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# Corporate Self-regulation: Political Economy, State Regulation and Reflexive Labour Law

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# CORPORATE SELF-REGULATION: POLITICAL ECONOMY, STATE REGULATION AND REFLEXIVE LABOUR LAW

Harry Arthurs\*

## *Introduction*

In his introductory essay, Brian Bercusson notes:

Actors at disparate levels ... are linking up to form novel regulatory approaches ... The efficacy of these emerging forms of labour regulation, their democratic legitimacy, the goals and values underlying them, and the direction of reform are all in dispute.<sup>1</sup>

The ambition of this chapter is to explore one such “novel regulatory approach” – reflexive labour law – and to assess not only its efficacy, legitimacy and normative aspirations, but also its intellectual origins, assumptions and implications.

The growing corpus of reflexive labour law scholarship comprises foundational essays by Gunther Teubner,<sup>2</sup> an extensive body of work by Drs. Rolf Rogowski and Ton

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\* University Professor Emeritus and President Emeritus, York University. I am grateful to Freya Kodar and David Doorey for their research assistance, to the Social Sciences and Humanities Research Council of Canada for its financial support, and to the Hugo Sinzheimer Institute and the University of Amsterdam, my hosts at a conference on Reflexive Labour Law in 2001, where I presented an earlier version of this essay.

<sup>1</sup> This volume at p. 11.

<sup>2</sup> See e.g. G. Teubner, “The Transformation of Law in the Welfare State” and “After Legal Instrumentalism? Strategic Models of Post-regulatory Law” in G. Teubner (ed.) *Dilemmas of Law in the Welfare State* (Berlin/NY: DeGruyter, 1985); “Industrial Democracy Through Law” in T. Daintith and G. Teubner *Contract and Organization: Legal Analysis in the Light of Economic and Social Theory* (Berlin/NY: DeGruyter, 1986); *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law* (Berlin/NY: DeGruyter, 1987); *State, Law and Economy as Autopoietic Systems: Regulation and Autonomy in a New Perspective* (Milan: Giuffrè, 1992) (with Alberto Febbrajo); *Law as an Autopoietic System* (London: Blackwells, 1993).

Wilthagen as well as several volumes edited by them,<sup>3</sup> and a number of books and articles which engage with their work and Teubner's.<sup>4</sup>

While reflexive law belongs to a family of post-modern socio-legal theories which dispute the state's centrality in the administration of law's empire, it is distinguished by several controversial features: its claim that legal and other social systems are closed and autonomous; its demarcation of system boundaries on the basis of functional differentiation rather than stipulated or *a priori* characteristics; its identification of legal discourse as the trigger for a binary distinction between law and non-law; its

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<sup>3</sup> Their English-language publications include: R. Rogowski and T. Wilthagen, "Reflexive Labour Law: An Introduction" in R. Rogowski and T. Wilthagen (eds) *Reflexive Labour Law: Studies in Industrial Relations and Employment Regulation* (Deventer/Boston: Kluwer, 1994); M. Aalders and T. Wilthagen, "Moving Beyond Command-and-Control: Reflexivity in the Regulation of Occupational Safety and Health and the Environment" (1997) 19 *Law and Policy* 415; R. Rogowski, "Autopoietic Industrial Relations and Reflexive Labour Law" in T. Wilthagen (ed.) *Advancing Theory in Labour Law and Industrial Relations in a Global Context* (Amsterdam: North-Holland Press, 1998); R. Rogowski, "Industrial Relations as a Social System" (2000) 7 *German Journal of Industrial Relations* 97; R. Rogowski, "The Concept of Reflexive Labour Law: Its Theoretical Background and Possible Applications" in J. Priban and D. Nelken, *Law's New Boundaries: The consequences of legal Autopoiesis* (Aldershot: Ashgate/Dartmouth, 2001).

<sup>4</sup> See e.g. C. Barnard, S. Deakin, R. Hobbs, (2005) 'Reflexive law, corporate social responsibility and the evolution of labour standards: the case of working time', in O. De Schutter, and S. Deakin. (eds.) *Social Rights and Market Forces: Is Open Coordination the Future for European Employment and Social Policy?* (Brussels: Bruylant, forthcoming) [available at: <http://www.cbr.cam.ac.uk/pdf/wp294.pdf>]; J. Cohen *Regulating Intimacy: A New Legal Paradigm* (Princeton U. Press, 2002); H. Collins "Is there a Third Way in Labour Law?" in A. Giddens (ed), *The Global Third Way Debate* (Blackwell Pub., 2001) 300; D. Doorey, "Who Made That? Influencing Foreign Labour Practices Through Reflexive Domestic Disclosure Regulation" (2006), 44(1) *Osgoode Hall L.J.* [forthcoming]; O. Lobel, "The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought" (2004) 89 *Minn. L.R.* 262 esp at 328 – 343; D. O'Rourke "Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring" (2003) 31 *Policy Studies J.* 1; S. Smisman, "Reflexive Law in Support of Directly Deliberative Polyarchy: Reflexive-Deliberative Polyarchy as a Normative Frame for the OMC" in O. De Schutter & S. Deakin (eds.), *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?* (Brussels, Bruylant) [forthcoming].

insistence on the autopoietic - self-referential, self-regulating and self-reproducing - character of law; and its novel hypothesis that law acts not so much by imposing itself on other social domains directly as by regulating their self-regulatory processes as well as its own.<sup>5</sup>

I will explore some of these ideas in greater detail below. First, however, I will sketch out three case studies of self-regulation in the labour sphere which will hopefully bring into focus these features of reflexive law. Next, I will consider reflexive labour law from the perspective of legal theory and political economy, with particular emphasis on the marginalization of the state in both domains. And finally, I will explore the possibility that the normative implications of reflexive labour law may turn out to be even more important than its descriptive insights

### ***Three case studies***

#### *Case study no. 1 - Voluntary codes of conduct*<sup>6</sup>

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<sup>5</sup> See generally N. Luhmann, *Essays on Self-Reference* (New York, Columbia University Press, 1990); G. Teubner (ed.) *Autopoietic Law: A New Approach to Law and Society* (Berlin/New York: Walter de Gruyter, 1988); J. Priban and D. Nelken (eds.), *Law's New Boundaries* supra note 3. For a root-and-branch critique see A. Beck, "Is Law an Autopoietic System?" (1994) 14 *Oxford J. of Legal Studies* 401.

<sup>6</sup> For a fuller development of these ideas, and more extensive references, see H.W. Arthurs, "Private Ordering and Workers' Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation" in J. Conaghan, K. Klare, M. Fischl (eds.) *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford: Oxford University Press, 2001) and "Corporate Codes of Conduct: Profit, Power and Law in the Global Economy" in W. Cragg (ed.) *Ethics Codes, Corporations and the Challenges of Globalization* (Edward Elgar Press, 2005).

As has been widely remarked, many global corporations have recently adopted voluntary codes of conduct. Labour standards feature frequently in these codes, which also often encompass environmental practices, commercial honesty, consumer protection and integrity in dealings with government officials. What does this sudden upsurge in the use of voluntary codes signify? Opinions vary: codes represent the principled acceptance by corporations of their social obligations; they are a fig leaf used to conceal corporate exploitation; they fill a regulatory gap caused by the inability of states to regulate the actions of corporations outside their own boundaries; they signal an innovative shift in the modalities of market regulation from a pure state-based command model to new hybrid models involving a mix of public and private initiatives; they are a concession wrung from governments and corporations as a result of pressures generated by political and social actors concerned about exploitation and abuse; and - perhaps - they are evidence of the existence of autopoietic systems and of the ubiquity of reflexive law.

The use of the term “voluntary” to describe these codes requires some explanation. They are typically adopted without compulsion of law; thus in a juridical sense they are indeed voluntary. But in a practical sense, they are generally less so. They are often adopted only after a corporation has been accused of exploiting or abusing its workers, either at home or abroad. Adverse publicity ensues, and the corporation is confronted by threats of moral, economic or political sanctions such as consumer boycotts, sympathetic industrial action, denial of government loans and procurement contracts, or

(infrequently) legislation barring its goods from market. If these threats are deemed credible, the corporation must respond. One response is to adopt a “code” which declares its commitment to respect fundamental labour rights such as freedom of association, a safe work environment and the absence of coercion and discrimination. In a variant of this scenario, corporations which are not themselves the immediate target of censure or pressure, but are potentially vulnerable to it, may proactively adopt a code developed by a sectoral organization, an international agency, a national government, or their professional advisors. Or they may adopt a code entirely on their own initiative, in an effort to secure whatever market or moral rewards accrue to exemplars of corporate social responsibility. In a final variant, corporations may be drawn into collaboration with NGOs in drafting, administering and even monitoring a code.<sup>7</sup> To reiterate: in these scenarios, codes are “voluntary” in the sense that corporations do not adopt them under compulsion of state law. But of course they are also “non-voluntary”, in the sense that they are adopted out of fear of sanctions or hope of reward.

Whether voluntary or not, however, corporate codes are indisputably “corporate”. That

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<sup>7</sup> For an overview of codes and their contents see K. Gordon and M. Miyake, *Deciphering Codes of Corporate Conduct: A Review of their Contents* Paris: OECD, Directorate for Financial, Fiscal and Enterprise Affairs, Working Papers on International Investment No. 99/2 (1999); Report of the Working Party of the Trade Committee of the Trade Directorate, *Codes of Corporate Conduct - An Inventory*, Paris: OECD TD/TCWP(98)74, 1999. For a discussion of labour codes in particular, see United Nations Commission on Trade and Development (UNCTAD) *World Investment Report 1994 - Transnational Corporations, Employment and the Workplace* (New York/Geneva: United Nations, 1994) at 349 ff.; ILO, *Overview of Global Developments (Working Party on the Social Dimensions of the Liberalization of Trade, Report to the International Labour Office Nov. 1998) GB.273/WP/SDL/1* found at [www.ilo.org.ch/public/english/20gb/docs/gb273/sdl-1.htm](http://www.ilo.org.ch/public/english/20gb/docs/gb273/sdl-1.htm); J. Diller “A Social Conscience in the Marketplace? Labour Dimensions of Codes of Conduct, Social Labelling and Investor Initiatives” (1999) 138 *International Labour Review* 99.

is to say, their drafting, administration and enforcement reflect the fact that they originate in the realm of private, rather than public, regulation.<sup>8</sup> This shapes their architecture in several important ways. First, their substantive provisions are typically vaguely worded, perhaps to allow for their application in diverse economic, socio-cultural and legal contexts; as a result, it is difficult to identify clear violations. Second, responsibility for code administration is seldom fixed on any specific corporate officer, nor are procedures mandated whereby adherence is promoted or compliance monitored; as a result, corporations often fail to publicize codes internally, train their employees to respect them, clarify vague language through information bulletins, or report on overall code compliance to their boards of directors.<sup>9</sup> Third, sanctions for non-compliance are seldom specified, nor is machinery established whereby sanctions can be imposed on non-complying employees, subsidiaries, suppliers or affiliates. Given these characteristics, codes often appear to be - and are - ineffectual, if not actually counter-productive.<sup>10</sup> This is obviously not to suggest that all corporations with codes

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<sup>8</sup> See generally M. Priest, "The Privatization of Regulation: Five Models of Self-Regulation" (1997) 29 *Ottawa Law Review* 233; N. Gunningham and J. Rees, "Industrial Self-Regulation: An Institutional Perspective" (1997) 19 *Law and Policy* 364.

<sup>9</sup> A recent survey of major Canadian companies doing business abroad discloses that over 85% professed to have a written document dealing with corporate ethics relating to labour, environmental and business practices, including about 50% which described such statements as "rules of conduct" or "guidelines". However, over 60% did not train their staff to administer such documents; virtually all those which did spent 4 hours per year or less on such training; that only 15-25% of such companies applied any aspect of their ethics codes to suppliers; only 2-12% reported to their Boards of Directors on compliance; and similarly low rates of Board oversight were exercised even with regard to the firms' own practices. Bribery stands apart as receiving somewhat more intensive and extensive scrutiny. KPMG, *Ethics Survey 2000 - Managing for Ethical Practice* <http://www.kpmg.ca/english/services/docs/fas/ethicssurvey2000e.pdf>.

<sup>10</sup> A. King and M. Lenox, "Industry Self-Regulation Without Sanctions: The Chemical Industry's Responsible Care Program" (2000) 4 *Academy of Management Journal* 698.

are guilty of egregious behaviour: only that codes *per se* do not seem to not seem to be an efficient or contributing cause of higher labour standards.<sup>11</sup>

However, reflexive law makes us sensitive to the possibility that the very appearance of a code may be evidence of a pattern of adaptive behaviour, of a learning process which over time will reshape the law of the corporation and its workplaces. Indeed, while I have accurately described the first generation of corporate codes, I believe, a second generation of codes is said to be emerging. This second generation is characterized by several innovations, designed to give greater credibility to codes, if not actually to enhance their effectiveness. First, transnational advocacy organizations - unions and social movements - are claiming a greater role in the formulation and administration of codes. Second, the monitoring or auditing of code compliance has become a discrete and increasingly professionalized function, often contracted out to specialist commercial or non-profit agencies which operate at arm's length from the corporation itself. Third, in a few cases, senior management and boards of directors are becoming more heavily invested in the exercise: responsibilities are fixed on a compliance officer and the code itself becomes a standing item on the directors' agenda. Fourth, proactive steps are

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<sup>11</sup> Of course, this is an empirical question in each case, and therefore likely to involve controversial issues of evidence interpretation. For a rather poignant example of such a controversy, contrast the honestly optimistic view of the chair of the Independent Monitoring Council responsible for ensuring implementation of Mattel Inc.'s "Global Manufacturing Principles" with the critical comments of the representative of an independent monitoring group (Asia Monitor Resource Centre) concerning non-compliance with those principles in Mattel factories in Thailand. See S. P. Sethi, "Corporate Accountability through International Codes of Conduct - Theoretical Implications and Challenges to Cross-Cultural Applications: The Case of Mattel, Inc." (Sao Paolo: Second World Congress, International Society of Business, Economics and Ethics - 'The Ethical Challenges of Globalization', July, 2000, unpublished) and S. Frost "Factory Rules versus Codes of Conduct: Which Option makes Sense for Business?" (2000) 2:4 Human Rights Dialogue 3 (Carnegie Council on Ethics and International Affairs).

being taken to ensure that suppliers and other elements in the production chain do not embarrass the company by violating code standards. Fifth, less frequently, the language of the code is re-written to provide more explicit guarantees of a broader range of employment standards, occasionally even including a “living wage” or a “fair wage”. And finally, sanctions are built into some code regimes in the form of compliance marks or labels whose presence or absence will trigger positive or negative consumer reactions.

It is too early to assess what practical consequences - if any - might flow from these second generation corporate codes. However, a third generation may be just over the horizon. One distinguishing feature of third generation voluntary corporate codes would be that they cease to be purely “corporate”; states and civil society actors would be equal partners or even prime movers in their drafting, promulgation, administration and enforcement.<sup>12</sup> The other is that they would no longer be purely “voluntary”; they would be mandated and enforced by law. Legislation has been proposed in both the United States and Australia which would require that all corporations doing business abroad adopt a code, ensure its transparent administration, and be subject to sanctions for non-compliance in the form of loss of access to government export loan guarantees,

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<sup>12</sup> R. O'Brien, “NGOs, Global Civil Society and Global Economic Regulation” and R. Mayne, “Regulating TNCs: The Role of Voluntary and Governmental Approaches” in Picciotto and R. Mayne, *Regulating International Business - Beyond Liberalization* (New York: St. Martin's Press, 1999); K. Gordon, “Rules for the Global Economy: Synergies between Voluntary and Binding Approaches” Unpublished paper, Conference on Corporate Citizenship: Linking CSR business strategies and the emerging international agenda (London, 8-9 November, 1999).

procurement contracts and other forms of government support.<sup>13</sup> And several legal scholars and advocates have suggested that corporate codes might be used by courts as evidentiary or normative standards designed to establish, diminish or eliminate corporate civil or criminal liability for wrongful conduct, even though the codes themselves are not directly enforceable as such.<sup>14</sup> But so far, neither legal approach has made much headway.

If indeed a third generation of codes does emerge, with the imprimatur of state law and the involvement of civil society and state - as well as corporate - actors, this would represent a genuine innovation. It would also constitute a convenient site for empirical investigation of the hypothesis that regulatory efficacy will increase as successive generations of codes move up a rising gradient of state involvement. But we may not be able to investigate this hypothesis for some time yet. State-mandated codes so far remain below the horizon and, for reasons canvassed in a subsequent section of this

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<sup>13</sup> In the United States, see the Corporate Code of Conduct Act, HR 4596 IH (Rep. McKinney) introduced June 7, 2000. Complying corporations would receive preferential treatment in the awarding of federal contracts, participation in trade and development programs and access to export-import credits and loan guarantees. In Australia, a similar Corporate Code of Conduct Bill 2000 was introduced by Senator Vicki Bourne as a private member's bill. See <http://search.aph.gov.au/search/parlinfo.ASP?action=browse&Path=legislation/>. Neither is likely to be enacted in the foreseeable future.

<sup>14</sup> See e.g. for international law perspectives: N. Horn, *Legal Problems of Codes of Conduct for Multinational Enterprises* (Deventer: Kluwer, 1980). And for domestic perspectives: see e.g. H.L. Pitt & G. Groskuafmanis, "Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct" (1990) 78 *Georgetown Law Journal* 1559; C.J. Walsh & A. Pyrich, "Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul" (1995) 47 *Rutgers Law Review* 605 Winter 1995; K. Webb, "Voluntary Approaches, the Environment and the Law: A Canadian Perspective" in C. Carraro and F. L  v  que (eds.) *Voluntary Approaches in Environmental Policy* (Deventer: Kluwer, 1999); S. Lu, "Corporate Codes of Conduct and the FTC: Advancing Human Rights Through Deceptive Advertising Law" (2000) 38 *Columbia Journal of Transnational Law* 603.

chapter, they are unlikely to surface soon. Codes, therefore, remain no more than a potentially interesting example of how reflexivity and change may occur in a closed normative system.

### *Case study no. 2 - Ratcheting Labour Standards*

An important recent academic article has proposed that leading corporations should commit themselves to “ratcheting labour standards” permanently upward. The essence of this “RLS” proposal is to create a system for

... monitoring and public disclosure of working conditions [which would] ... create official, social and financial incentives for firms to monitor and improve their own factories and those of their suppliers.

This would be accomplished by creating

... an easily accessible pool of information with which the best practices of leading firms could be publicly identified, compared and diffused to others in comparable settings....The combination of firm-level monitoring and an infrastructure for pooling results would help to set provisional minimum standards of corporate behaviour, upon which competition - driven by social and regulatory pressures - would generate improvements that then “ratchet” standards upwards.<sup>15</sup>

The key features of the RLS proposal - transparency, competition, continuous improvement and sanctions (“social and regulatory pressures”) - mark it as worthy of attention from students of reflexive labour law. However, it has already received attention - unflattering attention - from labour and academic commentators, who have

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<sup>15</sup> A. Fung, D. O’Rourke & C. Sabel, “Realizing Labor Standards” (2001) <http://bostonreview.mit.edu/BR26.1/fung.html>; see also C. Sabel et al “Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace” (2000) <http://www.law.columbia.edu/sabel/papers/ratchPO.html>.

dubbed it “wishful thinking”.<sup>16</sup> As one such commentator has noted, there is little empirical evidence that RLS will in fact produce the desired results:

...of 61 factories “certified” by SA8000 [a standard such as those proposed by the authors of RLS], 34 of them are in China. In the SA8000 code there is very strong language about freedom of association. If any workers in those 34 factories were to try and exercise the rights spelled out in the code, they would find themselves in jail or an insane asylum.<sup>17</sup>

At the very least, then, RLS raises in different form issues similar to those posed by the “third wave” of voluntary codes: what is the relationship between self-regulation and state regulation? to what extent is it possible to think about RLS in isolation from the political economy and legal system of each state in which this approach is to operate? For example, if states tolerate or even insist upon a low level of workers’ rights, how likely are corporations operating there to adhere to a higher standard even when formally committed to RLS? And, conversely, if states insist on decent labour standards, what need is there for RLS?<sup>18</sup>

The RLS proposal itself is less than clear on these questions. Its proponents insist that RLS “...aims not to deregulate, but rather to redeploy public power in ways that extend

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<sup>16</sup> M. Levinson, “Wishful Thinking” <http://bostonreview.mit.edu/BR26.1/levinson.html>. Cf. J. Murray, “The Sound of One Hand Clapping? The ‘Ratcheting Labour Standards’ Proposal and International Labour Law” (2001), 14 *Aust. J. Labour L.* 306

<sup>17</sup> Levinson, *supra* note 16.

<sup>18</sup> A less polemical, recent empirical study of codes operating in four Chinese footwear factories which supply footwear to US-based transnational corporations concluded: “the absence of de facto supporting institutions and norms at the national and local level in China militated against workers’ awareness and support for workers’ rights, as enshrined in labour legislation and the codes of practice. For the codes to be effective ... institutional supports in the form of labour law enforcement, some kind of legitimate, independent workers’ institution, and procedures for skill enhancement, will be necessary....” S. Frenkel, “Globalization, Athletic Footwear Commodity Chains and Employment Relations in Southern China” (2001) 22 *Organizational Studies* 531 at 558.

its regulatory reach and wisdom”, that it is not “a concession to unfettered markets” but rather that it will “strengthen the hands and extend the horizons of those who have long championed workplace improvements”.<sup>19</sup> However, state action is clearly not an intrinsic feature of RLS. On the one hand, RLS rests on the fundamental assumption that conventional regulation by the state has proved incapable of achieving its objectives, and that it must be replaced or supplemented by new regulatory strategies which are more compatible with the political economy of globalization. For that reason, the design of RLS begins not with state initiatives or in state institutions but with private initiatives and in the corporate context. On the other hand, RLS proponents do make passing reference to “a more ambitious” model of their project. In this more ambitious model, they suggest, states might enact legislation requiring domestic firms to participate in RLS, might promulgate performance standards and benchmarks generated by RLS procedures as their own official labour standards, might “transform their own regulatory systems from fixed-rule to ratcheting by requiring domestic firms to score high on RLS measures or face sanctions,” and might (one can infer) impose sanctions which are of a “regulatory” as well as a “social” character.<sup>20</sup>

In short, even in the eyes of its proponents, for RLS to become “more ambitious”, it must become more state-centred. But here there is a potential contradiction: state law, state institutions, state policies may endanger reflexivity. This may happen in several

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<sup>19</sup> Fung et al, *supra*, note 15 at p. 17.

<sup>20</sup> *Ibid* at pp. 17-18.

ways. State policies may force social actors such as corporations to abandon their efforts to ratchet labour standards upwards, as in the Chinese example cited above. State regulatory institutions in countries with politically accountable legislatures may brush aside corporate regimes of self-regulation which are deemed unambitious, insincere or inefficacious. Or state law may encumber reflexive systems with constitutional, procedural and substantive requirements - formal promulgation, clear definitions of conduct, predictable sanctions - which are inconsistent with their implicit, allusive and inchoate character.

*Case study no. 3 - The United Nations Global Compact*

Self-regulation has perhaps reached its apotheosis in the Global Compact signed by the Secretary General of the United Nations, more than fifty of the world's most powerful corporations and a number of unions and social movements.<sup>21</sup> Like the RLS proposal, the UN Global Compact displays some characteristics of reflexive law. It is driven by the techno-professional discourse of a dialogic community; it is a closed system capable of receiving and responding to external stimuli; its success depends on the willingness of participants to engage in a transparent exchange of opinions and information; and is designed to regulate not conduct *per se* but other normative systems, especially those embedded in corporate relationships.

The Global Compact declares nine substantive principles - two concerned with human

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<sup>21</sup> See <http://www.unglobalcompact.org>.

rights, four with the environment and four with labour standards.<sup>22</sup> It commits signatories to advocate the principles of the Compact to both internal and external audiences; to “embrace, support and enact” these principles “within their sphere of influence”; to submit once each year “a concrete example of progress made or a lesson learned in implementing the principles”; to promote positive behaviour by their own employees; to participate in an exchange of information with other companies; and to enter into a dialogue with their social partners concerning further measures.<sup>23</sup>

Finally, the Compact initiates various processes - a learning forum, policy dialogues, company and partnership initiatives and outreach - through which it seeks to promote the dissemination of best practices, to encourage their adoption by subscribing corporations, and to foster cooperation amongst corporations, governments, unions and civil society.<sup>24</sup>

On its face, the UN Global Compact seems at worst innocuous, and at best a modest step towards promoting global corporate accountability. Indeed, it is likely the most ambitious initiative that the Secretary General could hope to undertake, given the adamant refusal of many states to accept any measures which might compromise their

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<sup>22</sup> Freedom of association and effective recognition of the right to collective bargaining (principle 3); elimination of forced and compulsory labour (principle 4); effective abolition of child labour (principle 5); and elimination of discrimination in respect of employment and occupation (principle 6).

<sup>23</sup> Global Compact, supra note 21.

<sup>24</sup> Ibid.

sovereignty or their competitive edge.<sup>25</sup> However, some civil society actors have been critical of the Compact from its inception, claiming that corporations have become “tangled up in blue” - accorded recognition and prestige through their association with the Secretary General and the UN itself. These critics argue, for example, that membership of the Global Compact should not have been extended to corporations which have been guilty of egregious abuses of workers, human rights or the environment; that the relationship of such corporations to the UN and civil society actors should not be described as a “partnership”; that the image of the UN has been sullied by its deferential attitude towards these corporations; and that the Compact establishes no monitoring or enforcement procedures.<sup>26</sup>

As the Compact was signed only in mid-2000, and is not yet fully operational, it is impossible to evaluate its positive or negative impact.<sup>27</sup> However, it does constitute a highly visible experiment whose results will contribute to a better understanding of the potential and the limits of self-regulation and reflexive labour law.

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<sup>25</sup> The inability of the UN - for over 35 years - to agree upon even a non-binding code of conduct for multinational corporations is some evidence of the difficulties which confronts such measures. See D. Kinley, “Human Rights as Legally Binding or Merely Relevant?” in S. Bottomley and D. Kinley (eds.) *Commercial Law and Human Rights* (Aldershot: Ashgate/Dartmouth, 2001). For an account of other difficulties precluding more conventional strategies, see J. Ruggie, “Global\_governance.net: The Global Compact as a Learning Network” (2001) 7 *Global Governance* 371. Ruggie was one of the architects of the Global Compact.

<sup>26</sup> See Transnational Resource and Action Center (TRAC), *Tangled up in Blue: Corporate Partnerships at the United Nations*. <http://corpwatch.org/trac/globalization/un/tangled.html> (Sept 6, 2000).

<sup>27</sup> The early literature - a Symposium on the Global Compact in (2001) 34 *Cornell International Law Journal* - is perforce largely descriptive and speculative. For a guardedly optimistic view of the Global Compact from the perspective of critical legal pluralism, see A. Blackett, “Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct”(2001) 8

***The significance of self-regulation: several observations in search of an hypothesis***

These brief sketches of experiments in corporate self-regulation suggest that reflexive labour law may be becoming more commonplace, that it may indeed emerge as the characteristic legal form of the future.<sup>28</sup> This makes it especially important to explore why self-regulation and reflexive labour law seem so relevant at this particular moment in history. Note first that many of the post-modern socio-legal theories<sup>29</sup> which have emerged in recent decades display characteristics associated as well with reflexive law. (They also exhibit fundamental differences, reflecting the diversity of intellectual provenances and socio-political milieux in which they first appeared.)<sup>30</sup> These theories in general challenge the conventional “command model” of law; emphasize the normative fecundity of social fields; insist on the pluralistic character of legal systems; acknowledge the role in law-making, -interpreting and -enforcing of discursive communities and other agents not formally mandated by the state; and regard the close alignment of state and law as an historical contingency of the modern era. In various

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Indiana Journal of Global Legal Studies 401 at 440 ff.

<sup>28</sup> W. Scheuerman, *Liberal Democracy and the Social Acceleration of Time* (Baltimore/London: The Johns Hopkins University Press, 2004) at 210 ff.

<sup>29</sup> This includes work on jural polycentricity or legal pluralism; Bourdieu’s emphasis on the constitution of the “legal field”, studies by Burawoy and Stuart Henry on workplace normativity; the governance school which derives from the work of Foucauld; analyses of the emergence of “soft law”, especially in transnational relationships; and elements of critical legal studies. For references to this work see H. Arthurs, “Landscape and Memory”: Labour Law, Legal Pluralism and Globalization in T. Wilthagen (ed.) *Advancing Theory* supra note 3.

<sup>30</sup> See generally David Nelken, “Changing Paradigms in the Sociology of Law” in G. Teubner (ed.)

ways, then, they share an attitude of scepticism about the state's central role in the meta-narrative of law.

And now a second observation. The de-centering of the state is not only an important issue for socio-legal scholars. It is the defining issue of political life in most countries. The notion that the state should intervene actively to promote the public interest and distribute public goods has been the subject of relentless, often irrational and sometimes cogent criticism for almost as long as activist government has been advocated and practised. However, especially since the Thatcher and Reagan administrations of the 1980s, this criticism has become particularly strident in the English-speaking world. It has produced disenchantment with the state, and apathy - even hostility - towards electoral politics not least, ironically, amongst marginalized groups which are the principal clients of state intervention and amongst the political and technocratic elites which have been shaping state policy and directing state administration.

Disenchantment, hostility and apathy have transformed the discourse of labour law. It is no longer a given that the state can or should ensure minimum labour standards, promote countervailing power, redistribute wealth or coordinate corporatist strategies which feature labour as a prominent contributor and principal beneficiary. Instead, the state is now to be assigned the more mundane tasks of providing infrastructure,

supporting human resource development, blaming refugees and immigrants for labour market dislocations caused by structural adjustment to technology and globalization, and imposing economic and legal discipline on assertive workers. Likewise, the key participants in the formation of labour policy have changed. Labour lawyers (now “employment lawyers”), industrial relations managers (now “human resources” officers), trade unionists (still “trade unionists”, but fewer in number) and labour ministries (where they still exist) no longer play key roles, if any; economists, corporate lobbyists, central bankers, Treasury officials and Ministries of Trade and Industry now control the agenda.

<sup>31</sup> And that agenda itself has changed, both for policy makers and scholars.

Considerable anti-labour legislation has been enacted by neo-liberal, centrist and social democratic governments around the world; progressive reforms are at best a remote possibility in most countries;<sup>32</sup> and in many benign neglect is the most labour can hope for. In much of North America (though perhaps not in Europe)<sup>33</sup> the intense and highly politicized debates over workers’ rights which once raged within academic labour law have been largely superseded by yet more intense and highly politicized controversies over gender, race and disability;<sup>34</sup> and within the residual domain of labour law,

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<sup>31</sup> H.W. Arthurs, “What Immortal Hand or Eye? – Who Will Redraw the Boundaries of Labour Law?” in G. Davidov and B. Langille, *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (forthcoming, Hart, 2006).

<sup>32</sup> See e.g. C. Estlund, “The Ossification of American Labor Law” (2002) 102 *Columbia Law Review* 1527.

<sup>33</sup> See e.g. A. Supiot, with M.E. Casas et al., *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oxford: Oxford University Press, 2001).

<sup>34</sup> For a rather dyspeptic view of this tendency, see M. Finkin, “Reflections on Labor Law Scholarship: The Reveries of Monsieur Verog” (1992) 46 *University of Miami Law Review* 1101.

individual employment law - for practical reasons, the law of privileged categories of workers - attracts more attention than collective labour law.

In short, the de-centering of the state has altered power relations. Most states are now unwilling or unable to confront powerful global corporations, which can dis-invest with relative ease, which can relocate production to more business-friendly jurisdictions, and which can destabilize share prices and national currencies. In fact, in most states, the shift of political power away from labour is accepted, however glumly, as a fact of life. Governments confront only sporadic protests against the loss of labour's entitlements, only plaintive pleas for protection against the dislocations which result from the "creative destruction" of global capitalism. Even the traumatic anti-globalization protests in Seattle, Prague, Genoa, Quebec and elsewhere have not so far produced organized, sustained, mass support for laws and policies which protect workers. For all of these reasons, workers - even those who populate the thinning ranks of unions - are reluctant to challenge their employers. This, I suggest, is the context within which we must understand the recent proliferation of experiments in corporate self-regulation.

***The political economy of a reflexive labour law system: voluntary codes as a test case***

Against this background, one may ask: if socio-legal theory and political economy are being transformed in the same moment, in the same direction, does one have something to do with the other, and if not, what does their coincidental convergence

imply for an understanding of reflexive labour law?

In an important recent piece, Rogowski argues that “... a major function of reflexive law is to stimulate and instigate self-reflection and self-regulation in other social systems.....<sup>35</sup> Taking the three episodes of self-regulation described above as examples of reflexive labour law operating in this way, we can next explore what Rogowski describes as his “research hypotheses”, as trends which he detects in the regulation of labour and employment conflicts:

- \* the emergence of increasingly specialized and autonomous labour tribunals, which become the primary locus of innovation in the labour law system
- \* enhanced proceduralisation of labour law, in part reflecting a growing disenchantment with instrumentalism, formalization and materialization
- \* self-regulation leading to mutual recognition amongst the multiple systems of social ordering which impinge on the workplace, with a view to facilitating their autonomy and self-reproduction and with a commensurate decline in judicial regulation.<sup>36</sup>

Rogowski does not suggest, of course, that these are the only possible manifestations

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<sup>35</sup> Rogowski in Wiltshagen (ed.) *Advancing Theory*, supra note 3, at 73-74.

<sup>36</sup> Ibid. at p. 74-77.

of reflexivity in labour law whether in its conflictual or non-conflictual aspects. Nor does he have much to say specifically about corporate codes or other forms of corporate self-regulation. Nonetheless, the three case studies summarized above - of corporate codes, of RLS and of the UN Global Compact - generally do support Rogowski's "research hypotheses". However, in each case one must enter a serious *caveat*.

It is true that voluntary code-based systems are totally or largely "autonomous", that they are closed systems and that tribunals associated with them - though rare - are indeed highly specialized. But there is little evidence that code-based systems actually produce innovation, except to the extent that by masking or cosmeticizing the decline of state labour law they help to facilitate and normalize the shift of power from unions and workers to employers.

As Rogowski predicts, these new regimes of corporate self-regulation - unlike state law - are often neither rational nor instrumental nor formal in their operation and effects. Their mandates tend to be expressed only in vague and modest aspirational terms; their capacity to initiate action or pursue complaints is circumscribed; their remedial powers are negligible or non-existent; their professional character is typically underdeveloped; their activity levels are low; and their capacity or ambition to actually shape the conduct of the corporations which promulgate them appear to be minimal. Consequently, as near as anyone can tell, they have produced little change in the workplace.<sup>37</sup>

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<sup>37</sup> In fairness, while claims and counter-claims abound concerning the efficacy or inefficacy of self-

To compensate, as Rogowski points out, these regimes are often heavily “proceduralized”, in the sense that they seek to achieve their objectives by emphasizing transparency, the promotion of cooperation and the dissemination of best practices. Their proceduralism is fraught with great symbolic significance. Performances of the rituals of self-regulation - the well-publicized adoption of a code, for example, or the blessing conferred on the exercise by senior government officials, the undertaking of annual compliance audits, the occasional solemn exorcism of an offending contractor, the publication of self-congratulatory reports - tell us a great deal about the values and interests which shape labour market regulation today.<sup>38</sup> They remind us that states and their voters seem content that corporations should create and administer their own standards, that they should be trusted and admired for their conscientious behaviour, and that while workers should benefit from such behaviour, they should play no role in shaping or censuring it. And they remind us, as well, that to the extent that reflexivity is accomplished by such symbolic strategies, we must ask ourselves what are its prospects for improving on the outcomes achieved by more conventional regulatory regimes.

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regulatory regimes, the literature does not provide much empirical evidence one way or the other. The most sophisticated empirical study to date, however, concludes that companies which have subscribed to an code of self-regulation in the US Chemical Industry have a worse environmental record than those which did not. See A. King and M. Lenox, *supra* note 10.

<sup>38</sup> Compare A. Hyde, “Labor Law as Political Symbol - A Critical Study of Labor Legislation” in Rogowski and Wilthagen (eds.) *Reflexive Labour Law*, *supra* note 3 at 173.

Rogowski hypothesizes that workplaces are increasingly regulated by multiple regimes - including “company procedures and other mechanisms of self-regulation” - which contribute to legal complexity, and ultimately to the “juridification of social regulations”.<sup>39</sup> Because these multiple regimes interact with but do not control each other, he suggests, state courts tend to concentrate on the necessary task of resolving conflicts amongst them rather than regulating employers and workers directly. A reasonable hypothesis: but what does it imply?

On the one hand, courts may use state laws of general application or broad concepts such as “jurisdiction” to mediate inter-systemic conflicts by limiting the autonomy of one system or enlarging that of another. In given circumstances, this may protect workers’ rights and limit corporate power. Or courts may use concepts such as “due process” or “reasonableness” to ensure that all systems - state or private - conform to minimal standards of fairness. Again, in given circumstances, workers may be the beneficiaries. However, even such well-meant curial mediation may undermine or over-burden the fragile procedures, doctrines and discourses of reflexive workplace systems and render them incapable of performing the protective functions for which they were originally designed.<sup>40</sup> On the other hand, when courts decide to simply take a hands-off attitude

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<sup>39</sup> Rogowski in Priban and Nelken (eds.) , *Law’s New Boundaries* supra note 3 at 191 ff.

<sup>40</sup> H. Arthurs, “Protection Against Judicial Review” (1983) 43 *Rev. du Barreau* 277, reprinted in C.I.A.J., *Judicial Review of Administrative Rulings* (Montreal: Editions Yvon Blais, 1984); H. Arthurs, “The New Economy and the New Legality: Industrial Citizenship and the Future of Labour Arbitration” (1999) 7 *Can. Employment & Labour Law Journal* 45.

to reflexive regimes, the result can also be prejudicial to workers.<sup>41</sup> Everything depends on the nature of the systems in question.

Likewise, courts may decide to attempt to resolve inter-systemic conflicts not by adjusting reflexive workplace regimes to conform to the mediating principles of state law, but rather by mobilizing the power of state law to reinforce the values and assumptions of those reflexive regimes. For example, as noted earlier, courts might decide to hold corporations liable under state criminal, tort, contract or regulatory law for violations of their own codes of conduct.<sup>42</sup> Or they might actually mandate the creation of new reflexive systems of self-regulation, which would operate under court auspices on an ongoing basis,<sup>43</sup> much as legislatures did in encouraging or requiring the practice of grievance arbitration in North America. Again, in terms of the consequences for workers, everything depends on the quality of those systems.

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<sup>41</sup> For example, several recent U.S. Supreme court decisions have held that employees must honour provisions in their employment contracts which require them to arbitrate statutory claims against their employer rather than seek recourse through government agencies. K Stone, "Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s" (1996) 73 *Denver University Law Review* 1017; K. Stone, "Rustic Justice: Community and Coercion under the Federal Arbitration Act" (1999) 77 *North Carolina Law Review* 77.

<sup>42</sup> See supra note 12.

<sup>43</sup> An American federal district court has been asked to issue a consent decree approving the settlement of litigation by some 50,000 Asian migrant workers against a group of garment manufacturers in the Marianas, an offshore U.S. dependency. The proposed decree would mandate the adoption of a code of conduct to prevent continuation of egregious employment practices by the employers, require that the code contain effective monitoring, complaint and remedial procedures, and place the whole arrangement under the ongoing surveillance of specially-trained court monitors. For a history of the litigation, see Sweatshop Watch, Summary of the Saipan Sweatshop Litigation, [http://igc.org/swatch/marianas/summary10\\_00.html](http://igc.org/swatch/marianas/summary10_00.html).

It seems clear, then, that Rogowski is right in his fundamental insight that the existence of normative pluralism raises issues of legal complexity and internormativity which in turn invite mediation by state courts. But it is now important to add that there is no single set of appropriate organizing principles which must inform such mediation, that there is no way of predicting whether mediation will work in favour of particularistic, indigenous or reflexive law rather than in favour of state laws of general application, and that there is no necessary assurance that the resulting social outcomes are likely to be favour workers rather than employers.

From Rogowski's perspective, systemic mediation is driven by a tendency towards the reduction of legal complexity. However, as he acknowledges, the reduction of legal complexity may amount in practice to deregulation of the labour market. This is clearly a matter of concern to Rogowski who distinguishes "reflexive deregulation" of the workplace from that driven by neo-liberal ideology. Indeed, Rogowski's own preference is for an approach which "... pursues not only economic but also wider social goals, ... [which] tries to strike a balance between employer demands of reduced levels of protection and the employees' interests to find and keep a secure job".<sup>44</sup> But this formulation is important. It suggests that while proponents of the theory of theory of reflexive law begin by stating that their aims are purely descriptive or analytical, they themselves acknowledge that in practice reflexive labour law systems may produce effects with real-life political, social or moral consequences which they regard as

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<sup>44</sup> Rogowski in Priban and Nelken (eds.) supra note 3 at 192.

undesirable. I will return to this point in my conclusion.

Finally, as Rogowski remarks, reflexive systems are not only autonomous in their operation; they have an extensive capacity for self-reproduction.<sup>45</sup> States have so far generally not captured them; they proliferate; they mutate in successive generations; and they maintain remarkable isolation from the adjacent state systems, whose incursions they are designed to forestall. They operate, in other words, in much the same way as lethal viruses and dangerous new drug-resistant strains of bacteria. Of course, reflexive systems of labour law are not inherently lethal or dangerous to the well-being of workers and the health of unions. But it is not irrelevant that the proliferation of regimes of corporate self-regulation - of reflexive labour law regimes, in other words - seems to have no necessary connection with an improvement in labour standards for workers employed by corporations which have adopted codes of conduct, committed themselves to “ratcheting” standards upwards through the sharing of best practices, or signed on to the UN Global Compact.

Even more cynical interpretations are possible. Perhaps there is a connection between reflexive labour law and enhanced labour standards. Reflexivity, after all, implies learning. In the new labour law dispensation of corporate self-regulation, employees are indeed learning: to accept that the state cannot or will not protect them; to applaud employers whose adoption of voluntary codes certifies that they are responsible

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<sup>45</sup> Rogowski in Wilthagen (ed.) *supra* note 3 at 71.

corporate citizens; to subject themselves willingly to governance by those codes and, by extension, by the other normative systems promulgated by their employer; and ultimately to abandon the notion that they can shape their own fate by supporting unions or political parties committed to aggressive state regulation of the labour market.

***Conclusion: beyond reflexivity, beyond labour law***

The three sketches of corporate self-regulation which introduce this essay do not so much challenge the hypotheses of reflexivity as expose their potential dark side. However, one should not criticize theories of reflexivity for what they do not claim and therefore do not accomplish. As noted, Rogoswki and Wilthagen maintain that the theory of reflexivity is intended to be descriptive rather than prescriptive.<sup>46</sup> That is to say, it is meant to help us better understand socio-legal phenomena, not to enlist support for specific regulatory strategies or programs, much less for ultimate political or social values. To that extent, I have been somewhat unfair in stressing that reflexive labour law may express, legitimate and even reinforce corporate power. On the other hand, for several reasons, it is important for reflexive labour lawyers to come to grips with the issue of power more explicitly than they have done so far.

Rogowski aptly cites Hegel's famous aphorism that "... philosophy [a]s the thought of the world ... appears only at a time when actuality has gone through its formative

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<sup>46</sup> Rogoswki and Wilthagen (eds.) supra note 3 at 7-8.

process and attained its completed state .... [T]he owl of Minerva begins its flight only with the onset of the dusk...."<sup>47</sup> The idea of reflexivity, I wish to suggest, arrives at the dusk of postwar optimism about the potential of electoral politics and the activist state, about social democracy, about the emancipatory potential of collective workers action, about law's rationality and practical attainments. It would therefore be helpful if reflexive labour law had more to say about the events which characterize this neo-liberal dusk, and about what Minerva's owl portends for relations of power in the workplace.

This shortcoming is no reason to resist reflexive labour law as a descriptive or explanatory theory. Indeed, the crisis of theorization in industrial relations, in law generally, and in labour law in particular amply justifies all attempts to develop new scientific critiques and new theoretical perspectives.<sup>48</sup> Reflexive labour law clearly responds to this crisis. However, let us revisit the context. Like other theories associated with post-modernity, reflexive law assumes - but does not insist - that the state and its legal system are historically contingent and increasingly irrelevant. Fair enough: but note that theories of neo-liberalism and globalization also dismiss the state and its legal system - or at least the social democratic state and transformative legal strategies. Is this mere coincidence? Or is there a connection - consequential, ideological or epistemological - between reflexive law and neo-liberalism?

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<sup>47</sup> G. Hegel, *Elements of the Philosophy of Right* (Cambridge: Cambridge University Press, 1991) at 23 (A. Wood ed., originally published 1820) cited by Rogowski in Wilthagen (ed.) *supra* note 3 at 67.

At the least, it seems that the postmodern view of the state and the reflexive analysis of law may become self-fulfilling prophecies. Theories such as reflexivity are not parthenogenic: they do not create themselves, write themselves, disseminate themselves. They are produced by human intelligence and propagated by human agents - by scholars like us. But scholars like us are also - inescapably - political actors: we write books and articles and shape the thinking of students, lawyers and judges; we advocate public policies and advise governments and civil society organizations; we prepare legal opinions and draft legislation. My concern is that our scientific work will - even against our intentions - come to affect our political work, so that our descriptive hypotheses about how law works will become prescriptive. After all, if we believe in autopoiesis, what can we say about legislation or right-based litigation or other purely instrumental approaches to law? If we believe in legal reflexivity, how can we be critical, much less cynical, about corporate self-regulation which, after all, is a text-book example of the phenomenon? At some point, then, what we believe as scholars is likely to impinge upon what we do as political actors. When it does, the activist state is going to suffer the defection of some of its most influential and knowledgeable supporters - a loss it can ill afford in this era of neo-liberal ascendancy.

Finally, in this scenario, it is not just the state and its legal system which are being transformed by the simultaneously assault of neo-liberalism and post-modern theorizing. The metaphoric death of the state is likely to have the same disconcerting

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<sup>48</sup> H. Arthurs, "‘Landscape and Memory’: Labour Law, Legal Pluralism and Globalization" in

effects on labour lawyers and scholars as the death of God had on theologians and members of religious orders. In the end, some of us may cling mindlessly to the old church; others may abandon labour law entirely; still others may embrace new economic faiths, new political values, new scientific revelations or new legal rituals. Will reflexive labour law rise to the challenge of this new era to provide us with a narrative of workplace normativity which is not only helpful in a descriptive and explanatory sense, but which provides a basis for evaluation and critique? And will those of us who persevere with scholarship in the field be able to build again - with new insights, in new historical circumstances - a new regime of state labour law which speaks social justice to corporate power? Or does the very formulation of these questions mark me as someone who has failed to grasp the fundamental insights of reflexive labour law?