinished products. However, the movement of labour, a fundamental production input, is ignored. Instead, dominant trade liberalization policy efforts assume, with little challenge, the immobility of labour. But, at the same time, mass migratory movements by labour representing all levels of skills, and facilitated by active labour trading in the transborder market by states, capital, and criminal enterprises, reveal a deep disjuncture between the dominant model and economic reality.

The failure of the contemporary trade liberalization project to recognize and implement labour's equal status as a factor of production and to deploy a holistic economic conceptualization of labour undermines the trade liberalization project.

Since labour may not freely undertake transnational

movement to either exit or enter individual domestic markets, this blind spot in trade liberalization hinders the ability of individual states to flexibly adjust the factor inputs into their domestic economic production in response to changes in their economies' demand for labour. Labour liberalization would allow the unemployed from a labour-rich economy to find employment in labour-poor economies where such employment openings might otherwise not be filled. At the same time, a labour-poor economy engaged in labour-intensive production would be able to increase the supply of labour through labour liberalization polices that welcome the influx of new labour.

Further, the failure to challenge the assumed immobility of labour flies in the face of evidence of the adjustability and mutability of factor inputs and of comparative advantage. For example, through government intervention in education, an economy's qualitative comparative advantage in labour may be transformed from low-skilled to high-skilled labour. Alternatively, an economy may adjust its factor inputs so that, for example, an economy that is rich in labour but poor in capital may, through the import of capital, transform its comparative advantage from production of low-capital to more sophisticated capital-intensive products. Therefore, the flexibility and ease of adoption of different policies by, as well as the development of, individual economies would be enhanced by the liberalization of labour.

In addition, the failure to liberalize labour distorts the transnational labour market. While domestic capital, producers, and consumers are allowed to respond to increased competition originating from outside domestic state borders, labour is prevented from freely and fully responding to the economic stimuli in a productive manner. Consequently, labour may lose its utility in the then-existing production framework of the domestic economy (i.e., become unemployed or underemployed) because of exposure of domestic producers to transborder competition in goods, services, capital, and/or ideas. However, labour itself is prevented from competing transnationally; from seeking transborder employment opportunities. In

constructed and defended borders and barriers from responding productively to increased transborder economic opportunities.

Furthermore, the continued and self-contradictory assumptions about, and attempted enforcement of, labour immobility allows capital to substitute capital and labour transnationally; capital therefore 'price discriminates' in its payments of compensation to human labour providers trapped in and confined to domestic labour markets. Manufacturers and some service providers are able to outsource production to pools of cheap labour held immobile by the national borders of host states. Service providers whose services must be provided in situ, for example, landscaping, roofing, and house cleaning companies, are able to access the cheap labour of the undocumented worker who, due in part to the legal quasi-personhood imposed by the state, accepts lower wages than does the domestic labour force. That acceptance of lower wages by the worker who is illegally present may exert additional downward pressure on the wages of other labour providers in the host economy.

The General Agreement on Trade in Services (GATS) does provide, rather indirectly, for some liberalization of labour. Under Mode 4 of the GATS, a service supplier from State A may supply services in State B through the presence of natural persons; that is, the human labour provider necessary for the delivery of the liberalized service. However, the GATS Annex on Movement of Natural Persons expressly excludes and disclaims an intent to affect individual member state domestic immigration laws and/or any implications that it creates rights to access the labour market of individual member states. Further, to the extent that WTO member states have made commitments under the GATS, and those limited commitments have been fulfilled, liberalization of labour is restricted to the highly skilled human labour providers who serve the

service delivery interests of juridical entities. Finally, Mode 4 addresses only the *temporary* movement of natural persons. In order for human labour to claim its proper place (equal to the other mobile factors of production) in the world trading system, and to enjoy the human rights promised by the international human rights regime (as well as some domestic civil rights regimes), labour must be recognized as an autonomous economic unit and liberalized to perform as such.

Proposed solution: labour liberalization

Labour must be brought front and centre instead of being subsumed into other inputs into production. Contemporary proposals for addressing the transnational labour market disequilibrium include expansion and enhancement of existing domestic guestworker programmes, liberalization of labour within the context of regional trading arrangements, and/or expansion of GATS Mode 4. However, none of the proposals attempts to reconceptualize and facilitate the role of labour in economic activity: they offer the prospect of increased legal transborder movement of human labour providers in response to transborder economic incentives but do not fundamentally challenge the status quo. The proposals rely instead on the continued interposition of the non-omniscient state between the human labour provider and the economic stimuli to which the provider attempts to respond, and maintain the structures and mechanisms of exploitation and facilitation of inadequate agency in individual labour providers. As a result, the existing preconditions for exploitation would continue.

The contours of labour liberalization

The labour liberalization that I advocate would not commoditize labour in order to facilitate its increased *exploitation* in economic activity by other actors. Instead, I propose that the liberalization of labour within the broader trade liberalization project would free labour on three levels. Firstly, labour would be liberalized from its current conceptualization as a mere immobile input into the production of goods and services. Secondly, labour would be liberalized from the state border constraints that have sought

to limit its transborder movement and rendered it more easily exploited. As an autonomous economic unit, labour could seek out the markets where demand is highest and labour is more highly valued and compensated. Thirdly, labour liberalization would democratize access to the benefits of trade liberalization by increasing the opportunities of individual labour providers to seek out the newly accessible transborder economic benefits. Inextricably linked, these three steps are interdependent. Freed of the constructed state border barriers, labour would be liberalized to engage in its own decision making and thereby conduct its own cost-benefit analysis and choice of the utility of movement or non-movement to a new employment market.

I acknowledge the fundamental moral, philosophical, and ethical truth that labour is not merely a commodity. However, I seek to point out and to provide a solution based on the reality that while *more* than a unit of production or economic input, human labour providers are *also* just that: economic units and factors of production. A holistic reconceptualization and implementation of that human role is absolutely essential to the formulation of a global social contract that is protective of the interests of labour.

While, under human rights law, the individual is more than an economic unit, it is as economic units that human labour providers are conceptualized under domestic immigration law and, implicitly, under international trade law. Indeed, the international trade system treats and relies upon humans to function *principally* as economic units — producers and consumers — without explicitly recognizing and implementing the necessary steps for their economic liberalization.

Labour liberalization will foster the enforcement of human rights. Liberalization of the movement of labour will give labour more economic power: the ability to respond freely and autonomously to economic conditions. The right to enter and exit competing domestic labour markets will exert pressure, creating competitive conditions and market discipline that will create a trend towards an increased recognition and

enforcement of labour and other human rights standards. That power of the human labour provider to exit individual markets will add substantive content to human rights in a manner that immobile labour currently is unable to do. That is, the power to exit will impose market discipline on would-be autocrats seeking to oppress the populations of their nation states. Labour liberalization will cause nation states to compete for populations, thus encouraging improvements in living conditions, including economic conditions, and the recognition and enforcement of civil and human rights.

In order for labour liberalization to be most effective, it must take place within a context where human rights standards are recognized and enforced and the mobile individual human labour provider enjoys the human rights protections of the applicable domestic and international legal regimes on the same basis as does his/her domestic analogue. Contemporary international human rights and domestic civil rights law delineate minimum standards of treatment that did not exist in the earlier, freer eras of transnational labour movements. The liberalization of labour will enhance the capacity to implement and enforce those minimum standards within competing domestic labour markets. The relationship is symbiotic: liberalization would not enhance pro-labour developments in the absence of the minimum standards; without liberalization the baseline is inadequately enforced.

Implementing labour liberalization through a general agreement on trade in labour

Since this policy brief advocates the recognition and implementation of labour's role in the global trading system, it is appropriate, even necessary, that that recognition and implementation be incorporated in the treaty architecture of the existing multilateral trading regime. Individual labour providers should be able to freely trade their labour internationally within the institutional framework of the General Agreement on Tariffs and Trade (GATT)/WTO system. The negotiation and entry into force of a multilateral agreement on trade in labour offers the prospect of achieving distributive justice as well as both human

rights (combating labour exploitation) and trade liberalization (more efficient use of economic resources with welfare enhancing effects) goals.

Labour liberalization sits squarely within the trade liberalization raison d'être of the WTO, and the equity rationale of the GATT/WTO system also speaks in favour of utilizing the WTO's institutional framework to further the liberalization of labour. As such, the WTO provides the most appropriate framework for the mechanism of labour liberalization — a mechanism aimed at widely disseminating the benefits of trade liberalization by removing the mobility constraints on labour's autonomous activity. A new General Agreement on Trade in Labour (GATL) would create such a mechanism. The proposed GATL would be negotiated and adopted as a new Annex to the WTO Agreement — a multilateral agreement creating obligations for all WTO members.

The proposal brings to the fore and gives substance to an attribute of labour - its transnational mobility that is key to the formulation and enforcement of a global social contract that benefits labour. The GATL would untether the transnational trade in labour from the constraints of Mode 4, including the mandated temporariness of the limited transborder labour movement that the GATS contemplates. It would also untether human movement from the irrational nativist constraints of domestic immigration law that too often lay the foundation for the exploitation of transborder human labour providers. Implementation of the GATL will benefit from the flexibility that is intrinsic to the multilateral trade regime. Within the overarching obligations and principles (such as national treatment and most favoured nation) negotiated by the member states, the commitments made by individual members to each other may be tailored to individual nation state circumstances so as to slow down or accelerate the transition challenges that will result from the fundamental reconceptualization and liberalization of the role of labour.

In addition, the GATL and its interpretation will be subject to existing GATT/WTO jurisprudence and to nondiscriminatory criminal and other public order legal regimes of individual member states. Member states would not be obligated to allow the entry of individual labour providers who intend to participate in illegal and/or illegitimate endeavours. For example, the GATL would not require the entry of individual labour providers destined for industries that are illegal under the laws of the host member state. Furthermore, activities that are *malum in se*, such as the movement of underage children for sexual or other exploitation, would not be legally required by the GATL.

Further, the GATT/WTO system offers the power to enforce through sanctions, which is missing from both the international human rights and labour rights regimes. The Dispute Settlement Understanding of the GATT/WTO system offers an avenue for effective mutual member state enforcement of the new GATL obligations.

Conclusion

Individual states are subject to pressures from transnational economic forces that have fundamentally altered the existing domestic social contracts between, among others, labour and capital. To create a rights-protective equilibrium in the transnational labour market, the economic nature of humans – their economic roles in the global and economic system - must be more fully recognized and facilitated through the liberalization of labour. The liberalization of labour will allow human labour providers to compete and collaborate with capital on the global stage. Global competition and collaboration between and among labour and capital are more likely to stimulate the formation of a global social contract than is the current structure of the transnational labour market.

As logically convincing as this argument is, it seems politically unfeasible. The reason for this discouraging conclusion is the juxtaposition of two conceptions of justice: on the one hand, a distributive justice agenda that revolves around an economic analysis of incentives and disincentives; and, on the other hand, a conception of justice that is grounded in politics of identity, feelings of solidarity, culture, inclusion, and exclusion. More bluntly, racism and ethnic strife

inhibit what would seem to be an economically rational and moral policy. Further, labour liberalization is unthinkable and off the table because the political organization of the world into states imposes on individual states limited obligations toward noncitizens outside their borders. Another influential political obstacle is the fear that the benefits of labour liberalization would not accrue to those located within the borders of the more powerful states.

However, despite the efforts of its architects and implementers to limit the scope of its effects to selected aspects of domestic economies, multilateral trade liberalization already has unleashed integrative processes. It may well be the case that we are currently living in an era that is characterized by partial changes (open borders for capital, ideas, and trade goods) that will be completed in time (with open borders for labour). History may provide some basis for this optimism: the social contract developed from a very localized concept to a national one over a period of several centuries. The move to a global social contract may be an extension of this trend.

The practical implications of this policy suggest that the liberalization of labour would not have the immediate dramatic effects of mass migration. The historical evidence demonstrates that the flows of labour are self-correcting. There are built-in checks to the prospect of floods of new labour overwhelming the infrastructure and people of a given state. Individuals are motivated not only by the prospects of higher income, but also by family ties, community relationships, and cultural norms that lead them to stick to the familiar and the convenient. The vast majority of Italians and Swedes did remain in Italy and Sweden during the height of Italian and Swedish migration to the New World; and the same is true of the Irish, even in the throes of the potato famine. The flow of responsive labour will rise and fall in response to the economic opportunities available within individual labour markets.

In order to liberalize labour and thus mould the institutions and processes of globalization to maximize and widely disseminate welfare enhancing

benefits, it is incumbent on political leaders and policymakers to make the conceptual leap from the nationality- and border-based 'us-versus-them' theoretical framework to a more holistic vision that prioritizes common humanity and global interests.

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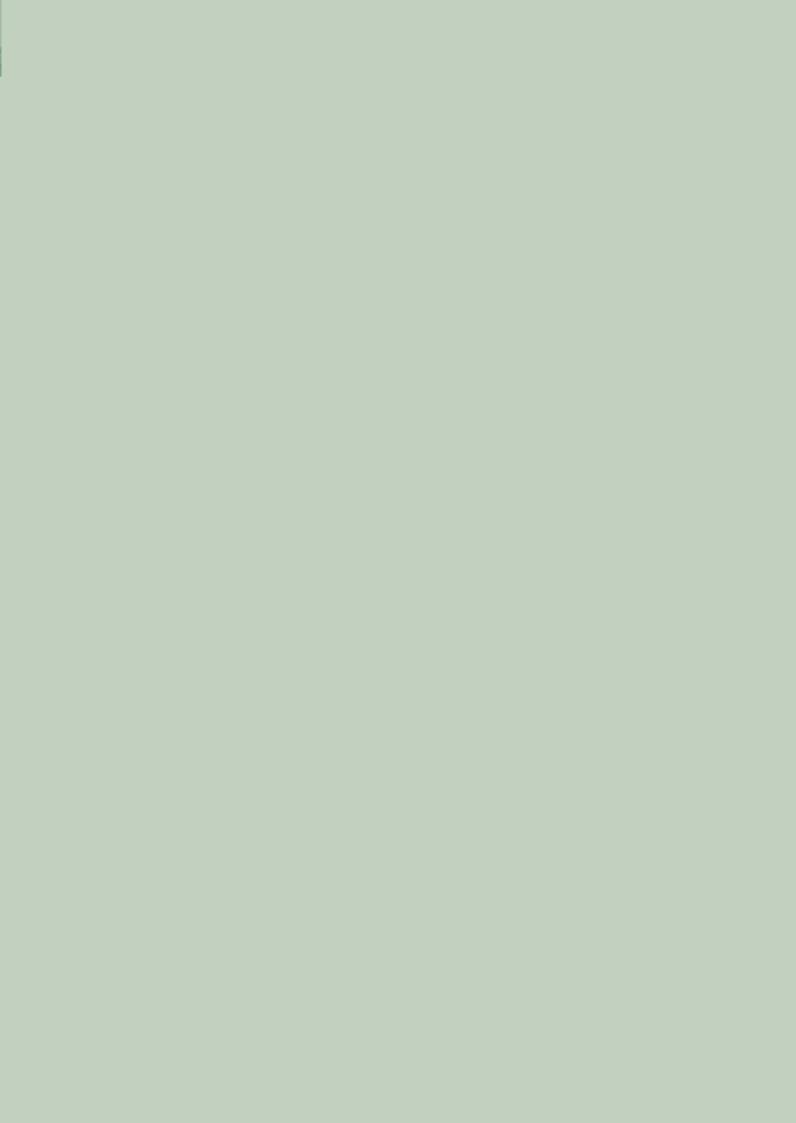
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Karen E. Bravo is an Associate Professor of Law at the Indiana University School of Law, Indianapolis, where she researches and publishes on, among other subjects, regional integration, human trafficking, labour liberalization, and democratization and the rule of law. She practised corporate law with international law firms in New York City and Boston before joining the American Bar Association Central European and Eurasian Law Initiative in the Republic of Armenia, where she worked with domestic judiciary and advocates, and local and international NGOs on legal reform and education programmes and strategies. Professor Bravo is a graduate of the University of the West Indies, Columbia University School of Law, and New York University School of Law.

For further information please visit our website at www.fljs.org or contact us at:

The Foundation for Law, Justice and Society

Wolfson College Linton Road Oxford OX2 6UD

T · +44 (0)1865 284433

F · +44 (0)1865 284434

E · info@fljs.org

W · www.fljs.org