

Introduction: Transnational futures of international labour law

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Abstract. *This Special Issue on transnational labour law is placed in the context of the ILO centenary and the challenge of achieving the objective of decent work in a new century, under distinct transnational pressures. The author argues that international labour law, as the normative core of transnational labour law, can play a crucial role – in conjunction with a wide range of actors and the ILO in its standard-setting and convenor capacities – in addressing this challenge and in re-shaping the transnational legal architecture.*

Keywords: *international labour law, transnational labour law, globalization, trade, normative conflict, governance, social justice, role of ILO.*

1. The ILO centenary

In 2019, the ILO celebrated its centenary. Created in 1919 under the Treaty of Versailles, as part of the League of Nations, the ILO survived to become a specialized agency of the United Nations (UN) in 1946. Founded on the conviction that “universal and lasting peace can be established only if it is based upon social justice” (Preamble to the ILO Constitution), the ILO has pursued the improvement of working conditions worldwide, largely – but not exclusively – through international labour standard-setting and monitoring. Perhaps its most ambitious rethinking is found in its move beyond a narrow vision of its mandate, as that of regulating labour law through the prism of the employment relationship, to promoting “decent work for all”.

Yet the ILO faces staggering “decent work” challenges as it moves into its second century and seeks to make its constitutional mandate to promote social justice a reality for workers. These challenges link the global South with the global North in strong and, at times, unexpected ways. An illustration of this is provided

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by construction workers in France, who are protected by domestic labour laws banning the use of asbestos that were unsuccessfully challenged by Canada before the World Trade Organization (WTO).¹ The protective legislative initiatives taken by the French State on behalf of those construction workers are inseparable from the initiatives of construction workers in many parts of the global South who handle hazardous materials without protective equipment. They are also linked to informal economy waste pickers in the global South who recycle precious metals from technology shipped from globalized industries in the global North (Khan, 2018). Another example is provided by the COVID-19 pandemic, where the low-waged, disproportionately racialized “essential” workers in the global North – who may or may not be migrant workers – labour while the majority of society shelters in place. The ability of people to shelter in place – and the massive unemployment caused and the care burden that it reveals – requires redistributive policies such as state-provided income replacement and wage maintenance benefits. States in much of the global South can ill-afford to offer anything comparable; most workers are simply unable to survive generalized confinement policies without a multilateral or regional commitment to fund global social protection (Blackett, 2020). The contemporary global environment makes the ILO’s foundational social justice objectives – to be pursued for their own sake and not only to prevent war (Corbett, 1971, p. 197) – seem every bit as relevant, urgent and inspiring today.

2. Understanding transnational labour law

These concrete global governance challenges are transnational. In other words, they intricately link work beyond national borders, across the global North and the global South. The challenges concern a broad range of actors, including but extending beyond individual States. They require attentive responses: approaches that help actors to move beyond zero sum analyses of globalization’s winners and losers. Can trade and decent work be reconciled? Can the growth and broader benefits promised by globalization be shared? How might state and tripartite-plus actors (Novitz, 2019; Mundlak, 2019) foster a regulatory climate to promote equitable, sustainable sharing? More specifically, how might international labour law help a broad range of actors to operate transnationally to make globalization fair and build what UN Secretary-General António Guterres has referred to as a “New Global Deal”? (Guterres, 2020).

As argued elsewhere, transnational labour law has 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. The field critically encompasses the actions of transnational enterprises, labour federations, civil society and other actors. Moreover, transnational labour law does not stop where national labour law begins: the two are deeply intertwined and challenge each other. Transnational labour law is a form of multi-level govern-

¹ WTO: *European Communities – Measures affecting asbestos and asbestos-containing products*, Report of the Appellate Body, WT/DS135/AB/R, Geneva, 2001.

ance, including the international, the regional, the national and the shop floor: its ability to address challenges of economic interdependency is similarly enmeshed with its ability to acknowledge and deal with complexity, diversity and asymmetries across time and space – among States, across uneven regional development, among vastly differently empowered institutions and actors. It holds no monopoly on either the rise of legal centrism through the prevalence of “rule of law” doctrines, or the expansion of pluralist, reflexive new governance methods. Its distinctiveness lies in its capacity to be counter-hegemonic, and promote social justice (Blackett and Trebilcock, 2015, p. 4).

The framing of this Special Issue around the transnational futures of international labour law seeks to underscore the particularly important role that international labour law plays. It provides the normative core of transnational labour law, which draws much of its strength and legitimacy from the painstakingly built and carefully consolidated corpus of international labour standards, currently being culled and honed. International labour law takes the transnational beyond a “collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions” (Halliday and Shaffer, 2015, p. 11). To promote social justice, it must often dislodge or unsettle existing, asymmetrical legal relationships (Blackett, 2019a). Of course, this means that international labour standards may become the subject of contestation and push-back (La Hovary, 2015) – precisely because the norms challenge structural inequality. Efforts to ensure that international labour Conventions are ratified as a matter of priority have also reinvigorated the slower, but decidedly more deliberate, new standard-setting of the past decade.²

Is it desirable or even possible to centre international labour law while de-centring the ILO itself? A transnational labour law framework recognizes that the ILO is far from being the only relevant actor in attempts to deepen the interplay between economic and social architecture beyond domestic governance. Moreover, by definition, international labour law’s transnational uses will span a broad range of institutional settings, from regional human rights courts to multi-lateral trade and financial institutions and corporate social responsibility initiatives. However, transnational experimentation quickly confirms the significance of the ILO’s convenor function, and the dialogic role that it enables tripartite and other interested actors to play (Maupain, 2013; Boisson de Chazournes, 2015; Blackett, 2019a). The ILO is particularly well placed to create spaces in which social-justice-based alternatives may emerge.

3. The commemorative course

This Special Issue emerges from an initiative to commemorate the centenary of the ILO. With the support of a 2016 Pierre Elliott Trudeau Foundation Fellowship, I had the honour to offer a bilingual course at the McGill University Faculty of

² In other words, although it may be a source of concern that only two international labour Conventions have been adopted in the past decade, both have been propelled forward by strong communities of historically marginalized groups who have identified the lacunae in international labour law and insisted on meaningful inclusion (see Blackett, 2019a and 2019b; Trebilcock, 2019).

Law entitled “The transnational futures of international labour law – *La justice sociale dans le monde du travail*”, also known by its Twitter hashtag, #TFILL.³ Through the course, we engaged closely with the ILO’s past and encouraged thoughtful, sustained reflection about the ILO’s future.

McGill University was a historically appropriate site for the course, as it was the ILO’s wartime Canadian home, from 1940 to 1948.⁴ The 1944 constitutional annex adopted at the 26th Session of the International Labour Conference, held in Philadelphia (the Declaration of Philadelphia), was drafted in Montreal, re-affirming the “truth” of the 1919 ILO Constitution that “lasting peace can be established only if it is based on social justice”.⁵ During that time, the ILO prepared its post-war policy and its approach to decolonization, readied itself for an outward-looking approach as part of a soon-to-emerge UN system and articulated the relationship between international economic policy and international labour law. Clarence Wilfred Jenks, a respected international lawyer at the centre of much of this work, who went on to become the sixth Director-General of the ILO, delivered the following words as part of a thank-you speech to the Canadian Government: “This is hallowed ground in the history of the ILO. Here we kept alive in a world at war the ideal and practice of international collaboration in pursuit of social justice in a world of freedom” (cited in Blackett, 2018, p. 1).

The Winter 2019 “Transnational futures of international labour law” course was a collective effort, characterized by a rich mix of presentations and comments to registered students (who also had the opportunity to comment on the speakers’ presentations) from leading and emerging scholars from around the world, high-ranking international labour officials, independent UN experts and several dignitaries, including a former justice of the Supreme Court of Canada, the Honourable Louis LeBel, and the then Canadian Minister of Employment, Workforce Development and Labour, the Honourable Patty Hajdu. ILO Director-General Guy Ryder opened the course, recalling the importance of alliances with academic friends concerned about the ILO and the future of work. Several of the participants were also members of the Pierre Elliott Trudeau Foundation, which honours the legacy of a prime minister who epitomized Canada’s constructive leadership role in the world. Each session was also webcast live and was joined by a vast group of participants worldwide. A web-archive of the lectures remains available and serves as a source for ongoing knowledge-sharing and reflection on international labour law.

³ I wish to acknowledge the sterling support of Emily Painter, BCL and LLB graduate of McGill University, scientific coordinator of the LLDRL throughout the implementation of the #TFILL course. I also wish to acknowledge the support of LLDRL postdoctoral researcher, Dr Liam McHugh Russell, currently Assistant Professor, Schulich School of Law, Dalhousie University. Finally, several research assistants were pivotal to the #TFILL initiative. They include Si Chen, doctoral teaching fellow on the #TFILL initiative; Daniel Crespo, LLM candidate at McGill; Lian Francis, Sydney Lang, Morgan McGinn and Cassandra Richards, all BCL and LLB/JD degree candidates or graduates of McGill University.

⁴ Moreover, in 1946, the International Labour Conference was held at the University of Montreal.

⁵ The text of the ILO Constitution and its Annex are available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:62:0::NO::P62_LIST_ENTRIE_ID,P62_LANG_CODE:2453907,en [accessed 18 September 2020].

4. Contributions

This Special Issue builds on a number of the stellar presentations on the course. Each represents a distinct, important dimension of the emerging field of transnational labour law. As several of the articles in this Special Issue illustrate, international labour law has played a pivotal, and often creative, role in reshaping the transnational legal architecture.⁶

Tonia Novitz leads the Special Issue with the strong affirmation that “we ignore at our own peril the fact that ‘sustainable development’, which is the new lingua franca of international policy-making, is now taken as embracing and incorporating the protection of labour standards”. Her article, entitled “Engagement with sustainability at the International Labour Organization and wider implications for collective worker voice”, offers a rigorous yet generous assessment of the pitfalls and perils associated with the labour “pillar” of sustainable development. From just transitions to worker voice, Novitz considers the UN’s Sustainable Development Goals (SDGs) in relation to international labour law, stepping beyond the obvious SDG 8 on decent work to address at times uneasy relationships (for example, can trade unions simply be subsumed within “civil society” under SDG 16?). While acknowledging the limits, she invites the ILO to engage more closely with the SDGs, and considers them in the context of the ILO centenary initiative on the future of work. The ILO’s proposed universal labour guarantee and the normative prioritization of safety and health at work are foregrounded. For Novitz, sustainability could serve as a fruitful framework to enhance international labour standards and broaden worker voice.

Sophie Robin-Olivier’s contribution, entitled “The relationship between international law and European labour legislation and its impact on the development of international and European social law”, offers a close and careful examination of what she refers to as the discrete but notable influence of international labour law on the law of the Court of Justice of the European Union. Robin-Olivier focuses on the Court’s social law jurisprudence, setting out a typology through which to assess the sources of law – from inspiration, to autonomy, to embedding or nesting, and finally to mediation. She seeks to capture the subtle yet discernible movement away from the occasional referencing of international labour law in a decision, and towards the recognition of international labour law as an element of European Union law. For Robin-Olivier, this is a critical indication of the emergence of transnational labour law, carving out a necessary place for the protection of workers in the context of globalization.

In “On the International Labour Organization and prison labour: An invitation to recalibrate”, Faina Milman-Sivan and Yair Sagy provide a timely example of the ways in which international labour law may be nudged into becoming responsive to transnational developments. They call on the ILO to move past its reification of the historically specific and troubled public/private prison labour dichotomy. They offer a close critique of the observations of the Committee

⁶ A 2019 Special Symposium in Volume 113 of the *American Journal of International Law Unbound*, which I guest edited with Laurence Helfer, comprises a series of short contributions by other presenters at the Transnational Futures of International Labour Law course.

of Experts on the Application of Conventions and Recommendations on the Forced Labour Convention, 1930 (No. 29). Their assessment does not lead them, however, to follow some ILO Members' call to restrict Convention No. 29's fundamentally counter-hegemonic, normative demands on prisons in the private sector. Rather, given the stated goals of transcending abuses in prisons and re-centring rehabilitation and prisoners' well-being, they question the exemption of public prisons from the prohibition of forced labour. Their alternative, a "hybrid framework of prison labour", captures how important it is to international labour standards to acknowledge and unsettle the transnational reality of contemporary prison labour.

Bernard Duhaime and Éloïse Décoste offer a close analysis of one of the transnational uses to which regional human rights bodies apply international labour law. They encourage the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights to be attentive to developing consistent rules for deciding whether concurrent proceedings exist, and for ensuring that the specialized interpretations emerging from ILO supervisory bodies build coherent decision-making and enhance the normative legitimacy of international decision-making. They understand this normative sharing to be part of the process encouraged by the ILO's first Director-General, Albert Thomas, teaching the world to speak something of a common language on labour standards (Thomas, 1948, p. 22).

The challenge of the regulation of contemporary global value chains is epitomized in the 2013 Rana Plaza disaster in Bangladesh, as parsed by Anne Trebilcock in her article "The Rana Plaza disaster seven years on: Transnational experiments and perhaps a new treaty?" Acknowledging that changed corporate behaviour respectful of human rights is likely to emerge only with increased corporate accountability, Trebilcock chronicles the creative transnational initiatives that were crafted in response to the disaster with the significant participation of the ILO, in its convenor function. Her assessment is attentive to the deep limits of each initiative, and turns instead to an analysis of the evolving UN draft for a binding instrument on business and human rights. The treaty is not a panacea. Moreover, Trebilcock acknowledges that the treaty process itself remains "captive to a statist model, from adoption to ratification", a central problem that transnational labour law seeks to escape.

In "The trade-labour relationship in the light of the WTO Appellate Body's embrace of pluralism", Joanna Langille turns her attention to how the multilateral trade regime can act to reduce the likelihood of normative conflict in labour law. She offers a careful discussion of recent WTO Appellate Body reports to show the attentive manner in which policy space has been carved into decision-making. Although international labour standards may be helpful, her focus is ultimately on preserving domestic regulatory autonomy in labour law, and affirming States' right to regulate.

Lastly, in "On social regionalism in transnational labour law", I question the assumption that the appropriate governance level for labour is the domestic level and that regional trade agreements' forays into addressing labour should focus on ensuring domestic enforcement of labour law. Through a detailed critical analysis of the first dispute resolution report to emerge from a regional free

trade agreement, I urge a retreat from methodological nationalism and a more fulsome embrace of the regional as an appropriate governance level for labour. Not only does this shift concern how international labour law is marshalled in treaty interpretation; it also affects the design of regional agreements, including the scope to consider their capacity to foster transnational distributive justice.

5. Conclusion

Cumulatively, the contributions in this Special Issue offer sharp assessments of an emerging transnational labour law. The sheer breadth of sources – from UN SDGs to corporate codes and trade agreements – is instructive. These sources invariably intersect with international labour law and draw on it to assist in interpretative mediations. This includes understanding transnational action as interpreting treaty provisions to preserve space for domestic regulatory capacity in labour law (Langille), offering a way to ensure that international obligations can in fact be respected by some States.

The contributions to this Special Issue are, all but one (Trebilcock), weighted in favour of analyses of supervisory or adjudicative bodies, which assume varying interpretative roles. However, the question of the relationship between interpretation and the possible need to renegotiate or otherwise recalibrate norms themselves – according to Trebilcock in particular but also to Novitz and Blackett – is part of what transnational reflection brings to the foreground. In the case of Milman-Sivan and Sagy, moreover, the call is to rethink the interpretative direction of a fundamental principle of international labour law. States, then, are far from eclipsed (Dukes, 2017), but the extent to which transnational framing enables tripartism to be enhanced and broadened to secure the mediations necessary to address transnational challenges remains largely unanswered. The power of tripartite and other actors is asymmetrical, but by acting across governance levels, in governance spaces that vary from regional courts willing to invoke international labour law – as in Duhaime and Décoste and Robin-Olivier – to corporate social responsibility initiatives with ILO involvement – as in Trebilcock – these actors offer the possibility of building or reviving sites for social justice.

It is not hard to identify the potential risks of any turn away from a classic approach to international labour law that emphasizes the hierarchy of norms in a Westphalian understanding of state authority and action. But it is hard to escape the nostalgia for a unity that many States of the global South never quite enjoyed and that it is increasingly perilous to reify anywhere with rising nationalist populism inhabiting the seats of majoritarian state power. The work of social movements – at least implicit in the contributions to this Special Issue – is a pillar upon which the transnational uses of international labour law stand.

Ultimately, each contribution offers prescient assessments that contribute to the normative thickening of transnational labour law, through international labour law. This Special Issue's collective contribution to that endeavour lies in its resolve to take the ILO seriously, and in particular to engage in a thorough and critical manner with the remarkable, capacious and evolving normative corpus of the century-old ILO. Although the demands on them may be different from

those in 1919, the ILO and international labour law are as relevant as ever in pursuing a shared social justice mandate, urgently, purposefully and creatively, over the next century.

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