

WHAT IS INTERNATIONAL LABOUR LAW FOR?

Brian Langille

Geneva, March 2005

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International Institute for Labour Studies
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Preface

The International Institute for Labour Studies organizes the Public Lectures twice a year in connection with the Governing Body Meetings of the ILO. These lectures are meant to provide a global platform for opening up new perspectives on contemporary economic and social issues before an audience of international opinion-makers and policy-practitioners that include representatives of the ILO tripartite constituency of governments, business organizations and trade unions; the academic, diplomatic, and press communities of Geneva and senior international officials from the ILO and other United Nations agencies. The texts of the lectures are brought out as Institute publications and disseminated to a wider audience through the electronic and print media.

The Public Lecture in connection with the March 2005 Governing Body Meeting of the ILO was given by Professor Brian Langille, Faculty of Law, University of Toronto, and Visiting Scholar at the International Institute for Labour Studies. The present paper: "What is international labour law for?" is an extended version of the lecture delivered by Brian Langille, which has been specially prepared for the Institute by the author. The Institute is proud to present this extended version of the lecture to a wider audience of the ILO constituents.

Professor Langille's thesis is that the very broad question of "what is international labour law for?" has commonly been given a very particular and narrow answer, one which is increasingly unlikely and unhelpful. It is an answer which both fits with, and is made necessary by, an equally dominant but also problematic account of domestic labour law. Many believe it is the answer given by the Preamble to the 1919 ILO Constitution. But it is also an answer which causes grave difficulties for the ILO as it makes it very difficult for law, the central constitutional "procedure" of the Organization, to be part of the solution rather than part of the problem. Because of the very nature of subjects such as labour law, it is difficult to see what alternative answers there are — or even that an answer is required. There is an alternative account which makes better sense of our world, coheres with our best thinking about the relationship of social justice and economic progress, provides a useful role for law, makes sense of the ILO Constitution, and surprisingly for some, is also found in the 1919 Preamble.

Jean-Pierre Lavieć
Director a.i., International Institute for Labour Studies

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I. Introduction - In the grips of an older theory

Theory is inescapable. As Northrop put it:

“The only difference between a person without a philosophy, and someone with a philosophy, is that the latter knows what his or her philosophy is.”¹

Or, as Terry Eagleton put it, invoking, Keynes, who is somewhat more at home in this house:

“Those who prefer to ignore theory, or think that they can get along better without it, are simply in the grips of an older theory.”²

Keynes himself put it this way:

“The difficulty lies, not in the new ideas, but in escaping from the old ones, which ramify, for those brought up as most of us have been, into every corner of our minds.”³

These passages are of great interest to me – especially the notion that ideas “ramify ... into every corner of our minds” and that we can actually be, as Eagleton puts it, in the grips of an older theory. That latter claim is both a familiar, yet slightly disturbing, way of putting things. We know what he means, but this is one of those standard metaphoric flourishes, which is likely to be misunderstood in certain ways. What is it to be in the grips of a theory? Not that theory reaches out and grabs us by the throat, forcing us to think and to see a perfectly well understood world in a remarkable new way; a way at odds with what we know makes sense. Nor is it that theory casts a spell upon us, or charms us, or seduces us to leave the commonsense view of things and take off on some magic carpet ride of the mind. Not at all. Those images and ideas **underestimate** what it means for us to be in the grips of a theory. “Theory” does not come along and force us to see what we otherwise know as the real world in a radically unfriendly, counterintuitive, unnatural way. Rather, being in the grips of a theory is

¹ F.S.C. Northrop: *The complexities of legal and ethical experiences*, 1959.

² Terry Eagleton: *Literary theory*, Introduction.

³ In his Preface to *The general theory of education, interest and money* (1931), I remember my legal philosophy professor, the late Robert Samek, making the same point by noting that “Education does not so much consist in putting furniture into the mind, as taking it out.”

the most natural precondition of human interaction with the world. To be in the grips of a theory is simply to understand the world in the first place. Let me add one further observation by a very distinguished Canadian – Northrop Frye – the great literary critic. Having a theory, or overarching vision, is not having some gauzy set of abstractions, which we revert to only in philosophy courses at university. Instead, listen to Frye:

Every person with any function in society at all will have some kind of ideal vision of that society in the light of which he operates. One can hardly imagine a social worker going out to do case work without thinking of her as having, somewhere in her mind, a vision of the better, cleaner, healthier, more emotionally balanced city, as a kind of mental model inspiring the work she does. One can hardly imagine in fact, any professional person not having such a social model – a world of health for the doctor or justice for the judge – nor would such a social vision be confined to the professions. It seems to me in fact that a Utopia should be conceived, not as an impossible dream of an impossible ideal, but as the kind of working model of society that exists somewhere in the mind of every sane person who has any social function at all.⁴

This is, in my view, the best account of what it is to be in the grips of a theory. It is to be, as Frye says, simply “a sane person” with “any social function at all”.

Now, a large part of what I want to say this evening is that labour lawyers, and international labour lawyers, have a kind of mental working model, to use Frye’s term. They have a vision of Utopia – and of their role and of labour law’s role in attaining it. This vision is quite rich and detailed but rarely fully articulated. People are usually too busy going about their work to do that sort of thing. But, as Frye says it “exists somewhere in the mind” and when they are asked the questions – “what is labour law for?” or “what is international labour law for?” – it is this vision which provides the answer to the very question I am posing this evening.

My main thesis is that it is time to rethink that working model, that Utopia, that account of what labour law and international labour law are for. However, I also believe that this rethinking is hard. It is hard precisely because to be a rational, sane and functional international labour lawyer is to be precisely in the grips of such a vision. It is hard just because we are people with a particular role and function in society with a working model of why we are here – that is what it means to be in the grips of a theory. These working models are not picked up and discarded at will – they are lived.

Let me add three more preliminary points. First, I do not say any of this with the intention of subverting any particular theory or any person’s account of it. Subversion can never be the **point** of real inquiry. Nor can one think in a serious fashion by setting out with the desire to sustain, or subvert, any particular status quo. Any subversion, or sustaining, of any particular status quo must be the by-product of real and honest inquiry – it can never be its objective. As Wittgenstein said “ambition is the death of thought”.⁵

Second, I don’t believe that these remarks perfectly reflect what every ILO official thinks – in fact most of the points I make tonight are not new and have been made by others. What I do claim is that it is useful to try to draw together much of what has been noted by others, and to see a pattern there.

Third, I make my points with a genuine desire to tell the truth as I see it – and to help, if at all possible, in advancing the causes of the ILO. That is why I am spending my sabbatical year

⁴ Northrop Frye: *On education* (1988) p. 70.

⁵ Wittgenstein: *On certainty*, p. 77.

here. I don't pretend to be practical: what I am trying to do is figure out what it is we should be practical about.

II. Answering our question in ten steps

With those preliminary remarks out of the way, I now address the question "what is international labour law for?" In addressing my question, I make 10 points.

1. My first point is that the answer to **the question "what is international labour law for?" begins** at home in the sense that our account of international labour law begins **with understanding what domestic labour law is for**. The proof of this requires that I start by answering the second question. This I do below – but it is necessary to see why I undertake that task.

[Here is an aside. I am a Canadian labour lawyer. I believe I know what the answer to this question is in Canada – and even in the United States, the United Kingdom, and in other common-law systems. My instinct is that the answer to the basic question "what is domestic labour law for?" may be the same everywhere. But I do not claim to know that this is true. What I do claim to know is that every legal system has an answer to this question and every labour lawyer is in the grips of the account which provides the answer. Not in the sense that they all agree on the substance of their labour law, but in the sense that the account tells them what their labour law is and what it is not, and provides the standard normative defence of it – whether they agree with its content or not. It provides the subject matter about which people can disagree. (It creates the broad agreement without which real disagreement is impossible). I also claim that whether this account is universal, or local or regional, it is well worth subjecting this received wisdom, that is, the common answer to our question, to careful examination.

2. My second point is that **the answer to the question** about domestic labour law (and as I say my example will be Canada) **has a particular structure**.

Legal subject matters such as labour law have a "logic" or "grammar" which is distinct. Every legal subject matter, that is every course in a law school curriculum, has an account of itself – of what it is and what it is not and why it has a claim to our attention – i.e. why it is important. Such accounts have two components, one conceptual and one normative. They lay out the conceptual longitude and latitude of the subject matter – giving us a conceptual map – and tell us why it is worthy of study. But labour law is not like many other legal subject matters such as contract, torts, corporations, property, trusts, etc. These too are legal subject matters and they are law school courses for which one can give a coherent account. They operate in a straightforward way – they are organized around a legal concept. They can be separated out from the rest of our law in virtue of the coherent central legal concepts each explores. For example, tort is made coherent and normatively salient by the content of the inherent logic of the idea of tort – of harm and correcting for it – i.e. the idea of corrective justice. Other law school courses stake their claim to carve up the legal universe in exactly the same way. But labour law, like family law, environmental law, international trade law, does not.

Subject matters like labour law do not stake their claim to subject-hood on the basis of a single legal concept, such as tort, contract, etc. Rather, they stake their claim to coherence in a radically different way. The subject matter is not a legal concept but, for want of a better expression, a "slice of life". In the case of labour law this slice is, to choose a neutral term for the moment, work. In family law, it is the family. And so on. What labour law then does is to take all the laws which apply to its slice of life – work – and treat them as a separate coherent subject matter called labour law. Many different types of law will be involved – contract, human rights, tort, administrative law, constitutional law, etc. Yet the claim is that parts of all of these various

and disparate elements of our law are usefully seen as part of something new and separate called labour law.

This kind of project is a tricky business. The question will arise – how do you know that you really have sliced up reality at the “joint” as it were. How do you know whether labour law is a useful subject matter, on the one hand, while something like “swimming pool law” is not? That is, you could make the same kind of formal claim about swimming pool law. You could say, here’s a part of reality, here is a lot of law which applies to it [people get hurt in swimming pools, they buy and sell swimming pools, swimming pools create environmental issues, there are planning law considerations, and so on and so on.] And you could say we should treat this as a subject matter unto itself. Yet we do not have courses in swimming pool law, nor swimming pool lawyers, nor an international organization of swimming pool law, and so on, even though the same kind of formal claim could be made on their behalf. Why not?

The answer is – because they do not have coherence as a subject. But what does that mean? It means that it is useless to recite the law of contract regarding swimming pools, the law of tort regarding swimming pools, and so on, because nothing is gained in so doing, and in fact quite a lot of time is wasted.

Labour law claims to be and is different. It does have a conceptual coherence and normative salience, which justifies its separate treatment. As we have noted this coherence does not arise in the same way as for courses such as tort law or contract law. But whence does it come then? It comes in virtue of being able to say that something is gained by drawing together all the elements of contract, tort, administrative law, and so on that apply to the chunk of reality we call work, which lets us see all these parts of labour law as parts of one greater whole. As a result each part is seen in a new light and not simply as part of some other more generic category of law. Contracts of employment will not cease to have much in common with other types of contracts – but they will be seen to have a great deal in common with collective agreements and human rights statutes, and health and safety regulations, and so on. Labour law is not made up of isolated bits – rather it is seen as falling together in a compelling pattern. Let me put this point positively – this will be true, will be the case, when we can construct a compelling narrative or account of law which sets out its conceptual metes and bounds – that is, tells us where the joints are which make sense of the decision to carve reality at this particular place, and why it is important to do so. The account will make the whole greater than the sum of its parts – will let us see our subject matter as a subject matter. It will make labour law, labour law.

3. But note the following. There is a problem lurking here. **This particular structure has particular liabilities.** If this is the structure of our account or working model of labour law – that is, if labour law depends upon our being able to give a conceptually distinct and normatively compelling account (or narrative) – then our answer to the question “what is labour law for?” depends upon “knowing” where and why to carve the universe of life. But we know that reality changes. Moreover, we know that our best normative thinking evolves – that is, our best way of expressing our best values changes over time. Subject matters such as labour law therefore run the risk that their train will leave the intellectual station without them. A further difficulty is that this will be difficult to see, and make sense of, precisely because we are, to use Keynes’s phrase “in the grips of” our account of our subject matter. That is to say, precisely because, to use Frye’s idea, we have a function in society, which is made possible by our grasp of this larger account. And the more successful the constituting narrative is, and labour law’s is very successful, and the longer it is taught in law schools, and learned, and courses are organized around it, and specialized firms and government departments reflect and embody it, and international institutions are created to sustain it, the harder it will be to get rid of – i.e. to think hard about. This is not simply a difficulty caused by laziness, nor even because of vested

interests which would lose out if the paradigm were to shift; it is a much more difficult problem than that.

So our theory, our answer the question “what is labour law for?” is at once dependent upon, but also autonomous from, reality. Our account doesn’t just tell us where to find the joints; it lets us see them in the first place. Thinking “outside the box” really is hard. We will find ourselves like Wittgenstein’s fly in a fly bottle. Wittgenstein asked himself the question “what is your aim in philosophy?”⁶ He answered, “to show the fly the way out of the fly bottle.” Think about Wittgenstein’s image of the fly in the bottle for a moment. The bottle is an invisible barrier to the fly, which it just keeps bumping up against. The fly cannot see it. But it cannot get beyond it. Our constituting narratives for subject matters such as labour law pose a similar risk. Our Utopia can become an invisible prison.

It is always healthy to remember then that there was a time when labour law was not a subject matter. There was of course a lot of law about conspiracies and contracts, and even some protective legislation. But all that changed. Labour law emerged not only to make sense of, but also to justify, all that and more. Labour law emerged to make sense of a particular reality. It was assisted by the early giants of the field – Laskin and Arthurs in Canada – Kahn-Freund, Zinzheimer and others elsewhere. And all this happened, more or less, over the last 100 years or so. As such it is quite a success story. The question is whether the story has now outlived its own success.

The point is that there may well come a time, and it may be now, when the standard account can still be repeated, its mantras still recited, its framework still deployed, its comforts still felt, long after it has become detached from the reality it is meant to make sense of, and from its fundamental ethical moorings. Here we run a real risk – where our account of labour law becomes not simply irrelevant, but dangerous. This occurs when any theory becomes detached from its primal inspirations and serves only its own internal logic. This is when a working model stops being a working model of a reality and crosses over into the realm of pure ideology – serving nothing but itself.

4. Now I come to my fourth point, the account of domestic labour law, the received wisdom, the framework of understanding the working model of society which every labour lawyer not so much knows but occupies as comfortably as he or she breathes the Earth’s atmosphere. **Here is the answer to our question “what is (national) labour law for?”**

The constituting narrative of Canadian labour law runs as follows. It has the two required elements (conceptual map and normative underpinning) which make sense of labour law – telling us what it is and is not and also what we should worry about – that is why it is normatively salient, that is morally important. Many labour lawyers can give a reasonably good rendition of this constituting narrative if pushed to do so. But many cannot. They are rather like the users of a natural language, who, although they are perfect masters of the language, have difficulty articulating the rules of its grammar. But they are at home with the model – it is as Frye says, “somewhere in the mind”.

The story is a narrative with both a timeline and a definite moral message.

The starting point is a basic assertion, which goes something like this – the objective of labour law, as with the rest of our law, lies in securing justice in a particularly important aspect of our lives – that is in our working lives. [The narrative does not require a particularly sophisticated account of “justice”. Most Canadian labour lawyers would understand it simply as a requirement

⁶ *Philosophical investigations*, para. 309.

of sufficient respect for the rights of individuals and concern for their well-being following, either knowingly or intuitively, standard liberal, i.e. Rawlsian and Dworkinian lines]. The account continues – but justice will not be secured for most employees because, in the common law, the employment relationship is now understood in contractual terms. That is, the legal analysis of working relations is seen through the legal category or lens of contract. On this view employees and employers are located in the labour market. Their relationship begins with the negotiation of a contract of employment and is subsequently governed by it and the law of contract applying to it. Justice will not be secured for employees in this legal circumstance for the following reason. In the negotiation of contracts of employment employees will suffer from an “inequality of bargaining power”. This observation is understood as politically neutral, and indeed some version of it was as common to Adam Smith as it was to Karl Marx. (I should add that it does no good to point out, as some economists have done, the fact that within economic theory a general idea of inequality of bargaining power is a form of economic nonsense. This is because in large measure the idea of inequality of bargaining power is not meant to be a comment **within** economic theory, but **about** economic theory. It is like the slogan “property is theft” – whatever else you make of it, it is not meant to be taken as a comment internal to property law – but a critique of it (cleverly using concepts from within the theory to do so.) As a result these negotiations will generate poor results – both in terms of concern and respect – for employees. The role of labour law is to address the injustice of this situation. There are two basic techniques which labour law deploys in the name of justice for employees in the labour market. First, given that our objective is to secure justice in employment relations, and that justice will not be secured because the law analyses that relationship in contractual terms, and that in the resulting negotiations employees will suffer, for the most part, inequality of bargaining power, then the role of law is to intervene in the contracting process in a procedural way. If the problem is that workers suffer from inequality of bargaining power then the first appropriate response is to turn up the bargaining power on the employees’ side, thus enabling them to secure more just outcomes. The primary vehicle for this sort of procedural intervention is through laws which protect freedom of association and structure and require free collective bargaining between employees and employers. Collective bargaining is a device of pure procedural justice. It does not dictate substantive outcomes – it merely restructures the bargaining process itself.

Labour law’s second response to injustice in employment relations is very different. If the problem is that we are not securing justice in employment relations because the law analysed that relation as a contractual one and in the negotiation of contracts in the labour market employees will suffer from an inequality of bargaining power, then we should simply rewrite the resulting bargain. We do so through legal regulation in the form of human rights codes, occupational health and safety legislation, minimum wages and maximum hours laws, and so on and so on. The object of both procedural and substantive labour law is the same – justice for employees. And the rationale is the same – inequality of bargaining power. But the techniques of intervention are different, and even in tension. The morality of procedural intervention through collective bargaining law is quite distinct from the morality of substantive intervention. And both stand in contrast to the morality of the underlying law of contract. But the net result is that labour law is seen to consist in three distinct legal régimes – the original régime of contract ordering, the régime of collective bargaining law, and the régime of direct statutory intervention. This creates the space for much substantive, procedural, and institutional overlap, interaction and conflict between the three régimes. That is, much labour lawyers’ labour law. But what makes it all part of one thing we call labour law is the narrative we have just recited.

Now the point of the narrative is to tell us what labour law is, and what it is not, and why it is important. It is not critical that the narrative be historically accurate, although it is in basic terms, and it is certainly not important that all labour lawyers agree with the substance of its claims about justice. What is critical is not that labour lawyers agree about the detail or the morality of the narrative – what is critical is their agreement that this narrative tells us what labour law is

and why we have it – leaving them free to hold their own views about it. In fact, most of the narrative is controversial in some way or another. But that is not the point. The point is that the narrative instructs us as to the map and the morality of labour law. It lets us know what labour law is, and what it is not. And it tells us why it is important.

5. Now I come to my fifth point. I wish to stop and think about the narrative for a moment – to consider **the nature of the normative claims and conceptual map**.

The essential conceptual narrative and drama of labour law takes place on the stage of contract law. It is a drama about resistance to contract power. On this account labour law is essentially a form of consumer protection. As in other forms of consumer protection law workers are regarded as people in the market place who are in need of protection. This is a story of justice against markets. The morality of labour law is a morality which aims at “civilizing” or “constraining” or “resisting” or “democratizing” labour markets in the name of justice and fairness. On this view, justice is at odds with and comes at the expense of market activity. Money isn’t everything. On this view we could be a more efficient, more wealth-maximizing society – less equal, less fair, but richer overall. But our instincts about justice convince us that we should make a large trade-off in the name of justice and at the expense of market activity. On this view justice through labour law is a cost, a constraint, a tax on market behaviour. The cynical view would be that we price the tax at a point just sufficient to prevent revolt. A more positive view is that we set the tax at a rate which satisfies our society’s self-image of a decent and well-ordered state. But the most critical point is that it is extremely common that the history of labour law be understood as a battle of resistance to the market ordering of labour and that it involves a trade-off between social justice and economic efficiency. The trade-off is in a sense the whole point. It can indeed be quite intoxicating – providing simultaneously a sense of moral superiority and overt willingness to suffer economic sacrifice to achieve it.

Now consider the conceptual map of our subject matter as shaped and understood by its constituting narrative. In this account of labour law there is an empirical reality which is being addressed and responded to. It is a world which made labour law, so understood, available, necessary, compelling, convenient, and natural. In return, labour law helped to legally structure, formalize, and clarify this reality. (I do not have time to develop this idea called reflexivity here.) It is a world that seems extremely natural and it is a world which is inhabited by legal characters and concepts which are basic to our conceptual understanding of the field – employees, employers, contracts of employment, unions, collective agreements, statutory regulation, and so on. It all seems such a peaceful little world. But, recall, there was a time when this world did not exist. In Blackstone’s *Commentaries on the laws of England* we find the following claim:

“The three great relationships in private life are (first) master and servant..., (second) husband and wife..., and (third) parent and child.”⁷

The key word here is “relationship”. In fact “contract” was not a separate category of law for Blackstone, writing “only” 235 years ago or so. This reference to Blackstone prompts the idea that the world of which our labour law provides such a compelling map is a recent world. The world of the contract of employment, of employees and employers joined in the sort of relationships which made legal regulation by contract both necessary and natural came into maturity and then, perhaps, beyond, all in the last century. Many will see it as a working out, in detail, of Sir Henry Maine’s dictum that the “movement of the progressive societies hitherto has been a movement from status to contract”.⁸

⁷ Book I, ch. 14.

⁸ Maine, *Ancient law* (1861) p. 170.

I have, elsewhere, tried to summarize my key points about the “naturalness” and “fit” of our constituting narrative with our reality as follows:

... this received wisdom of labour lawyers did not evolve in some formalistic legal realm. It cohered with and was made possible by the real world of the North American economy for much of the twentieth century. The real world of that economy provided the context, melded with, made necessary, made possible, and made available all of this as a way of thinking.

Coase’s theory of the firm as a nexus of contracts explains that it is transaction costs that lead firms to decide to “build” rather than “buy”. That is, Coasean economics explains that sometimes firms will hire employees within the firm subject to managerial discretion for insubordination, rather than contracting at arm’s length with independent contractors. In the last century, the transaction costs of the time, combined with the then dominant management theory, led to Taylorist modes of production, which involved vertical integration, the hiring of a large number of employees on long-term contracts, the construction of “internal labour markets”, and the rise of the basic understanding of the trade-offs that employees, as opposed to independent contractors, make. The basic trade-off was that those who are party to an employment contract – employees – receive security and stability in employment through a long-term contract, in return for subordination to the control of the firm, while self-employed independent entrepreneurs forego security in return for the chance of profit, subsidized in part by the tax system. This workplace reality was supplemented by a social reality and family life that from the modern perspective is extremely striking. In 1960 more than 70 per cent of Canadian families had two parents with the father in full-time, long-term employment, and the mother at home raising the children. In 1990 fewer than 20 per cent of Canadian families had that structure.

In this context, it was natural that labour law would focus upon regulation of the long-term employment contracts in the name of employees conceived of as needing protection, because of unequal bargaining power. Contract of employment was the obvious “platform” for regulation and for the delivery of a social safety net that would protect against both employment risks and wider social risks, for the worker and the family.⁹

It has become a commonplace among labour lawyers in North America, Europe, and elsewhere, to note that in many ways our empirical world has moved on. This is not a topic which I can expand upon here. But it is an important part of my claim that a new working model, a new paradigm, is required.

6. I now come to my sixth point. It is time to make the transition from this discussion of our understanding of domestic labour law to a discussion of international labour law. My claim is the following. Starting from this sort of account of domestic labour law, one is pretty much bound to end up with a certain account of international labour law, one which is also very familiar.

My view and my claim is that **the dominant domestic account of labour law “drives” us to a similarly dominant, familiar, and framing narrative about international labour law** – what it is, and why it is important that we have it. Let me explain.

I have thought for some time that the best way to think about international labour law in our “globalized” world – i.e. in our actual world of an integrating global economy – is to start with the exact opposite. That is, I suggest that the best way to think about our globalized world is to engage in a thought experiment in which we imagine a world of non-globalized, non-integrated, nation states. In fact, we should begin our thinking by imagining a world of isolated, autarkic,

⁹ Langille: “Labour policy in Canada – New platform, new paradigm”, in *Canadian Public Policy*, vol. 12, No. 28, 2002.

“island” jurisdictions with no economic ties between them – no trade, no FDI, no aid, no global financial or currency markets, no immigration, and so on. I further suggest that we continue our thought experiment by imagining each of our island jurisdictions to be tolerably well-ordered societies and economies – all little Denmarks, if you like. They are liberal, democratic, market-ordered societies with decent and smart labour and social laws. These decent and smart laws are, of course, the result of democratic processes in which all stakeholders – workers, shareholders, consumers, have “voice” and, critically, because of the “island” status of these states, do not have “exit” as an option. In the full version of this thought experiment, I suggest that it is extremely useful to introduce the various elements of our modern world one by one. This, in order to see the separate dynamics introduced, first by the introduction of trade, then the introduction of foreign direct investment and the mobility of capital, and so on. We gradually build up the world of deep economic integration – a world of global finance, production and consumption. The final step in our thought experiment is to alter the initial assumption that all states are tolerably well-ordered and democratic. In this story it is not the opening of the economy to trade, but particularly and more critically the introduction of the idea of mobile capital, which is catastrophic from the perspective of the dominant account of domestic labour law. This is because from the perspective of our “received wisdom” about domestic labour law, these phenomena change everything. In particular, the evolution of an economically integrated world creates two distinct types of domestic crises:

First, there is the **direct** impact in the labour market – the impact on employment as jobs are “lost” to foreign competition, or “delocalized” or “outsourced” to use the currently fashionable labels.

Second, there is the **indirect** impact on labour and social policy as states find it more difficult to sustain the political compromises of the “island” way of life.

Why do these crises occur on the received view of things? Simply because, as we have seen, on the orthodox account of domestic labour law it is a cost [worth paying, at least in the old days] imposed on market activity in the name of justice. The simplest way of understanding this is to acknowledge that the received wisdom conceived of domestic labour law as a form of redistributive tax. In the new world mobile capital will seek to avoid this tax, and increasingly, our former “island” jurisdictions will find it difficult to impose. In a word, the mobile factor of production [capital] will, the story goes, play the immobile factors – including nation-states – off against each other, forcing them to engage in a game of what is called “regulatory arbitrage” in which they attract mobile investment by setting lower and lower taxes, i.e. lower and lower levels of labour regulation.

From the theoretical perspective we have a problem of a specific sort. The problem is a “collective action one” and in particular, it is a “prisoners’ dilemma”.¹⁰ In contrast to the island

¹⁰ A very useful rendition of the “story” of the prisoners’ dilemma is presented by Amartya Sen as follows: The story goes something like this. Two prisoners are known to be guilty of a very serious crime, but there is not enough evidence to convict them. There is, however, sufficient evidence to convict them of a minor crime. The District Attorney – it is an American story – separates the two and tells each that they will be given the option to confess if they wish to. If both of them do confess, they will be convicted of the major crime on each other’s evidence, but in view of the good behaviour shown in squealing, the District Attorney will ask for a penalty of 10 years each rather than the full penalty of 20 years. If neither confesses, each will be convicted only of the minor crime and get two years. If one confesses and the other does not, then the one who does confess will go free and the other will go to prison for 20 years ... What should the prisoners do? ... Each prisoner sees that it is definitively in his interest to confess no matter what the other does. If the other confesses, then by confessing himself this prisoner reduces his own sentence from 20 years to 10. If the other does not confess, then by confessing he himself goes free rather than getting a two-year sentence. So each prisoner feels that no matter what the other does it is always better for him to confess. So both of them do confess guided by rational self-interest, and each goes to prison for 10 years. If, however, neither had confessed, both would have been in prison for only two years each. Rational choice would seem to cost each person 8 additional years in prison. (Sen 1986: 69).

nation scenario, in this sort of dilemma choice by nation states is influenced by the choices made by others. The tragedy of the prisoners dilemma is that it presents what is referred to as a “dominant” choice to individual states. In our case, it is always economically rational to reduce the tax, that is, to reduce labour standards, regardless of what other nations do. If other nations do not reduce the tax it is economically rational to do so in order to attract investment. If other states do reduce their tax’ then it is even more necessary to reduce the domestic tax rate in order to remain competitive. It is in this sense that the choice to reduce standards is dominant. This is perfectly rational given the tax view of labour policy. This is a real race to the bottom in which everyone ends up with lower standards, but without any change in investment patterns. The net result is simply transfer from workers to shareholders, that is, from labour to capital. Or more simply, it is a move from a more just world to a less just one.

Here is a critical point. The true tragedy involved in this scenario is that the states are acting in an economically rational manner. It is not that they are being irrational in their policy choices. Just the opposite.

Game theorists and economists have long recognized that the obvious solution to these sorts of collective action problems lies in creating – through contract or law – binding and enforceable obligations upon all players not to “defect”, that is not to enter the race to the bottom, not to cut the tax rate, in the first place. Now we come to concrete matters. The answer to this international labour law regulatory competition – that is, competitive bidding down of standards in order to attract new investment, or to retain existing investment – is to create international agreements or treaties, which are binding and enforceable, and which prevent a race to the bottom from starting in the first place. That is why we have international labour law. That is why we have ILO Conventions. This is the answer to our question “what is international labour law for?” And it is an answer which not so much builds upon, as is made inevitable by, our domestic account of labour law.

I have been around debates about international labour standards, and trade and labour, and so on, long enough to be able to say that this account of international labour law is in a word, dominant. This logic has been central to debates about the ILO’s *raison d’être* since the beginning. More than that, the Preamble to the original 1919 ILO Constitution expresses (or has been read to express) this very idea as the central rationale for the existence of the Organization. I’ve spent some time reading the ILO Constitution and as I read the statements of purpose contained in its 1919 Preamble, and in the 1944 Declaration of Philadelphia, there are only two interesting propositions. They are both in the 1919 Preamble although they find echoes in the Declaration of Philadelphia. I call these propositions, somewhat anonymously, P1 and P2.¹¹ Why are there only two interesting propositions? Because, search as you may, you’ll find only two propositions that address the question of how the world works – that is, that specify causal relations, which can in turn provide a rationale for action, that is, a rationale for creating the Organization. There are lots of other sentences in the Preamble and in the Declaration of Philadelphia. But these are either claims about how things are, or how they should be, both morally and empirically, or they are lists of things the Organization should do and policies it should pursue. But only two sentences address the question “why?” Here they are:

P1. UNIVERSAL PEACE CAN ONLY BE ESTABLISHED IF IT IS BASED UPON SOCIAL JUSTICE.

P2. THE FAILURE OF ANY COUNTRY TO ADOPT HUMANE CONDITIONS OF LABOUR IS AN OBSTACLE IN THE WAY OF OTHER NATIONS WHICH DESIRE TO IMPROVE CONDITIONS IN THEIR OWN COUNTRIES.

¹¹ I first developed this set of ideas in Langille, “ Re-reading the 1919 ILO Constitution in light of recent evidence on foreign direct investment and worker rights”, in *Columbia Journal of Transnational Law*, vol. 101, No. 42, 2003.

My sixth claim is, then, that by starting with the traditional understanding of labour law as a cost, which involves an economic trade-off which decent and fair-minded people believe is worth paying, you are bound to end up with the account of international labour law just outlined, i.e. a prisoners' dilemma/race to the bottom, what I will now call a "P2 account" of international labour law and of the ILO.

7. My seventh point is that it doesn't stop there. If the answer to our question "what is international labour law for?" – is that its purpose is to solve a prisoners' dilemma and forestall a race to the bottom in labour standards via the creation of binding international treaties which are enforceable – then much else follows. **The answer has significant implications for international labour law and the ILO.**

First, this purpose informs and indeed makes necessary a certain idea of law, that is, what sort of law international labour law ought to be. Because the *raison d'être* of international labour law is to prevent nation states from entering a race to the bottom and pursuing their dominant economic self-interest, the model of law required to address this phenomenon is one appropriate to the constraining of self-interest. Our purest example of this is the criminal law. The law will be duty imposing, not power conferring, to use the familiar distinction of H.L.A. Hart.¹² We will as a result draft laws which are often specific, detailed, mandatory but almost always duty-imposing on member States. The central problem for Convention drafters will be to wonder whether their favourite word is "prohibited" or "mandatory". International labour law will look a lot like domestic labour law statutes, which constrain self-interested employer behaviour.

Second, we will favour Conventions and not Recommendations because only they are "enforceable".

Third, not only will the content of the laws be seen to, and need to, conform to this particular model of law; so too will the ILO's constitutional processes associated with ratified Conventions. They will, almost naturally, be **seen as** enforcement mechanisms. Their point will be enforcement of obligations, even if the sanctions are weak. These processes will be mobilized and understood in a sanctioning way, even if the ultimate sanction is only one of shame. The role and purpose of the Committee of Experts will be cast in a similar light. So too, the role of the Conference Committee. And it could be predicted that the Committee on Freedom of Association would follow a similar path to self-understanding.

Fourth, there will be complaints about the lack of "real" sanctions. Discussions about whether the ILO has "teeth" or not will abound. This will lead many to advance and defend claims about the need for a social clause within the WTO. The very essence of that idea is to create real enforceability for ILO law, all in the name of creating the conditions required to forestall the race to the bottom, that is, to stop nations from pursuing their dominantly rational choice in their own economic self-interest.

We could go on – but you have the main idea. This is all a "package" deal driven by the P2 view of the world. And it is a package deal we are all very familiar with. It is the real world of international labour law, as we know it. We know the answer to our question "what is international labour law for?"

8. My eighth point is the following. **If this is indeed the answer** to our question about the point of international labour law, and if this is indeed the role of the ILO – then the ILO and its international labour law have been handed a very tough, or not to mince words, impossible

¹² Hart: *The concept of law*, Oxford, Carenden Press, 1961.

assignment. In a very few words, if this is indeed the purpose of ILO law then the drafters of the ILO Constitution failed to put in place the mechanisms necessary to do the job. The Constitution does not and cannot live up to its Preamble and **we are in trouble**. Why?

The two required ingredients to solve the prisoners' dilemma/ race to the bottom/ P2 view of the world are, first, binding, and second, enforceable, laws or obligations. But ILO Conventions are not binding. Ratification remains, under the ILO Constitution, an entirely voluntary affair. Nor are ILO Conventions "enforceable". [I shall say more about article 33 of the ILO Constitution in due course.] They are in the general run of things "voluntary" on any realistic assessment.

But there is, unfortunately, more. This received wisdom about the nature of international labour law becomes, in the end, part of the problem and not part of the solution. This is so in a number of ways. First, if international labour law really is best understood as an attempt to block the economically rational – then any success it has had will come to be understood as the product of other causes and the result of other forces. So, it will become a commonplace to attribute the successful construction of the international labour code to political circumstances that obtained before the fall of the Berlin Wall. It will be impossible to understand otherwise. This will reinforce the view that in the new global political dispensation ILO law in general is best done without.

Second, the model of detailed prescription and enforcement will become increasingly detached from reality. It will "merely" annoy countries such as my own, Canada, and do little for countries with very pressing labour market problems. Its obvious inability to deliver on what P2 demands will lead to the model becoming more and more irrelevant and less and less used. The numbers here are very striking indeed. In a recent article Breen Creighton observes that the traditional ILO system of law making is "in a state of crisis of such magnitude as to raise serious questions about its future role and relevance".¹³ Here are a few of the statistics that he uses to back up this assertion. First, the existing Geneva-based standards creation industry looks like it is gradually going out of business. In the postwar golden era the average rate of standard production was 3.15 Conventions and 2.94 Recommendations per year. For the past 10 years this yearly average has dropped to 1.1 and 1.3 respectively. Even more startling is the ratification crisis. For all the Conventions adopted in Geneva over the past 25 years the average number of ratifications is 20.1. If the widely ratified Elimination of the Worst Forms of Child Labour Convention is taken out of the calculation the average is a mere 16.05. This out of a possible 177.

Third and at the same time, it becomes increasingly difficult to address new empirical realities, such as informality, through the lens of a model which sees the central issue as one of bargaining power between employers and employees.

There is yet more. If we are stuck with this model of, and rationale for, international labour law then the International Labour Organization has even larger problems. On this model, it becomes increasingly difficult to connect the real work of the Organization, that is its instincts about what a better world informed by ILO basic values would look like (whether labelled "decent work", or "fair globalization" or otherwise) with the law. The model of law available is simply not helpful. There is an additional, fifth, problem as well. One could predict that those programmes, especially with those labels, will be understood as part and parcel of the same problem. That is, claims about decency and fairness will be understood to sound within and resonate with the same framework of thought as the law's self-understanding – as a cost or tax upon the workings of the "real" world.

¹³ Creighton, "The future of labour law: Is there a role for international labour standards?" In Bernard, Deacon, and Morris (eds.) *The future of labour law* [Hart, 2004] p. 253.

I am afraid there is yet more as I see it. On the received answer to our question, law becomes a problem for the ILO itself. This is worrying enough for the result is the marginalization of law within the Organization. But there is a further, sixth, problem – it is not easy to see what is left of the ILO if the law is set aside as unhelpful. Let me try to unpack this point. The ILO has as we have noted many goals and many of you will be familiar with the Declaration of Philadelphia and its articulation of the core values of the institution. There it is made clear that the ILO believes that all human beings irrespective of race, creed or sex have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security, and equal opportunity and that it is committed to “the attainment of the conditions in which this shall be possible.” As we have noted, all of these moral declarations and policy commitments are informed by only two propositions, P1 and P2, which offer accounts of how the world works and thus offer a functional, rational, explanation of the existence of the Organization, which could inform the ILO’s work in making those commitments into a reality. But the ILO not only has moral beliefs, not only has a list of concrete policy aspirations (to full employment, rising standards of living, a just share in the fruits of progress for all, etc.), not only P1 and P2 – these are all to be found in the Preamble – it also has, after the Preamble, a Constitution. This is not a lawyer’s point, at least per se. It is a larger point, which is deeply connected to the claim I’ve yet to deliver upon – that we need, and have available to us, an alternative account of international labour law. But the lawyer’s point is this. We have beliefs and commitments. We have two available theories or explanations of why the ILO is useful in achieving them, as expressed in P1 and P2. But then we have the actual Constitution. Virtually all that Constitution is about law, that is, about law making and then procedures for seeking compliance with the laws once made (these latter are carefully chosen words). The overwhelmingly central methodology in advancing the ILO’s aims is the creation of law through the legislative body of the ILO, the International Labour Conference. There are 40 articles in the ILO Constitution. Articles 1-13 establish the central organs but say virtually nothing about what they are to do or how they are to go about doing it. This comes in part II entitled “Procedures” and it is here that there is law and nothing but law. Now, if I were a lawyer defending the view that the ILO could happily get along with its work without any laws flowing from the Conference, I would be forced to and I would enjoy resting my case upon the first 20 words of the first article of the Constitution which reads:

“A permanent organization is hereby established for the promotion of the object set forth in the Preamble to this Constitution ...”

But I would have a very hard time responding to questions asking why the remaining 39 articles, and thousands of words, of the Constitution were there at all. They contain, after all, the constitutionally central mechanisms, indeed, seemingly the only available “procedures”, to use the constitutionally correct term, for advancing the aims of the institution.

So, the problem as I see it is that we have a model of international labour law which makes it very difficult to see how it could be part of the solution rather than part of the problem. Moreover, we have a model of law which makes it very difficult to use the main mechanism available to advance ILO aims. There is a dangerous possible by-product here – that the work of the institution will be increasingly seen as lacking institutional, that is to say constitutional, legitimacy. The real decisions of the Organization will be taken at an executive level, in the context of budget negotiations for example.

But all of this, troublesome as it is, rests on the rosy assumption that what I think of as the “development” side of the house does not share the basic theory of the legal side.

Here is a provocative thought. Does the ILO internalize, and become destabilized by a view, which it is (or at least should be) in its constitutional bones, at odds with? But is this a problem

simply of ILO law, or could it be true of the ILO? To put the point bluntly, the conventional view of domestic labour law, which in turn drives our familiar view of international labour law is at home with a “Washington consensus” view of the world. This is a view of the world which requires the segregation and sequencing of the economic agenda and the agenda of social justice. The latter is a cost or tax upon the former. Getting economic fundamentals right, getting prices right, and so on, comes first. Social justice is best viewed as a kind of luxury good which can be purchased as desired, subsequently, and with the fruits of progress generated elsewhere. On this view the difference between the Washington consensus approach and the ILO view of the world, was simply whether the tax is worth paying. The ILO sees the tax as worth paying in the name of decency, fairness, equality, democracy and human rights. But on this view – of the ILO as a whole having bought into what the dominant view of international labour law has bought into – it is the shared understanding of how the world works, rather than how to react to it, which is the problem.

So in offering my analysis of the law I do not mean to suggest that ILO law is to be singled out here. Rather, I think the underlying ideas of the view of law I have outlined may inform much of what the Organization does, whether via law and lawyers or otherwise. The idea that the received wisdom concerning ILO law shares a fundamental starting point with the basic theory of those with whom the ILO also believes it strongly disagrees, can be equally true of the Organization as a whole. Indeed, as I have noted, the rhetoric of “decent” work and “fair” globalization are easily heard to sound in the same (shallow as we shall see) P2 view of the world – that there is a big trade-off between fairness and decency on the one hand, and economic development on the other. (There is a thing out there called globalization and the job is to bring it to heel – rather than seeing “fairness” as necessary to and a driver of successful globalization). My point is that it is particularly unfortunate in the case of our view of international labour law because it is the central constitutional mechanism of the ILO. Even if we have an alternative and integrated (P1 as we shall see) view of development well entrenched, i.e. a view not of tax and trade-off but of mutual support, we would then have a divided house “merely” operating with a view of law at odds with its own aims. That might even be progress. But I fear that the basic working model of ILO law may be dominant beyond the legal side. My main point remains that we have deployed a vision of the content and process of law which is, to say the least, unhelpful, and based upon a P2 view of the world.

And there is the further risk that someday someone may come along and read the Constitution.

If P2 is it, we are in deep trouble – and with no way out.

9. My ninth point is that P2 is not the end of our road – **there is another answer to our question**. A better view of the world and of international labour law is not only required – but at hand – as it has been from the beginning – locked in our overlooked and underestimated P1.

There is a better account of labour law, both domestic and international. This is being made apparent at the international level where, as we shall see, the best data refuse to conform to the dictates of the dominant and received view. Furthermore, our best current thinking offers us insight as to why this should be so. Such thinking opens the way to comprehending a new map of the content of labour law, one which is not stuck in the story of employees and employers, inequality of bargaining power, labour law as tax, and so on. This account is open enough to make sense of informality and the complex modes of modern production. In the new era it will be our thinking about international law which will drive a new understanding of domestic labour law and not vice versa. Most significantly this new view transcends our current understanding of the relationship between the economic and the social, between social justice and economic development. For our current purposes it offers a new rationale for international labour law, and

as a result, a new model for its content, a new understanding of what “enforcement” of that law would be for, what it would look like, and so on.

There are then three main flanks to what I see as the strengthening assault upon the dominant P2 understanding of international labour law. First, the data continue to mount undermining the race to the bottom thesis. The P2 rationale for international labour law does not exist. Second, our best thinking about the nature of the relationship between social justice and economic development reveals why this should not come as a surprise. This points the way to a richer understanding of the P1 rationale for the ILO. Contrary to the P2 view, and the Washington consensus view, social justice is both the goal and the precondition for creating durable economies and societies. If this is so the object of international labour law is not to constrain nations from acting in their own self-interest but to show them where it lies in the first place, and to assist them in achieving it. This rethinking of purposes has profound consequences for the content and processes of international labour law. It makes it possible to have an integrated view of the ILO in which its central constitutional mechanisms are available to advance its basic goals and not be at war with them. Third, the world which the traditional model was designed to make sense of, with which it melded, and which provided the dramatis personae for our narrative of labour law, is no longer our world. Our working model is not only normatively impoverished; it is increasingly beside the point. It is time to carve the labour law universe at some new joints. In what follows I concentrate upon the first two of these three flanks.

So, it is not only time for, but we have at hand, a new theory, a new working model which we as sane people with some function in society cannot do without. True, we have been in the grips of an older theory, so has the ILO, and it is hard to shake free. The details of the new theory, of the new working model, are not all sketched in but the general contours of what it is not, and of what some of its most important claims consist in, are available. And the first requirement of any progress on these projects is that we see the fly bottle of the received wisdom, and realize that we are inside it. Once we see this it is an emperor’s new clothes story. Constructing a new working model which provides the necessary map of the field and explains its normative salience is not a project we will finish today. But we can make a start.

What is P1 saying, and what has it been saying to us all along?

P2, as we have noted, is the race to the bottom/prisoners’ dilemma/received wisdom/ dominant account proposition. P1 has been hidden from view. I think we have in fact for most of ILO history read P2 in a “sophisticated” or “deep” way. This is by seeing it not as expressing what must have been a pretty obvious idea in 1919 – that one nation’s domestic problems can cause enormous negative “externalities” or spill-over effects for others – but as expressing the “deep” ideas of the prisoners’ dilemma/race to the bottom and all which that entails. P1 on the other hand has received a “shallow” reading – that there is a limit to social unrest in any society which ends in a threat to peace. My idea is that we have had these readings backwards, as it were. What we have had is a shallow reading of P1 and a deep reading of P2. What we need is the reverse.

P1 is a remarkably deep assertion. (P2, on the other hand, looks increasingly shallow). Why?

In order for P2 to be correct it must be the case that nation states really are stuck in a prisoners’ dilemma. In order for this to be the case, it must be true that investment really is attracted by lower labour standards. So that the choice to lower standards is “dominant”, i.e. in a nation’s economic self-interest no matter what other nations do. This is the required precondition for the race to the bottom. If labour law is merely a cost or tax upon economic progress this is an easy choice matrix to construct – as we have seen. During much of the long debate about trade and labour standards, about the idea of a social clause, about what is wrong in the modern world,

this has simply been assumed. And no wonder, given the theory which had us in its grip. It is the kind of theory which makes data unnecessary. But the theory was also bolstered by anecdotal and obvious cases. (To be autobiographical for a moment – the first academic article I wrote was about globalization although I did not know it, and globalization was not a word, at the time. It was about a French multinational, Michelin, quite openly persuading my home province to pass legislation to protect it from a unionization drive, in return for increased investment (a third plant) in the province. As we shall see the new theory does not deny that this can and does occur – the important question is whether it is a **dominant** strategy.) One of the most refreshing developments in the debate in the last decade is that it has taken an empirical turn with surprising results that is, surprising on the dominant view of things. The key finding is that there is no evidence of a race to the bottom. I will not recite chapter and verse here – many of you are deeply familiar with the 1996 OECD Report and the 2000 follow-up. You will also be familiar with other studies by Rodrik, Flanagan, Kucera, Oman, Moran, Aggarwal, the Brown-Deardorff-Stern team, Morici and Shultz, Busse and Brown, Hussain and Maskus, and so on. These studies provide a much-needed wake-up call for those of us fed on the mother's milk of the received wisdom. The key findings are consistent – there is no evidence of gains in either trade performance or in FDI associated with lower labour rights. One of the most important findings remains that of the 1996 OECD study:

...the clearest and most reliable finding is in favour of a mutually supportive relationship between successfully sustained trade reforms and improvements in association and bargaining rights.¹⁴

And Flanagan in 2003:

Contrary to the race to the bottom hypothesis, the analysis did not find significant linkages between export performance or FDI inflows and the measures of labour standards. In sum, the paper finds no evidence that countries with lower standards gained competitive advantage in international markets. Poor labour conditions often signal low productivity or are one element of a package of national characteristics that discourage FDI inflows or inhibit export performance.¹⁵

Keep your eye on that word “package”.

I do not wish to discuss the methodological shortcomings and details of these studies for in my view the more interesting question is the one which follows from what they all suggest – how could this be true? Is there a plausible explanation for these data, and a new account of how the world works which make this counterintuitive data, intuitive? If this is at hand then a rigorous research programme could be structured which could test its hypothesis in a richer way. Not by searching for the methodological shortcomings of studies challenging the received wisdom – but by thinking of rigorous ways to test the new wisdom.¹⁶

It is critical however to be specific about one aspect of the claims that are made here. Whatever disproof of a race to the bottom exists does not amount to a claim that collective action problems are not in play. It is simply – but critically – that there is no prisoners' dilemma and no race to the bottom. As we have seen, the key to this sort of scenario is that the choice to defect and to lower standards is “dominant” – it is in your self-interest to do so no matter what the others do. The disproof of the prisoners' dilemma does not mean that there cannot be cases like my Michelin example. As we shall see, all that is required is shortsightedness and lack of trust

¹⁴ OECD, 1996, pp. 111-112.

¹⁵ Flanagan: “Labour standards and international competitive advantage” in Flanagan and Gould (eds) *International labour standards* (Stanford, 2003), p. 17.

¹⁶ See Sen. A.: *Development as freedom* (New York, Knopf, 1999).

about what others will do. Even if it is the case that all nations are best off to, say, eliminate discrimination or child labour in the workplace, there can be short term (albeit in the long run less optimal) gains to be had at the expense of competitors. This very important set of points is well made by the American labour law academic Alan Hyde in an important new essay “A stag hunt account and defence of transnational labour standards – A preliminary look at the problem”.¹⁷ Hyde’s analysis is that what we see in the international labour law arena is best captured as a different collective action problem – what Amartya Sen called “assurance games” but which are now much more commonly called stag hunt games. This striking label is taken from a hunting story told by Rousseau in his *Discourses of inequality*.¹⁸ This is not a talk about game theory. For our purposes we can note that the critical difference in such games is that there is no “dominant” choice to defect or to lower standards. Rather what you do depends on what others do. The highest pay-off is from cooperation but there are gains, lower but positive, from defection. The difference is critical for our purposes. In the stag hunt there are two possible equilibria, one higher than the other. In the prisoners’ dilemma there is only one. But here is the truly vital point – in the prisoners’ dilemma the irony is that they could have ended up less worse off if they had cooperated. In the stag hunt you can end up better off than where you started if you cooperate. These are very different dilemmas with very important implications for international labour law and the ILO. If we have a prisoners’ dilemma, and we do not, we would be faced with the problem of getting nations to act against their own apparent self-interest, which involves changing motivations. This is not true in the stag hunt or assurance game. The solution does not require constraining self-interest at all. For our purpose this is the critical point. In a nutshell, rather than constraining states from pursuing their clear and rational instincts, which is what the traditional model attempts to do, the task is to help states maximize their self-interest.

But this point is merely supplemental to our main quarry. It simply lets us understand what we know to be true in terms of regulatory competition without falling into the trap of the prisoners’ dilemma/ race to the bottom analysis. Our main question remains, however: How can the data be true, be made sense of, given that they are counterintuitive on the assumptions of our received wisdom? These data require and lead us to an analysis of the second and theoretical front in the assault upon our dominant way of thinking. The data require, indeed demand, some explanation. In my view the general contours of the theoretical understanding of the world that makes sense of these data is at hand and indeed it has been lurking in the terse but elegant wording of P1 since 1919. The problem is that our dominant understanding has not permitted us to see it.

As we have seen, the dominant view of both domestic and international labour law shares a set of assumptions with an opposing view, which I have called the “Washington consensus” view of the world. The core shared assumption is that social justice is a cost or tax (which the ILO believes is worth paying) that is, that it comes at a price in terms of economic development and progress. What separates the two camps on this received view is not the analysis but the reaction to it. The “good guys” would pay the cost in the name of fairness, equality, and so on. The “forces of darkness” would rather not. From this quite a bit follows, as we have seen, especially for international labour law. But what is at work here in this shared position is a view of how just and durable societies and economies are made possible, how they work, and how to help create them – a view which we have good reason to question. I believe that Amartya Sen has provided the intellectual leadership in the effort to map this new understanding of the idea of development and the true relationship between social justice and economic progress. It is this understanding which offers the hope of making sense of our data, and much more. As the ILO well knows, Sen celebrates what he calls *human freedom* understood not in a formal way but as “the real capacity to lead lives we have reason to value”. We also know that for Sen human

¹⁷ forthcoming in Craig (ed): *Globalization and international labour law* (Cambridge University Press, 2005).

¹⁸ See Skyrms: *The stag hunt and social evolution* (Cambridge, 2004).

freedom is not only the goal but a most important way there – not only the destination but the path. There are two further elements of Sen’s thinking which are often overlooked but which are important for our current purposes. First, Sen is brave enough to begin his thinking at the beginning – with a discussion of our true goals as opposed to our means or modalities for achieving them. Increasing GDP per capita or drafting a complete international labour code are means, not ends in themselves. Very few thinkers go this far. But this is precisely the kind of thinking required to see the theory we are currently in the grips of. Second, and of more concrete relevance, is his attention to the complex interconnectivity, intertwining, and interactions of various sorts of human freedoms. Sen refers to the “remarkable empirical connections”¹⁹ of various sorts of freedoms, especially economic, social, and political freedoms, noting that “they are mutually reinforcing”.²⁰ There is no time to draw out fully the significance of these remarks but the following is important for our current purposes:

Political freedoms (in the form of free speech and elections) help to promote economic security. Social opportunities (in the form of education and health facilities) facilitate economic participation. Economic facilities (in the form of opportunities for participation in trade and production) can help to generate personal abundance as well as public resources for social facilities. Freedoms of different kinds can strengthen one another.²¹

It is this line of thinking which offers the best possible account of the world our data reveal to us and which must remain a mystery on the received wisdom’s view of the world. It is in the detailed and complex interconnections of various aspects of human freedoms that our explanation must be found. Only on this type of view can we see the futility of the segregation and sequencing of the social and economic realms which in turn generates the “taxation” account of social policy and so on and so on. That is, Sen has unpacked what P1 is expressing so cryptically. What we need now is more explicit and detailed research, which explores the empirical connections of this complex package, for as Sen points out “the reach of policy analysis lies in establishing the empirical linkages that make the viewpoint of freedom coherent and cogent as the guiding perspective of the process of development”.²² This is the way I understand the important research of, for example, David Kucera, who seeks to explain that there are complex ways in which, and “channels” through which, labour rights such as freedom of association, contribute to successful economies.²³ This type of broader framework makes it possible to explain what has been before our eyes for some time – the fact that all the just and successful societies of the world make their way on exactly this basis. The question is not what makes the 20 or so successful societies and economies of the world successful, because we know it is some version of the “package” (recall Flanagan) deal, which Sen has put his finger on. The question has never been “what do we want?” Rather, it has simply been “how do we get there from here?” It is a problem of transition from have not status to have.

This alternative view has large consequences for international labour law. At its core the new view makes clear that the legal project is not one of legally coercing states to abandon their self-interest. It is also clear that the model of law appropriate to that sort of enterprise is, in spite of its popularity and dominance, inappropriate to our true challenges.

In my view all this is summed up beautifully in P1. In so saying I make no claim that this is what the original drafters of the ILO Constitution had in mind when they drafted their Preamble.

¹⁹ Sen, *op. cit.*, p. 11.

²⁰ Sen, *op. cit.*, p. 6.

²¹ Sen, *op. cit.*, p. 11.

²² Sen, *op. cit.*, p. siii.

²³ Kucera: “The effects of core worker rights on labour costs and foreign direct investment: Re-evaluating the conventional wisdom” ILLS Decent Work Research Programme Working Paper No. 130 (2001). Kucera and Sarna: “ How do trade union rights affect trade competitiveness?” ILO (2004) Policy Integration Department Working Paper, No. 39.

Original intent, conceived as what was “before the drafters minds”, is never of use or interest when important issues of interpretation are at stake. Almost miraculously I came across the following passage from Shotwell who was one of the original drafters. He makes this point beautifully:

... [the ILO] dealing as it does with the homely problems of the welfare of the common man, has a universal constituency and a lasting cause to serve ... Its name belies its nature; for it represents all interests, not merely those of labour. It is a **world parliament** [note these words] limited in scope to the problems that affect labour but it acts in the name and the interests of all. It might more accurately have been termed the International Industrial Conference or, better still, the International Organization for Social Justice.

There was a hint of this broader conception of the purpose and scope of the [ILO] in the Preamble to its Constitution, in the statement that universal peace “can be achieved only if it is based upon social justice”. It must be confessed however that when we wrote those words into the text, we were not thinking of their far reach, but of a formula which would enable us to tie our organization into the structure of that new world order which the League of Nations symbolized. As I look back at it now, I am led to the opinion that we stated the most fundamental of all principles in political as well as social polity.²⁴

This makes the two points about the irrelevance of original intent and the true meaning of P1 as eloquently as possible in my view.

The basic lesson may be put thus – there are bigger and better reasons for the ILO and for international labour law than the received wisdom could imagine or permit us to see. These reasons provide the kind of rationale required to deal, among other things, with our new empirical reality which has exploded beyond the confines of employees, employers, bargaining power and all of the rest of it. (This is a view which can begin to comprehend what I called earlier the “third flank” and which I am skipping over here.) The project of international labour law is to lead member States to pursue their self-interest through the construction of social policies which are part of the complex and mutually supporting aspects of human freedom which both make possible the construction of just and durable societies and which at the same time are their goal. This is a positive, coherent, integrated, and radical account of the mission of the ILO and of international labour law.

10. My tenth point is to note, albeit briefly, the kinds of effects all of this has upon international labour law and even the ILO. I believe **there are many positive implications**. Now, you may well remain unconvinced of the import of our new empirical findings – and of Sen’s ability to provide the basic theoretical infrastructure which would permit us to make sense of such a world. If P2 remains more appealing, or at least more realistic, to you than P1 then bear with me and treat the following as a description of how much better the ILO world would be if only my P1 account of it were true.

You will recall my saying that “if P2 is it, we are in trouble”. How, precisely, would a P1 view of the world change things?

First and foremost, a P1 understanding of the world makes the ILO’s task a possible one. As we have seen, if the task assigned to the ILO, and to international labour law, is the P2 one of enforcing obligations which are not in the self-interest of members to recognize or live by – then the ILO is in serious difficulty. We have seen that the ILO’s constitutional framework does not

²⁴ Shotwell: *At the Paris Peace Conference* (1937) p. 54-55.

make available the two requirements which are essential to constrain the race to the bottom, which this view of the world makes inevitable. Those two requirements, it will be recalled, are binding and enforceable laws. They are simply not there. On the P1 view there is no prisoners' dilemma and the lack of a Constitution which is equipped to deal with one is not a matter of concern. That is, we have a Constitution which might make sense of the world as we (now) understand it. It is equipped to do what needs to be done and is not an obvious failure in institutional design.

Second, a P1 view of the world would require not only a revision of the purpose of international law but a reorientation in our thinking of what the contents and methodology of international labour law would look like. Here is a provocative way of making this point. I note that in the ILO Constitution there is what I believe to be a completely overlooked word. That word is "proposals".²⁵ ILO Conventions and Recommendations, which are two very familiar words, are in fact constitutional subsets of the larger set or constitutional class called "proposals". The ILO makes proposals to its members. (The International Labour Conference decides whether they should take the form of a Convention or Recommendation.) This is not a word normally associated with law understood as the enforcement of rules designed to constrain members' self-interest. We do not for example make "proposals" to criminals. We do, however, make proposals to those whom we are inviting to further their own self-interest. In short we will do without, for the most part, the duty imposing/enforcement/sanctions model.

What would, then, conference "proposals" look like? What would proposals which are Conventions look like? What would proposals which are Recommendations look like? What rationale would inform our distinction between the two? It might be that Recommendations should take the form of detailed model laws – which groups of members can take off the rack, or modify, in their efforts to coordinate in finding optimal solutions to remaining collective action problems. Perhaps we would make better use of article 21(1) and not think that most instruments have to be universal. Not everyone needs the same kind or level of assistance. It would appear from article 19 (3) that not all Conventions have to be "of general application".

But the fundamental rights may require another kind of Convention – written at the level of principle. And what would the Committee of Experts look like? Do we need two different sorts of committees – one for legal cases and one for monitoring real world progress and redirecting resources? Is that what article 37(2) might provide – a new monitoring system, perhaps specialized for different sorts of instruments promoting different sorts of projects?

And there could be instruments on any topic the ILO believes is worthy of promotion. They would be tied to money, expertise, assistance, and so on.

As you can see, I do not know the answers to these questions at the level of detail. That is beyond my competence. As I say, my concern is what it is we should be detailed and practical about. But, there are some clear general principles that should inform any possible reform. If enforcement is the wrong idea then it is clear on a P1 view of the world that knowledge, technical assistance, money, expertise, incentives, "promotion", benchmarking, coordination through the provision of both "off the rack" and "bespoke" best practices in the solution of specific collective action problems, are all of much more significance.

A third point. A P1 approach links international labour law with the law and development sides of the ILO. Law becomes possible as a vehicle for articulating goals and providing resources for meeting them, rather than the site for the construction of prohibitions and mandatory

²⁵ ILO Constitution, article 19.

requirements, combined with enforcement and sanctions, which often only thwart those development goals.

Fourth, on this view the 1998 ILO Declaration, at least in its original design and theory, looks like the way of the future. In fact, I believe and have written that Philip Alston's recent and strongly worded attack on the Declaration is fundamentally wrongheaded for just these sorts of reasons.²⁶ Alston sees the Declaration as an attack on ILO law – one which undermines the Conventions, the detailed jurisprudence of the committees, and their enforcement. I see it as a better and alternative model of ILO law, a P1 model. Alston is, however, right in believing that the Declaration represents a new game. He is wrong in thinking it is an inferior game. That idea is only possible on a P2 view of the world (and even then faces formidable challenges, some of which I have mentioned above.)

Fifth, the P1 starting point puts the social clause debate in a new light as well. The criticism that the ILO has no teeth, and the debate about whether it should visit the WTO dentist for implants to remedy this deficiency, can now be largely viewed as unhelpful. Rather, and as we shall come to see, there is instead a kind of “man bites dog” story here. Our problems with the WTO are, it will turn out, as follows. First, there will be the problem of keeping the WTO out of the way of article 33 enforcement activity in the pathological cases, such as Myanmar/forced labour. The “man bites dog” quality of this arises from the fact that almost all the debate about WTO and labour rights has been structured around the claim that WTO has no labour rights competence and the issue is whether it should acquire one or not. My view is that to the contrary, WTO has an obvious labour rights competency (in its role in constraining its members using economic sanctions to address human rights abuses – an issue now concretely presented by the Myanmar case) – and the issue is, can we get it out of the way in those cases? Second, there is the more general task of assisting WTO in finding its way to a P1, as opposed to a P2, view of the world. If this were to happen it would be of assistance to ILO, and all other multilateral institutions in their articulation of a coherent P1 approach. Moreover, this would enable WTO to play a positive role in a coherent international approach to development issues. The Trade Policy Review Mechanism, accession negotiations, and much else could be mobilized to this end.

On the other hand, it must be said that the P1 view of the world has its limits. Those limits are found in cases such as Myanmar/forced labour. The country represents a problem which is not a collective action problem of any sort, either P1 or P2. It is a problem on a different plane. This is a problem of constraining the self-interest of an oppressive and undemocratic military regime. Here the criminal law model is not inappropriate. This is what article 33 is for. But this case happens to make much clear. In a few words, our problem has been that the pathological case has been taken as the paradigmatic case. The model of law appropriate to that case has been taken as the central model for ILO law. But we do not want to throw the enforcement baby out with the general P2 bath water – far from it.

A P1 view has many other advantages. It gives a reason for governments, dare I say it, such as Canada, to see the ILO as part of a solution rather than merely annoying. It lets the Organization really render assistance to member States organized around decisions (proposals) put forward using the actual Constitution and deriving all the benefits (of legitimacy for example) that this would entail. Moreover a P1 approach might solve another ILO mystery – why the governments, with 50 per cent of the votes, do not really “drive” the ILO agenda. Why have the other players been so successful in “dividing and conquering”? The P2 approach has, I would suggest, great explanatory power here. The common explanation is the divided interests of

²⁶ Langille: “Core labour rights – The true story” forthcoming in (2005) *European Journal of International Law*.

governments. But a large part of that lies in not seeing the possibility of a coherent and positive agenda for all. It could be very different in a P1 world.

Finally, and as I can only suggest here, P1 is our only hope of understanding how we might deal with informality and the new world of work – not all of which is just bad employment that needs to be fixed; it represents a radical change in the dramatis personae of our constituting narrative.

III. CONCLUSION: Into the grips of a new theory?

I don't doubt that when the full history of the ILO is written, it will turn out that, in spite of the dominance of the P2 account of international labour law, some if not a lot of the actual success of the ILO and the international labour law regime will be seen to have been achieved by ILO officials who in fact operated on a P1 view of the world. Moreover, it seems that only a P1 view of the world can make sense of what we know to be true of how ILO law really works. For example, Chau and Kanbur's findings that it is peer pressure, that states ratify when their peer group does, is much more compatible with a non-prisoners' dilemma/stag hunt view of the kind of collective action problems nations face.²⁷ Many of the ideas here are, as I said at the outset, not new, and many of you will rightly object to my ignoring important nuances, and more I expect. But if my claims that for labour law "the working model is all there is", and that there are real liabilities here because the world "moves on", both empirically and normatively, then surely it is right to take stock of our working model – our overarching framework of thought – from time to time. Yes, this runs the risk of ignoring much that needs to be said at the level of detail – but there are, in my view, even greater risks in not undertaking this larger task from time to time and always sticking to our normal routine. To return to our starting point, we are in and are always going to be in the grips of theory and just because of this we need to constantly wonder what it is and whether it is the best we can do. As Keynes said, the grip of the old ideas is firm and hard to shake free of. Thus we have a necessary and difficult task.

I admire James Wolfensohn for starting almost every speech with the same set of reminders – that, roughly speaking, there are 6 billion souls on this planet, 3 billion of whom live on less than 2 dollars a day, and 1.2 billion in absolute poverty of less than 1 dollar a day. There is poverty and unfreedom everywhere. That is the problem. The question is whether the ILO can be part of the solution. I think that is what P1 makes possible and P2 very unlikely. It is progress – theoretical perhaps, but I think more than that too – to see this clearly. The change of view I am suggesting has the advantage of making sense of our world. But it has another advantage as well – it enables us to see and believe in the idea of the ILO as an institution critical to the solution of the really important problems of the world and, most importantly, to see this possibility "not as an impossible dream of an impossible ideal, but as the kind of working model ... that exists somewhere in the mind of every sane person who has any social function at all".

Geneva, March 2005

²⁷ "The adoption of labour standards: Who, when, why?" Centre for Economic Policy Research Paper 2904 (2001).