

# **New Developments in Labour Law – towards a Hybrid Type of Labour Law?**

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This article aims at mapping – in a rather general manner - the major developments in labour law in Europe since the early 90s. There are several important developments within the field of labour law, one of which is the evolution of new types of non binding legal instruments, sometimes called soft law, sometimes described as new types of governance etc. This article aims at discussing the impact of this new elements on labour law as a whole and argues that the impact of these new elements are so strong that there is reason to classify labour law of today, at least in an international and new global setting, as a new type of *hybrid labour law*.

## 1 Changes in Labour Law in Europe

The societal conditions for labour law has drastically changed since the early period after world war II. The most important developments in this respect for labour law are the globalization, the free movement of capital and also the possibility and factual trend to transfer production to countries with cheap labour in order to cut production costs. Generally speaking the trend towards internationalization has been met by some efforts to regulate labour on a transnational level. These efforts have mainly resulted in different forms of “soft law”, the strictly binding minimum standard setting labour law that we find on a national level in many western European countries does not have its counterpart within the transnational labour law.<sup>1</sup>

The evolution regarding transnational labour law has its counterpart also in the trend towards flexibilization and deregulation of national labour law. Here we can see a gradual transformation of collective bargaining on branch level in the whole of Europe.<sup>2</sup> In this context I will not document these developments in detail, but my argument is that a transformation has gradually taken place and the end result is that wages are not any more predominantly settled by branch level collective bargaining, but increasingly by company level collective bargaining and also by minimum wage legislation.<sup>3</sup>

This development reflects a more general trend which is characteristic for globalization: On one hand it makes international non-state actors as organisations, corporations, networks and others more significant and moves power and influence to this transnational level, on the other hand it promotes a process of decentration, which also undermines the authority of the Nation State.<sup>4</sup>

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1 See concerning the globalization and labour law chapter 1.2 in Collins, Hugh – Ewing, K.D. – McColgan, Aileen, *Labour Law*. University Press 2012 p. 45-90.

2 See Vaughan –Whitehead, Daniel (ed), *Work inequalities in the Crises. Evidence from Europe*. ILO 2011. Geneva.

3 See *Collective Bargaining and Wages in Comparative Perspective. Germany, France, The Netherlands, Sweden and the United Kingdom* (eds. Blanke, Thomas and Rose, Edgar). Bulletin of Comparative Labour Relations. Kluwer Law International 56. Kluwer Law International 2005.

4 See Mückenberger, Ullrich, *Civilizing Globalism: Transnational Norm-Building Networks as a Lever of The Emerging Global Legal Order?* Transnational Legal Theory, 1 (4) 2010

The old principle that branch level collective bargaining sets a general minimum wage level which cannot be undermined by any companies in that branch is not a valid description of the general situation anymore. In the old postwar days this branch level minimum was seen as the big achievement forcing companies to compete on productivity, not low wages.<sup>5</sup> In the present Europe even economically strong States as Germany and Austria have introduced concession bargaining which means that it is possible to agree on standards below the branch minimum on local level. In countries - like the Nordic ones - where the principle of minimum is still upheld, the practical implications of this principle are significantly limited by the far reaching possibilities to introduce local deviations – still only when the parties have agreed on such possibilities under certain conditions.

## **2 International Developments**

### **2.1 Background**

The starting points for the new regulatory developments are to be found within the ongoing globalization where multinational companies often have lost their clear link to a “Home Country” and where production can be transferred from one country to another rather easily and where multinational companies can choose where to locate production and where to pay taxes.

Within this context big multinational companies are faced with different national labour law regimes with different contents. In order to be able to manage different national legal regimes, these companies might create their own internal quasilegal order: Internal rules on vocational training, on the interaction between different units in the company etc.

### **2.2 Trade Agreements**

Since the 1990s, we have seen a proliferation of bilateral trade agreements. Many of these have encompassed topics that are only indirectly linked to trade, such as labour standards. The European Union itself has followed this trend and thus undertaken to promote labour standards and decent work in multilateral and bilateral trade negotiations by including clauses that require basic compliance with core labour standards.

The background for this development was the controversy between the GATT Contracting Parties whether to introduce explicit references to core labour standards in the Marrakech Agreements (1994) concerning the establishment of the World Trade Organization WTO. No result on this matter

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p. 524 who characterizes the concept “Decentration” by arguing that it stands for the simultaneity of both globalization and localization of important economic and political decision-making processes.

5 This was the central content of the old Rehn-Meidner doctrine in Sweden.

was achieved in relation to the WTO, but a certain number of organizations, public and private, made commitments to respect Human Rights, to comply with core labour standards and to promote decent work and sustainable development. A strong signal in support of this development was sent from the World Summit for Social Development in Copenhagen in 1995.<sup>6</sup> The final version of the declaration of the WTO Ministerial Conference (Singapore, December 1996) stated that the member countries "renew their (our) commitment to the observance of internationally recognized core labour standards", which were subsequently set out in the ILO's "Declaration on Fundamental Principles and Rights" (1998) requiring Member States to observe and promote ILO core labour standards (eight specific conventions). At the same time, the ILO has been promoting the concept of "decent work" which, in addition to the core labour standards, views this from the perspective of social progress. The "Decent Work Agenda" (2000) has been recognised and taken up by the UN Economic and Social Council (ECOSOC) in particular, as well as by the European Union, which has committed to promoting decent work, notably in its trade agreements.

The ILO "core labour standards" are to be found in the eight Conventions on the freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the elimination of discrimination in the workplace and the abolition of child labour (age, worst forms).<sup>7</sup>

The European Council at its meeting in December 2004 stressed the importance of the social aspects of globalisation and has since reasserted this commitment, specifying what it means in more detail.

### **2.3 *Labour Provisions in Bilateral and Regional Treaties***

Since the signing of the NAFTA Treaty (between the United States, Canada and Mexico) in 1994, numerous regional or bilateral trade treaties have included provisions relative to labour. Nonetheless, only a limited number of countries have been involved, principally the United States and Canada, together with certain regional unions, such as the Mercosur and the EU.<sup>8</sup>

The US-Cambodia Agreement (1999), limited to the textile industry, thus linked access to U.S. markets to compliance with certain standards. The agreement with Jordan (2000) introduced a section on labour which was to become a benchmark for subsequent agreements. Canada signed a supplementary agreement to the free trade treaty with Chile (1997) and Costa Rica. The Treaty of Asunción, which established the Mercosur, was extended

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6 See Somavia, Juan, *Promoting policy coherence in the global governance of trade and employment*. Published in "The WTO and Global Governance. Future Directions" (ed Sampson, Gary P.). United Nations University Press 2008 p. 128-148.

7 See further Alston, Filip, *Labour Rights as Human Rights. The not so happy state of the art*. In "Labour Rights as Human Rights" (ed. Alston), Oxford University Press 2005.

8 See Charnovitz, Steve, *The Labor Dimension of the Emerging Free Trade Area of the Americas*. In Alston, Filip (ed). See footnote 7.

by a declaration on labour. The agreement between Japan and the Philippines introduces respect for workers' rights and condemns social dumping. European agreements have to integrate a section on labour and sustainable development. Agreements related to the Generalised System of Preferences introduce clauses relative to labour and include the options of imposing sanctions or providing incentives (GSP +). During the Obama regime the USA has further developed this policy.

The introduction of such provisions takes various forms and covers different aspects of social practice and labour laws. In addition to simply being mentioned in the preamble, they may be covered in a separate section (United States and the European Union) or in an agreement annexed to the treaty (NAFTA and Canada). They are included in different ways in agreements not only between countries but also in the case of a single country (United States). No standard model can be identified when we review these agreements. The most commonly included provisions are: an explicit reference to the 8 core ILO Conventions, their extension to other aspects of decent work (acceptable working conditions, minimum wage, working hours, health and safety in the workplace, etc.), the existence of a procedure for settling disputes and/or imposing sanctions, and cooperation procedures. GSP agreements are generally broader, more restrictive and tend to be unilateral rather than bilateral treaties.

#### **2.4 *Multinational Companies***

Insofar as regards multinationals, ethics codes and codes of good conduct are the principal reference texts usually adopted under the general label of Corporate Social Responsibility (CSR). Such codes contain an undertaking to observe national laws and ILO agreements, the Universal Declaration of Human Rights or/and the OECD Guidelines for Multinational Enterprises. Some have negotiated international framework agreements with the unions, often within a specific sector.<sup>9</sup>

Such international framework agreements have become rather common during the last 15 years or so. Researchers have studied their content and found them very different as also their headings show: We find "agreements", "charters", "codes of conduct", "joint opinions" and "declarations". Only very few of these agreements fulfill the classic task of collective agreements, ie. setting binding standards for working conditions. Nonetheless these transnational agreements are not insignificant: They refer to ILO-standards, they might set up restructuring frameworks and they include requirements on employers to bargain in good faith.

On European Union level there is a special Directive (2009/38/EU) on European Works Councils. In accordance with this agreement multinational companies or a Community scale undertaking with 1000 employees altogether and at least 150 employees in two European union Member States has to establish a European Works Council or a similar arrangement for crossborder

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<sup>9</sup> See Collins – Ewing – McColgan (2012) p.72-80.

information and consultation within multinational companies within the EU. Also in the context of this cooperation different agreements can be entered into.

## 2.5 *Fairtrade – Standards – an Example of Consumerism*

The Fairtrade Foundation is the independent non-profit organisation that licenses use of the FAIRTRADE Mark on products in accordance with internationally agreed Fairtrade standards.<sup>10</sup>

The Foundation is the UK member of Fairtrade Labelling Organisations International (FLO), which unites 21 labelling initiatives across Europe, Japan, North America, Mexico and Australia/New Zealand as well as networks of producer organisations from Asia, Africa, Latin America and the Caribbean.

The vision is one of a world in which justice and sustainable development are at the heart of trade structures and practices so that everyone, through their work, can maintain a decent and dignified livelihood and develop their full potential.

To achieve this vision, Fairtrade seeks to transform trading structures and practices in favour of the poor and disadvantaged. By facilitating trading partnerships based on equity and transparency, Fairtrade contributes to sustainable development for marginalised producers, workers and their communities. Through demonstration of alternatives to conventional trade and other forms of advocacy, the Fairtrade movement empowers citizens to campaign for an international trade system based on justice and fairness.

In order for producers/exporters to be able to use the FAIRTRADE Mark on their products they must fulfill several requirements. They must commit themselves to a fair pricing of their products (that includes a requirement on sustainable production and a fair compensation). They must – if necessary – provide compensation in advance for farmers who cannot otherwise deliver, they must commit themselves to long-term cooperation agreements and to respect ILO labour standards and specified environmental standards set by the international organization. There must also be an opportunity for the organization to monitor and inspect the farms in order to exercise surveillance.

Regarding the labour standards the Fairtrade International follows ILO Conventions 100 on equal remuneration and 111 on discrimination as well as ILO Convention 110 in the case of plantations. All workers must work under fair conditions of employment. The company must pay wages in line with or exceeding national laws and agreements on minimum wages or the regional average. Fairtrade International expects that the progress requirements where applicable, will be dealt with annually in the collective bargaining process.

Fairtrade International follows ILO Convention 111 on ending discrimination of workers. The Convention rejects “any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or

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<sup>10</sup> See Bowes, John, *The Fair Trade Revolution*. Pluto Press, London 2011.

impairing equality of opportunity or treatment in employment or occupation” (Art. 1).

Fairtrade International follows ILO Conventions 29, 105, 138 and 182 on child labour and forced labour. Forced or bonded labour must not occur. Bonded labour can be the result of different forms of debt owed by the workers to the company or to middlemen. Children may only work if their education is not jeopardised by them doing so. If children work, they shall not execute tasks that are particularly hazardous for them because of their age.

Fairtrade International follows ILO Conventions 87 and 98, and Recommendation 143 (protecting the rights of workers’ representatives) on freedom of association and collective bargaining. Workers and employers shall have the right to establish and legalise and/or to join organizations of their own choosing and to draw up their constitutions and rules, to elect their representatives and to formulate their programs. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment. The term ‘workers’ organization’ as used below refers to any organization of workers for furthering and defending the rights and interests of workers. Fairtrade International enshrines the rights of freedom of association and collective bargaining and considers independent trade unions the best means for achieving this. Workers shall be trained to understand their legal rights and duties.

Fairtrade International follows ILO Convention 155 which aims “to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, by minimising, so far as is reasonably practicable, the causes of hazards inherent in the working environment.”

## **2.6 *OECD Guidelines for Multinational Companies***

The OECD Guidelines for Multinational Enterprises (the Guidelines) are recommendations addressed by governments within the OECD to multinational enterprises.<sup>11</sup> The Guidelines aim to ensure that the operations of these enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance the contribution to sustainable development made by multinational enterprises. The Guidelines are part of the OECD Declaration on International Investment and Multinational Enterprises, the other elements of which relate to national treatment, conflicting requirements on enterprises, and international investment incentives and disincentives. The Guidelines provide voluntary principles and standards for responsible business conduct consistent with applicable laws and internationally recognized standards. However, the countries adhering to the Guidelines make a binding commitment to implement them in accordance with the Decision of the OECD Council on the OECD Guidelines for Multinational Enterprises. Furthermore, matters covered by the Guidelines may also be the

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<sup>11</sup> OECD Guidelines for Multinational Enterprises Recommendations for responsible business conduct in a global context. Revised version 2011.

subject of national law and international commitments. The US government recently promoted the OECD guidelines:

As indicated in the Department's July 2011 statement on due diligence, the United States government continues to encourage companies to exercise due diligence based on the guidance issued by the Organisation for Economic Cooperation and Development (OECD).<sup>12</sup> In its rule, the SEC specifically identified the OECD Guidance as an internationally recognized framework for performing due diligence. As a number of companies have begun to demonstrate through their own efforts and through participation in implementation of pilot projects, the OECD due diligence framework can be implemented in a manner that enables companies to monitor supply chains appropriately and, if necessary, to adjust them in response to identified risks.

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To this end, the Department and USAID are pleased to be partners with more than 30 companies, trade associations, civil society groups, and other organizations in the Public-Private Alliance for Responsible Minerals Trade (PPA). The PPA is financially supporting specific conflict-free supply chain efforts in the DRC and continues to.

In the foreword to these Guidelines it is emphasized that many multinational enterprises have demonstrated that respect for high standards of business conduct can enhance growth. Today's competition is fierce and the multinational enterprises face a variety of legal, social and regulatory settings. There is therefore a risk that some enterprises may be tempted to neglect appropriate principles and standards of conduct in an attempt to gain undue competitive advantage.

Furthermore the Guidelines argue that many enterprises have responded to these public concerns by developing internal programmes, guidance and management systems that underpin their commitment to good corporate citizenship, good practices and good business and employee conduct. Some of them have promote conflict-free sourcing from within the region called upon consulting, auditing and certification services, contributing to the accumulation of expertise in these areas. Enterprises have also promoted social dialogue on what constitutes responsible business conduct and have worked with stakeholders, including in the context of multi-stakeholder initiatives, to develop guidance for responsible business conduct. The Guidelines clarify the shared expectations for business conduct of the governments adhering to them and provide a point of reference for enterprises and for other stakeholders. Thus, the Guidelines both complement and reinforce private efforts to define and implement responsible business conduct.

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<sup>12</sup> Statement Concerning Continued Implementation of Conflict Minerals Due Diligence Pursuant to Section 1502 of the Dodd-Frank Act. Bureau of Economic and Business Affairs, February 28, 2013.

## 2.7 *Forced Labour and Human Rights*

The globalization has also brought back some opportunities for misusing and exploitation of workers from abroad. For instance domestic workers form a large group of dominantly female workers worldwide who are recruited abroad and who might be without any protection by legislation. Such migrant domestic workers are extremely vulnerable and might experience violence, abuse and harassment within the private sphere of persons that they are serving.

These groups as well as other groups that are lacking protection can only invoke certain human rights treaties in order to improve their position.<sup>13</sup>

Several human rights treaties have articles with bearing on labour law issues.

Since the Declaration of Human Rights was adopted in 1948 the UN system for the regulation and monitoring of human rights has expanded enormously. Today we have 10 general UN treaties on human rights, which are monitored by different specialized bodies. The Human Rights Committee (CCPR) monitors implementation of the International Covenant on Civil and Political Rights (1966) and its optional protocols; The Committee on Economic, Social and Cultural Rights (CESCR) monitors implementation of the International Covenant on Economic, Social and Cultural Rights (1966); The Committee on the Elimination of Racial Discrimination (CERD) monitors implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (1965); The Committee on the Elimination of Discrimination against Women (CEDAW) monitors implementation of the Convention on the Elimination of All Forms of Discrimination against Women (1979) and its optional protocol (1999); The Committee against Torture (CAT) monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (1984); The Committee on the Rights of the Child

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<sup>13</sup> The situation for domestic workers has slightly improved since the ILO in 2011 adopted the Domestic Workers Convention, 2011 (No. 189) Convention concerning decent work for domestic workers.

In Article 3 of the Convention it is stated:

- “1. Each Member shall take measures to ensure the effective promotion and protection of the human rights of all domestic workers, as set out in this Convention.
2. Each Member shall, in relation to domestic workers, take the measures set out in this Convention to respect, promote and realize the fundamental principles and rights at work, namely:
  - (a) freedom of association and the effective recognition of the right to collective bargaining;
  - (b) the elimination of all forms of forced or compulsory labour;
  - (c) the effective abolition of child labour; and
  - (d) the elimination of discrimination in respect of employment and occupation.
3. In taking measures to ensure that domestic workers and employers of domestic workers enjoy freedom of association and the effective recognition of the right to collective bargaining, Members shall protect the right of domestic workers and employers of domestic workers to establish and, subject to the rules of the organization concerned, to join organizations, federations and confederations of their own choosing.”

(CRC) monitors implementation of the Convention on the Rights of the Child (1989) and its optional protocols (2000); The Committee on Migrant Workers (CMW) monitors implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990); The Committee on the Rights of Persons with Disabilities (CRPD) monitors implementation of the International Convention on the Rights of Persons with Disabilities (2006); The Committee on Enforced Disappearances (CED) monitors implementation of the International Convention for the Protection of All Persons from Enforced Disappearance (2006); and the the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) established pursuant to the Optional Protocol of the Convention against Torture (OPCAT) (2002) visits places of detention in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

Among these human right bodies at least the CESCR, CERD, CEDAW, CRC, CMW and CRPD monitor systematically issues that are related to working life and working conditions. So actually an evaluation of how the situation for domestic workers or for migrant workers has developed will be given by this governing system. Again here we find a kind of soft law system: Member States take part in a constructive dialogue with the human rights treaty bodies, composed by experts working in their individual capacity. Their conclusions are not enforceable, but again they can be taken up by organisations (NGOs, International Corporations) in the context of Trade agreements, Fairtrade-contracts etc.

### **3 Conclusions**

In the context of decentration we can see that the nation state in many ways loose control over labour standards due to both globalization and national decentralization.

We also find a strong tendency towards the use of soft law also within an area such as labour law where there is a strong tradition of use of mandatory legislation in order to protect the weaker party in the employment relationship, the employee.

In this article I have not focussed on the use of soft law within EU labour law and national labour law. Such a tendency exist, only a separate study can assess how significant it is.

In this article we have explored the development on international level. Here we can here observe a tendency towards increased use of different forms of soft law as well as a development towards a plurality of legal sources.

Regarding different forms of soft law, we can refer to the fact that some of these forms include state regulation. The states are part to free trade agreements which include references to labour standards. The states are bound by the UN international treaties which include references to working life standards. State parties are further parties to the ILO Conventions.

On the other hand we find an increasing number of non-state actors that demand or agree to soft law arrangements. We find different consumer organisations, in this article exemplified by the Fairtrade-movement, which require labour standards in order to grant certain labels to products or services. We also find that private multinational corporations within the context of agreements or arrangements with its employees agree on certain minimum labour standards. The same type of commitments can be made within the framework of Corporate Social Responsibility-codes or commitments. Labour standards can also be included in standards issued by private standardization organization, ISO-standards for example.

Here we find forms of private transnational norm-building networks which actually adopt and promote soft law as a part of arrangements aiming to achieve fair economic market relationships and quality standards. Both the actors and the instruments used show a large variety as have been demonstrated above.

The paradox here seems to be that the increased plurality of sources, forms of regulation and actors do not lead to a great plurality of normative content. There are some universal standards, especially the ILO eight core conventions, and some international human rights instruments, which often are interpreted in consistency with the ILO instruments, that are referred to and used by most actors. So actually the globalization seems to bring about some normative harmonization in the form of material content regarding both norm-emergence and norm-consistency.

The divergence between different forms of regulation is primarily related to how binding certain standards are regarded to be and whether there are some surveillance and sanctions attached to con-compliance. It is also a question whether the commitment covers the principles in certain conventions or the concrete norms and standards set by them.

The result is that we get a hybrid labour law where non-state actors support binding ILO Conventions by using them as the basis for voluntary transnational regulation. On one hand this policy serves the justification and legitimacy of the basic ILO instruments. It therefore also supports the state actors efforts to implement ILO standards on a national level. On the other hand there are often no mechanisms in place for the implementation of the basic ILO standards and this transnational “soft” regulation might undermine the traditional forms of labour law as setting binding minimum standards.

The fact that the transnational regulation has a normative core of the content in some common internationally binding instruments justifies the use of the term labour law in this context. It is not just “soft law” which often is regarded as something not binding and not enforceable. On the other hand this transnational labour law clearly has several elements of voluntary character (the non-state actors, the legal forms used etc). It is therefore reason to characterize the new “soft” forms of working life regulation as hybrid labour law, a term that professor Ullrich Mückenberger from Germany has used regarding norm-emergence,- norm-implementation and- norm-consistency<sup>14</sup> in the new environment.

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14 See Mückenberger, power-point slides 30.3.2012, ReMarkLab-seminar, Stockholm.

