

Introduction

Labour law in the 100 years of the *International Labour Review*

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Abstract. *This Centenary Issue presents a selection of the articles on labour law that were published in the International Labour Review (ILR) during its first 100 years. The articles were chosen for their contribution to two tracks of debate and discourse. The first concerns a progression of ideas over time with respect to the scope and substance of labour law in general. The second charts the evolution of international labour law more specifically. This introduction provides a narrative weaving together the landmarks that were selected in each of these tracks and pointing out recurring themes, questions and challenges as well as changing points of view.*

Keywords: *labour law, labour legislation, international labour standards, labour history, literature survey.*

1. Lines of discourse and debate

A journey through 100 years of articles on labour law published in the *International Labour Review* (ILR) reveals two prominent lines of discourse and debate. The first maps changing ideas on the scope and substance of labour law in general, while the second charts the evolution of international labour law. In this Centenary Issue, we have selected a few landmarks along the way, beginning with the publication of the first volume of the ILR, which contained Ernest Mahaim's article on "International Labour Law" (1921). Mahaim, was a law professor at the University of Liège, a founding member of the International Association for Labour Legislation and Minister of Industry, Food Supply and Labour in the Belgian Government (1921–23). He also belonged to the group of drafters of Part XIII of the Treaty of Versailles, which became the Constitution of the ILO. He remained a high-ranking official

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of the ILO for two decades. In his contribution, Mahaim sets out his vision of international labour law, in which the ILO was to play a central role, but he also lays the foundations for understanding the importance of labour law as “legislation for the protection of the worker” (Mahaim, 286). We treat his article as the common point of departure for the two tracks identified above.

2. The first track: Labour is not a commodity

Mahaim’s commentary on international labour law addresses normative questions about the scope and substance of labour law within nation states. Although the primary focus of his contribution is the substance and “spirit” of *international* labour law, he reveals his own understanding of labour law’s purpose in general – namely, the protection of the worker and the guarantee to citizens of a minimum standard of living. He concludes that “the final purpose of international labour law is to place beyond attack from international competition a minimum of conquests in the world of labour, such as shall constitute a human charter” (286).

A more extended and very different consideration of these matters was presented by Isaïc Pieter de Vooy two years later in an article on “Labour Legislation and Economic Possibilities” (1923). De Vooy was a Dutch mechanical engineer and industrialist, a social critic and a poet. The main thesis of his article is that the development of labour law and the consequent improvement in workers’ terms and conditions of employment and in their standard of living must always proceed “within the limits set by economic laws” (de Vooy, 181). In other words, wage increases must not outpace increases in productivity. Attempts to improve the worker’s lot at too great a speed will be self-defeating. Since productivity levels can vary between countries and localities, it follows that the appropriate purposes of labour law are twofold. Firstly, it can properly be used to set minimum standards below which conditions of labour must not fall (183). Secondly, it should be used to support trade unions and collective bargaining as potentially the most effective means of adjusting wages in line with productivity levels. At the same time, labour law serves the purpose of controlling the demands of trade unions and workers, ensuring that these, too, do not breach economic laws (185).

De Vooy offers a strongly technocratic idea of labour law. Wages, he believes, are neither a moral nor a political matter but rather a question of economic fact (184–185). Today, this line of reasoning may be familiar. For example, it may be brought up in policy debates about the benefits and risks of introducing a national minimum wage. At the time he was writing, however, de Vooy was able to claim that his points were rarely advanced during any discussion of the subject (183).

Although we can identify the beginnings of the debate about the proper, or desired, purposes of labour law in these two articles from the early years of the ILR, this discussion subsided for several decades before being taken up again, with renewed enthusiasm, towards the end of the twentieth century. The vast majority of articles on labour law published from the 1920s to the 1990s were single-country studies, often designed to explain to an international audience

the labour law of a specific country, or an element thereof. Although many of these studies may be of historical interest today – especially those dealing with the labour laws introduced by newly independent States liberated from colonial rule, or those offering depictions of the labour order in non-democratic regimes – we have excluded them from our selection in this Centenary Issue in favour of articles with arguments that have wider application.

Reviewing the first decades of the ILR, we were able to identify two notable exceptions to the preference for single-country studies. The first is a comprehensive three-part study of “The Contract of Employment” (1935a, 1935b and 1935c) by Ernst Herz, an internationally renowned jurist and expert in labour law who was also an ILO official before and again after the Second World War. Anticipating that the law of the contract of employment might, at some point, be the subject of a session of the International Labour Conference, Herz provides a preliminary survey of the law across different jurisdictions, aimed at identifying “the social problems arising in connection with the regulation of contracts of employment, and at showing their international significance” (Herz 1935a, 838). Herz offers a sophisticated and lengthy analysis of the role of the contract of employment in national systems of labour law, its functions, and its shortcomings as a “method of regulating conditions of employment” (Herz, 838). From this, he concludes that supplementary labour legislation will be required. In some respects, his analysis foreshadows the work of prominent scholars of labour law in the decades after the Second World War. He argues that the existence of a contract and ostensible bipartite negotiations over its terms mask the reality of the unilateral fixing of the conditions of employment by the employer. If the contract of employment is interpreted according to principles of private law, account is taken only of the exchange of work for wages and not of the technical or organizational subordination of the employee to the employer’s managerial prerogative.

Herz’s survey also anticipates the more recent flourishing of scholarly analysis of the vertical disintegration and “fissuring” of employment relations (Weil 2014). Marie-Laure Morin’s (2005) discussion in the ILR regarding “Labour Law and New Forms of Corporate Organization” took an early look at these phenomena and the difficulties they posed when it came to identifying the “employer”. Antonio Aloisi and Valerio de Stefano’s (2020) article on “Regulation and the Future of Work” offers a very recent defence of the contract of employment that secures workers’ rights just as much as it is a facilitator of innovation. Thus, the ILR publications depict an ongoing defence of the unique status that the employment relationship enjoys in the legal field, despite significant changes in the labour market and the policy context over the years.

A second noteworthy theoretical contribution is an article by Johannes Schregle on “Labour Law and Development in South-East Asia” (1976). At the time of writing, Schregle was Chief of the ILO’s Industrial Relations and Labour Administration Department. His article considers the contribution that labour law, trade unions and employers’ associations may make to the national development of Asian countries, bearing in mind the significant differences between those countries. Beyond providing a mere description of Asian labour

law, Schregle's study emphasizes that labour law is essentially political in nature. His discussion offers an alternative view to the one de Vooy's (1923) advanced some 50 years earlier. Schregle notes that "Labour law is not, and cannot be, an abstract notion, nor can it be a theoretical model to be imposed on a country. Labour law is the result of an ongoing process of adjustment and change, a process reflected in the struggle for power and influence between the various social forces" (Schregle 1976, 285). In this political view, Schregle enters the halls of law and politics, a field taken up by critical legal studies (Klare 1982) and more recently in the academic stream of law and political economy (Rahman and Thelen 2019).

The growing economic case against labour law rekindled the debate over labour law's purpose in the late 1990s. The free-market economic policies embodied in the Washington Consensus opposed the protective dimensions of statutory labour law, which were seen as a form of rent-seeking behaviour by insiders at the expense of outsiders, such as the unemployed. Pietro Ichino (1998), Professor of Labour Law at the University of Milan, member of the Italian Parliament, journalist and former trade union leader, discusses in an ILR article what, in his view, labour lawyers could learn from economists. He claims that the "very purpose of labour legislation is to correct distortions of the free market" (Ichino, 306). This embrace of a neoclassical approach to the regulation of labour markets provoked two types of responses in the pages of the ILR: a strong assertion of the need for a rights-based framework for work; and a challenge to the World Bank's claims on its own econometric terms.

Amartya Sen's article "Work and Rights" (2000) exemplifies the rights-based approach to labour regulation. It builds upon the Nobel laureate's 1999 book *Development as Freedom*, in which he argues that development should be viewed as an effort to advance the real freedoms that individuals enjoy, rather than simply focus on metrics such as gross domestic product (GDP) or income per capita. Sen's article sketches the key features of a rights-based approach and celebrates the goal of the ILO's Decent Work Agenda, which is the promotion of "opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity" (ILO 1999, 3). Sen insists that this evaluative framework should begin by acknowledging certain basic rights, irrespective of whether they have garnered legal recognition, and the need for an "open society and the promotion of social dialogue" if rights are to be effective (Sen 2000, 125). Perhaps most challenging to the ILO's structure and orientation is Sen's call for a truly global approach, reminiscent of the labour movement's call for solidarity across borders, which he contrasts with an international approach that "is inescapably parasitic on the relation between nations, since it works through the intermediary of distinct countries and nations" (Sen, 127).

In the face of the prevailing neoliberal economic wisdom, this assertion of the importance of a rights-based approach to labour regulation can be viewed as a *cri du cœur*. Sen's approach was an important counterweight to the thin conception of the purpose of labour law – to facilitate free markets – that was embraced by international financial institutions.

A different response to the same challenge appeared following the World Bank's flagship report on *Doing Business in 2004* (2004). The report ranked countries in the order in which their labour laws contributed to economic performance, with the clear implication that, if countries ranking low on the list abolished some or all of their labour laws, they would improve their economic performance. In "The Evolution of Labour Law: Calibrating and Comparing Regulatory Regimes" (2007), Simon Deakin, Priya Lele and Mathias Siems tackle head-on the econometric argument that labour law undermines economic performance. Their specific target is the influential "legal origins" (Deakin, Lele and Siems, 133) hypothesis, which claims that distinctive national regulatory styles can be traced back to their origins either in English common law or in civil law in its French, German and Nordic variants (Botero et al. 2004). Applied to labour law and the template for the World Bank's Employing Workers Index in *Doing Business in 2004*, the legal origins hypothesis predicts that common law systems "are more likely than their civil law counterparts to produce efficient rules for the governance of the business enterprise" (Deakin, Lele and Siems 2007, 133). The authors contest the methodology of the World Bank's report and show that the results of their leximetric analysis do not support the claim that the legal origin of a national system has a strong effect on a country's economic performance. They offer a historical-institutionalist account that emphasizes the need to examine, at the national level, the institutional factors that have shaped the labour law system historically.

Further results of this leximetric approach were published in an article in the ILR a few years later, and its findings support the hypothesis that "efficiency and fairness" could be aligned in "the operation of labour law rules" (Deakin, Malmberg and Sarkar 2014, 19). In the midst of these leximetrics debates, the World Bank retreated from its earlier position that "laws created to protect workers often hurt them", claiming in 2014 that employment regulations "benefit both workers and firms" (cited in Adams et al. 2019, 2).

3. The second track: International labour law

Affiliated with the ILO, the ILR has had a special role in publishing articles that concern international and comparative labour law. Observing what the journal has published over the past 100 years helps one to understand the evolution of labour law's international dimension.

In 1921, Mahaim defined international labour law as "that part of international law which regulates the mutual relations of States as touching those of their nationals who are workers" (Mahaim 1921, 283). The article reflects the premises underlying the establishment of the ILO – a central international institution, with its unique tripartite structure, deliberating over the appropriate labour standards that should apply to all States. This vision has several interrelated components. First, the ILO is a stable international organization, "not an assembly of plenipotentiaries authorized to sign on behalf of Governments, but a kind of international parliament [on a tripartite basis]" (Mahaim, 284). Second, it has a universal character "because it aims at securing to the whole of the labouring portion of mankind a certain minimum

of rights” (285). Third, it aims to implement a comprehensive set of rights and standards – a code of international standards. The three components, Mahaim admits, will be riven with tensions, requiring mediation between universal conventions and national legislation; the sovereignty of States and the community of States; national jurisdiction and private international law; and universal standards and the vast differences between States. Nevertheless, Mahaim is highly optimistic, stating that this “organization will create international labour law, and its future possibilities are infinite” (286).

In its first few decades, the ILO project seemed to follow Mahaim’s script closely. Fifty years after the ILO’s foundation, it could boast the adoption of 130 Conventions and 134 Recommendations. The ILO achieved recognition for its central role in promoting social justice and internationally recognized labour rights, enjoying the membership of 130 States. Between 1955 and 1975, the ILR published a series of articles with a template title along the lines of “The influence of international labour standards on the legislation of such and such country”. These articles upheld the hierarchy of a central international agent that drafts international conventions, which are then applied by Member States. It seemed that the project of devising the universal code of labour standards was progressing just as Mahaim had envisioned in the ILR’s first volume.

Soon, however, some cracks began to appear in the ILR’s reportage. Nicolas Valticos, Head of the Department of International Labour Standards, Assistant Director-General of the ILO from 1976 to 1981 and author of the leading book on the topic of *International Labour Law* (1979a), published an article on “The Future Prospects for International Labour Standards” (1979b). Referring to these standards, he wonders whether there is “really any future for them at all”. “Or”, he asks, “are they an outdated mechanism, a mirage even, based on Utopian notions of global uniformity and the primacy of law?” (Valticos, 680). His response to this essentially rhetorical question is unequivocally affirmative. He refers to the expanding content of the international code and to its changing form, which allows flexible standards to be applied to States in different stages of development and to diverse social, economic and political cultures. He also tracks new forms of implementation, including greater visibility of the ILO’s standards. Did this mean that all was well in the ILO’s habitat?

Despite this optimistic depiction of the expansion of international labour law, Valticos identifies some problems that cast doubt on the potential of international law as envisaged by Mahaim. Valticos notes the challenges incurred by the growing diversity among ILO Member States and the development of methods that put technical cooperation alongside the project of devising an international code. He identifies the concern that, with the improvement in social conditions worldwide, the necessity of international labour standards is being questioned at the same time as doubts are being raised about their efficacy in creating fair competition between States (Valticos, 680–681). Nevertheless, following up on an in-depth review by the Governing Body of the ILO in 1976, Valticos shares the optimism of the early days. The centrality

of the ILO is reinforced by the fact that other international organizations affiliated with the United Nations and regional institutions, notably the European Union and the Council of Europe, draw on its international standards (695).

The cracks in the structure of international labour law become faintly visible in later articles. The next landmark is covered by Hilary Kellerson's "The ILO Declaration of 1998 on Fundamental Principles and Rights: A Challenge for the Future" (1998). Kellerson, a former Deputy Legal Adviser of the ILO, provides a descriptive account of the path-breaking Declaration. She picks up where Valticos left off, pointing to change in institutions and fora outside the ILO – especially the World Summit for Social Development in Copenhagen in 1995 and the Ministerial Conference of the World Trade Organization (WTO) in Singapore the following year. The article highlights the importance of the 1998 Declaration for the ILO's future and clarifies the importance of focusing on four principles and core labour standards. She notes that the "Declaration thus envisages a new emphasis in the use of ILO resources – constitutional, operational and budgetary as well as external – on promoting respect for the principles and rights reaffirmed in the Declaration" (Kellerson, 225).

Kellerson's article is short and descriptive. It is also the last of the articles in this track that was written by an ILO official who used the ILR as a platform to inform the readers of important developments at the ILO. From the mid-1990s, the internet became more easily accessible, and informative legal articles in the ILR were gradually substituted by more scholarly research output. Kellerson's short description commends the Declaration but only hints at the reasons for its adoption and the controversies surrounding it. The Declaration sought to create a new consensus, required because of the ILO's weakened position in the context of global governance. Institutionally, the centrality of the ILO's role in international labour governance was no longer taken for granted. By the 1990s, it had become just one of numerous institutions involved in this matter. The reference to global social justice was also contested, given the growing political prominence of the Washington Consensus and the emergence of competing discourses on human rights and development. The number of new Conventions and Recommendations had declined significantly, and the rate of ratifications was also dropping. The Declaration sought to respond to these problems. In the following years, the academic literature depicted its potential disadvantages as well as its advantages (Alston 2004; Maupain 2005; Langille 2005).

From the competing claims of consensus and contestations at the turn of the twenty-first century, two processes emerge. The first is the fluidity of the ILO standards, even around the narrow focal point of the principles and rights at work. The second is the opening up of international labour law to a broad range of international standards, instruments and organizations outside the ILO.

Two articles demonstrate the first process. Colleen Sheppard's "Mapping Anti-discrimination Law onto Inequality at Work: Expanding the Meaning of Equality in International Labour Law" (2012) brings to the discussion of international labour law the author's accumulated experience and knowledge

concerning discrimination and inequality. Sheppard starts out by demonstrating that the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), a fundamental Convention covered under the Declaration, embodies a thin notion of formal equality. However, she points out that it also contains “the seeds of a broader vision” (Sheppard, 7). Sheppard shows that States’ development of methods seeking to promote substantive equality together with the ILO’s Global Reports in the wake of the Declaration make it possible to elicit from the wording of Convention No. 111 an expansive approach that can facilitate measures such as affirmative action and remedies for disparate impacts and structural disadvantage. The analysis suggests that the focus and consensus of the Declaration conceal very different notions of equality. But Sheppard’s reading is indicative of the dynamic potential vested in Conventions. The flexibility that was emphasized first by Mahaim, and decades later by Valticos, is useful not only to address the diversity of States but also to accommodate changing understandings of equality. The international code, in this account, is a living document.

Janice Bellace’s article on “The ILO and the Right to Strike” (2014) shares with Sheppard the suggestion that the aspiration for consensus in the Declaration is facilitated by an expansive interpretative space. But, in contrast to Sheppard’s demonstration of the dynamic adaptation of fundamental principles to a higher standard, Bellace examines a heated debate within the ILO on the status of the right to strike and the scope of the freedom of association. Bellace turns to the history of the freedom of association, responding to originalist claims that the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) were not intended to secure the right to strike. Her historical reading challenges these claims. But, more generally, the articles by Sheppard and Bellace contrast ideas of a constantly adjusting living standard with originalist claims that take the parties back to the point in time at which there was an alleged agreement over fundamental values and institutions. International labour standards, like constitutional provisions, are thus agile in the service of competing ideas.

The second process looks at the changing position of international labour standards in the overall global governance of work. Bob Hepple (2005, 3) describes international labour law as a “spider’s web”, an image very different from the well-ordered views of earlier articles. A precursor of Hepple’s view appears in Steve Charnovitz’s article on “The Influence of International Labour Standards on the World Trading Regime: A Historical Overview” (1987). The author describes the contested relationship between international fair labour standards and trade law. Almost a decade before the establishment of the WTO, Charnovitz’s article, written in preparation for the Uruguay Round of multilateral trade negotiations (1986–93), advocated an integration of trade and fair labour rights by means of a “social clause” (Charnovitz, 575) in trade law.

The connection made between international labour standards and trade law portrays the ILO no longer as the sole and central agent but rather as part

of an ensemble. Charnovitz critically addresses the notion that the ILO's labour standards are the animating force of the developing global governance system, concluding that, "Compared with the significant influence which international labour standards have had on national legislation, as shown in numerous articles in this journal, the influence of labour standards on the world trading regime has been rather modest. ... And yet there is room for optimism" (580).

The troubled relationship between trade law and international labour standards reappears in later articles (Dolumbia-Henry and Gravel 2006; Brown 2016; Langille 2020). Side by side with the trade-labour nexus, other articles analyse the impact of international labour standards on the movement of business and people. David Kucera (2002) identifies the effects of labour standards on foreign direct investment, while Tomei and Belser (2011) examine the importance of the Domestic Workers Convention (No. 189) and Recommendation (No. 201), 2011, in better understanding transnational labour migration.

A different departure from the ILO's central role as a standard-setting organization is described in an article by Richard Locke, Thomas Kochan, Monica Romis and Fei Qin entitled "Beyond Corporate Codes of Conduct: Work Organization and Labour Standards at Nike's Suppliers" (2007). Corporate codes of conduct, a component of Hepple's spider's web, represent what may be perhaps the greatest deviation from the original premises of the ILO's central role in conceiving an international code that is legitimized by state membership and implementation. The authors describe the growth of global supply chains, headed by global brands, as the leading force in a deterritorialized variant of international law or – as it will later appear – *transnational* labour law. Under the label of "corporate social responsibility", multinational corporations develop modes of private self-imposed governance instruments, such as corporate codes of conduct that are generally assumed to be in the domain of "soft law", which means that they cannot be legally enforced. However, various components of these arrangements may be questioned. For example, do these instruments really display the social responsibility of multinational companies or are they simply a means of legitimizing the traditional profit-making practices of these companies? The assumption that such instruments are outside the domain of "hard law" increasingly began to be tested in transnational litigation drawing on private international law, just as Mahaim had predicted in 1921. Furthermore, States began to integrate these measures into domestic legislation in the form of reflexive law that requires reporting on corporate social policies. The authors carefully conclude that, in some circumstances, corporate codes can make a difference (Locke et al., 34). Their nuanced approach invites further research seeking to identify the very conditions that can make international labour standards effective in transforming labour practices in global supply chains.

Together with the international labour standards of the ILO, trade law, immigration law and soft law measures add up to what Adelle Blackett designates as "transnational labour law" in her "Introduction to a Special Issue: Transnational Futures of International Labour Law" (2020a). She describes

how transnational labour law “emerged to challenge and resist the direction of social regulation under globalization. By recognizing globalization’s asymmetries, and identifying spaces for action, it operates within, between and beyond States to construct counter-hegemonic alternatives” (Blackett, 456). The special issue of the ILR explores elements of this diffuse body of law, spread over many institutions, covering various legal fields, types of instruments and heuristic techniques. The issue includes further engagement with trade law, but also introduces novel components, as in Tonia Novitz’s (2020) discussion of the relationship between the ILO’s labour standards and the United Nations’ Sustainable Development Goals or Blackett’s (2020b) conceptualization of the role of regionalization in transnational labour law.

Of particular importance for contemporary transnational labour law is the aftermath of the Rana Plaza catastrophe in Bangladesh. Anne Trebilcock’s contribution to the above-mentioned special issue, “The Rana Plaza Disaster Seven Years on: Transnational Experiments and Perhaps a New Treaty?” (2020), describes the institutional and legal developments that sought to address structural failures in global value chains following the catastrophe. She notes their limited outcomes and points to further attempts to secure a more solid body of protective transnational law through the ongoing discussions about the establishment of a binding instrument on business and human rights. It is saddening to conclude this brief journey through 100 years of the ILR’s articles on international labour law with reference to a catastrophe as a catalyst for change. With some variation on Mahaim’s reliance on the peace-making objective in 1919, and Valticos’s emphasis on social justice in 1979, ILR publications continue to demonstrate the importance of international labour standards and their changing role in the challenge of maintaining the life, health and spirit of workers, as well as workers’ sense of justice and solidarity in their communities.

4. Conclusion

Bridging the two tracks of legal research in the ILR, Alain Supiot articulates a vision of labour law informed by universal human rights that resonates with the view that Mahaim expressed almost 90 years earlier. In his 2010 article “A Legal Perspective on the Economic Crisis of 2008”, Supiot, a member of the ILO’s Global Commission on the Future of Work, reflects upon the neoliberal goal of liberating markets from state accountability that led to the global crisis and its devastating consequences for working people. Drawing some lessons for labour law, he harkens back to “the spirit of Declaration of Philadelphia which, towards the end of the Second World War, aimed to harness the economy and finance in furtherance of the principles of human dignity and social justice” (Supiot, 160). Law, labour rights and standards – the ILO’s core business – are, he argues, critical institutional foundations for markets if we want to achieve lasting peace through social justice. Supiot’s account demonstrates that the ILO’s motto “Labour is not a commodity” and the purpose of labour law to humanize the market are as apt today as they ever were in the past.

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