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Sovereignty and authority in labour relations and among states

Niklas Selberg (Lund University (Sweden)) · Wednesday, April 10th, 2024

War and oppression plague the world. Peaceful relations among states still seems like a distant dream.

From a labour lawyer's perspective, the quest for an international legal order among states parallels the historical development of the legal order among labour and capital on the labour market. In the purpose of fueling a discussion on the boundaries of law and the relationship between violence and law, this piece reflects on some historical points where international law and (collective) labour law cross paths.

Labour law shares with international law an ambiguous relationship to the nation state, not least since labour regulation is created not only by states but also by autonomous institutional organizations of workers and employers. There are historical examples of trade unions being

derided as usurpers or insurgents after having succeeded in generating normative effects through collective agreements, because the fruits of their efforts effectively compete with the Legislator/state in regulating working conditions for members and non-members. Collective bargaining agreements achieving normative effect was essentially compared to the coup d´état and, because of its similarities with state legislation, were thought of as a transgression in relation to employers and the state. In the early 20th century and onwards, however, labour regulation has rather been conceptualized by lawyers as outside the legal system because of the lack of sanctions to some of its 'rules' – the argument being that if breaches of collective bargaining agreements cannot lead to sanctions besides industrial action (de facto strike), then they are not really within the realm of law.

The creation of autonomous norms – essentially through self-help – has always been understood as a drastic and violent procedure, including by proponents of the practice. Beatrice and Sydney Webb wrote 1897 in their seminal *Industrial Democracy*:

Every strike, like every other kind of war, necessarily causes damage to other persons – damage which the strikers can clearly foresee, and which the Legislature must as clearly have foreseen when it sanctioned the terms of labor being left to this kind of private war.

Walter Benjamin noted in 1921 (in "Critique of Violence") that "[t]oday organized labor is, apart from the state, probably the only legal subject entitled to exercise violence". The right to strike is protected, not least in international human rights instruments and several conventions (i.a. nos. 87 and 98) of the International Labour Organization (ILO). Attempts to curtail that right are constantly ongoing, including in Sweden.

International law and labour law overlap in their ambivalent position vis-à-vis the nation state, and furthermore share an interest in delimiting 'law' from 'interests'. This theme was recurring in the legal scholarship of long time (1924–1926, 1945–1962) Swedish Secretary of State Östen Undén, who also was one of the first to defend, in 1912, a Ph.D. in labour law in Sweden. Disputes on rights concern the application and interpretation of norms emanating from the state or from autonomous agreements (collective bargaining agreements). Disputes on interests, however, concern issues not regulated in state law or agreement – instead they are the result of conflicting economic wants. While disputes over rights in law and agreement can be subject to adjudication, labour market disputes over interests cannot. A third party settling a dispute over interests would in effect amount to imposing a compromise between conflicting economic powers. What norm would an adjudicator or arbitrator apply when handling a completely unregulated conflict between labour and capital about the results of production? Disputes over interests on the labour market are settled (economically) violently by the use of force in industrial action: strike, lockout, blacking, boycotts and sympathy/secondary actions of different kinds. Walter Benjamin, writing in 1921, phrased this as the strike's ability to "found and modify legal conditions, however offended the sense of justice may find itself thereby" and that violence in the form of strikes and military actions have an inherent lawmaking character. Benjamin continued: "The possibility of military law rests on exactly the same objective contradiction in the legal situation as does that of strike law – namely, on the fact that legal subjects sanction violence whose ends remain for the sanctioners natural ends and can therefore in a crisis come into conflict with their own legal or natural ends."

When states enact norms and when autonomous organizations agree to norms, conflicts of interests turn into conflicts of rights and the scope for legal/allowed violence decreases. International law is sometimes – e.g. by Michael Akehurst – characterized as a "horizontal legal system". International

law's absence of a supreme authority and centralized use of force together with the reliance on self-help in case a state's right is violated compares to the historical trajectories of regulation of labour and the labour market.

In approaching the end of this blog post, I remind the reader of an obscure episode from the negotiations of the regulation of the world order between the two world wars: Swedish delegate Engberg suggested that trade unions were to play a role in sanctioning the crime of aggression. Trade unions were to call for a general strike in case the state violated international peace. The act of aggression, it was argued, constituted a crime against the world order and the domestic legal order, making it a moral obligation on part of trade unions to attack their own government, according to Engberg. Die Arbeiter haben kein Vaterland and Proletarier aller Länder vereinigt Euch!, one must assume. The proposal was not implemented (note, however, Article 41 of the Charter of the United Nations).

Labour lawyers and international lawyers seem to have some common ground when it comes to shaping the boundaries of law. Perhaps such a discussion could explore the possibilities for a deepened understanding of international law and the interaction of states through the lens of the regulation of labour and labour markets. After all, it is in the context of the international regulation of labour (International Labour Organization Constitution; originally part XIII of the Treaty of Versailles, 1919) that it is being said most clearly and with most urgency: "universal and lasting peace can be established only if it is based upon social justice".

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