Osgoode Hall Law Journal

Volume 44, Number 3 (Fall 2006) Article 9

July 2006

Book Review: Labour Laws and Global Trade, by Bob Hepple

Adelle Blackett

Follow this and additional works at: https://digitalcommons.osgoode.yorku.ca/ohlj

Book Review

Citation Information

Blackett, Adelle. "Book Review: Labour Laws and Global Trade, by Bob Hepple." *Osgoode Hall Law Journal* 44.3 (2006) : 573-582.

DOI: https://doi.org/10.60082/2817-5069.1289

https://digitalcommons.osgoode.yorku.ca/ohlj/vol44/iss3/9

This Book Review is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

Book Review: Labour Laws and Global Trade, by Bob Hepple

This book review is available in Osgoode Hall Law Journal: https://digitalcommons.osgoode.yorku.ca/ohlj/vol44/iss3/9

LABOUR LAWS AND GLOBAL TRADE BY BOB HEPPLE (OXFORD: HART PUBLISHING, 2005) 302 pages.[1]

BY ADELLE BLACKETT[2]

Over roughly the last ten years, there has been an explosion of scholarship on transborder labour law,[3] as commentators attempt to come to terms with the shifting labour law paradigm in the new economy. Most of the work has filled law review pages. Fortunately, Sir Bob Hepple has led the way in *Labour Laws and Global Trade* by producing a well-written and engaging book. The format weaves together the existing scholarship in a manner that provides a comprehensive, challenging, and satisfying assessment of established ideas, and produces a forward-looking account of regulatory directions. Hepple's vigorous defence of an institutional vision of state labour regulatory action offers a singular contribution to the field.

---

[1] [*Labour Laws and Global Trade*].

[2] Associate Professor and Member, Institute of Comparative Law, Faculty of Law, McGill University.

[3] See Eric Tucker, "Great Expectations Defeated?: The Trajectory of Collective Bargaining Regimes in Canada and the United States Post-NAFTA" (2004) 26 Comp. Lab. L. and Pol'y J. 97 at 97.

Labour Laws and Global Trade draws masterfully on the expertise of a scholar whose life work has encompassed national and transnational labour law. Hepple has been an international consultant for the International Labour Organization (ILO) in labour law reform, and is a leading expert on equality rights including racial discrimination as it relates both to his native country, South Africa, and his scholarly home, the United Kingdom.[4] In this book, Hepple also relies on his expertise in European social law. Hepple's work crosses the permeable borders of domestic and transnational law, standard setting and national implementation (including law reform), and the labour rights/human rights divide. For these reasons, *Labour Laws and Global Trade* sets a high standard for future transborder labour law scholarship.

Hepple's work is divided into ten chapters. Chapter one makes the empirical and normative case for transnational labour regulation, offering a textured account that is attuned to the benefits of labour laws in the North and in the South. Hepple first captures a guiding principle of embedded liberalism in industrialized market economies that retains its importance despite the shifted, post-industrial need for distributive justice beyond national borders. He then articulates the principle with a simplicity that speaks across the development divide: "[T]he crucial point from the perspective of labour laws is that the benefits from trade to the poor are never automatic."[5] Transnational labour regulation matters.

On the basis of that acknowledgement, Hepple ably positions his book to speak to policy makers, and, in particular, to state actors. According to Hepple, these actors are rarely at the extremes of the centuries-old labour regulation/protection vs. labour flexibility/ deregulation/free trade debate. Rather, they strive to achieve balance through hybrid labour laws that seek to meet both aspirations. The developing result is "[a] spider's web of hard and soft transnational regulation ... weaved around domestic labour laws."[6] Hepple holds this web up to his analytical light and considers normatively whether regulatory mechanisms can provide an institutional framework that

---

[4] See recently Bob Hepple, "Race and Law in Fortress Europe" (2004) 67 Modern L. Rev. 1.

[5] *Supra* note 1 at 17. On distributive justice beyond borders and its potential implications for the WTO, see Donald McRae, "Developing Countries and the 'Future of the WTO'" (2005) 8 J. Int'l Econ. L. 603.

[6] *Supra* note 1 at 3.

offers workers a basis of fundamental, substantive rights, not atomized, individualized freedoms. Hepple searches for rights that will provide, in Nobel Laureate Amartya Sen's terms, an "equality of capabilities"[7] in the global economy.

Chapter two offers one of the most precise and informative recent accounts of the origins of the ILO. Hepple is an experienced commentator who knows the ILO well enough to offer a textured appreciation for its contributions, not only in relation to the creation of an international normative regime, but also in reference to law reform in industrialized and developing countries. Despite (indeed because of) his engagement at various levels with the ILO, Hepple is not an apologist for the institution and its new policy directions. Hepple reminds the reader of the institution's early inertia on apartheid-era union segregation, and subsequently offers a scathing critique of the report of the independent World Commission on the Social Dimensions of Globalization[8] established by the ILO. On the latter, Hepple contends that while it endorsed the ILO's policy prioritizations,

> the Commission failed to develop the idea of a socio-economic floor in any detail, beyond trite generalizations on fundamental rights at work, the combating of social exclusion and social protection. ... Such platitudes do little to explain the ways in which relatively high standards in the formal sector in developing countries are to be reconciled with the abysmal poverty and absence of regulation in the informal sector. The starting point has to be economic growth.[9]

The field of labour rights has embraced the language of human rights, but has inherited the troubled debate over its divide into civil and political rights on the one hand, and social, economic and cultural rights on the other.[10] Hepple's vision is fuller, and is enriched by his

---

[7] *Ibid.* at 18-23, analyzing the work of Amartya Sen, *Development as Freedom* (New York: Random House, 1999).

[8] The World Commission on the Social Dimension of Globalization, *A Fair Globalization: Creating Opportunities for All* (February 2004), online: International Labour Organization <http://www.ilo.org/public/english/wcsdg/docs/report.pdf>.

[9] *Supra* note 1 at 65.

[10] See Philip Alston, "'Core Labour Standards' and the Transformation of the International Labour Rights Regime" (2004) 15 E.J.I.L. 457; Philip Alston & James Heenan, "Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?" (2004) 36 NYU J. Int'l L. & Politics 221; Philip Alston, "Facing Up to the Complexities of the ILO's Core Labour Standards Agenda" (2005) 16 E.J.I.L. 467; Brian A. Langille, "Core Labour Rights – The True Story (Reply to Alston)" (2005) 16

understanding of discrimination law, including the often overlooked issue of racial discrimination.[11] This wider view enables Hepple to argue that the ILO's decent work agenda should be the basis for greater coherence in international social policy.[12]

Chapter three, tellingly entitled "Privatizing Regulation," offers a sobering account of a field that has garnered some unabashedly uncritical reviews. One may, however, question the space devoted to the OECD Guidelines and ILO Tripartite Declaration, two older, ultimately state-centred mechanisms. Although it is true that the OECD Guidelines could become "increasingly important should a multilateral investment framework be adopted,"[13] the value of such an agreement—even if it was politically feasible after the Multilateral Agreement on Investment's (MAI) spectacular defeat—is itself deeply contested.[14] Yet Hepple's overview enables him to conclude that existing public and private initiatives still reflect a "transnational regulatory void." Instead, Hepple advocates "a public international regulatory mechanism which can ensure that transnational corporations observe international norms."[15]

Chapters four to six address the notion of the social clause, which Hepple uses to illustrate the myriad ways in which a social dimension has been introduced into trade relationships. Chapter four offers a biting critique of the United States' aggressive unilateralism in Generalized System of Preferences (GSP) legislation. Hepple strongly

---

E.J.I.L. 409 at 428-433; and Francis Maupain, "Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights" (2005) 16 E.J.I.L. 439 at 448-49.

[11] Perhaps surprisingly, the World Commission seems to have overlooked forms of discrimination other than on the basis of gender, and has been critiqued for its thin conceptualization of equality as an individual freedom. See Kerry Rittich, "Rights, Risks and Rewards: Governance Norms in the International Order and the Problem of Precarious Work" in Judy Fudge & Rosemary Owens, eds., *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* (Oxford: Hart, 2006).

[12] *Supra* note 1 at 65-67. Hepple speaks of a cross-fertilization between the ILO and the EU, and subsequently explains how the EU may also benefit from closer attention to the ILO's prioritization of fundamental rights.

[13] *Ibid.* at 84.

[14] See Peter T. Muchlinski, "The Rise and Fall of the Multilateral Agreement on Investment: Where Now?" (1999) 34 The Int'l Lawyer 1033; Kevin C. Kennedy, "A WTO Agreement on Investment: A Solution in Search of a Problem?" (2003) 24 U. Pa. J. Int'l Econ. L. 77 at 147; and Stephen Young & Ana Teresa Tavares, "Multilateral Rules on FDI: Do We Need Them? Will We Get Them? A Developing Country Perspective" (2004) 13 Transnat'l Corp. 1.

[15] *Supra* note 1 at 87.

prefers the EU's soft unilateralism approach because of its capacity to ensure transparent, fair procedures, and also because of the EU premise that development policy should include "the general objective of developing and consolidating democracy and the rule of law, and respect for human rights and fundamental freedoms."[16]

Chapter five on bilateral and regional agreements focuses on the likely suspects, notably recent trade agreements negotiated by the United States, such as the United States-Jordan agreement, NAFTA and the EU. Certainly, Hepple is too sophisticated a thinker to make the mistake of attempting to transplant the EU's approach.[17] However, more discussion about developments in and with the South could feed a broader series of reflections about developing countries' use of trade relationships to reshape distributive justice across regional borders.[18] Nonetheless, Hepple's analysis of winners and losers in bilateral and regional trade raises many crucial considerations for industrialized and developing countries. It also foreshadows the potential for further linkages in trade cooperation on labour, as well as the potential of technical cooperation, notably between labour ministries.

Chapter six raises the bar for transborder labour lawyers with its technical precision in respect of the World Trade Organization GSP analysis. The text takes the reader through a careful assessment of GATT articles, Article XX exceptions, and other mechanisms for social "clauses," underscoring the limits of a sanctions-based approach to labour standards violations. Hepple helpfully challenges the utility of a sanctions-based approach and proposes to have the ILO as the ultimate arbiter. Yet the analysis remains within the social "clause" framework, which tends to shut out the ways in which labour rights will necessarily appear before a decision-making body like the ILO. The WTO appellate body's asbestos report[19] is a cardinal example of this dilemma, in which labour legislation protecting workers from asbestos was challenged, but upheld on the grounds of consumer preference rather than worker

---

[16] Art. 177(2) EC Treaty.

[17] See the discussion in chapter 9 and conclusions, *supra* note 1 at 247.

[18] See Adelle Blackett, "Toward Social Regionalism in the Americas" (2002) 23 Comp. Lab. L. & Pol'y J. 901.

[19] *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products* (complaint by Canada) (2001), WTO Doc.WT/DS135/AB/R (Appellate Body Report) online: WTO <http://www.wto.org/english/tratop_e/dispu_e/135abr_e.doc>.

protection. In this regard, the trade law divide between unilateralism (France's legislative ban on import and use of asbestos, but on its own territory) and multilateralism (Canada's WTO challenge, but in support of its export of a carcinogenic product) in trade law might have been contemplated somewhere at the intersection of chapters five and six, as trade disputes invariably entail some degree of both, and, arguably it is the degree that matters.

Chapters seven to nine offer an in-depth analysis of the different directions in European labour law. Here, Hepple demonstrates his ability to convey a depth of content that is intelligible to a readership of non-European law specialists (the boxes in chapter eight help), yet meaningful to those who know the EU regulatory framework well. In chapter seven, entitled "Labour Laws Beyond Borders," Hepple focuses on the different ways that choice of law questions have been addressed, with limited success, primarily through the use of directives. Hepple's critique is clear: the primacy given to freedom of contract is inappropriate for relationships of unequal bargaining power and is at odds with the basic premise recognized since the Treaty of Rome.[20] Consistent with this analysis, Hepple is wary of measures, such as the Posted Workers Directive,[21] that seek to respond to fears of "social dumping" but offer "no panacea"[22] to the workers who avail themselves of the free movement of persons. While recognizing that EU law cannot respond to the claim for "uniformization" of labour law, Hepple makes the case for greater "institutional redesign" through the adoption of more classic EU hard law instruments, the Directives, to redress

> [o]ne of the paradoxes of the new European social model ... that ... relies on the social dialogue, which depends on strong representation of management and labour at European, national and sectoral level, but at the same time provides no mechanisms for strengthening and protecting collective organizations.[23]

---

[20] *Supra* note 1 at 190.

[21] EC, Council Directive 96/71 of 16 December 1996 concerning the posting of workers in the framework of the provision of services, [1997] O.J.L. 18/1 [Posted Workers Directive].

[22] *Supra* note 1 at 191.

[23] *Ibid.* at 188.

Crucially, Hepple is concerned to see ILO leadership affirm the consistency of worker solidarity actions across borders with freedom of association principles.[24]

Chapter eight, on negative and positive harmonization in the EU, not only tackles the conventional economic wisdom that labour laws cause rigidities in the labour market (negative harmonization claims), but also grapples with the drive toward compatibility between the labour law frameworks (positive harmonization claims). Affirming that neither method is value neutral, Hepple provides a historical contextualization that informs his analysis of the legal development, consistent with the comparative method endorsed by other leading labour law scholars.[25] He also challenges the "end of history" vision of EU social policy, reminding the reader that the EU social model has not resulted in a linear form of consensus, but rather, remains ongoing and contested.[26] His insightful overview of the many amendments to what he refers to as the EU's economic and social constitutions culminates, in a text written prior to the French vetoing referendum in 2005, with the conclusion that a genuine European social constitution is emerging, but with its own contradictions.[27]

Labour Laws and Global Trade also offers a particularly compelling assessment of the tensions associated with the retreat from "harmonization by directive" in favour of new methods of integration in chapter nine. Hepple reminds us that this shift was hardly a foregone conclusion; instead, he cogently matches legal limits and political limits. Among the former, Hepple denotes the limits associated with processes of mutual recognition in labour law where there is great diversity of systems, a demonstrated risk of deregulation via directives, and palpable limits of partial harmonization. Among the latter, Hepple identifies the renewed emphasis on cooperation between states via "soft" measures other than legislation, in order to focus attention on job growth. Hepple makes a plea for this shift to be undertaken within a framework of fundamental social rights.[28]

---

[24] *Ibid.* at 189.

[25] See Sir Otto Kahn Freund, "On Uses and Misuses of Comparative Law" (1974) 37 Modern L. Rev. 1 at 20-27.

[26] *Supra* note 1 at 197-98.

[27] *Ibid.* at 211.

[28] *Ibid.* at 222-24.

That some of these pressures—notably the push for deregulation—are wrapped into the European Employment Strategy and adoption of an Open Method of Co-ordination is, of course, recognized by Hepple.[29] Despite the wish list of positive measures that are encouraged through the European Council's adopted employment guidelines, and despite significant labour market reforms in EU member states, the 2003–2004 joint employment report signals the great risk that key targets would not be met by 2010. Instead the report calls for even greater "adaptability," accompanied by a persistent failure to reference workers' legal rights. Tellingly, as well, the coordination is in some cases to the exclusion of other options, thereby creating a "hierarchy of social inclusion."[30] And, in a field that is replete with analyses that hinge on the premise that labour law should prevent a "race-to-the-bottom," or worse, social dumping, Hepple's analysis time and again reaffirms the centrality of the mission of trade liberalization and labour harmonization: in the words of the Treaty of Rome of 1957, the promotion of peace and social justice. In this regard, Hepple not only offers appropriate criticism of a social Europe that has fuelled a "Fortress Europe" mentality, notably on the movement of persons,[31] but also provides an emerging blueprint for thinking broadly about regulating "decent work."

Hepple's discussion of social dialogue also effectively demonstrates an important difference between the representative character of negotiation and broader questions of democratic legitimacy, which may call for more direct forms of participation. Without referencing this notion, Hepple may be heading toward a vision of "tripartism plus," a challenging but promising source of ILO experimentation.[32]

---

[29] *Ibid.* at 228.

[30] *Ibid.* at 230. Hepple notes for example that harmonizing Directives are permitted for gender equality, but not in respect of ethnic minorities or disabled persons.

[31] *Ibid.* at 198-99 ("inward-looking Union with restrictive immigration and asylum policies, rifts between ethnic communities and continuing or worsening racial disadvantage"); *ibid.* at 191 (discussion of the Posted Workers Directive).

[32] See Anne Trebilcock, "Tripartite Consultation and Cooperation in National-Level Economic and *Social Policy-Making: An Overview"* in Anne Trebilcock *et al.*, eds., *Towards Social Dialogue: Tripartite Cooperation in National Economic and Social Policy-Making* (Geneva: International Labour Office, 1994) 1 at 3; Tayo Fashoyin, "Tripartism and Other Actors in Social Dialogue" (2005) 21 Int'l J. Comp. Lab. L. & Ind. Rel. 37.

In chapter ten, which is the final chapter, some may be left to question the solidity of reliance on comparative institutional advantages of labour laws:[33] that is, the notion that state prosperity may occur, not through homogenization, but by enhancing institutional heterogeneity.[34] Consider, in particular, the risk that redistributive labour laws (of the "labour is not a commodity" variety), rather than the laws promoting economic "efficiency" from the perspective of firms, are those most likely to lead to a real risk of deregulation.[35] Yet labour law in the new economy is a field of significant experimentation, with old and new forms of governance colliding, overlapping, and reshaping their relationship. It is broadly acknowledged that game theory aside, questions of a race to the bottom or the top are ultimately empirical questions, requiring attentive, non-alarmist analysis. It is not surprising that Hepple acknowledges at the outset of this book what many would prefer not to see: that "[a]n obvious solution to the inequalities between poor and rich countries would be free migration."[36] Yet Hepple's analysis offers throughout the text a careful, cogent case for states, and for state action, including at the domestic level. The case is not an exclusive or totalizing one, nor has it ever been in the inherently pluralist field of labour relations law. But there is a clear roadmap, and it is one in which fundamental labour rights play a crucial role.

With great subtlety, Hepple's analysis—although state-centred—embraces the paradox that in an economic context in which products, services,[37] and workers migrate "from" abroad, the original and more refined versions of comparative advantage that left the nation-state intact are themselves in need of reconsideration. Trade is not elsewhere;

---

[33] Hepple draws heavily on Hall and Soskice's analysis in *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford: Oxford University Press, 2001), which predicts that liberal market economies and co-ordinated market economies will respond differently to competitive pressures of globalization. See *supra* note 1 at 252-53.

[34] See David Trubek, "Towards a New International Architecture for Workers' Rights – The Emergence of Transnational Law" (2006) 100 A.J.I.L. [forthcoming].

[35] *Supra* note 1 at 256.

[36] *Supra* note 1 at 5. Of course, the European experience calls some of the assumptions about massive labour migration into question, and Hepple himself concludes that a level playing field on labour costs would be impossible (*ibid.* at 24). Moreover, even within China, the empirical data on worker preferences may reaffirm the importance of non-alarmist, empirical analysis. See David Barboza, "Labor Shortage in China May Lead to Trade Shift" *The New York Times* (3 April 2006), online: <http://www.nytimes.com/2006/04/03/business/03labor.html>.

[37] See Hepple's important discussion of outsourcing, *supra* note 1 at 6-7.

it is intimately interwoven with conceptions, not only of local regulatory action, but of what the local actually means. This is palpably the case in respect of labour, and pushes the borders of distributive justice claims. That Hepple's appraisal should take us through the transnational and back to domestic regulation is therefore appropriate: it is further evidence that the spider's web surrounding local labour law may over time reveal itself as the laborious process (indeed, in the reproductive sense) of preparing an egg sac[38] for labour law's rebirth.

This book is highly valuable, and not only to academics. It is written in a lucid, accessible style, and is replete with sturdy analysis and interesting historical nuggets that will render it required reading in many advanced labour law courses; it will also serve policy makers well in a rapidly changing domain in which lucid analysis is at a premium.

---

[38] See SpiderRoom.info, online: <http://www.spiderroom.info/lifecycles.html>.