

Labour Law and Social Progress

92

Holding the Line or Shifting the Boundaries?

Editors

Roger Blanpain & Frank Hendrickx

Guest Editor

D'Arcy du Toit

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Labour Law and Social Progress

Bulletin of Comparative Labour Relations

VOLUME 92

Editor

The series started in 1970 under the dynamic editorship of Professor Roger Blanpain (Belgium), former President of the International Industrial Relations Association. Professor Blanpain, currently Professor Emeritus of Labour Law, Universities of Leuven and Tilburg, is also General Editor of the International Encyclopedia of Laws (with more than 1,600 collaborators worldwide) and President of the Association of Educative and Scientific Authors.

In 2015 Frank Hendrickx, Professor of labour law at the Faculty of Law of the University of Leuven (Belgium) joint as a co-Editor. Frank Hendrickx has published numerous articles and books and regularly advises governments, international institutions and private organisations in the area of labour law as well as in sports law. He is the Editor-in-Chief of the European Labour Law Journal and General Editor of the International Encyclopaedia of Laws together with Professor Roger Blanpain.

Introduction

The Bulletins constitute a unique source of information and thought-provoking discussion, laying the groundwork for studies of employment relations in the 21st century, involving among much else the effects of globalization, new technologies, migration, and the greying of the population.

Contents/Subjects

Amongst other subjects the Bulletins frequently include the proceedings of international or regional conferences; reports from comparative projects devoted to salient issues in industrial relations, human resources management, and/or labour law; and specific issues underlying the multicultural aspects of our industrial societies.

Objective

The Bulletins offer a platform of expression and discussion on labour relations to scholars and practitioners worldwide, often featuring special guest editors.

The titles published in this series are listed at the end of this volume.

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Preface

This volume contains a selection of papers presented at the 21st World Congress of the International Society for Labour and Social Security Law,¹ including keynote addresses and other contributions that are relevant from an international and comparative point of view.

The original Call for Papers, written at the end of 2013, had introduced the theme of the Congress as follows:

'In the era of globalisation, the four pillars of the ILO's Decent Work Agenda ultimately depend on the prospects for the global economy. Since the recession of 2008 these prospects have changed for the worse. Unlike previous recessions it has not been followed by renewed growth. Rather, it has opened up a period of even greater uncertainty in which a new paradigm of fragile and unpredictable growth could be in the making. This raises the spectre of labour market policy concerned more with spreading the burdens of insecurity through negative reforms than sharing the fruits of growth through positive reform.'

'If this is so, how can labour law continue serving the ends of collective regulation, individual protection and social justice?'

Events have moved on since this was written but economic uncertainty continues, coinciding with pervasive and explosive political tensions, manifested in phenomena such as the refugee crisis in Europe and its intractable causes. This volatility, intensifying the destabilizing consequences of decades of 'globalisation' based on 'neo-liberal' policies (itself a term of art), frames the present discussion.

But times of volatility are also times of creative response. Because the old can no longer suffice, new understanding is needed. The challenge of the future has been an insistent theme of labour law scholarship over the past thirty years. In this collection the focus is not so much on the future as on the present. The papers take stock of what has emerged and what can be learned from previous analyses in putting forward a range of new and possibly more nuanced perspectives on certain crucial issues of labour market regulation.

1. Held in Cape Town, South Africa, from 15 to 18 September 2015.

The richness of the contributions makes it impossible to write meaningful summaries, especially since various themes recur in different papers. Rather, it will be attempted by way of introduction to lift out some of the central themes.

Most fundamental, perhaps, is the premise that labour law is not the problem (as the neoliberal paradigm would have it); it is, or should be, part of the solution. This remains true whether the question is viewed from the standpoint of economic development (Simon Deakin) or the pursuit of social justice (Alain Supiot). Indeed, as these and other papers demonstrate, these purposes are interwoven in a quest for what may be termed 'social progress': that is, sustainable economic growth combined with social justice, including mechanisms for (re)distribution of social wealth to eliminate unjustifiable inequality. And to play this role in a dramatically transformed world, it is widely accepted that labour law must move beyond its traditional forms. But here at least two qualifications emerge, the elaboration of which runs through several of the papers.

First, the processes of change associated with globalisation are not unilinear, a one-way journey towards the atomization of trade unions and the dismantling of labour law under the inexorable pressures of neo-liberalism. Opposed to this is the resilience of trade unions and collective bargaining as mechanisms of labour market regulation at least in certain sectors as well as the importance of national policy, despite the influence of global market forces, in shaping national outcomes that are far from uniform (Graciela Bensusán).

The continuing relevance of collective bargaining is also reflected in the significant number of papers presented at the Congress dealing with the right to strike (of which three are included in this collection). The recent attempt by the employers' group at the International Labour Conference to delete the right to strike from ILO Convention 87 may partly explain this interest. However, it is also a fact that non-standard as well as standard work – despite the promotion of 'individualisation' – by and large remains collective in nature. This creates an ongoing basis for collective action and legal protection thereof, as one of the few checks on the power of corporate employers, in the interests of market effectiveness as well as fair outcomes for workers.

But, if not unilinear, the processes of change are also not circular. The growth of labour law cannot pick up from where it left off in its pre-globalisation heyday. Not only is it impossible to turn the clock back; even in its golden age labour law was shot through with limitations reflective of that period, implicitly marginalizing much of the workforce beyond the 'standard' paradigm. To recover its vitality in today's labour market calls for more than a streamlining of existing institutions (Judy Fudge, Adelle Blackett). The goal of social justice implies nothing less than a reimagining and reconstruction of labour law as a discipline encompassing the rights of all those performing what Judy Fudge terms 'socially valuable' work.

What this could mean for the existing institutions of collective bargaining and worker protection, but above all in the evolution of new institutions responsive to different needs, should be a central focus of academic research and is engaged with in several papers. But, as the analyses of Alain Supiot and Simon Deakin demonstrate in different ways, it also needs to be confronted at a very practical level if labour law is to contribute to social progress. The papers referred to above and others (for example, by

Isabelle Vacarie and Stefan Bellomo) build on previous scholarship in bringing more clarity to different aspects of this interventionist project.

What is true of labour law is, in essence, true of social security law also. Keith Puttick examines the challenges at the 'labour-social security interface'. After highlighting the problems resulting from underemployment, short-term and increasingly intermittent work and diminishing wages, he notes how such transformations have meant increasing reliance on State in-work support. Such support is problematic, however, and costly in an era of austerity. Partly in response to this, he argues for more effective regulatory interventions, including measures to close the gender gap, improved sectoral bargaining and other redistributive mechanisms. On the social security side of the interface, besides improved design and funding, much can be learnt from systems in the Americas, South Africa, Asia and China. The purpose of social security is complementary to that of labour law; it is to promote social justice for workers outside as well as in the workplace. Indeed, it is impossible to conceive of workers enjoying meaningful labour rights without socio-economic rights, enabling them to lead dignified lives both as citizens and workers.

This leads back to the theme of social justice in which labour rights are understood as an aspect of human rights and the protection of those rights is redefined as an affirmation of 'industrial citizenship' in an inclusive sense, overlapping with, but also transcending the limitations of, national citizenship.

Tragically absent from this collection is the paper by the late Sir Bob Hepple, 'Can Labour Law Survive Globalisation?', that was to have been a keynote presentation at the Congress. To the shock of many, he passed away less than four weeks before he was due to deliver it. The question in the title, of course, was metaphorical. What was really awaited were his insights into the development that labour law might be expected to undergo in order to 'survive', that would no doubt have addressed, qualified or enriched the ideas put forward in these papers. Although this was not to be, much can be learned from his rich legacy of published work, an important part of which speaks to the central theme of the Congress: the relationship between labour law and social progress.

And so, to express the esteem in which he was held and the affection of those who knew him, the session he would have addressed was used to pay tribute to his life and work. Six of his former colleagues from South Africa and other countries shared their recollections of this unassuming man and outstanding scholar in what many delegates described as the most moving and memorable congress session they had ever attended. A video of the event, 'A Tribute to Professor Sir Bob Hepple QC', can be seen at <https://www.youtube.com/watch?v=zcbY3twHRD4>.

Finally, special thanks are due to Professors Manfred Weiss and Stefan van Eck for their assistance in selecting the papers in this collection.

D'Arcy du Toit
Guest Editor
 29 November 2015

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