

RESEARCH HANDBOOK ON  
**Transnational  
Labour Law**

Edited by

**Adelle Blackett • Anne Trebilcock**



# Research Handbook on Transnational Labour Law

*Edited by*

Adelle Blackett

*Law Professor, William Dawson Scholar and Director of the Labour Law and Development Research Laboratory, McGill University, Canada*

Anne Trebilcock

*Centre de Droit International, University of Paris 10, Nanterre-La Défense, Paris, France; Institut für Arbeitsrecht, Georg-August University, Göttingen, Germany*

RESEARCH HANDBOOKS IN INTERNATIONAL LAW

 **Edward Elgar**  
PUBLISHING

Cheltenham, UK • Northampton, MA, USA

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Published by  
Edward Elgar Publishing Limited  
The Lypiatts  
15 Lansdown Road  
Cheltenham  
Glos GL50 2JA  
UK

Edward Elgar Publishing, Inc.  
William Pratt House  
9 Dewey Court  
Northampton  
Massachusetts 01060  
USA

A catalogue record for this book  
is available from the British Library

Library of Congress Control Number: 2015935908

This book is available electronically in the **Elgaronline**  
Law subject collection  
DOI 10.4337/9781782549796



ISBN 978 1 78254 978 9 (cased)  
ISBN 978 1 78254 979 6 (eBook)

Typeset by Columns Design XML Ltd, Reading  
Printed and bound in Great Britain by TJ International Ltd, Padstow

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## Contributors\*

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**Zoe Adams** is an LLM candidate at the European University, Florence, Italy, and former Researcher at the Centre for Business Research, University of Cambridge, United Kingdom.

**Paula Church Albertson**, JD, is Labor Attaché, United States Embassy, Dhaka, Bangladesh. She served until August 2014 as Division Chief for the Monitoring and Enforcement of Trade Agreements division in the Bureau of International Labor Affairs (ILAB) at the US Department of Labor, Washington, DC.

**Jean Allain**, PhD, is Professor of Public International Law at Queen's University, Belfast, Northern Ireland and Extraordinary Professor at the Centre for Human Rights, University of Pretoria, South Africa.

**Rose-Marie Belle Antoine**, D Phil, is Dean and Professor of Labour and Offshore Financial Law, Faculty of Law, University of the West Indies, St. Augustine Campus, Trinidad and Tobago, and Commissioner and President of the Inter-American Commission on Human Rights.

**Aimée Asante**, PhD, is a former part-time lecturer of the University of Strathclyde, Scotland, United Kingdom.

**Pamhidzai H. Bamu**, PhD, is Research Fellow at the Centre for Applied Legal Research, Zimbabwe.

**Mark Barenberg**, MSc and JD, is Isador and Seville Sulzbacher Professor of Law at Columbia Law School and Co-Director of the Columbia Program on Labor Law and Policy, New York City, United States.

**Janice R. Bellace**, MSc and JD, is Samuel Blank Professor of Legal Studies and Professor of Legal Studies and Business Ethics, and Management as well as Director, Huntsman Program in International Studies & Business at the Wharton School, University of Pennsylvania, United States.

**Graciela Bensusán**, PhD, is Professor and Researcher at the Universidad Autónoma Metropolitana X, Mexico City, Mexico.

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\* All contributors have expressed their views in a personal capacity, and they do not necessarily represent the views of institutions for which they work or have worked.

**Adelle Blackett**, JSD, is Associate Professor and William Dawson Scholar at the Faculty of Law, Director of the Labour Law and Development Research Laboratory, McGill University, Montreal, Canada and a Researcher, Interuniversity Research Centre on Globalization and Work (CRIMT), Montreal, Canada.

**Laurence Boisson de Chazournes**, PhD, is Professor of International Law at the University of Geneva, Geneva, Switzerland, and Member of the Advisory Committee of the UN Human Rights Council.

**Steve Charnovitz**, JD, is Associate Professor at the Law School, George Washington University, Washington, DC, United States.

**Ben Chigara**, PhD, is Professor at Brunel Law School, Brunel University, London, United Kingdom.

**Kathleen Claussen**, JD, is Legal Counsel at the Permanent Court of Arbitration, The Hague, in the Netherlands.

**Lance Compa**, JD, is Senior Lecturer, International and Comparative Labor Department, ILR School, Cornell University, Ithaca, New York, United States.

**Sean Cooney**, JSD, is Professor at the Law School, University of Melbourne and Associate Director of the Asia Law Centre.

**Simon Deakin**, PhD, is Professor of Law, Faculty of Law, and Director of the Centre for Business Research, University of Cambridge, United Kingdom.

**Janelle M. Diller**, JD, is Senior Counselor to the Deputy Director General for Policy, International Labour Office, Geneva, Switzerland.

**David J. Doorey**, PhD, JD, is Associate Professor, York University and Director, Osgoode Hall Law School, PDP LLM Specialist Degree, Labour and Employment Law, Canada.

**Renée-Claude Drouin**, DPhil, is Associate Professor, Faculty of Law, Université de Montréal and Researcher, Interuniversity Research Centre on Globalization and Work (CRIMT), Montreal, Canada.

**P. Martin Dumas**, Doctor of Law, is Associate Professor, Faculty of Social Sciences, Laval University, Québec, Canada, President of *Filos Mundi*, and Researcher, Interuniversity Research Centre on Globalization and Work (CRIMT), Montreal, Canada.

**Franz Christian Ebert**, LL.M., is Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany.

**Cynthia Estlund**, JD, is Catherine A. Rein Professor at New York University School of Law, United States.

**Aukje van Hoek**, Doctor of Law, is Professor of Private International Law and Civil Procedure at the University of Amsterdam and Honorary Justice at the Court of Appeal's Hertogenbosch.

**Jo Hunt**, PhD, is Reader at Cardiff Law School, United Kingdom.

**Kevin Kolben**, JD, is Associate Professor at Rutgers Business School, Newark and New Brunswick, New Jersey, United States.

**Claire La Hovary**, PhD, is Lord Kelvin Adam Smith Fellow at the University of Glasgow, United Kingdom.

**Brian Langille**, BCL (Oxon), is Professor of Law at the University of Toronto, Canada.

**Julia López López**, Doctor of Law, is Professor of Labour Law at Pompeu Fabra University, Barcelona, Spain.

**Isabelle Martin**, DCL, is Assistant Professor, School of Industrial Relations, Université de Montréal, Canada, and Researcher, Interuniversity Research Centre on Globalization and Work (CRIMT), Montreal, Canada.

**Francis Maupain**, Doctor of Law, is Special Adviser to the Director-General of the International Labour Organization, Geneva, Switzerland and former ILO Legal Adviser.

**Faina Milman-Sivan**, JSD, is Associate Professor at the Faculty of Law, University of Haifa, Israel.

**Rutendo Mudarikwa**, LLM, is former Research Assistant, Labour and Enterprise Policy Research Group, University of Cape Town, South Africa.

**Aristide Nononsi**, Doctor of Law, is the United Nations Independent Expert on Human Rights in Sudan and the former Executive Director of the Institute for Human Rights and Development in Africa, Gambia.

**Tonia Novitz**, D Phil, is Professor of Labour Law and Research Director for the Law School, University of Bristol, United Kingdom.

**Colleen Sheppard**, LLM, is Professor, Faculty of Law, McGill University and Director, Centre for Human Rights and Legal Pluralism, McGill University, Montreal, Canada.

**Adrian A. Smith**, DCL, is Assistant Professor, Department of Law and Legal Studies Institute of Political Economy, Institute of African Studies, Carleton University, Ottawa, Canada.

**Ashwini Sukthankar**, JD, is Deputy Director, International Affairs, UNITE HERE, New York City, United States.

**Jean-Marc Thouvenin**, Doctor of Law, is Professor at the University of Paris Ouest, Nanterre-La Défense and Director of the Centre de droit international de Nanterre (CEDIN), Paris, France.

**Anne Trebilcock**, JD, former Legal Adviser of the International Labour Organization, is associated with the Centre de droit international at the University of Paris Ouest Nanterre and the Labour Law Institute, University of Göttingen in Germany. She serves as a neutral in the dispute resolution bodies of several international organizations.

**Reingard Zimmer**, Doctor of Law, is Professor of Labour Law at the Berlin School of Economics and Law in Germany.

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## Preface

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This book brings together the thoughts of 41 contributors in 38 chapters, each exploring different facets of transnational labour law. In the first part, we explore 'transnational,' 'labour' and 'law,' and set the scene for the sections that follow in relation to each of these elements. The second part begins with a sampling of transnational labour law's methods, along with some of its development dimensions, taking into account north-south perspectives. Part 3 looks at the field as labour law, shedding light on freedom of association and equality in particular while exploring the emerging role of institutions such as the International Labour Organization. The focus then shifts in Part 4 to some striking features of this body of norms, ranging from the thickening of soft law to social regionalism and the transnational challenge to the regulation of labour as a factor of production.

Various chapters remind us that this field lies on the cusp of human rights, labour rights and broader international law. Transnational labour law remains in some respects a contested field, and with that in mind, the collection includes some views that we do not share.<sup>1</sup> We hope that this book will spur greater investigation of the relationship between transnational labour law and other public international law developments.

This book would not have appeared without the support of many people. In particular, we wish to express our gratitude to:

- Each of the contributors to this volume
- The Interuniversity Research Centre on Globalization and Work/Centre de recherche universitaire sur la mondialisation et le travail (CRIMT) and the Labour Law and Development Research Laboratory (LLDRL) for co-sponsoring research and travel
- Professor Julia López López of the University of Pompeu Fabra and her assistant Georgina Folguera for the warm welcome, opportunity to test out some ideas from the book with colleagues and students, and space to work on the handbook
- Lina Mullings, Administrative Coordinator, McGill University, for her able assistance in preparing the manuscript for submission
- Mark Phillips, BCL and LLB candidate at McGill University, for insightful preparation of the chapter abstracts for the electronic version of the book
- Châu Nguyen for translating one contribution from French to English (Anne Trebilcock also translated others from French and Spanish)
- Tara Gorvine of Edward Elgar for proposing the idea and providing encouragement
- The members of our families for their support and patience throughout the life of this project.

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<sup>1</sup> We think, for example, that the prohibition of forced labour does fall into the category of *jus cogens*, a view increasingly supported in human rights law.



Finally, a revelatory anecdote: when we met for our first meeting on drafting the introductory chapter, we both appeared carrying the same new book.<sup>2</sup> This demonstrated tacit recognition of the debt we owe to the many academics and practitioners who have written on topics relevant to transnational labour law. This is a dynamic field that is important to people's lives. In the interest of social justice, it deserves its own further development as well as strengthening of its ties to related fields of international law.

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<sup>2</sup> GRÁINNE DE BÚRCA, CLAIRE KILPATRICK & JOANN SCOTT, eds, *Critical Legal Perspectives on Global Governance: Liber Amicorum for David M. Trubek* (2014). TERENCE C. HALLIDAY & GREGORY SHAFFER, eds., *TRANSNATIONAL LEGAL ORDERS* (2015) was published after our volume was completed, but will constitute an important part of our ongoing reflections on transnational labour law.

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# PART I

## CONCEPTUALIZING TRANSNATIONAL LABOUR LAW



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# 1. Conceptualizing transnational labour law

*Adelle Blackett and Anne Trebilcock*

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## 1. THE SCOPE OF INQUIRY

The deliberately short and pithy chapters in this research handbook offer a unique and multifaceted lens through which to explore the texture of transnational labour law (TLL). For at least the past 30 years, TLL has emerged alongside struggles to understand and address the implications of a ‘polycentric’ globalization, for the implicit domestic labour law bargain.<sup>1</sup> Some relevant changes include heightened global interdependency, technological innovation, labour migration, increasing informalization of work, and the persistence of poverty, discrimination and inequality along fault lines of historical marginalization. Today, thick webs of contractors structure global production chains, constructing yet obscuring links between workers in the global South who produce products they cannot afford to buy, and workers in the global North who both market and consume goods they no longer produce. The transnational enterprises through which markets operate are able to control the means of production, transform that control into power, and exercise it transnationally to compel workers to live and produce by their norms.<sup>2</sup>

Similarly complex networks of labour brokers recruit workers from an intricate range of regional peripheries, to provide a host of activities recharacterized<sup>3</sup> as services. They may work in actively informalized agricultural production, building construction or care reproduction servicing global cities, shaped in the light of – rather than in opposition to – a global and regional architecture structuring the provision of services transnationally. Such phenomena reflect and adapt a Westphalian notion of state sovereignty, and the highly differentiated rules governing the conditions of movement of products, services and capital. TLL builds on a recognition that liberal states have made the global era possible: what was conceived as national becomes denationalized

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<sup>1</sup> See SIMON DEAKIN & FRANK WILKINSON, *THE LAW OF THE LABOUR MARKET: INDUSTRIALIZATION, EMPLOYMENT AND LEGAL EVOLUTION* (2006); Andreas Fischer-Lescano & Gunther Teubner, *Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law* 25 *MICHIGAN JOURNAL OF INTERNATIONAL LAW* 999 (2004).

<sup>2</sup> See Jean-Philippe Robé, *Multinational Enterprises: The Constitution of a Pluralistic Legal Order*, in *GLOBAL LAW WITHOUT A STATE* (Gunther Teubner, ed., 1997), 45, 49; DAVID HARVEY, *THE CONDITION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE* (1989) 141–72, 187.

<sup>3</sup> See Tonia Novitz, Ch 34 in this volume.



in a process propelled by actors and sources of authority that proliferate in territory beyond the decentred state.<sup>4</sup>

The changes afoot have led to substantive rethinking of the spatial and temporal configuration of the global regulation of work. They challenge deeply rooted assumptions about law, labour and the transnational. And they shift the focus to alternate actors. Workers in particular, as principal actors seeking to refocus global governance's direction, are required to reimagine if not the nature then certainly the focus of their justice claim. TLL therefore does not reflect a rigid reclassification of the field of labour law, or international (labour) law. TLL rather reflects a recognition, captured by Trubek, that:

there is a missing pillar in the architecture of global governance. Globalization has shifted the world balance of power between labor and capital ... The international mechanisms to protect rights and raise standards, never very robust, have proven inadequate in the face of global economic forces.<sup>5</sup>

A fragmentary TLL has emerged to problematize and resist the direction of social regulation under globalization. Recognizing globalization's asymmetries, and identifying spaces for action, TLL operates within, between and beyond states to construct counter-hegemonic alternatives. The field critically encompasses actions beyond the state, to take into account the actions of transnational enterprises, labour federations, civil society and other actors. Moreover, TLL does not stop where national labour law begins: the two are deeply intertwined, and challenge each other. TLL is a form of multi-level governance, 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 – amongst states, across uneven regional development, amongst vastly differently empowered institutions and actors. TLL 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. We contend that it is the early International Labour Organization (ILO) constitutional *acquis*, rooted in labour history's recognition that law's normative character is indeterminate and must be the basis of continuous struggle for social justice, that is at the core of TLL's emergence. That centring of social justice – which includes but extends beyond 'bringing redistribution out of the closet'<sup>6</sup> – goes a long way to explaining why TLL is also such a contested terrain.

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<sup>4</sup> See SASKIA SASSEN, *TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES* (2006); SASKIA SASSEN, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION* (1996).

<sup>5</sup> See David Trubek, Review Essay: The Emergence of Transnational Labour Law, 100 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 725 (2006). See also ANTONIO OJEDA AVILÉS, *TRANSNATIONAL LABOUR LAW* (2014).

<sup>6</sup> Karl Klare, Horizons of Transformative Labour Law, in *LABOUR LAW IN THE ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES* (Joanne Conaghan, R. Michael Fischl & Karl Klare, eds, 2002) 1 at 3.