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Globalization and the Future of Labour Law

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BOOK REVIEWS

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Globalization and the Future of Labour Law. Edited by John D.R. Craig and S. Michael Lynk. New York: Cambridge University Press, 2006. xx, 498 pp. ISBN 0-521-85490-3, $110.00 (cloth).

One of the pressing issues confronting international and comparative labor law scholars is how domestic systems of labor regulation are affected by global economic interpenetration and liberalization. For some scholars and labor advocates, increased capital and trade flows pose a serious threat to the integrity and efficacy of domestic regulatory structures. The editors of this volume of essays delivered at a 2003 conference at the University of Western Ontario believe that while domestic labor law will remain the dominant form of workplace regulation in the foreseeable future, it is increasingly unable to accomplish its traditional objectives. These essays, therefore, are meant to aid in understanding how traditional modes of workplace and labor regulation are affected by globalization, and what should be the policy and regulatory responses to this phenomenon, particularly at the supranational and international levels. Some of the contributions are quite compelling. The volume's overall success, however, is uneven.

The essays, which are contributed by both academics and practitioners, are organized into six sections: "Perspectives on Globalization," "International Labour Standards," "The European Union," "The Americas," "The ILO," and "Labour Rights." In the first section, Harry Arthurs, one of the most respected academics writing on labor law and globalization today, sets the tone for much of the volume, arguing that while globalization has not made a significant normative impact on Canadian labor law, it has made a number of what Arthurs terms harmful "formative" impacts. In particular, Arthurs sees four ways in which globalization negatively affects labor law: it has helped politicize labor law by making it more partisan and less consensus-driven than it used to be; it has helped facilitate privatization of labor law by shifting dispute settlement and standard setting away from state mechanisms; it has resulted in more flexible employment with more movement between jobs; and it has resulted in the trans-nationalization of employment, which, for Arthurs, means that Canada will have to rethink its constitution-based tradition of assigning labor law jurisdiction to the provincial level. Finally, Arthurs questions the usefulness of locating labor law within a human rights discourse. He believes that rights discourse has had only negative effects on Canadian labor law, and might in fact disempower workers by distracting them from the most important means of effecting labor law reform—political and grassroots mobilization. Arthurs wants reform of labor law through political means, not through human rights discourse or an over-reliance on constitutional rights. As he puts it, you cannot rely on the Supreme Court or the ILO to do the heavy lifting of workers who cannot mobilize. But could Arthurs be downplaying rights discourse too much? Cannot the use of rights discourse legitimate the claims of workers to workplace rights and justice, which could in fact help them mobilize? Could stronger constitutional protections for freedom of association, for example, help create a space more conducive to political mobilization for labor law and other social reforms?

In the second set of essays on international labor standards, Véronique Marleau's response to one of Arthurs's concerns about globalization—the trend toward labor law without a state—is to reintroduce the notion of subsidiarity into labor law and globalization discourse. Subsidiarity, according to Marleau, is the allocation of primary responsibility for the exercise of authority to the local level, while leaving the central level the power to intervene to supplement this authority to ensure the scheme's effectiveness. But Marleau's essay might have benefited from providing more guidance on how to concretely apply the subsidiarity concept in the real world, and from connecting her arguments with, for example, the burgeoning New Governance literature in legal scholarship, which has used versions of subsidiarity in analyzing new paths of labor regulation at both the international and local levels.

Kevin Banks's chapter takes on the issue of the so-called "race to the bottom." Banks questions the emerging consensus that a race to the bottom either does not exist or is over-stated. While developing countries might realize long-term advantages by implementing high labor standards, he argues, globalization might also create short-term incentives for some countries to compete primarily on unit labor costs, thus

perpetuating a form of economic segmentation between certain countries and regions. Race-to-the-bottom skeptics fail to marshal convincing evidence to support the rosier picture they favor, Banks argues. However, Banks provides few citations to refute the skeptics.

Alan Hyde, in one of the most interesting essays of the collection, attempts to model the development of transnational labor standards using game theory. Assuming the "consensus" view on the race to the bottom that Banks questions, Hyde argues that transnational labor standards can best be understood not as a Prisoner's Dilemma (the basis for many models), but rather as a Stag Hunt. In Stag Hunts, all parties are best off when they cooperate (to hunt stags), but without assurances of cooperation they will likely take the safe route of individually hunting hares. Hares are less appealing than stags, but at least you know you can get them. As applied to such global labor issues as child labor, this argument suggests that countries will cooperate to improve conditions if they can be assured that their neighbors will cooperate as well. Accordingly, Hyde (a) is skeptical of the use of sanctions in trade agreements that might work against creating trust between parties, (b) is skeptical of U.S. unilateralism, which conveys to other countries that the United States will not cooperate and "play the game," and (c) believes that the persistence of regulatory redundancy, that is, having multiple sources of labor standards, such as international ILO standards and standards in treaties, can be explained by its utility: in small groups, participants can be assured of cooperation, while international standards serve as "coordination points for small scale bargaining." But how do we model standards such as freedom of association, where it is not necessarily in the long-term *political* self-interest of many governments to improve labor standards, or in the economic interests of certain economic elites? It would be interesting to see more work on this by Hyde and other scholars.

Hyde's skepticism toward sanctions is partially challenged in Lance Compa's essay on how labor should be addressed in the Free Trade Agreement of the Americas (FTAA). Compa argues that an FTAA labor standards agreement should integrate the best elements of three other regional labor rights initiatives: the North American Free Trade Agreement's (NAFTA's) side agreement on labor standards (NAALC), South America's arrangement (MERCISUR), and the Caribbean Common Market (CARIOCOM). Recognizing the unlikelihood that countries will agree to a sanctions system, he still would like to see a labor rights arrangement that preserves a sanction option, while also emphasizing other elements such as an institutional role for civil society, multi-layered compliance mechanisms, the ability to file complaints against corporations, and the incorporation of core labor standards and not just an enforce-your-own law standard, as well as independent review processes. He also would like to see more firm-level mechanisms, such as specific company-level audits that would be made public. José Pastore in his essay, on the other hand, is, like Hyde, skeptical of sanctions. Pastore wants fewer standards prescribed from "above" and would like to see a more procedural model that will permit countries to negotiate economic and labor standards according to local conditions.

Brian Langille's essay, taking a somewhat more abstract approach, attempts to address critics of trade and labor linkage in the FTAA. Grounding his argument in a Senian model of development, Langille makes the case that economic and social freedoms are critically interlinked, and that core labor rights are both the means to development and the goal. Langille then proceeds to argue—as does Werner Sengenberger in another essay—that in addition to being worthy ends in themselves, Core Labor Standards (CLS) are instrumental in achieving beneficial economic outcomes. Yet while Sengenberger and Langille try to make the case that CLS are key to economic development, it is too easy to point to China, Singapore, Vietnam, and other countries as counter-examples. More research is needed on the degree to which labor rights are instrumental to economic aspects of the development project.

Other authors contribute essays on the gender dimension to labor rights, integration in the European Union, and migrant worker issues, including a particularly interesting essay by Catherine Barnard analyzing how the European Court of Justice's jurisprudence on migrant workers has changed from one based on "solidarity" to one based on anti-discrimination, possibly reflecting the less homogeneous nature of the expanding European Union. While a number of the essays in this volume are compelling and important contributions to the literature, the volume as a whole might have benefited from a more engaged dialogue between the contributors, as well as a more comprehensive treatment of some important current issues in transnational labor law literature that are relevant to the volume's theme of the relationship between globalization and labor law. These issues include, for example, the rise of non-state, or "private," regulation, and how

private regulation interacts with or supplements traditional public regulation.

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Homo Juridicus: On the Anthropological Function of the Law. By Alain Supiot. London and Brooklyn: Verso, 2007. 256 pp. ISBN 978-1-84467-105-2, $34.95 (cloth).

Alain Supiot, eminent French Professor of Law at the University of Nantes and one of the most famous French experts on labor law, in this book gives us his critical take on the place of law in modern society. His broad theme is how the values relevant to labor law have weakened, not only in France but in the world at large. In tracing the reasons for that development, he particularly emphasizes the effects of globalization.

Supiot is among a group of scholars returning to more traditional liberalism in recent French political writing, such as Pierre Manent in *An Intellectual History of Liberalism* (1996). As a reaction to the postmodernists' cynical humanism (often of a rather Nietzchian flavor), which was itself a reaction to the existentialists' world-weary, even in some ways nihilistic brand of humanism of the 1950s, this literature is both post-existentialist and post-Marxist. Even this movement is starting to be challenged, as the French avant-garde does not sit still and now includes supporters of something closer to 18th-century liberalism, which is, curiously enough, much like present-day American liberalism, in goals if not in means. To the extent that Alain Supiot's philosophy can be made out in this continuing ferment, it is something of a compromise. It leans toward a brand of liberalism that seeks to retain the best of French leftist politics and the traditions of European social democracy.

In *Homo Juridicus,* Supiot makes accessible a modernized liberal position on the relation between law and justice. The loss of a commonly accepted source of moral authority has produced a void, and this book is partly a meditation on what are the moral underpinnings of law. In general, this book is a good introduction to the state of present French—but not only French—scholarship on the sociology of law. It is what might be called post-postmodern legal scholarship with an emphasis on labor law.

Supiot writes a good deal about globalization. It is largely thanks to the operations of organizations such as the World Trade Organization, the World Bank, and the International Monetary Fund, he argues, that freedom of contract overrides respect for national legislation; and meanwhile the International Labor Organization, UNESCO, and the World Health Organization are setting less and less ambitious targets, like early 19th-century philanthropists who contented themselves with trying to stop the spread of epidemics, prevent forced labor, and limit child labor. Supiot writes, "Laws are emptied of substantive rules and replaced by rules on negotiation. This trend—proceduralization—transfers the concrete and qualitative questions that were previously settled by the State into the sphere of contract" (p. 103). In Supiot's view, this results in a return to feudal ways of thinking and acting, including practices aimed at enforcing inequalities in social power and producing social hierarchies.

Part 1 of this book, on legal dogma, is concerned with the decline in law's moral basis. The author describes how substantive standards of morality that derived, *ab initio,* from religion and were previously embodied in law and subject to state oversight have given way to instrumental standards of the sort that are established by contractual agreement. Whatever the political opposition to these trends, economic and now technological changes work in tandem to make state "moral" oversight complicated and difficult to enforce.

In Part 2, on legal technique, Supiot argues that new information technologies, by destabilizing the labor market, interfere with law's historic role in humanizing technology. Many of the consequences are in plain sight; he writes, "The boundaries between salaried and freelance work, and private and professional life, have become blurred; new forms of subordination have emerged, while economic power is diffused across a labyrinth of company networks; and any reduction in working hours goes together with an increase in work intensity" (p. 124). One conspicuous and important development that has served to circumscribe the work-lives of employees, and even of suppliers who are not physically present at the workplace, is the monitoring made possible by modern communications technology. Few practices could better illustrate the trend toward the "automation" of law. As Supiot writes, "Since the dawn of the modern age the West has aspired to replace the government of people with the administration of things" (p. 149) by reducing law to pure technique without reference to meaning and values.

The decline of state sovereignty in this world of increased market competition can lead to