

Labour Laws and Global Trade

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PREFACE

The focus of globalisation studies has been shifting towards the question of how global processes can be better regulated in order to deliver both economic growth and social justice embedded in the rule of law.¹ There is a rapidly expanding body of literature on the subject, mainly written by economists, political theorists and trade specialists. Why has a scholar and practitioner of labour law ventured into this controversial area? The first reason is a belief that the rules and practices governing productive work are as essential as property rights for the functioning of the market economy. Labour laws also have an important moral dimension. They thus provide an excellent case study of the possibilities for creating a legal framework within which economic integration in a globalised market economy can be reconciled with the ideals of social justice.

In order to understand the legal process we must, as Kahn-Freund famously said, recognise that law is 'neither a professional tool nor an academic toy, and...it has higher purposes than the convenience of the legal profession or the training of the minds of law students'.² Those who seek to penetrate the process of legal policy making as well as deductive reasoning must seek to penetrate the social objectives pursued by legislatures, judges and administrators, and... must seek to do so whether or not they have been made explicit by those who make the decisions.³ I have tried to provide an analysis of transnational labour regulation and to penetrate its objectives in the new global economy. I hope this will help all sides of the debate to argue on the basis of knowledge and reason, instead of simply voicing the stereotypes and dogmas of pro- and anti-globalisation ideologies. Since my readers will have varying degrees of legal knowledge, I have, wherever possible, inserted boxes in the text which briefly explain terminology and legal institutions, and provide examples.

The second reason for this book is more personal. My intense interest in international and comparative labour law began in the 1950s when I was a voluntary adviser to the South African Congress of Trade Unions (SACTU), then heavily persecuted by the apartheid government because it was the only multiracial union federation and was closely allied to the ANC. On behalf of the organisation, I drafted petitions to credentials committees of successive

¹ Held (2004) at xv.

² Kahn-Freund (1978) at 293.

³ Kahn-Freund (1978) at 278.

International Labour Conferences, challenging the Government's exclusive choice of workers' delegates from the all-white racist unions. To my astonishment, the ILO whose Constitution and conventions oppose all forms of discrimination, repeatedly rejected our petitions. Ultimately, however, international pressure forced the apartheid regime to withdraw from the ILO in 1964.⁴ This was the beginning of a campaign that led to international sanctions and contributed to the fall of apartheid. This experience predisposed me to the idea that trade sanctions should be used against countries that violate basic labour standards. My research for this book, over the past decade, has led me to modify that belief, and to argue that only in the case of pariah states (*hostis humani generis*) such as apartheid South Africa and the military junta in Myanmar will the advantages of trade sanctions outweigh the undoubted benefits of free trade in promoting economic growth, democracy, and improved labour standards.

My views about the possibilities and limits of transplanting international and regional labour standards into national systems of labour law have been affected by my experiences, since 1974, as an independent expert for the European Commission on projects such as the directive on the protection of acquired rights of workers on the transfer of undertakings and the implementation of EC labour law by the UK. By 1986, I had become convinced that the methods of negative and positive harmonisation of labour laws being pursued by the EC were inadequate, sometimes even counter-productive, as a means of reconciling economic integration and social policy. In meetings of experts under various presidencies from 1987, I was one of those who advocated a framework of fundamental human rights, in place of partial harmonisation.⁵ Although far from perfect, the EU Charter of Fundamental Rights, now incorporated in the EU Constitution signed on 29 October 2004, has enormous potential. One of my concerns in this book is how the new framework of rights can provide a floor on which the 'soft law' of the Open Method of Co-Ordination and Social Dialogue can function effectively.

My work as an ILO expert in the 1990s taught me about both the dangers and possibilities of using foreign experts in the law reform process in developing countries and emerging market economies. In Namibia I was asked to draft a Labour Code for the newly independent state in a very short period. I encountered inter-departmental disputes, stand-offs between civil servants who had served the old colonial regime and the new inexperienced Ministers and their staffs, a weak and divided trade union movement and powerful mining and farming interests, as well as some lawyers who wanted the quick-fix of importing inappropriate models from the US. The experience was quite different in my native South Africa, as an ILO expert on the Cheadle Committee which drafted the South African Labour Relations Act in 1994. Here I found a committed Ministry of Labour, outstanding labour law specialists, strong

trade unions which had been forged in the long struggle against apartheid and were close to the political leadership, and employers who were ready and willing to engage in constructive social dialogue. The Act that was produced was the product of intense consultation and discussion, blending foreign experience with the organic development of the country's labour laws. In Russia, sent by the ILO to advise the Government on labour relations, I witnessed the struggles of the new 'alternative' unions to establish their independence in the face of chaotic liberalisation, and without effective legal guarantees, while the 'official' unions and enterprise management retained the mindsets of the Soviet period.⁶ My conclusion was that labour rights need to start at home, and to be fashioned so as to improve, not diminish, the comparative advantages of each country in the new global economy. This led me to study the new scholarship on comparative institutional advantage, and to seek to develop it in respect of labour laws (chapter 10, below).

I owe many intellectual debts. Paul O'Higgins, who was my teacher, supervisor and later teaching and research colleague at Cambridge from 1964, impressed upon me the importance and relevance of international labour law. Otto Kahn-Freund and Bill Wedderburn showed me the enormous contribution that comparative law can make to understanding the social purposes of law. Kurt Lipstein sparked my interest in EU law even before the UK had joined the Community, and has continued to inspire and encourage me, and to guide me through the mysteries of the conflict of laws. Many of my ideas developed in the course of working with colleagues in the European Labour Law Group which produced *The Making of Labour Law in Europe* (1986),⁷ contributing to Roger Blanpain's *International Encyclopedia for Labour Law and Industrial Relations* and many of his other comparative projects, editing contributions in my role as Chief Editor of volume XV of the *International Encyclopedia of Comparative Law* (Max-Planck Institute, Hamburg), undertaking research projects for the International Institute for Labour Studies and the UN Conference on Trade and Development, serving as a member of an ILO expert group on standards-related activities and decent work, participating in numerous international seminars and conferences, and teaching with colleagues in Courses on International and Comparative Labour Law in London, Cambridge and Cape Town Universities, and on Civil and Political Rights in the EU in Cambridge. It would be invidious to attempt to name all these colleagues and students—to echo Montaigne, I have 'gathered a posy of [their] flowers, and nothing but the thread that binds them is my own.'

⁴ The story is told by Luckhardt and Wall (1980) at 388–93.

⁵ This work was undertaken with my friends and colleagues Roger Blanpain, Silvana Sciarra and Manfred Weiss, and won the support of over 100 labour law specialists: see Blanpain *et al* (1996).

⁶ For these reflections, see Hepple (1994).

⁷ Hepple (1986a).

I am especially grateful to those colleagues who read and commented on draft chapters of this book, in particular Catherine Barnard, Lance Compa, Simon Deakin, Sandy Fredman, Jo Scott, Katherine Stone, and Erika Szyszczak. The usual disclaimers apply. Daniel Bethlehem and Jo Scott kindly allowed me to absorb the basics of International Economic Law in their Cambridge classes. Jean-Claude Javillier and the Standards Branch of the ILO provided me with extensive information and analysis of the work of the ILO. I had excellent research assistance from Claire da Silva, Sarah Fraser, James Hawkins and Nicola Thompson. Keith Ewing, Francis Maupain, and Katherine Stone kindly permitted me to see their papers which are awaiting publication, and I had the good fortune to be able to consult proof copies of Neville Rubin's comprehensive *Code of International Labour Law*. The Leverhulme Trust generously awarded me an Emeritus Fellowship, which has covered my research expenses. The Master and Fellows of Clare College, and the Faculty of Law in the University of Cambridge, provided me with the space, facilities, and stimulating environment in which to work. Finally, but ultimately crucial, I pay tribute to the enormous patience and encouragement of my publisher, Richard Hart.

This is a project which has developed over many years and, inevitably, I have drawn on and cannibalised a number of my published articles, listed in the References, with due acknowledgment to their publishers.⁸ Most of the book consists of previously unpublished material.

Clare College
Cambridge
30 September 2004

⁸ In particular, Hepple (1993), (1997), (1999a), (1999b), (2002a), (2002b), (2002c), (2003).