
1. Conceptualizing transnational labour law

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1. THE SCOPE OF INQUIRY

The deliberately short and pithy chapters in this research handbook offer a unique and multifaceted lens through which to explore the texture of transnational labour law (TLL). For at least the past 30 years, TLL has emerged alongside struggles to understand and address the implications of a ‘polycentric’ globalization, for the implicit domestic labour law bargain.¹ Some relevant changes include heightened global interdependency, technological innovation, labour migration, increasing informalization of work, and the persistence of poverty, discrimination and inequality along fault lines of historical marginalization. Today, thick webs of contractors structure global production chains, constructing yet obscuring links between workers in the global South who produce products they cannot afford to buy, and workers in the global North who both market and consume goods they no longer produce. The transnational enterprises through which markets operate are able to control the means of production, transform that control into power, and exercise it transnationally to compel workers to live and produce by their norms.²

Similarly complex networks of labour brokers recruit workers from an intricate range of regional peripheries, to provide a host of activities recharacterized³ as services. They may work in actively informalized agricultural production, building construction or care reproduction servicing global cities, shaped in the light of – rather than in opposition to – a global and regional architecture structuring the provision of services transnationally. Such phenomena reflect and adapt a Westphalian notion of state sovereignty, and the highly differentiated rules governing the conditions of movement of products, services and capital. TLL builds on a recognition that liberal states have made the global era possible: what was conceived as national becomes denationalized

¹ See SIMON DEAKIN & FRANK WILKINSON, *THE LAW OF THE LABOUR MARKET: INDUSTRIALIZATION, EMPLOYMENT AND LEGAL EVOLUTION* (2006); Andreas Fischer-Lescano & Gunther Teubner, *Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law* 25 *MICHIGAN JOURNAL OF INTERNATIONAL LAW* 999 (2004).

² See Jean-Philippe Robé, *Multinational Enterprises: The Constitution of a Pluralistic Legal Order*, in *GLOBAL LAW WITHOUT A STATE* (Gunther Teubner, ed., 1997), 45, 49; DAVID HARVEY, *THE CONDITION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE* (1989) 141–72, 187.

³ See Tonia Novitz, Ch 34 in this volume.

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in a process propelled by actors and sources of authority that proliferate in territory beyond the decentred state.⁴

The changes afoot have led to substantive rethinking of the spatial and temporal configuration of the global regulation of work. They challenge deeply rooted assumptions about law, labour and the transnational. And they shift the focus to alternate actors. Workers in particular, as principal actors seeking to refocus global governance's direction, are required to reimagine if not the nature then certainly the focus of their justice claim. TLL therefore does not reflect a rigid reclassification of the field of labour law, or international (labour) law. TLL rather reflects a recognition, captured by Trubek, that:

there is a missing pillar in the architecture of global governance. Globalization has shifted the world balance of power between labor and capital ... The international mechanisms to protect rights and raise standards, never very robust, have proven inadequate in the face of global economic forces.⁵

A fragmentary TLL has emerged to problematize and resist the direction of social regulation under globalization. Recognizing globalization's asymmetries, and identifying spaces for action, TLL operates within, between and beyond states to construct counter-hegemonic alternatives. The field critically encompasses actions beyond the state, to take into account the actions of transnational enterprises, labour federations, civil society and other actors. Moreover, TLL does not stop where national labour law begins: the two are deeply intertwined, and challenge each other. TLL is a form of multi-level governance, including the international, the regional, the national, and the shop floor: its ability to address challenges of economic interdependency is similarly enmeshed with its ability to acknowledge and deal with complexity, diversity and asymmetries across time and space – amongst states, across uneven regional development, amongst vastly differently empowered institutions and actors. TLL holds no monopoly on either the rise of legal centrism through the prevalence of 'rule of law' doctrines, or the expansion of pluralist, reflexive new governance methods. Its distinctiveness lies in its capacity to be counter-hegemonic, and promote social justice. We contend that it is the early International Labour Organization (ILO) constitutional *acquis*, rooted in labour history's recognition that law's normative character is indeterminate and must be the basis of continuous struggle for social justice, that is at the core of TLL's emergence. That centring of social justice – which includes but extends beyond 'bringing redistribution out of the closet'⁶ – goes a long way to explaining why TLL is also such a contested terrain.

⁴ See SASKIA SASSEN, *TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES* (2006); SASKIA SASSEN, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION* (1996).

⁵ See David Trubek, Review Essay: The Emergence of Transnational Labour Law, 100 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 725 (2006). See also ANTONIO OJEDA AVILÉS, *TRANSNATIONAL LABOUR LAW* (2014).

⁶ Karl Klare, Horizons of Transformative Labour Law, in *LABOUR LAW IN THE ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES* (Joanne Conaghan, R. Michael Fischl & Karl Klare, eds, 2002) 1 at 3.

This book, including this introductory chapter, is structured to interrogate each of the components of TLL: its characterization as law, its relationship to ‘labour’ and ‘labour law’ and its ‘transnational’ character. Each component raises points of convergence and disjuncture with the past. For although TLL has risen in response to the period of globalization, this handbook suggests that its roots lie in earlier moments, like 1919, when concerned actors sought to address the challenges inherent to the affirmation that ‘the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries’.⁷ TLL builds on the multiple, and largely mutually reinforcing, accounts of its past, but also loosens the grip both of a unitary, centralizing framing of the ‘sovereign nation state,’ however tripartite its conception, as the sole responsible actor; and of an accompanying exclusively statist understanding of law.

2. TRANSNATIONAL LABOUR LAW AS LAW

The World Trade Organization (WTO) currently occupies the initial home of the ILO. That property still bears the following inscription: *Si vis pacem, cole justitiam*: if you desire peace, cultivate justice.⁸ Yet in the contemporary landscape, the ‘rule of law’ has come to predominate, and has come to be conceived of as an unequivocal good for its own sake. Increasingly, it defines the landscape of trade, development and even rights discourse, and structures interventions designed to improve the lives of the poor in so-called fragile states.⁹ As David Kennedy succinctly affirms, ‘economic globalization means legal globalization.’¹⁰ Hardly deregulated, a new global legality under trade, investment and intellectual property regimes facilitates liberalization, or the ‘regulatory needs of the new neo-liberal development model’¹¹ that it has helped to consolidate.

Contrast this with the alternative legality applied to the (de- and re-)regulation of labour in the wake of the erosion of the embedded liberal bargain assuring

⁷ ILO Constitution, Preamble. See also GERRY RODGERS, EDDY LEE, LEE SWEPSTON & JASMIEN VAN DAELE, *THE ILO AND THE QUEST FOR SOCIAL JUSTICE, 1919–2009* (2009) and Charnovitz, Ch 29 in this volume, on the challenges in that foundational understanding of global interdependency. For an important earlier starting narrative see Smith, Ch 9 in this volume.

⁸ That capacious post-war conviction is found in the ILO Constitution’s preambular affirmation that ‘universal and lasting peace can be established only if it is based on social justice.’ It was reaffirmed and extended ‘to all peoples everywhere’ in a constitutional annex, the 1944 Declaration of Philadelphia, and deliberately reinscribed by ILO constituents in the title of the 2008 ILO Declaration on Social Justice for a Fair Globalization.

⁹ See e.g. MARK FATHI MASSOUD, *LAW’S FRAGILE STATE: COLONIAL, AUTHORITARIAN AND HUMANITARIAN LEGACIES IN SUDAN* (2013); Jothie Rajah, ‘Rule of Law’ as Transnational Legal Orders in *TRANSNATIONAL LEGAL ORDERS* (Terence C. Halliday & Gregory Shaffer, eds., 2015) 340.

¹⁰ See David Kennedy, *The Mystery of Global Governance*, 34 *OHIO NORTHERN UNIVERSITY LAW REVIEW* 827, 848 (2008).

¹¹ BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW LEGAL COMMON SENSE* (2002) 343.

redistributive policies and social security in individual, western, nation states.¹² The Westphalian intellectual foundations of national labour law's justice claim are rooted in a diad of the unitary 'nation state' and international law. That diad is currently not meeting the challenge posed by the movement of capital, goods and people. These movements are asymmetrical, and are actively structured by law. Zumbansen refers to the 'across-the-board undermining of both institutional and individual frameworks for workers' rights.'¹³ Critically, the asymmetrical legal order is presented as part of a continuity of 'good governance' principles, characterized by minimal state intervention into self-regulating markets. An 'autonomous,' soft governance form of reflexive labour law¹⁴ – and in particular new employment-based strategies¹⁵ – may be seen to fit the prescription to 'regulate' labour loosely along the transnational supply chain, alongside a coexisting authoritarian, hard and resolutely transnational law of trade and investment. As Claussen notes (in this volume), parallel mechanisms – like arbitration and enforcement for transborder labour cases – pale in comparison with the robust regime for investor and investor-state arbitration. The asymmetry is rarely so stark as in the juxtaposition between the rules assuring the movement and non-discriminatory treatment of trade in goods and investment of capital, as contrasted with temporary labour migration regulatory frameworks that sustain the commoditization of the men, women and young people who cross state borders, often at great peril, as the factor of production that is labour. Existing legal rules like choice of law in private international law, as van Hoek observes in this volume, are poorly equipped to manage migration.

Is the prevalence of reflexive law in labour law – as contrasted with trade and investment law – not part of the package of neoliberal asymmetry,¹⁶ relegating labour to globalization's periphery? Or is it a basis for TLL's self-reproductive power, overcoming the limits of traditional command and control regulatory approaches to enable an autonomous, 'facilitative instrument of mutual recognition of self-regulation'¹⁷ to reposition itself as a 'fair' globalization's *raison d'être*? This pivotal debate is re-enacted precisely upon the terrain of TLL, but one point is conceded: there is emergent, settling global legal order, even in the absence of centralized 'legislation' or sites of decision-making, and even in the face of some degree of fragmentation of

¹² See STEFANO GIUBBONI, SOCIAL RIGHTS AND MARKET FREEDOMS IN THE EUROPEAN CONSTITUTION: A LABOUR LAW PERSPECTIVE (2006).

¹³ Peer Zumbansen, Transnational Legal Pluralism, 10 TRANSNATIONAL LEGAL THEORY (2010) 141, 183.

¹⁴ See in particular RALF ROGOWSKI, REFLEXIVE LABOUR LAW IN THE WORLD SOCIETY (2013).

¹⁵ DIAMOND ASHIAGBOR, THE EUROPEAN EMPLOYMENT STRATEGY: LABOUR MARKET REGULATION AND NEW GOVERNANCE (2005).

¹⁶ Harry Arthurs, Corporate Self-Regulation, Political Economy, State Regulation and Reflexive Labour Law, in REGULATING LABOUR IN THE WAKE OF GLOBALISATION: NEW CHALLENGES, NEW INSTITUTIONS (Brian Bercusson & Cynthia Estlund, eds, 2008) 19.

¹⁷ ROGOWSKI, *supra*, at 43. See also Gregor Murray, Can Multiple Weak Ties Reverse the Social Regulation Deficit? Multinational Companies and Labor Regulation 33 COMPARATIVE LABOR LAW & POLICY JOURNAL (2013) 715.

international law.¹⁸ Law remains central to the globalization project, and TLL can ill afford to romanticize plural sources of law, or their disruptive power.¹⁹ To re-centre social justice, we argue that TLL's capacious understanding of the sources of law-making – soft or hard, command and control or reflexive, state or non-state, inter-related, challenged and thickened – must be counter-hegemonic.

a. Transnational Labour Law's Methods

To focus on methods might be read as suggesting that transnational labour law is above all a strategy, an ongoing experimentalist attempt to counterbalance, to empower, or to remedy. While the strategic character of TLL is not denied, in this chapter we would suggest that TLL has come to entail something more. TLL produces ways of knowing, including 'particular understandings of the world and how it works.'²⁰ In so doing, TLL helps actors to resist framing the market, and private law rules that govern it, as naturally pre-existing the social realm to which labour law turns its attention.²¹ In its continual search for new methods,²² TLL may offer ways of reimagining space and time.

Contestation, in the form of collective worker action, has always been, and remains, one of labour law's key methods. Several contributors to this volume capture the centrality of freedom of association, and reflect on the deep contestation to which it has been subjected internationally and in domestic courts. Sukthankar's contribution speaks to the interplay of collective action-based methods that characterize transnational labour law; in a richly documented study, the author chronicles trade union action in the global North and global South, and assesses the counter-movements and shifting understandings over time of the viability of strategies ostensibly secured in emerging forms of legality. The legal defence raised by employers and government to the application of 'living wage' provisions on 'fair trade' certified tea plantations in India was one such example: tripartite bargaining on wages was said to preclude any

¹⁸ DE SOUSA SANTOS, *supra*, at 443; ROGOWSKI, *supra*, at 16; TERENCE C. HALLIDAY & GREGORY SHAFFER, eds., *TRANSNATIONAL LEGAL ORDERS* (2015) at 27. See also United Nations, *FRAGMENTATION OF INTERNATIONAL LAW : DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW* (Report of the Study Group of the International Law Commission finalized by Martti Koskeniemi. Document A/CN.4/L.682, International Law Commission, 58th Session, Geneva, 2006).

¹⁹ See David Kennedy, *supra*, at 848 (citing their 'disorderliness, the pluralism, the uncertainty and the chaos' of the rules and institutions); Duncan Kennedy, *The Stakes of Law*, or Hale and Foucault, 15 *LEGAL STUDIES FORUM* 327 (1991), at 357, 360 (arguing that Foucault's approach brackets out not only the market, if perhaps because his theory is seen as completing Marxist theorizations of it, but 'a whole area of legality – namely the "private law" rule system that constitutes bargaining situations – that is crucial to understanding economic (as opposed to disciplinary or sovereign) power.')

²⁰ Duncan Kennedy, *supra*, at 361.

²¹ RUTH DUKES, *THE LABOUR CONSTITUTION: THE ENDURING IDEA OF LABOUR LAW* (2014).

²² See e.g. Anne Trebilcock, *Spécificités quant aux techniques de mise en œuvre et de contrôle: à la recherche de nouveaux chemins*, in *DROIT INTERNATIONAL SOCIAL* (Jean-Marc Thouvenin & Anne Trebilcock, eds, 2013) 106–46.

application of a universal ‘living wage.’ Noting that global framework agreements (the focus of Drouin’s contribution in this volume) were initially conceived as precursors to transnational labour law beyond the state, Sukthankar opines that such mechanisms will have to be reconceived, and implemented *through* national laws, rather than in spite of them. Mostly, she captures a more modest, nuanced and realist approach to global engagement, accompanied by an increased recognition that TLL must extend beyond labour law.²³ Sukthankar points to emerging and aspirational forms of global organizing or global engagement.

In a complementary and illuminating discussion of the challenge to TLL of the fragmentation of the firm and its conceptual separation from the notion of the corporation, Martin also asks whether something more is left to TLL than ‘presid[ing] over an organized competition of national labour laws.’²⁴ While she reaches for an alternative reading of the social responsibility of the firm and explores the potential in both directors’ fiduciary duty and shareholder’s participation, she is alive to the limits of this source of normativity in the wake of firms’ capacity for self-transformation. Ultimately Martin returns to fundamentals, seeing TLL’s core contribution as its ability to go beyond spotlighting deficits, to reaffirming the crucial role of collective representation. Collective representation, in all of its substance, remains TLL’s core method.

To start with unions and firms in a discussion of methods is not to challenge the vital importance of treaties to TLL in the global order. The construction of supranational entities and accompanying transnational citizenship in the European Union remains a particularly potent example, in which constitutionalized economic freedoms are hierarchized in relation to treaty-based fundamental labour rights (see e.g. Novitz, Sukthankar and Zimmer in this volume). TLL recognizes this asymmetry, but seeks to put treaties – and treaty interpretation – to creative use. As Bellace underscores (in this volume), it is no accident that ILO ‘treaty interpretation’ on the right to strike is currently under attack. The ILO’s ‘jurisprudence’ on freedom of association is a critical normative cornerstone of TLL, as La Hovary illustrates in this handbook.

Moreover treaties are at the basis of a distinct method, as Boisson de Chazournes captures in her chapter. The ‘dialogic’ approach is characterized by the involvement of a range of non-State actors in decision-making processes. The ILO’s focus on social dialogue, including its creativity on public participation in respect of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), is seen as inspiring a broader range of initiatives, in related fields of international law, but also in related mechanisms, notably corporate social responsibility initiatives. Other contributors to this volume, ranging from Barenberg to Maupain, explore the distinctiveness of the dialogic function, or the space that can be created to try to resolve legitimacy challenges.

²³ This view resonates with several contributions to Guy Davidov & Brian Langille, eds, *THE IDEA OF LABOUR LAW* (2011) and Judy Fudge, Shae McCrystal & Kamala Sankaran, eds, *CHALLENGING THE LEGAL BOUNDARIES OF WORK REGULATION* (2012).

²⁴ For similar recent questioning from a range of additional authors, see MARK RIGAUX, JAN BUELENS & AMANDA LATINNE, eds, *FROM LABOUR LAW TO SOCIAL COMPETITION LAW?* (2014).

This volume invites the reader to think of the ILO itself as both a contributor to the construction of dialogic spaces, and a space for concertation and experimentation. The annual International Labour Conference (ILC) is canvassed by several contributors to this volume. But for Barenberg, radical rethinking of currently tripartite spaces is necessary to implement an iterative process that could democratize reliance on indicators formulated by élites. In this regard, Barenberg shares and develops further Boisson de Chazournes' carefully explained legitimacy challenge to dialogic approaches, and pleas for inclusiveness.

Legitimacy challenges are also at the heart of Barenberg's critique of the 'indicator revolution' that has gripped a number of fields,²⁵ including TLL. The space that it occupies is reflected in several contributions, including chapters by Adams and Deakin, Antoine and Trebilcock. Equally telling is what does not appear to be measured: Ebert notes that the International Monetary Fund (IMF) does not systematically assess the effects of its proposed labour law reforms on workers. In the wake of weakened structures for collective representation and enforcement, metrics are seen by proponents as data rich sources of reflexive regulation based on 'best' practices, challenging command-and-control models. In addition to providing robust critiques of their internal coherence, Barenberg places their democratic deficit in the foreground. He exhorts institutions like the ILO to reimagine themselves; similarly, transnational actors such as unions are asked to see themselves as the horizontally habilitated law-makers of these brave new norms.

In the last chapter in this part, Trebilcock chronicles important reliance in TLL on privatized, and often 'soft law' norms. Several contributors to this volume complement this discussion, including Diller, Drouin, Dumas and Kolben. Trebilcock's chapter focuses on a uniquely captivating initiative on corporate social responsibility (CSR), the 2011 United Nations Guiding Principles on Business and Human Rights marshalled by the United Nations (UN) special representative on business and human rights, John Ruggie, and endorsed by the UN Human Rights Council in June 2011. The widely commented 'protect, respect and remedy' framework and the ILO's identification of fundamental principles and rights at work infuse public law norms into notions like 'due diligence;' they also support their progressive re-insertion into reformulated international instruments, as in the 2014 Protocol to the ILO's early Forced Labour Convention, 1930 (No. 29). Although this might thicken 'soft law' on CSR as compared with the early days of thin, unilateral, unilingual corporate head office dictated codes of conduct, Trebilcock recognizes the extent to which the thickened framework may not necessarily lead to 'greater clarity' in addressing the particularity of labour issues effectively. Her insight reflects a key TLL theme: power is multiple, and operationalized across a range of unequal, fluid relations. TLL is attentive to who benefits from any given arrangement, at any particular time, in a relationship of relative indeterminacy.

²⁵ See for instance Kerry Rittich, *Governing by Measuring: The Millennium Development Goals in Global Governance*, in 2 SELECT PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW 2008 (Hélène Ruiz Fabri, Rüdiger Wolfrum & Jana Goglin, eds, 2010) 463–87.

b. Challenging Austerity, Facing Development

Transnationalizing economies have witnessed a particularly potent break with post-war, social justice-inspired legality. This volume considers regulating austerity alongside regulating development, as emblematic of a key insight of TLL: the global South and development are not simply elsewhere; they are intimately linked to the ways in which global economic restructuring re-creates the conditions of the global South in the global North.²⁶ Moreover, the tight relationship between social policy, economic policy and development is not of recent vintage. Charnovitz in particular underscores the origins of special and differential treatment of developing countries within the ILO Constitution, a notion later picked up on by the world trading system. His contribution to this volume is a reminder of the value of retaining an historical perspective to refine contemporary understandings.

In their chapter, Adams and Deakin ask how it was possible for structural adjustment, ‘a policy which was deeply controversial in the developing world, and which was rapidly falling into disrepute in that context, to be transferred to the industrialized economies of the EU.’ They explain the extent to which Germany became the prototype for the Maastricht Treaty, and in the process, a one-size-fits all model on monetary policy, forcing conformity by those EU member states that had not yet achieved sufficient economic coherency/autonomy. Financial assistance during the economic crisis was conditioned on ceding significant autonomy over economic and social policy to the European Central Bank, the IMF and the European Commission, and accepting conditions reminiscent of structural adjustment in the developing world, through which ‘[d]eregulation of the labour market would, it was thought, help to restore competitiveness in the short run by reducing wage costs, while contributing over the longer term to productivity improvements.’ Collective labour relations mechanisms in Greece and Spain have in particular been subjected to major change (and, we add, sharp criticism by ILO supervisory bodies for non-respect of ratified ILO Conventions). For Adams and Deakin, the strategy is misguided, likely to lead to increased unemployment and inequality. They call for a fundamental rethinking of economic and monetary policy.

Their contribution illustrates the importance of looking across jurisdictions, and beyond temporal boundaries. It is at peril that the global North exceptionalizes regulatory reform in regions of the global South. The advent of TLL captures the extent to which institutions and actors ‘borrow’ legal norms, techniques and policy approaches – whether they realize it or not. Beyond a critique of ‘legal transplantation’ and a recognition of the asymmetrical speed of norm migration in the form of ‘legal irritants,’ is the upsetting of invisible but prevalent geopolitical assumptions that norms flow unidirectionally from the ‘developed’ to the ‘developing’ world. The legality that TLL confronts may be chaotic, with ‘marginalized’ territories serving as laboratories. TLL arguably goes further than normative convergence, to offer a profound challenge to the

²⁶ See generally GRÁINNE DE BÚRCA, CLAIRE KILPATRICK & JOANN SCOTT, eds, *Critical Legal Perspectives on Global Governance: Liber Amicorum for David M. Trubek* (2014); 32 *COMPARATIVE LABOR LAW & POLICY JOURNAL*, 303 ff, Special Issue on Labour Law and Development: Perspectives on Labor Regulation in Africa and the African Diaspora (2011).

appropriate territorial scope of labour legality. In other words, TLL shakes loose the assumption that distributive justice concerns do (and arguably can) stop at the doorstep of individual nation states, even those that had firmly sought to seal them out or regionally reconfigure them, in the global North.

As to normative convergence, Ebert's analysis of the IMF explores theoretical foundations, recalling that for the IMF, labour law is an obstacle to growth. Ebert ably illustrates how the institution legitimates its policy prescriptions by 'portray[ing] itself as an advocate of the most vulnerable workers' and even stepping in to secure some labour rights, but retaining at its core the dismantling of employment protection legislation. The 'most vulnerable' workers are to be brought into employment first and foremost without regard for 'decent work for all.' Any protections of the social *acquis* of those in employment or sustaining robust collective bargaining frameworks are not part of the package. Nor has sufficient thought been given to the future impact of the digital revolution on work and to means for ensuring an adequate standard of living when the oft-promised nirvana of employment creation does not occur.

The need for fundamental rethinking flows through Smith's challenge to capabilities-based approaches to development as applied in the labour law context. However, Smith expressly roots his account of TLL within Marxist theory; he understands labour migration from the global South to Canada and other countries of the global North as part of a racialized logic inherent to – rather than an anomaly of – market dependence. He seeks to underpin an emergent TLL with 'a rich and textured understanding of market-dependent relations.' In so doing, he illustrates the deep integration of the South in the North, normatively, in the management of labour migration. He cautions against a development project in labour law that reproduces labour law's 'others.' Smith also hints at histories of collective resistance.

The historical dimension of the contestation of particular models of development is also part of Cooney's analysis of China's challenge to labour law in both the global North and the global South. For Cooney, the evolution of Chinese labour law affects, and has the potential to continue to affect, debates over the direction of TLL. Cooney's chapter invites readers to look beyond a view of China as the harbinger of the worst excesses of capitalism and political authoritarianism threatening wages everywhere. Cooney takes pains to highlight the paradoxical flip side, witnessed in China's extensive labour law reforms and dynamic mechanisms for generating them. Through them we see formalization, enforcement and even some forms of collective consultation, albeit with evident, major violations of freedom of association. Cooney identifies a range of historical, ideological and socio-economic factors that lead Chinese policy toward a pragmatic approach that enables change when circumstances demand. Involving close ILO engagement and learning via high-level delegations sent to other jurisdictions, China's approach offers an example of how transnational norm-sharing has been fostered. For Cooney, China might help to forge the direction of TLL, in part by providing a counterweight to 'deregulatory' impulses. Cooney points to China's experimentalist approach, on both substance and method, to suggest that it might interest as disparate a group as European states facing the Troika in the global North, and developing countries in the global South. In this projection, our juxtaposition of austerity and development comes full circle

The final chapter in this part is López López's work, which recalls that austerity-based legislation is the basis of counter-hegemonic contestation. In the process, López highlights the significance of collective resistance to TLL. She chronicles the various protest movements that erupted in Spain to attempt to change the labour re-regulatory impulses of the austerity measures, and puts solidarity centre front. López frames protest to include but extend beyond demonstrations and strikes. She considers recourse to the courts neither as a beginning nor an end, but as embedded in a broader strategy of contestation. Through her textured account, she poignantly illustrates TLL's setting the stage for the moment of conflict as a key 'way to transform societies'; 'activism [is a source] from which the regulation of social rights emerges.' Her statement dovetails with Ebert's study, which underscores inconsistencies between the IMF's discourse and its practices that are attributed to more than ideological biases. It also foreshadows Thouvenin's reminder in this volume that the official pronouncements of the Organisation for Economic Co-operation and Development (OECD) in favour of austerity measures were countered by its Trade Union Advisory Committee, which pointed out that the measures violated ILO freedom of association principles. For Ebert, such sources of resistance open avenues for contestation. Like other contributors to this volume, both López and Ebert tend to converge on the view that TLL does not necessarily depend on consensus to move forward. TLL emerged out of struggle, and solidarity.

3. TRANSNATIONAL LABOUR LAW AS LABOUR LAW

One of the most powerful framings of the importance of work comes from former Chief Justice Brian Dickson of the Supreme Court of Canada:

Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self-respect.²⁷

That framing of work transcends jurisdiction. TLL shares labour law's subject specificity.²⁸ It is rooted in workers' economic dependence, or subordination, on another – the employer. The societal compact operational in the context of vertically integrated firms and a patriarchal division of labour in male-breadwinner families in nation states, was that 'inequality within the enterprise (the employee's "subordination"

²⁷ *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313, para. 91. This dissenting position has also become part of a reversed – if now ambiguous – approach to the freedom of association by the current Canadian Supreme Court. See also Marion Crain, *Arms Length Intimacy: Employment as Relationship*, 35 WASHINGTON UNIVERSITY JOURNAL OF LAW & POLICY (2011) ('[t]here can be little doubt that the workplace is a central site for the personal relationships that sustain us').

²⁸ PIERRE VERGE & GUYLAINE VALLÉE, *UN DROIT DU TRAVAIL? ESSAI SUR LA SPÉCIFICITÉ DU DROIT DU TRAVAIL* (1997).

to managerial prerogative) was traded off in return for certain social guarantees.²⁹ Labour law's response to this subordination was to seek to redress the fundamental 'inequality of bargaining power' between the individual employee and the employer through collective action and regulation of the employment relationship.³⁰ Under global restructuring, the compact has broken down, and the inequality is exacerbated. A core feature of TLL therefore remains its recognition of the 'extent of the power over the life of others [workers] which the legal order confers on those called owners [employers],'³¹ however diffuse both the legal order and the owners of capital have become. With its close scrutiny of transnational chains of production and service provision across national borders, and alternative constructions of networking and forms of organizing, TLL builds from its focus on asymmetries of power, including non-state power. It challenges the (exclusive) reliance on institutions of national labour laws that may be 'ossified'³² from innovation, competition and prospects for change. It depends on an ability to be seen both as a response to global challenges, and a vector of an alternative vision of globalization. In that sense, labour law's constitutive narrative has shifted, as TLL is deeply intertwined with the call for a reconstruction of labour law across governance levels. But does TLL share labour law's normative specificity, that is, its ability to go beyond identifying the specific relationship of subordination, to create an autonomous space through which to redefine and rebalance the relationship that it has named?³³

a. Freedom of Association and the Specificity of Labour Law

The use to which TLL has put freedom of association is a key starting point from which to answer that question. In part, this reflects our conviction that labour law has not simply emerged through acts of the state, but is claimed, by workers,³⁴ out of recent and ongoing struggle. Yet even such a basic idea as freedom of association has hardly escaped controversy. An essential element of its effective exercise, the right to strike, is today under a fresh 'gloves off' assault. As Betten so presciently wrote 20 years ago

²⁹ Simon Deakin, *Capacitas: Contract Law, Capabilities and the Legal Foundations of the Market*; in CAPACITAS: CONTRACT LAW AND THE INSTITUTIONAL PRECONDITIONS OF A MARKET ECONOMY (Simon Deakin & Alain Supiot, eds, 2009) 1, 17–18.

³⁰ On the latter aspect, see KATHERINE V. W. STONE & HARRY ARTHURS, eds, *RETHINKING WORKPLACE REGULATION: BEYOND THE STANDARD EMPLOYMENT CONTRACT* (2013).

³¹ Morris R. Cohen, Property and Sovereignty 13 *CORNELL LAW QUARTERLY* 8, 13 (1927–28) (this affirmation flows from Cohen's characterization of property rights as a 'a relation not between an owner and a thing, but between the owner and other individuals in reference to things.' At 12.)

³² Cynthia Estlund, The Ossification of American Labor Law, 102 *COLUMBIA LAW REVIEW* 1527 (2002). But see Lance Compa, Not Dead Yet: Preserving Labor Law Strengths While Exploring New Labor Law Strategies, 4 *UNIVERSITY OF CALIFORNIA IRVINE LAW REVIEW* 609 (2014).

³³ See VERGE & VALLÉE, *supra*, at 170.

³⁴ As Nononsi provocatively recalls, Ch 37 in this volume, organizations of child workers make similar claims.

about whether the right to strike is protected by the Freedom of Association and Right to Organise Convention (No. 87), 1948:

[w]hatever the correctness of the opinions expressed, it is clear that the employers' refusal to accept the Committee of Experts interpretation of Convention No. 87 on this issue ... any longer will lead to serious problems, if the question is not addressed explicitly.³⁵

Writing from different angles in their respective chapters, Bellace and La Hovary evaluate the crisis that erupted over this issue at the ILO in 2012. Bellace considers the right to strike as a stark example of 'pushback' in the face of a carefully constructed body of cases 'interpreting' conventions. Drawing on Nicolas Valticos' work, Bellace clarifies the responsibility of the Committee of Experts on the Application of Conventions and Recommendations (CEACR) to ask how a government has applied a Convention, and as a result to express views on its meaning. The international instruments are deliberately drafted in general terms and the expectation is that they will be interpreted. Her chapter traces the role, constitution and competencies of the ILO supervisory bodies; Bellace also takes pains to outline the ways in which the observations, requests, and recommendations have increasingly been used by the outside world 'as a form of soft law labour standard jurisprudence.' Bellace considers that use to be at the heart of employers' contestation; in her view, it brings with it the risk that the post-war notion of universal human rights comprising the right to strike will become a source of 'fragmentation and incoherence,' as Alston and Heenan predicted in the aftermath of the adoption of the 1998 ILO Declaration on Fundamental Principles and Rights at Work.³⁶ On this, La Hovary explores ILO 'soft law' from a public international law perspective.

This does not mean the 'hard law' on freedom of association is faring better. Amongst other factors, adjudicative forum – and its relative sensitivity to the fundamental character of labour rights as human rights – matters. Zimmer's chapter focuses on the transnational labour law that flows through Court of Justice of the European Union (CJEU) cases on the right to strike. Those decisions subordinate the freedom of association including the right to strike, however 'fundamental,' to the freedom of establishment and the freedom to provide services under the Treaty on the Functioning of the European Union.³⁷ The court's reasoning is juxtaposed with the comprehensive human rights based framework through which freedom of association and the effective right to collective bargaining are interpreted under the EU Charter of Fundamental Rights. Hinting at the backlash underscored in Bellace's contribution, Zimmer wonders what is to be made of the fact that reference to supervisory bodies' interpretations in later cases has decreased in the case law of the European Court of Human Rights. She

³⁵ LAMY BETTEN, *INTERNATIONAL LABOUR LAW: SELECTED ISSUES* (1993), 109.

³⁶ Philip Alston & James Heenan, *Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration of Fundamental Principles and Rights at Work?* 36 *NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW & POLITICS* 101, 125 (2004).

³⁷ See also NICOLA COUNTOURIS & MARK FREEDLAND, eds, *RESOCIALIZING EUROPE IN A TIME OF CRISIS* (2013).

concludes with caution: rather than develop a more robust approach to inclusion, the institutional commitment to the freedom of establishment could just lead the CJEU to develop better arguments on the basis of which to restrict the right to strike, and freedom of association more generally.

Milman-Sivan enters the freedom of association debate through a discrete discussion of a rarely analyzed international mechanism: the ILO's tripartite Credentials Committee. Its tasks include examining objections to the government-submitted credentials of delegates to the ILC who come from organizations that are challenged as not being 'the most representative of employers or workpeople' in that country.³⁸ Milman-Sivan's discussion focuses on spaces for tripartism's evolution; it therefore looks to freedom of association to find an aspirational basis on which to foster inclusion along a plural set of intersecting identities. The author offers an important critique of the corporatist model inherent in traditional ILO tripartism. She integrates an intersectional, non-essentialist understanding of overlapping labour identities, perpetually in flux, in search of a 'multi-interest' governance structure. For Milman-Sivan, this challenges an approach that would privilege 'class' identity, narrowly defined. She is careful also to identify the persisting concerns about the 'democratic deficit' challenge to civil society organizations. As such, she proposes a model that produces broader-based representativeness without diluting tripartism. And in this, the ILO Credentials Committee would shift to a more substantive conception of representation, to consider internal union governance rooted in the freedom of association. Her subtle proposal transforms a narrow international mechanism into a vehicle for fluid transnational democratic governance.

Drouin explores a more commonly known alternative basis for collective governance, and one of the most structured examples of worker solidarity across borders: international framework agreements (IFAs). Negotiated by Global Union Federations with some multinational enterprises, IFAs are different from typical forms of CSR, as they engage some level of bargaining between transnational actors over an increasingly harmonious range of fundamental principles and rights at work. Drouin considers that they come with a built-in credibility and legitimacy that is not shared by other unilateral CSR instruments.³⁹ Yet national laws – and international labour standards (ILS) – offer no framework to sustain or promote collective bargaining in the mainstream. Instead, IFAs rely on a number of implementation mechanisms in which worker representatives can play a role. Drouin argues for stipulations on the use of arbitration procedures to be generalized, or for ILO adoption of a new Recommendation that would support the form of transnational social dialogue that the IFAs have helped to start.

Finally in this part, Blackett challenges TLL to consider collective autonomy in relation to an historically marginalized group that has been at the centre of transnational social movement's claims for inclusion in ILS: domestic workers. She asserts

³⁸ ILO Constitution, Art. 3(5); see also *Standing Orders of the International Labour Conference*, Art. 5.

³⁹ Compare PETER UTTING & JOSÉ CARLOS MARQUES, eds, *CORPORATE SOCIAL RESPONSIBILITY AND REGULATORY GOVERNANCE* (2013) and RICHARD M. LOCKE, *THE PROMISE AND LIMITS OF PRIVATE POWER* (2013).

the imperative of collective autonomy to any transformative regulatory project, while underscoring its limits in relation to groups facing structural inequality. After reviewing the provisions on their freedom of association in the new Decent Work for Domestic Workers Convention and Recommendation, she canvasses one of the rare vehicles for domestic workers' collective autonomy, the legislatively extended French national collective agreements (CCN), which served as a source of norm migration. Blackett argues that France can in turn learn from the new international instruments and the activism that has sprung up around them by social movements of domestic workers themselves, to ensure that the CCN enables, rather than supplants, domestic workers' exercise of their collective action.

b. On Human Rights and Equality: Does Transnational Labour Law Provide Spaces and Vehicles to Challenge Domestic Labour Law's Exclusions?

Pioneering scholar Virginia Leary captured the 'parallel' tracks of labour rights and human rights,⁴⁰ questioning the latter's ability to centre questions of economic justice and workplace democracy that are the mainstay of the former.⁴¹ Yet what are we to make of the fact that several contributors to this volume reference international and regional human rights law as a potential avenue through which to resist transnational challenges to domestic labour regulation? What is to be said to those, like López, who express renewed hope in the ILO's ability to frame freedom of association as a fundamental principle and right at work? And what of those like Sheppard who root their understanding of labour law's potential in its ability to grapple with the structural, systemic inequality that perpetuates labour law's exclusions? All grasp at the recognition that human rights in an era of global restructuring extend beyond protecting individuals, to protecting contemporary society from profound regression. They are to be taken seriously both as an 'external outcry'⁴² against exclusion, and as a claim for robust re-embedding of the social in the economic.⁴³

Sheppard's chapter considers the rise of precarious forms of work, and affirms that '[g]lobalization appears to have ... further entrenched socio-economic inequities and restructured inequality in the workplace.' She turns to anti-discrimination law, not as a panacea, but as a way of seeing the critical challenges posed to the capacity of

⁴⁰ Virginia Leary, *The Paradox of Workers' Rights as Human Rights*, in LANCE COMPA & STEPHEN DIAMOND, eds, *HUMAN RIGHTS, LABOR RIGHTS AND INTERNATIONAL TRADE* (2003).

⁴¹ See also e.g. TONIA NOVITZ & COLIN FENWICK, eds, *HUMAN RIGHTS AT WORK* (2010); Guy Mundlak, *Human Rights and Labour Rights: Why Don't the Two Tracks Meet?* 34:1 *COMPARATIVE LABOR LAW AND POLICY JOURNAL* 217–43 (2012).

⁴² ROGOWSKI, *supra*, at 17. Rogowski cautions against their 'inflationary use'. *Ibid.* Rittich underscores their use as an 'ethical' claim, potentially signalling a move away from a claim rooted in an analysis of relative power. Kerry Rittich, *Core Labor Rights and Labor Market Flexibility: Two Paths Entwined?* in *LABOR LAW BEYOND BORDERS: ADR AND THE INTERNATIONALIZATION OF LABOR DISPUTE SETTLEMENT* (International Bureau of the Permanent Court of Arbitration, ed., 2003) 157.

⁴³ See JOHN GERARD RUGGIE, ed., *EMBEDDING GLOBAL MARKETS: AN ENDURING CHALLENGE* (2008).

transnational institutions to engage complex, fluid, intersecting identities. This reflects a commitment to include but extends beyond the important and capaciously framed work on ‘gendering’ labour law.⁴⁴ Looking at the ILO’s Decent Work agenda, Sheppard commends the fact that it unites horizontal inequality (prevalent in anti-discrimination law) and vertical inequality (prevalent in labour law), as it contemplates the transnational regulatory challenge. Rather than rattle off elaborate anti-discrimination measures, Sheppard reaffirms the importance of comprehensive strategies such as transitioning to formalization of informal economy jobs in which workers with multiple identities reside. By keeping her eye on the most precarious, Sheppard is able to offer a vision of equality that is attuned to equitable processes and equitable outcomes. For globalization’s most intractable challenges, TLL through human rights and equality must be able to articulate loudly and clearly what inclusive equality demands.

Estlund’s original chapter considers whether insights from transnational diversity within contemporary sites of global production might enable us to imagine a form of ‘working together transnationally.’ Drawing on her pivotal work on topic in the United States (US) context,⁴⁵ Estlund argues that the ‘crucial convergence of diversity and intense cooperation among co-workers is possible both because of the hold that the law has on the workplace, and *because* of the economic hold that the workplace has on individuals.’ In other words, the workplace is not only a site in which conflicts and inequality may surface, but also a critical site through which solutions – and exercises of collective self-governance – can be cultivated. However, Estlund is cautious not to extrapolate her insights outward onto global spaces; she remains focused on production-based workplaces, and teases out the complexity stemming amongst other things from the lack of shared transnational (democratic) polity. In anticipating the need for global governance, or transnational law, she reminds us of its slow emergence, worrying that it might be too slow to enable TLL to mount a sufficient challenge. Rather, in particular areas, like transnational migration, and in particular spaces, like the most diverse global cities, transnational ‘connectedness and solidarity’ might not only be possible, but are invariably ‘worth cultivating for their own sake.’

Bensusán looks at human rights through a (sub)regional lens, and in the process fills the space between local knowledge and theorizing. Chronicling the problems in the application of labour law and access to justice, with the ensuing unfair labour practices, she asks how human rights based policies can foster greater effectiveness of labour law. For Bensusán, the effects of greater multinational presence in a country are contingent on choices made by domestic institutions. In labour law, there is a huge gap between the law on the books and everyday reality; in particular, Bensusán cites high rates of non-compliance in Central America and Mexico. She seeks mechanisms that confront ‘the subordination of labour policy to macro-economic policy.’ Like many a transnational labour lawyer in this volume, Bensusán places faith in social dialogue, across regional space.

⁴⁴ See Judy Fudge & Emily Grabham, Introduction: Gendering Labour Law, 4 *feminists@law* 1 (2014).

⁴⁵ See CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* (2003).

Antoine continues the regional reflection. She considers that regional human rights jurisdictions have been able to engage actively on labour, citing the example of regional human rights bodies of the Organization of American States (OAS): the Inter-American Commission on Human Rights (IACHR), and the Inter-American Court. Antoine finds that the non-discrimination route holds some promise for historically disenfranchised groups like Afro-descendants, indigenous peoples, the disabled, persons living with HIV, and women. In contrast, the artificial but resistant binary between economic, social and cultural rights on the one hand, and civil and political rights on the other, affects the ability to address some basic labour issues directly. Antoine illustrates how a holistic approach to the two has enabled the IACHR to highlight the broad context out of which deprivations of labour rights arise. Like Sheppard, Antoine illustrates the potential of intersectional approaches, including in work-related discrimination cases. Finally Antoine notes that the human rights approach is far from uni-directionally supportive, an insight also underscored by Trebilcock in relation to CSR. In particular, Antoine discusses the Commission's ambivalent decision on the scope of the right to strike as an aspect of the freedom of association.

Several chapters in the handbook highlight the indeterminacy of human rights discourse for the construction of TLL. After all, as Ebert points out, the IMF is equally able to marshal the language of human rights, or fundamentals, 'by framing these rights as outcomes of the market rather than as a counter-weight to it and thereby subjecting these rights to the market's logic.' A further question is needed: what prevents ILS from being equally malleable?⁴⁶

c. Emerging Roles for the ILO as an Actor in Transnational Labour Law

In conversations about the challenges facing transnational labour law, suggestions often start with the phrase, 'Why doesn't the ILO. ...?' The ideas range from fanciful non-starters to innovative notions that the ILO should be encouraged to explore.⁴⁷ All belie the sense that the international community might well be expecting too much while at the same time insisting on too little of the ILO, as well as of other actors. Although chapters in this part of the handbook put the ILO at the centre of their analysis, it is telling that the overwhelming majority of contributions to this volume engage with – and at some level critique – the ILO, as a norm-setter or regulatory actor, of course, but beyond that as a space for dialogue. The engagement with the ILO suggests that, perhaps sometimes despite itself, the ILO holds significant potential to foster global, counter-hegemonic transformation. In other words, even with the ILO's

⁴⁶ See BOB HEPPLER, *LABOUR LAW AND GLOBAL TRADE* (2005). The arguably more 'association friendly' theories of human capabilities developed in AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999) and MARTHA NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (2001) may contrast favourably with a weaker so-called 'empowerment' approach favoured by international financial institutions such as the World Bank. See Anne Trebilcock, *Using Development Approaches to Address the Challenge of the Informal Economy for Labour Law in BOUNDARIES AND FRONTIERS OF LABOUR LAW* (Guy Davidov & Brian Langille, eds., 2006) 63-85.

⁴⁷ See, for instance, suggestions in Paul van der Heijden & Ruben Zandvliet, *Enforcement of Fundamental Labor Rights*, The Hague Institute for Global Justice, Policy Brief 12 (2014).

limitations, contributors to this volume reaffirm it as a key TLL actor beyond the central role it plays in traditional international labour law (ILL).⁴⁸

With a view to cultivating social justice, the ILO was constitutionally mandated to set and monitor minimum ILS, through a process of tripartite dialogue at the annual ILC. The ILO Constitution instructed the ILO secretariat to do more: to collect and share information, and to provide assistance to Members on the basis of decisions of the Conference.⁴⁹ This has laid the basis for a wide range of initiatives, from support to labour law reform processes⁵⁰ to hands-on programmes in member states.⁵¹ Guiding this work is the Organization's mandate as captured in a core set of principles, expressed in the ILO Constitution and its annex, the 1944 Declaration of Philadelphia, and more recent Declarations adopted by the ILC. But some might argue that in overwhelmingly emphasizing ILS to the exclusion of other functions, the ILO had lost its way, or at least an opportunity to be more persuasive.⁵² Amongst others, the Milman-Sivan, Smith and Sukthakar contributions engage with the concern that ILS are not just meant to be rolled out, and to reflect a dominant, industrial model of the working world. Rather, the chapters in this part of the handbook underscore more inspired uses of ILS.

Maupain refers to the 'magisterial' function of ILS, including those that are not even ratified by ILO Members.⁵³ 'Magisterial' is not a commonly used term; among its many meanings (teacher, tutor, director, instigator), 'instigator' seems best to us because it suggests Plato's social gadfly, stinging other institutions and actors – particularly sleepy states – into action for the (collective) greater good. As Charnovitz observes, the ILO's mandate to draft an international labour code was part of the broader League of Nations effort to write transnational ground rules for the emerging interdependent world economy. In addition, he reminds us that the focus on compliance with norms rather than the more standard international law remedy of reparations to

⁴⁸ On the extent of the ILO's role, see THOUVENIN & TREBILCOCK, *supra*, and JEAN-MICHEL SERVAIS, *INTERNATIONAL LABOUR LAW*, 4th ed. (2014).

⁴⁹ See ILO Constitution, Art. 10.

⁵⁰ See e.g. Colin Fenwick, *The ILO and National Labour Law Reform: Six Case Studies*, in *PROMOTING DECENT WORK: THE ROLE OF LABOUR LAW* (Shelley Marshall & Colin Fenwick, eds, forthcoming); Adelle Blackett, *Beyond Standard Setting: A Study of ILO Technical Cooperation on Regional Labor Law Reform in West and Central Africa*, 32:1 *COMPARATIVE LABOR LAW & POLICY JOURNAL* 443 (2011). See also Bamu and Mudarikwa, Ch 32 in this volume.

⁵¹ See e.g. Kari Tapiola & Lee Swepston, *The ILO and the Impact of Labour Standards: Working on the Ground after an ILO Commission of Inquiry*, 21:3 *STANFORD LAW & POLICY REVIEW* 101–14 (2010); Drusilla Brown, Rajeev Dehejia & Raymond Robertson, *Regulations, Monitoring and Working Conditions: Evidence from Better Factories Cambodia and Better Work Vietnam*, in *CREATIVE LABOUR REGULATION: INDETERMINANCY AND PROTECTION IN AN UNCERTAIN WORLD* (Deirdre McCann, Sangheon Lee, Patrick Belser, Colin Fenwick, John Howe & Malte Leubker, eds, 2014) 185–203.

⁵² See FRANCIS MAUPAIN, *THE FUTURE OF THE INTERNATIONAL LABOUR ORGANIZATION IN THE GLOBAL ECONOMY* (2013).

⁵³ See also Laurence R. Helfer, *Monitoring Compliance with Un-ratified Treaties: The ILO Experience*, 71 *LAW & CONTEMPORARY PROBLEMS* 195–217 (2008).

undo the harm from violations was in 1919 a key governance innovation of the Treaty of Versailles.

La Hovary picks up on the magisterial function, but turns to the question of the interpretation of Conventions by the ILO supervisory bodies, pointing out that the ILO secretariat and the CEACR have been interpreting Conventions for quite a long time.⁵⁴ For La Hovary, that does not mean, in relation to Art. 37 of the ILO Constitution, that these interpretations are binding. Although she steps away from the suggestion that the jurisprudence would constitute precedent, as in a common law legal tradition, she focuses instead on the CEACR's stated need to provide 'uniform comments' to member states over time. She then interrogates the use of the notion of 'soft law' to characterize the jurisprudence, rather than the type of instrument. She further challenges the simplistic diad between 'binding' and 'non-binding' interpretations, preferring to focus instead on the legal effects, which are generally well known both for soft law, and for the CEACR. La Hovary recognizes, moreover, that these effects may well vary over time. Like Bellace, La Hovary opines that the 2012 challenge by employers in the ILO is in part a reflection of the increased reference to the CEACR's pronouncements in a multiplicity of TLL fora; moreover, the interpretations increasingly inform judicial decisions by other international, regional, and domestic bodies worldwide, and are cited.⁵⁵ Is it their legal authority or the validity of their reasoning, as Maupain⁵⁶ argues, that is ultimately persuasive? For La Hovary the quality of their content, not their binding character, confirms the need to focus on their effect. She concludes by affirming that the challenge itself is ultimately less about the CEACR or even the status of the supervisory bodies, but rather goes to the existence of the standards themselves. And in this connection, Zimmer's reflections on the varying use of such pronouncements over time remain a source of concern.

There is a sense of urgency in Maupain's contribution to this volume, which seeks to address the perception that substantive standard-setting is not up to the challenge posed by various versions of the game theoretical collective action dilemmas⁵⁷ faced by states who might wish to promote a 'fair' globalization. Maupain recognizes and seeks to offer solutions to palliate competitive disincentives to ratification of ILS, in part through a reading of a more textured appreciation of compliance. Maupain reads a further function into the ILO's constitutional mandate, which he characterizes as the ILO's 'regulatory' or enabling function. In the process, he rereads – and arguably narrows – the constitutional bases for supervisory bodies' action, emphasizing the need to move away from 'proposing normative outcomes to promoting reciprocal efforts.' In his proposal in this volume, Maupain acknowledges the spatial character of norms, but emphasizes the temporal dimension, that is, enhanced capacity achieved by an individual state over time to redistribute the benefits (and losses) from improved

⁵⁴ See also C. Wilfred Jenks, *The Scope of International Law*, 31 BRITISH YEARBOOK OF INTERNATIONAL LAW 1, 22 (1954).

⁵⁵ See for instance commented cases in the new periodical, INTERNATIONAL LABOR RIGHTS CASE LAW JOURNAL.

⁵⁶ Maupain, *supra* at 61.

⁵⁷ See Alan Hyde, *What is Labour Law?* in BOUNDARIES AND FRONTIERS OF LABOUR LAW (Guy Davidov & Brian Langille, eds, 2006) 37.

prosperity grounded in economic interdependence. Moreover, in affirming that international coherency is not a one way street, and recognizing the ILO's limited persuasive ability amongst international institutions, Maupain leaves the door open to the function not explored by him in his 2013 book: the convenor function, or as Boisson de Chazournes emphasizes, the ILO's dialogic role. Thus Maupain envisages inviting the IFIs into the ILO.

Diller provides a rich exploration of the ILO's dialogic role in the wake of the death of 1135 workers caused by the collapse of their workplaces in the Rana Plaza building in Bangladesh in April 2013. The multinational enterprises that subcontracted along the global supply chain to Bangladesh scrambled to respond to the ensuing public condemnation. Some adopted ad hoc, 'go it alone' approaches. A critical part of the response, however, came from the ILO, which stepped forward to offer something that local workers, employers along the production chain, governmental actors, and overseas consumer needed: a single forum, with the ILO – the neutral chair – perceived as a trustworthy arbiter, committed to social justice and open to creative results. The result has been a five-year accord on fire and building safety to build safe workplaces in Bangladesh, involving two global union federations (GUFs) and 170 apparel company signatories committed to safety inspections, alongside payment arrangements in the form of an ILO established independent Trust Fund, to compensate affected workers and/or their survivors. And specifically to foster continuous improvement, Bangladesh has become part of the ILO's pioneering Better Work program for the apparel industry.⁵⁸ Simply put, the ILO provides a space for transnational action, and change, over time. In this regard, social dialogue and tripartism for the ILO are not just reflective of an older balance of powers in states, or a narrowly defined means to an end. The dialogue is intimately linked to the meaning of social justice. It is the expression of a fundamental concern to create space for democratic participation for those most concerned – workers, employers and government.

For Diller, ILS can also serve as 'means to coordinate national action for cross-border impact.' In their chapter on the Maritime Labour Convention, 2006 (MLC), Asante and Chigara canvass this theme in their exploration of the innovative regulatory approach adopted by the MLC, with its use of some techniques inspired by the International Maritime Organization. They underscore the extent to which it overcomes collective action challenges in this early global industry, such that compliant states are no longer at a competitive disadvantage with non-compliant states. Moving beyond traditional paradigms, the MLC demonstrates 'the need in transnational fields for a paradigm shift from the harmonization of parallel sovereign systems to a globally integrated network involving the cooperation of different levels of government within and between States.' Diller further considers that transnational market incentives and safeguards in the form of most favourable treatment have been built into the MLC, and have facilitated its entry into force and implementation. Moreover, the substantial equivalence standard that the MLC has firmly embedded in ILL is a feature whose broader potential some contributors, notably Maupain, would like to see operationalized in other contexts.

⁵⁸ See http://www.ilo.org/global/programmes-and-projects/WCMS_084616/lang-en/index.htm.

4. TRANSNATIONAL LABOUR LAW AS TRANSNATIONAL LAW

It might have been hoped that the ILO would pass the principle of peace through social justice along to a multilateral vector of transnationalism, the secretariat of the predecessor of the WTO, the General Agreement on Tariffs and Trade (GATT), when the ILO moved to a massive new building up the hill, large enough to accommodate the needs of its burgeoning tripartite membership on the advent of decolonization.⁵⁹ The ILO had already affirmed in the 1944 Declaration of Philadelphia that ‘labour is not a commodity,’ but the GATT apparently preferred to leave any state tripartism, and the social justice mandate, within nation state borders. This reflected the post-war compromise of embedded liberalism: Adam Smith abroad, John Maynard Keynes at home. With magisterial space and minimalist but dynamic regulatory infrastructure (the bicycle theory of keep pedalling or fall off),⁶⁰ it enabled certain states to set an oddly deterministic and thick liberalization process in motion. Has the injunction against labour commodification been a casualty of pedalling too fast, or was it ever even taken along for the ride? Certainly, the Declaration of Philadelphia’s invective that economic and financial measures should be accepted ‘only in so far as they may be held to promote and not to hinder’ social justice objectives has largely been ignored.⁶¹

In this volume, we take as a starting point Jessup’s conception of transnational law as including ‘all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories.’⁶² We note the parallels with his contemporary, C. Wilfred Jenks, later to become ILO Director-General, who envisaged the reconceptualization of ‘an emerging field’ in which ‘the law governing the relations between states is only one.’⁶³ Within Jessup’s notion of transnational law was a critique of a framing of human society, which:

in its development since the end of the feudal period has placed special emphasis on the national state, and we have not yet reached the stage of a world state. These facts must be

⁵⁹ On the decolonization period, see e.g. DANIEL MAUL, *HUMAN RIGHTS, DEVELOPMENT AND DECOLONIZATION: THE INTERNATIONAL LABOUR ORGANIZATION: 1940–1970* (2012).

⁶⁰ JAGDISH BHAGWATI, *PROTECTIONISM* (1988).

⁶¹ ALAIN SUPIOT, *THE SPIRIT OF PHILADELPHIA: SOCIAL JUSTICE vs. THE TOTAL MARKET* (2012).

⁶² PHILLIP C. JESSUP, *TRANSNATIONAL LAW* (1956) 2.

⁶³ Jenks, *supra* (characterizing the ‘common law of mankind in an early phase of development’ as ‘the law of an organized world community, constituted on the basis of States but discharging its community functions increasingly through a complex of international and regional institutions, guaranteeing rights to, and placing obligations upon, the individual citizen, and confronted with a wide range of economic, social, and technological problems calling for uniform regulation on an international basis’ (at 2)); C. WILFRED JENKS, *THE COMMON LAW OF MANKIND* (1958). Jenks is attributed with having sketched the background to the notion of “fragmentation” by the Study group of the International Law Commission on *FRAGMENTATION OF INTERNATIONAL LAW*, *supra*, at paras. 5–7.

taken into account, but the state, in whatever form, is not the only group with which we are concerned.⁶⁴

For Jessup, the variety of transnational situations was ‘almost infinite’ and could encompass ‘individuals, corporations, states, organizations of states, or other groups,’⁶⁵ including nongovernmental organizations. Jessup also contemplated the extralegal or metajudicial’ in his characterization of solutions that might arise without using state law.⁶⁶ Less often commented on is Jessup’s recognition of the importance of particular kinds of transnational spaces that might emerge, even within traditional sites of international law. In particular, Jessup commented on the inequality of state power in the midst of decolonization and nationalization, and opined that the UN itself might become a space within which ‘social consciousness’ might evolve.⁶⁷ Jessup resisted the classification of transnational law as a field at the time of writing his book, but the ‘subversive’ character of his early treatise has been underscored in key contemporary articulations of transnational law.⁶⁸ For Zumbansen, transnational law is a challenge, a reminder of law’s fragility, and a basis to recall law’s contested character, constituencies and communities.⁶⁹ Without attempting to represent or resolve the emerging, evolving currents in the contemporary literature, this introduction seeks simply to underscore the extent to which a polycentric globalization has rendered state-centric notions incapable of capturing the complexity of contemporary interlegality.⁷⁰ But plurality is not necessarily a destabilizing factor: transnational labour law reflects and expands a long-standing labour law tradition that interrogates its nexus to the state, and challenges legal centrism with labour law’s pluralist autonomy.⁷¹

The transnational focus of this part is particularly concerned to shed light on the asymmetrical points of connection between specific places in the global North and the global South.⁷² The centres and peripheries of ‘global cities’ connect products, services and people, like the T-shirt travelling with capital from Hong Kong, design in Milan, fabric in Delhi, production in Phnom Penh and marketing and retail in New York City; like the call centre work relaying Tunis to Paris; like the global care worker travelling from Manila to Beirut before finding a way to land in Toronto where the prospect of applying for permanent residency would remain on the horizon after several years tied

⁶⁴ Jessup, *supra*, at 1.

⁶⁵ *Id.* at 3–4.

⁶⁶ He does not define these terms, but proffers an example: commercial arbitration in which an arbitrator is authorized to arrive at a ‘fair compromise.’ *Id.* at 6.

⁶⁷ See also James N. Hyde, Book Review, *Transnational Law*, 66 *YALE LAW JOURNAL* (1957) 813–15.

⁶⁸ See e.g. Peer Zumbansen, *Transnational Law, Evolving in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW* (Jan M. Smits, ed., 2012).

⁶⁹ *Ibid.* See also Zumbansen, *Transnational Legal Pluralism*, *supra*, moving beyond transnational law as a ‘field’ to transnational legal pluralism as a methodological perspective.

⁷⁰ WILLIAM TWINING, *GLOBALISATION AND LEGAL THEORY* (2000).

⁷¹ See in particular HARRY W. ARTHURS, *WITHOUT THE LAW: ADMINISTRATIVE JUSTICE AND LEGAL PLURALISM IN NINETEENTH-CENTURY ENGLAND* (1985).

⁷² David Kennedy, *The Mystery*, *supra*, at 833 (recognizing that ‘knowledge of the ways the world is governed is not spread evenly:’ nor is it for those who live in the world).

to domestic servitude. It interrogates the prospects for, and challenges to, transnational citizenship or spaces for cosmopolitan democratic participation.⁷³

a. Thickening Soft Law? Privatizing or Infusing Transnational Labour Law with Public International Law Norms?

A lively debate has ensued over the potential for complementarity between soft law initiatives and hard law forms.⁷⁴ The debate around thickening continues in the contributions to this volume. Reactions to that thickening are chronicled by several contributors who analyse the challenge to ILO supervisory bodies' 'jurisprudence' as it has increasingly come to inform a range of norms, of both the hard law and soft law variety.

Two chapters in this part, by Kolben and Dumas, focus resolutely on initiatives at first blush divorced from state-based institutions, national or international. Yet the enmeshing of the institutional actors in initiatives framed as 'private' is quickly observed. The 'thickening' may well be as much institutional, as it is normative, and the continuity is readily observed with the emergence of action within the OECD (Thouvenin) and the potential development of 'harder' but privatized arbitration based dispute settlement mechanisms in labour agreements (Claussen).

From the advent of global supply chains, Kolben teases out the emergence of a transnational private labour regulation (TPLR). He defines TPLR as 'various forms of non-state, privately generated labour law rules and enforcement systems that are utilized to address labour conditions that do not meet the normative expectations of the Primary or of its stakeholders.' (Kolben, in this volume). Their development is far from spontaneous; mirroring Sukthankar's analysis, Kolben emphasizes the role of transnational labour activist networks, but resolutely situates the source of coercive power, and the source of regulatory legitimacy, in the 'private' market, and quite explicitly, in the contractual relationship. The threat of economic harm from the consumer is the link that enables the Primary entity to be acted upon by the subordinated Secondary. Through the lens of the preventable Rana Plaza disaster earlier canvassed by Diller, Kolben's chapter raises critical questions about the prospect for imagined communities constructed through consumer-citizens as the basis for his reflection on forms of transnational citizenship.

Dumas explores several similar considerations in his analysis of Rugmark's 'consumocratic' model as it relates to child labour in India. He provides a close analysis that captures the challenge of private action in relation to public order responsibilities operated in the backdrop of parental authority. He traces the adaptation in Uttar Pradesh from zealous enforcement of the private code through raids, the unintended consequence of pushing the practice of child labour in carpet weaving underground, to more mediated, consent-based interventions with parental and

⁷³ Iris Marion Young, Responsibility and Global Labor Justice, 12 JOURNAL OF POLITICAL PHILOSOPHY 365 (2004).

⁷⁴ See generally JOHN J. KIRTON & MICHAEL J. TREBILCOCK, eds, HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT AND SOCIAL GOVERNANCE (2004).

employer involvement to combat clandestine activity. Dumas further considers the ‘transcultural’ engagement that ‘consumocratic’ models entail. While he comes to the conclusion that ‘consumocratic’ approaches should not be conceived as a substitute for, but rather a complement to state law, the risk that they might supplant hard law irrespective of whether they thicken soft law pervades his analysis.

Soft law principles as elaborated in the OECD, an inter-governmental organization, are scrutinized by Thouvenin. These include, but extend beyond, the OECD Guidelines for Multinational Enterprises. He illustrates the role of OECD National Contact Points, and underscores the complementarity of principles and action with the ILO, strengthening the ILO’s normative authority. He analyses the exceptional and ‘fleeting’ example of the Republic of Korea, in which accession to the OECD was used as leverage to promote reforms on trade union pluralism that unfortunately proved to be temporary. As he suggests, institutional coalitions and measures promoting coherency are not fixed in time. They must be sustained.

Claussen takes the case of international arbitration, that is non-state, market-based dispute resolution grounded in consent, which may – but need not – take its authority from treaties. After canvassing under-used mechanisms in the ILO Constitution and the labour rights provisions of varying normativity, in bilateral trade agreements and foreign direct investment models, she considers the value of arbitral fora for transnational labour disputes. Joining her voice to what Zack has proposed in relation to conciliation,⁷⁵ she encourages further development of this field.

b. Beyond the WTO Linkage: Emerging Directions and Social Regionalism

The specificity of Claussen’s contribution on regional and bilateral trade and investment law developments on labour contrasts with the literature of the recent past. Two decades ago, emerging discussions of TLL would have focused on the relationship between trade and labour standards, exploring normative linkage, stressing or challenging the WTO’s ‘superior’ dispute resolution mechanisms.⁷⁶ An abundant if uneven literature has developed to address those questions, in what one commentator has ultimately referred to as the ‘WTO distraction.’⁷⁷ We are far from dismissive about the importance of linkage debates, and consider that one of the insights has been that linkages are not simply externally constructed; WTO disputes are a critical site at which competing policy considerations – on the environment, and on labour – are

⁷⁵ Arnold Zack, *Conciliation of labor standards disputes: A potential for the ILO*, lecture delivered to the International Institute for Labour Studies, April 2006.

⁷⁶ See in particular contributions by Brian Langille and Virginia Leary in *FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE*, Vol. 2: Legal Analysis (Jagdish N. Bhagwati & Robert E. Hudec, eds. 1996).

⁷⁷ Kevin Kolben, *The WTO Distraction*, 21 *STANFORD LAW & POLICY REVIEW* 461–92 (2010).

engaged; the linkage, in other words, is inherent, unavoidable, and must be interpreted.⁷⁸ It is certainly fair to argue that over time, greater attention has fruitfully been placed on the relationship between trade, labour law and development.⁷⁹

However, this handbook does not retrace those steps.⁸⁰ Instead, it canvasses linkages that have fostered an emerging TLL out of experimentation. Ebert and Posthuma report that of 186 trade agreements in force and notified to the WTO in 2009, over 35 contained labour provisions, as compared with four in 1995.⁸¹ Moreover, the learning can occur in multiple directions, as Charnovitz explores in his chapter on the WTO and the ILO. He reminds us that the Covenant of the League of Nations under the Treaty of Versailles was the first multilateral instrument to ‘champion fair labour standards in international commerce,’ followed by a similar provision a generation later in the proposed International Trade Organization. Charnovitz captures a number of valuable ways in which the WTO has inherited principles and institutional structures from the innovations surrounding the establishment of the ILO in 1919. Most notably, he details the impact on the complaints procedure, so often characterized as the ‘hard’ difference between the ILO and the WTO. Charnovitz nuances that view. In the process, his contribution recalls the ways in which the international architects conceived of the social as necessarily embedded in the economic. Charnovitz’s insights do not take away from scholarship that reminds us that in the post-war, pre-decolonization bargain, the trade regime could foster neoliberal policies in practice, ‘without formally imposing a particular vision of state-market relations’⁸² and what is more, without even hinting at the existence of political contestation. By invoking past forms of institutional innovation, and borrowing, Charnovitz subtly opens the door for innovative challenges within the ILO, and for emerging multi-level institutions of TLL governance to provide bases for further norm migration, or harmonization.

One of these areas is literally in the field of migration law. Hunt recognizes TLL’s boundary-crossing character, to consider how the EU’s Seasonal Workers Directive opens up a channel in EU law for low-skilled workers to migrate to the EU legally for economic purposes. Taking the case of migrant farm workers as her focal point, Hunt details the omission of workers’ rights from the EU’s subsidy-based support to European farmers, in the form of the Common Agricultural Policy (CAP). With an eye to normative coherence, she proposes a cross-compliance framework to incentivize CAP single farm payment recipients to respect labour rights, alongside accompanying

⁷⁸ See e.g. ROBERT HOWSE & MAKUA MUTUA, *CHALLENGES FOR THE WORLD TRADE ORGANIZATION* (2000).

⁷⁹ See e.g. Hepple, *supra*; Adelle Blackett, *Trade, Labour Law and Development: A Contextualization*; in *LABOUR LAW AND WORKER PROTECTION IN DEVELOPING COUNTRIES* (Tzehainesh Teklè, ed., 2010) 93–132.

⁸⁰ See e.g. VIRGINIA A. LEARY & DANIEL WARNER, eds, *SOCIAL ISSUES, GLOBALISATION AND INTERNATIONAL INSTITUTIONS: Labour Rights and the EU, ILO, OECD and WTO* (2006).

⁸¹ Franz C. Ebert & Anne Posthuma, *Labour provisions in trade arrangements: current trends and perspectives*, International Institute for Labour Studies Discussion Paper 205 (2011).

⁸² ANDREW LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM: REIMAGINING THE GLOBAL LEGAL ORDER* (2011) 7.

inspection mechanisms. Her chapter acknowledges the challenges in a climate characterized by greater protectionism, but stresses the significance of a social regionalism approach to embedded liberalism, that is, one which ‘sees social rights and social justice fully incorporated across the policy terrain of transnational standard-setting organisations, rather than left to an increasingly constrained domestic space’ (in this volume).

Such an ex-ante approach would contrast favourably to the ex-post treatment of problems that arise in cross-border work, as described in van Hoek’s critique of the application of private international law rules in the EU. Van Hoek explores the Rome I Regulation on the law applicable to contractual obligations alongside the EU’s Posted Workers Directive (PWD), as interpreted in CJEU jurisprudence. Tensions in the differing rationales underlying them are reflected in a continuing debate in relation to enforcement of the PWD. As van Hoek notes, this in turn recalls the difficult match of private international law and the logic of the EU’s internal market.

Bamu and Mudarikwa adopt a social regionalism framework in their assessment of the Southern African Development Community (SADC). Amongst a range of initiatives undertaken by SADC on the social dimensions of trade, they capture efforts to eliminate barriers to the free movement of persons within the region. They suggest that SADC is not premised narrowly on economic prosperity, but rather on enhanced linkages, including on workers’ rights. They move beyond an analysis of specific provisions on social policy to assess normative convergence on dispute resolution. That convergence, they note, was cultivated by specific ILO-sponsored initiatives, as well as norm migration in the form of the so-called South African effect, or the impact of the regional hegemon – and its border-crossing legal experts – on institutional path dependency affecting the development of alternative dispute resolution mechanisms for the resolution of domestic labour law disputes. The Bamu and Mudarikwa contribution suggests that TLL should also concern itself with patterns of domestic institutional convergence within regions.

Albertson and Compa’s contribution to this handbook further centres on the regional, and offers an expansive assessment of US, EU and Canadian agreements, templates, and generalized, preferential schemes. Whereas the North American Free Trade Agreement (NAFTA)’s side accord, the North American Agreement on Labour Cooperation (NAALC)’s mechanisms provided at best ‘episodic, not systematic’ results, the Dominican Republic – Central America – United States Free Trade Agreement (CAFTA-DR) arbitral panel procedure recently set in motion with respect to Guatemala is anticipated to have a significant impact on concretizing to date somewhat abstract debates about the interface between trade and labour. The differences are stark, and the devil is in the detail. The agreements are sources of innovation, through which regional histories and context-specificities may be gleaned. These authors provide a basis for sustained reflection on how to build a robust integration of the social in the regional at other, more federating sites of transnational governance.

c. **The Transnational Challenge to the Regulation of Labour as a Factor of Production: On Commodification**

This volume ends by centring a transversal TLL concern not to treat labour as a commodity, despite its status as a factor of production in trade law. Most contributions have addressed it in one manner or another. The themes of migrant labour,⁸³ forced labour, and child labour squarely capture the outer-limits of labour as a fictive commodity, along with another fictive commodity, the environment.⁸⁴ We therefore end this handbook with a most basic TLL question: does TLL challenge or re-inscribe the commodification of workers in the contemporary economy?

Novitz's discussion of migration focused chiefly on the European context considers whether 'an apparent shift towards trade in *services* (from trade in *goods*) makes a difference to the past political accommodations – shaky though they may have been – concerning transnational labour standards.' In posing the question, Novitz presciently notes the active severing of the service provision from the end product that might ensue, like a meal, or a legal contract; this allows agents to provide catering or legal services across borders. The service provision is commoditized. She contends that the liberalization wrought by the 'posted workers' system in the EU liberalizes while leaving significant room for abuse by agencies and employers.⁸⁵ A similar impression is left by van Hoek's examination of CJEU jurisprudence. And despite the emphasis of many states on remittance-based development strategies associated with temporary labour migration, Novitz questions the viability of the posted workers system as a development strategy for impoverished workers in low-income settings. By following the person, rather than the characterization of production or service provision, Novitz captures indeterminacy, and advises greater rather than lesser labour protection in the wake of a market access more likely to benefit entrenched corporate interests than developing countries, or their workers.

Langille offers a close look at a particularly important case in ILO history, the Myanmar (Burma) forced labour case, and concludes that the ILO ultimately 'did nothing' when one might have expected it to act. He notes that this 'easy' case, in which a rogue state was for decades in de jure and de facto non-compliance with its obligations to eliminate forced labour, is also the first and only case in ILO history in which its 'full machinery' was deployed. Langille acknowledges that the high-powered Commission of Inquiry issued a legally binding conclusion of violation of Convention No. 29, concluding that forced labour is a peremptory norm in international law, and that Myanmar's actions constituted an international crime, committed on a widespread and systematic basis, amounting to a crime against humanity – hardly run-of-the-mill occurrences. Significantly, the ILC and the ILO Governing Body invoked Article 33 of

⁸³ See generally CATHRYN COSTELLO & MARK FREEDLAND, eds, *MIGRANTS AT WORK: IMMIGRATION AND VULNERABILITY IN LABOUR LAW* (2014) (notably the contributions on reintegrative approaches).

⁸⁴ These themes are effectively captured in TONIA NOVITZ & DAVID MANGAN, eds., *THE ROLE OF LABOUR STANDARDS IN DEVELOPMENT: FROM THEORY TO SUSTAINABLE PRACTICE?* (2011).

⁸⁵ See also JUDY FUDGE & KENDRA STRAUSS, eds, *TEMPORARY WORK, AGENCIES AND UNFREE LABOUR: INSECURITY IN THE NEW WORLD OF WORK* (2013).

the Constitution for the first time in the ILO's history, authorizing the Governing Body (a political body, rather than the legal body, the Commission of Inquiry itself) to recommend to the ILC the appropriate action to 'secure compliance.' Langille recognizes some 'legal ingenuity' of the decision adopted by the ILC, authorizing individual member states of the ILO to take 'appropriate measures to ensure that the said Member cannot take advantage of such relations to perpetuate or extend the system of forced or compulsory labour.'⁸⁶ The result was sustained limited engagement and dialogue, backed up by persistent pressure on the government. But beyond the fragile political will of ILO Members to take strong action, Langille questions the effectiveness of a sanctions-based model for an already-isolated country ill-equipped to see greater engagement as part of its self-interest. Considering that the Article 33 'bluff' has now been called, he wagers that it is highly unlikely that it will be replayed. The implications for the ILO's persuasion-based TLL bargain, according to Langille, are stark.

Looking at the various international treaties that address slavery, servitude and forced labour, and in particular the ILO's 2014 Protocol to the Forced Labour Convention, Jean Allain argues that the normative basis found in the conventional definitions these terms is of 'fundamental importance in contemporary debates.' Yet Allain also traces the exercise undertaken by an expert group of civil society and academic commentators that urges reconceiving the definition of 'contemporary' forms of slavery from one based on ownership to one based on 'control over a person in such a way as to significantly deprive that person of his or her individual liberty, with the intent of exploitation through the use, management, profit, transfer or disposal of that person' wrought usually by violent force, deception and or coercion.⁸⁷ Rather than exploring the challenge to distinguish between this 'soft law,' civil society definition of slavery and the conventional or interpretive definitions proffered for 'servitude' and 'forced labour,' Allain's contribution recalls the scope for contestation of TLL's direction, by challenging the ILO's position (a position with which, incidentally, the editors happen to agree): that is, that the prohibition of forced labour qualifies as a *jus cogens* norm. The workers' group's decision in the ILC to withdraw a proposal to reaffirm the *jus cogens* status in the new ILO forced labour Protocol underscores the challenge of standard-setting in a climate in which the stakes of TLL's emerging contours are understood to be high.

Nononsi considers another widely embraced TLL prohibition – that of child labour. The prevalence of the commodification of children as labourers – notably in many parts of Sub-Saharan Africa – forces a different level of inquiry. Nononsi situates the phenomenon of child labour within a framework of broader governance policies, harkening back in particular to discussions of the impact of structural adjustment

⁸⁶ ILC Provisional Record, 88th Session (2000), available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc88/resolutions.htm#1>

⁸⁷ But see JANIE CHUANG, *EXPLOITATION CREEP AND THE UNMAKING OF HUMAN TRAFFICKING LAW* (forthcoming) (critiquing the transition from forced labour to trafficking, and from trafficking to slavery, and preferring a labour rights framework rather than a crime and punishment approach to migrant worker protection).

measures highlighted at the beginning of the handbook, and the resultant transformation of traditional practices into bases for child exploitation. He does not discount the important message and break that the ILO's focus on the worst forms of child labour has provided, acknowledging as well the importance of labour inspection and universal education practices. At the same time, Nononsi situates his critique within the broader framework of the denationalization (and in some cases, criminalization) of the state in many Sub-Saharan African territories as a part of, rather than a casualty of, a particular kind of asymmetrical globalization.

Our volume ends with Doorey's chapter on climate change. Doorey raises a vital concern in this handbook: to break the notion of labour out of its closed conceptual sphere and explore its connectedness with related fields upon which the global has operated. As part of the sustainable development paradigm (economic, environmental and social), one related field is environmental law. Doorey's point is not to exceptionalize the connection to the environment,⁸⁸ or to presume that labour law and employment law are natural allies: Doorey acknowledges that they are not. We suggest that there is a taken-for-grantedness in the commodification of the environment in terms of labour productivity. Doorey brings a discussion of labour law into a transnational law of just transitions from high greenhouse gas to low carbon emission economies. He builds from the shared recognition in both fields that plural, reflexive approaches to governance engaging a mix of state and non-state actors and institutions are appropriate. In this volume, he argues that '[a] legal model to address climate change should promote public voice' and be rooted in a theory of justice that is attentive to the distributional consequences of the transition. The emphasis on participation and dialogue echoes concerns of other authors such as Blackett, Boisson de Chazournes and Milman-Sivan.

5. CONCLUSION: WHAT LIES BEYOND?

Rogowski argues that, '[i]t might well be that a major function of world law in the form of global administrative law is ... to provide support for the building of political structures'⁸⁹ on the basis of the kind of global administrative law principles that Kingsbury and others have brought to the fore.⁹⁰ This rebuilding could entail a resolutely cosmopolitan form of legal ordering, as Glenn understood it, one that avoids 'univalent choice between norms seen as conflicting.'⁹¹ Rather, it 'sustains diversity' and in the process, 'opens up an included middle where multivalent options are available.'⁹² Arguably, TLL could benefit from greater resort to 'the principle of

⁸⁸ The interdependence of the environmental, the economic and the social was recognized as early as in Agenda 21 for the implementation of the Rio Declaration on Environment and Development (1992).

⁸⁹ ROGOWSKI, *supra*, at 15.

⁹⁰ Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 *LAW & CONTEMPORARY PROBLEMS* 15–62 (2005).

⁹¹ H. PATRICK GLENN, *THE COSMOPOLITAN STATE* (2013) 275.

⁹² *Id.*

harmonious interpretation (systemic integration),', in which normative environment, and the ability to prioritize objectives, matter.⁹³

No doubt signalling some dissonance with the insights of reflexive law, this introduction is framed to lend particular credence to the persistence of global hegemony. David Kennedy worries 'that our projects to rethink global governance fail to grasp the injustice of the world today and the urgency of change.'⁹⁴ We share that concern. One of our primary objectives in presenting the breadth and depth of the contestation that accompanies the emergence of TLL is to spotlight the intensity of the challenge. The way in which work is organized is undergoing profound change in many areas. The challenge is no less urgent than the 1919 moment at which revolutionary change was the alternative to the post-war construction of a legality of social justice, through international and national cooperation.

As TLL is rooted in a quest for social justice, we recognize that it may develop in startlingly unbounded⁹⁵ ways that may be overlooked by focusing exclusively on counterbalancing force through the institution of workers' collective power. TLL's vitality might indeed be tightly wed to moving beyond equality, however inclusive, within received labour law paradigms, to challenging the legitimacy of layering social justice onto an acceptance of historically rooted, increasingly amorphous but persistently prevalent forms of subordination.⁹⁶

We have therefore framed TLL in relation to its counter-hegemonic potential, that is, its potential to chart alternative normative paths.⁹⁷ De Sousa Santos Santos calls this subaltern legality, and seeks to theorize 'spaces for and strategies of counter-hegemony'⁹⁸ at whatever governance level they may be found. We consider this the idea of TLL, rooted in a robustly participatory understanding of social justice, and encapsulating a claim for emancipation.

⁹³ KOSKENNIEMI, *supra*, at paras. 410–423; See also ERIKA DE WET & JURE VIDMAR, eds, *HIERARCHY IN INTERNATIONAL LAW: THE PLACE OF HUMAN RIGHTS* (2012), 309.

⁹⁴ David Kennedy, *The Mystery*, *supra*, at 851.

⁹⁵ GLEN COUTHARD, *RED SKIN, WHITE MASKS: REJECTING THE COLONIAL POLITICS OF RECOGNITION* (2014).

⁹⁶ See e.g. Harry Arthurs, *Making Bricks without Straw: The Creation of a Transnational Labour Regime*, in DE BÚRCA et al., eds, *supra*, at 129; Adelle Blackett, *Reflections on a Living Metaphor in Transnational Labour Law*, in *THE DAUNTING ENTERPRISE OF THE LAW: ESSAYS IN HONOUR OF HARRY ARTHURS* (Simon Archer et al., eds., forthcoming).

⁹⁷ De Sousa Santos, *supra*, at 14–15.

⁹⁸ BOAVENTURA DE SOUSA SANTOS & CÉSAR RODRIGUEZ-GARAVITO, eds., *LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY* (Cambridge, 2005) at 11.

