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Edited by John D. R. Craig and S. Michael Lynk

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INTRODUCTION

JOHN CRAIG AND MICHAEL LYNK

The power to become habituated to his surroundings is a marked characteristic of mankind. Very few of us realise with conviction the intensely unusual, unstable, complicated, unreliable, temporary nature of the economic organisation by which Western Europe has lived for the last half century. We assume some of the most peculiar and temporary of our late advantages as natural, permanent, and to be depended on, and we lay our plans accordingly. On this sandy and false foundation we scheme our social improvement and dress our political platforms, pursue our animosities and particular ambitions . . .

John Maynard Keynes, *The Economic Consequences of the Peace*
(1919)¹

Having lost the comfort of our geographic boundaries, we must in effect rediscover what creates the bond between humans that constitute a community.

Jean-Marie Guehenno, *The End of the Nation-State*²

Labour law and globalization

The defining characteristic of globalization in our modern age has been to challenge the stability and isolation of what is local, without always conferring the benefit of what is universal. Economic growth has lifted millions out of poverty over the past fifteen years, yet the prosperity has been unevenly distributed, and economic inequalities and social exclusion within and among nations have actually deepened. Open societies have emerged, but the erection of democratic national and global institutions to manage the volatility of social and economic change has proven largely elusive. New means of communications are enabling the arrival of a truly global conscience, but they have also spread a homogeneous culture that is eroding local identities and distinctiveness. More people are working but, more than ever before, they labour in conditions of employment

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informality and insecurity. The workplaces of our new world are being transformed by the dynamic push of international trade patterns, capital investment flows, and migratory labour movements, but the regulation of these workplaces, when they are regulated at all, remains the province of national labour and employment laws that are increasingly unable to either protect or adapt.

Compared to the whirl of change in the international economy, domestic labour laws have largely stood still over the past fifteen years. In part, this has been the result of new fiscal and economic policies pursued by governments and international institutions that have opened up labour markets and, in the process, weakened the ability of trade unions and liberal forces in society to seek enhanced employment conditions and improved legislation. Another contributing factor has been the declining role of national governments, where the self-induced policies of lower taxation rates, a reduced state presence in the economy, and more restrictive social programmes have curtailed their desire and their capacity to regulate labour market outcomes. A third factor has seemingly been an exhaustion of ideas, as if the statutory models of labour law regulation that have prevailed over the past half century and more have been depleted of their possibilities to be reformed and regenerated. Moreover, this legislative stagnation shows no sign of any early abatement, as the politics of national labour law reform have become increasingly contingent upon the deference of governments to the real and imagined imperatives of the international market-place.

Let us be clear. National labour laws will remain, far into the future, the primary legal structure for promoting fair employment practices, for enabling workers to achieve collective representation, for regulating the reconcilable differences between employers and employees, and for diminishing the patterns of discrimination and exclusion at work. But, increasingly, these laws are unable to accomplish their public purpose. The declining numerical strength of trade unions, the shrinking public resources devoted to the enforcement of legislative standards, and the rise of contingent and unregulated work relationships all point to a widening gap between labour law norms and workplace realities. Meanwhile, the rising percentage of trade as a component of national economies, the spreading out by companies of their production stages across countries and continents, and the instant transfer of work around the globe by modern technology have meant that globalization is reshaping our workplaces much more decisively than our available legal tools can meaningfully regulate them. Thus, the question becomes: if some of the causes for the malaise

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in labour law performance lie in the dynamic shifts in the global economy, can some of the solutions also be found in the international sphere?

The driving engine of globalization has been economic, and the struggle at the international level to promote non-mercantile values such as environmental protection, human rights, and social and labour standards, while not forgotten, has often been a distant concern. The law, in particular, has reflected this lopsided emphasis. A fierce commitment has been given within the international sphere to the legal status and enforcement of trade agreements, private capital investments and intellectual property guarantees, complete with elaborate dispute resolution mechanisms that are rules-based, respected and obeyed. Indeed, this nascent system of international economic rights has been regularly identified as a template for a grander law-based approach to manage other sorts of global issues. However, the blueprints for a brave new world of international social and workplace rights have not advanced much beyond drafting tables and noble dreams. To date, the success of international labour law in protecting and promoting employment rights has been confined largely to the issuance of aspirational declarations, advisory standards and tribunal recommendations.

Yet, something profound is stirring. The intense unease that has greeted the promises and the institutions of globalization has spawned a new intellectual climate of criticism and analysis. Among industrial relations and legal academics concerned with employment and labour rights, a recognition is growing that the grand project of regulating the workplace to promote industrial justice is passing through a period of propulsive change, comparable perhaps only to the transition from the common law and traditional contractual principles to statutory labour laws during the years immediately before and after the Second World War. As responses to the challenges of globalization and the limitations of national law, two distinct and complementary approaches are emerging. Domestically, the argument is being made more and more insistently that labour rights, until now expressed primarily through ordinary employment statutes, must acquire a constitutional status as fundamental legal rights if they are to avoid a slide into disrepair. Internationally, the promising achievements of the European experience with supranational agreements as a means to promote labour laws, and the altogether more modest attempts in the Americas to include voluntary labour standards as an adjunct to regional trade agreements, have stirred the intellectual and social imagination about the possibility of new international and continental structures to secure workplace rights.

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International labour law has existed as a discrete body of norms and advisory rules since the early years of the International Labour Organization following the First World War. For many years thereafter, there existed in the minds of most labour law scholars a traditional and simple division between the substantive rules of national labour laws and the advisory standards and conventions proclaimed by the ILO. One warranted a respected review, because it was solid, and the other received only a fleeting mention, because it was lighter than air. But over the past twenty years or so, this division no longer accurately represents the growing complexity of modern labour law on the international stage. Building on the promise of the European experiment, and the tentative steps taken elsewhere, it is becoming clear that the creation of new international labour law structures will not occur as a top-down project. Almost certainly, these new structures will evolve out of the growing number of regional and hemispheric economic agreements, which have added labour standards pacts as a political response to the demands for social protection against the shocks of rapid change. While, initially, many of these labour pacts have been humble efforts, they contain within them the potential of becoming the platforms for more substantive institutions and more effective rules that can complement and supplement the body of national labour laws. Yet, for any of this to occur, much depends upon the political will to recognize how globalization's imbalance between economy and society is exasperating social fault lines across the world.

Euclid, when asked by Ptolemy if there was a shorter route to mastering his teachings than by reading the *Elements*, is said to have replied: "There is no 'royal road' to geometry." So it is with the problems of globalization and the modern regulation of work. While the trials now confronting labour law are similar in importance to earlier periods of great transformations in the organization of employment, the challenges of our present era are almost certainly unique in dimension and complexity. The issues of national sovereignty, regional cooperation, the myriad of different systems of labour law regulation, the variety and number of workers falling outside formal protection, and the sheer pace of economic change present problems of an entirely new magnitude. But the very scale of the challenges of globalization to the world of work makes a multilateral response both indispensable and inescapable. As the World Commission on the Social Dimension of Globalization in its landmark report in 2004 pointed out, these problems are solvable and they are manageable, but not without a resolute universal recognition that human dignity, international solidarity and industrial justice are the cornerstone ethical values that

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can alone provide legitimacy to the globalization project as it affects the workplace.³

This volume of essays on globalization and the future of labour law seek to understand some of the problems and possibilities in our new world of work. The authors of these essays share the common starting point that the fundamental premises of contemporary labour law – workplace justice, industrial citizenship and production flexibility – remain intact, but that the ability to realize these goals through conventional regulatory tools are being substantially challenged by the new economic and political realities of the international marketplace. The authors' perspectives traverse through a range of issues, both geographic and topical, and are based on their experiences both in their home countries and regions and on the international stage. Drafts of many of the papers were first presented at a conference held at the University of Western Ontario in London, Ontario on 17 and 18 October 2003. This conference, co-sponsored by the Faculty of Law at the University of Western Ontario, the Canadian national law firm Heenan Blaikie LLP, and the Toronto law firm of Koskie Minsky, was among the first to be held in North America exclusively devoted to the issue of globalization and international labour law.

Part I Perspectives on globalization

Brian Burkett's introductory paper (Chapter 1) introduces the concept of the "international labour dimension", and sets the stage for each of the papers that follow. In Burkett's view, regional and international labour integration involves the interplay not only of legal norms and standards with regulatory effect, but also of processes and institutions to develop and administer norms and standards at the international level. Burkett suggests that initiatives within the international labour dimension have a long and complex history that predates the founding of the ILO in 1919, and can even be traced back to the early nineteenth century. With the ILO came the birth of modern international labour law, which was premised on three pillars: social, political, and economic. The *social* relates to the shared desire to improve the human condition; the *political* refers to meeting ideological challenges (in 1919, the ideological challenges of communism and socialism); and the *economic* addresses social dumping and the 'race to the bottom'. Burkett is able to identify these three pillars within regional initiatives such as the European Union, the North American Free Trade Agreement (NAFTA), Mercosur, and the Summit of the Americas Process.

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In Chapter 2, Harry Arthurs asks the question, “Who’s afraid of globalization?” He posed this question when delivering the inaugural Koskie Minsky University Lecture on Labour Law that opened the conference on 17 October 2003. In answering the question, Arthurs focuses first on assessing the actual impact of globalization on substantive domestic labour laws. His conclusion: labour law continues to be viewed as primarily local in nature. This leads him to adopt a “common sense hypothesis” that globalization is formative, as opposed to normative. In other words, globalization changes labour law not by directly amending the substantive rules but instead by transforming the institutions and processes through which those rules are made and administered. Arthurs offers a message of optimism in the face of globalization. He observes that social progress is most enduring when it is built from the bottom-up. While globalization may make grassroots reform a daunting prospect, it is nevertheless possible, particularly if the advantages of globalization – e.g. instantaneous communications and the ability to organize over great distances – can be harnessed.

Part II International labour standards

Part II focuses on the appropriate role of international labour standards in meeting the challenges of globalization. Each author offers a unique perspective. In Chapter 3, Kevin Banks addresses the phenomenon of social dumping and the link that has been drawn between international trade and labour standards. Banks writes that emerging scholarship has brought into question the theory that trade liberalization without labour standards will inevitably lead to a “race to the bottom”. In fact, the evidence suggests that nations that improve their labour standards will generate positive long-term economic benefits. Social dumping is, at best, a short-term economic strategy. The implication is that international labour standards can be justified because of their positive long-term economic impact and not simply because they constitute international barriers to social dumping. However, as Banks observes, the enforcement of international labour standards remains a thorny issue.

Véronique Marleau suggests a different approach to globalization in Chapter 4. In her view, the optimal means of managing labour law in an era of globalization is through the concept of subsidiarity: decisions affecting individuals should, as far as possible, be made by the level of government closest to them. As a principle of social organization, subsidiarity localizes decision-making to the greatest extent possible, thereby creating a link between social and economic phenomena occurring at the global level and

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the circumstances and priorities of affected individuals and communities. Marleau is able to point to concrete examples of subsidiarity within the European Union and the ILO to bolster her point.

In Chapter 5, Alan Hyde offers a colourful and instructive defence of transnational labour standards, relying for support on Game Theory. In Hyde's "stag hunt", participants are only able to achieve the optimal result (i.e. successfully hunting a stag) if they cooperate and act collectively. If one participant chooses the course of individual action (i.e. prefers to hunt a hare individually instead of a stag collectively) then all other participants will either be left empty-handed (since hunting a stag is no longer possible) or will be forced to engage in the individual hunt for hares. Through the stag hunt model, Hyde is able to draw certain conclusions about transnational labour standards. Foremost among these is that multilateral cooperation in raising labour standards is crucial. However, the fewer the participants, the more likely they will be to develop the level of trust and cooperation that is necessary to ensure compliance with transnational labour standards. As such, Hyde suggests that greater success may be achieved through transnational labour standards negotiated in bilateral or regional trading agreements.

Part III The European Union

The European Union has the most advanced system of regional labour integration, yet it is experiencing new challenges arising from the addition in 2004 of ten new states: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia. The future of European labour law is thus the focus of Part III of this book.

In Chapter 6, Manfred Weiss provides an overview of the industrial relations systems in the new member states from Central and Eastern Europe. He observes that these systems have developed over the past decade in reaction to the legacy of communism, and tend to reflect excessive neo-liberalism. As such, collective organizations representing workers and employers are relatively rare in the private sector, tripartite social dialogue is largely absent, and collective bargaining is the exception rather than the rule (and generally only occurs on a plant or company basis). Weiss further observes that while the Central and Eastern European states generally have favourable labour laws, implementation and enforcement are inadequate. Private sector companies are presently able to contract out of labour laws, in any event. Given the fundamental importance of collective organizations and social dialogue in EU-level labour law, Weiss

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identifies significant structural flaws that could threaten to undermine and delay future initiatives.

Arturo Bronstein's paper in Chapter 7 complements Weiss's paper. Bronstein outlines the evolution of labour laws in the Central and Eastern European states since the fall of communism. He describes their legal systems at the end of the communist era, emphasizing their diverse circumstances and laws. He then plots the approaches taken by these states to modernize their labour laws in the 1990s with a view to EU membership. Like Weiss, Bronstein points to excessive neo-liberalism and deregulation as predominant forces. Interestingly, however, he notes that most of the Central and Eastern European states have ultimately chosen to pursue a labour law model based on the German precedent; they have also sought technical assistance from German and French experts, and the ILO. Moreover, the ILO's standards and principles on freedom of association and collective bargaining have generally been adopted as the institutional framework for newly developing industrial relations systems. Given these developments, Bronstein predicts that the values of the European Social Model will eventually be embedded within the labour law systems of the Central and Eastern European states.

The final paper in Part III, by Catherine Barnard (Chapter 8), explores the development of worker mobility rights within the European Union, and considers whether the European experience holds any lessons for international labour law. Barnard is particularly interested in the implications of the principle of "solidarity", which has emerged within recent European jurisprudence. Solidarity is used to describe the relational bonds of citizens and communities, who share common interests, mutual dependence, and unity of purpose. While solidarity is generally found within states, it is not necessarily present at the transnational level. Indeed, the question arises whether the emergence of transnational solidarity is a precondition to true social and labour integration of the kind pursued by the EU. Barnard's discussion on this point could well be read in conjunction with Hyde's "stag hunt" analogy (Chapter 5). Are states more likely to cooperate in the pursuit of common social goals where solidarity prevails among their citizens? Is solidarity an essential precondition to multilateral action in social fields like labour law?

Part IV The Americas

Whereas the European Union has decades of experience in harmonizing economic and social policies, the nations of the Americas are only

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now embarking upon a process to create a common hemispheric market through the proposed FTAA. It remains an open question how labour and other social issues will be treated under the FTAA. Hence, the papers in Part IV consider the challenges and potential outcomes of the FTAA negotiations.

In Chapter 9, Lance Compa adopts a pragmatic approach to worker rights under the FTAA, emphasizing the need to develop a viable, as opposed to a definitive or triumphant, solution for addressing worker concerns in a hemispheric economic zone. To this end, Compa considers in detail the hemispheric systems that already exist – the NAALC regime within NAFTA, Mercosur's Social-Labour Declaration, and Caricom's Charter of Civil Society. He concludes that governments of the Americas do not need to invent a new approach to address workers' rights within the FTAA. Instead, a system can be developed that incorporates features from each of the existing systems.

Brian Langille (Chapter 10) provides a principled justification for the adoption of labour rights within the FTAA. In his view, what is needed is a dramatic shift in attitude towards the social dimensions of trade liberalization. Langille argues that the negotiation of transnational social protections and standards is defensible not simply to prevent the "race to the bottom". More importantly, such measures are essential for socio-economic development and human progress. In developing a labour rights component to the FTAA, Langille states that countries participating in the FTAA talks need to reevaluate their reasons for engaging a labour rights agenda. If countries' mutual objectives include long-term economic development, social progress and political stability, then these objectives can and should inform the outcome of the FTAA negotiations.

José Pastore's paper (Chapter 11) provides a detailed examination of Latin American industrial relations systems, to demonstrate the challenges facing FTAA negotiators in creating viable hemispheric labour standards. Pastore focuses on the nations of Mercosur – Brazil, Argentina, Paraguay and Uruguay – and observes that they each have comprehensive protective labour laws, yet compliance with these laws is problematic. Moreover, informal employment relationships predominate, leaving millions of workers beyond the reach of protective laws. Pastore also points to significant vested interests in Latin American societies that have frustrated previous reform initiatives, both domestically and within Mercosur. With respect to the FTAA, Pastore takes the view that the priority should be to develop hemispheric mechanisms to enhance local compliance with domestic labour laws, as opposed to implementing and enforcing

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hemispheric labour standards. Hence, a model based on the NAALC system would be preferable.

Part V The ILO

The ILO's significance in the debate over labour law and globalization cannot be overstated. Particularly since 1998, when it identified the "core" labour rights and promulgated its Declaration on Fundamental Principles and Rights at Work, the ILO has taken centre stage in all discussions related to global economic and social integration. The two papers in Part V consider the ILO's history and its future role in the globalization debate.

Werner Sengenberger's paper (Chapter 12) discusses the pluralist vision of the economy and society that has underscored the ILO's approach. Since 1919, the ILO has advocated processes for reconciling competing interests that emphasize association, consultation, negotiation and social dialogue. As Sengenberger notes, the ILO's pluralist approach to establishing international labour standards has often been challenged by economic orthodoxy, which itself advocates an unfettered free market as the optimal means of achieving greater employment opportunities and stronger worker protection. The pluralist approach has also occasionally been challenged on political and cultural grounds; however, Sengenberger argues that political and cultural objections to international labour standards are often mere pretexts designed to preserve the positions of powerful vested interests. Ultimately, Sengenberger suggests that the greatest challenge to the ILO in the coming years will arise out of the global economic and political environment. Will parochial attitudes and opportunistic local behaviour predominate, or will international cooperation prevail?

In Chapter 13, Edward Potter provides an overview of the United States' approach to the ILO. As the world's only superpower, the United States is a crucial player in the international sphere. Potter explains that the United States has had an uneasy relationship with the ILO since joining in 1934. Prior to 1989, the United States participated in the ILO primarily to fight communism and to limit the scope of international labour standards. Since 1990, however, there has been a remarkable transformation of the United States' attitude toward the ILO. Potter argues that the United States now views the ILO as an important actor in addressing worker rights in the global economy. This is particularly the case since the United States' policy is to link worker rights with trade. Potter argues that the United