

Antonio Ojeda-Avilés

Transnational Labour Law



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Transnational Labour Law

Studies in Employment and Social Policy

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Series Editors

Prof. Alan C. Neal
Prof. Dr Manfred Weiss
Prof. Birgitta Nyström

Launched in 1997, the Studies in Employment and Social Policy series now boasts over forty titles, addressing key policy and development issues in the fields of Industrial Relations, Labour Law, Social Security, and International Labour Regulation.

Under the direction of its General Editors, Professor Alan Neal (Founding Editor of the International Journal of Labour Law and Industrial Relations, and Convenor of the European Association of Labour Law Judges), Professor Manfred Weiss (past-President of the International Industrial Relations Association) and Professor Birgitta Nyström (Professor of Private Law at the Law Faculty, University of Lund, Sweden), Studies in Employment and Social Policy seeks to provide a forum for highlighting international and comparative research on contemporary areas of significance for evaluation and regulation of the world of work.

With contributors from leading figures in the field, Studies in Employment and Social Policy brings together key policy-makers, academics, and regulators, providing a unique context in which to analyse and evaluate the rapid and dramatic work and social policy developments taking place across the globe.

Foreword

We live and work in a world where the economy and labour relations are dominated by multinational corporations and financial institutions, often more powerful than nation states. These concentrations of capital can generally shift their activities across national frontiers to locations where they find regulation less burdensome. However, even where there is freedom of movement of labour, as in the European Union, there are many practical, linguistic and cultural obstacles for workers wishing to move to another country to find the best wages and working conditions. Moreover, trade union movements are closely linked to their own countries and face many legal and practical difficulties in organizing cross-border solidarity as a countervailing force against the power of globalized capital.

Despite this globalization of capital and the trade in goods and services, which has profoundly altered the way in which labour markets are regulated, books on labour law still mainly fall into one of two categories: they either cover exclusively national law, or they focus on international labour regulation (particularly through the ILO), and the patchwork of regulation by regional bodies such as the EU and MERCOSUR, with long and detailed accounts of the functioning of these supranational bodies. What is missing in the literature is a work that successfully brings together the mixture of public and private regulation through international and regional rules, national laws, multinational codes of conduct and the expanding body of global collective agreements. This regulation is both procedural and substantive. It is described not as 'international' labour law – which governs rules between states – but as 'transnational' dealing with rules, whatever their origin, that cross national boundaries.

In this important and timely book, Professor Antonio Ojeda-Aviles has given the reader the benefit of his lifetime of teaching and research in this subject to whose development he has made a major contribution. As far as I can discover, there is no other book – in English, Spanish, Italian, or French – that provides a similarly comprehensive introduction to this subject. It provides a new structure in which the main questions of private international law (conflict of laws) in labour matters, as well as the substantive public norms and private regulation including collective bargaining are systematically analysed. The text is enlivened by a number of boxes which contain

examples from case and statute law, codes and agreements that illustrate the problems being discussed.

The text raises critical theoretical issues – such as why certain substantive topics such as equality and health and safety, and even more surprisingly working time, are subjected to regional regulation, but others, such as minimum wages, are not. It also explains matters of practical importance – such as the choice of the applicable law and jurisdiction in cases with a cross-border element. Two of the most creative chapters are those dealing with transnational collective bargaining and collective conflicts on which until now there has been a relative lack of critical analysis and comment. The last chapter discusses the controversial issue of the scope and effectiveness of multinational codes of conduct and corporate social responsibility.

This valuable and innovative book deserves to be widely read by students, practitioners and policy-makers.

Professor Sir Bob Hepple QC, FBA
Emeritus Master of Clare College
Emeritus Professor of Law, University of Cambridge
Former Senior Vice-President United Nations Administrative Tribunal
Cambridge, 2014

Preface

Apparently, the title of this book, Transnational Labour Law, does not announce substantial differences with the general subject matter of this type of publications, from which there are many good examples in libraries all over the world. If we take a look at the summary, we can see that it also includes the most common topics discussed in International and European Labour Law. With so many good works on the matter it does not seem necessary to reiterate such contents and going into what it seems a ciphered denomination to distract the reader from the struggle between classic expressions, relieved only by the new developments in well known institutions.

However, the title conceals more than just a resounding title to analyse the same that many decades ago Gérard Lyon-Caen started to study under the title *Droit Social International et Européen*. First of all, we are using a novel approach under such heading because transnational implies a horizontal perspective across world institutions, something quite different from international as a synonym for interstate, or at least that is what many semantics scholars have decided in order to differentiate between both denominations. And this is not related just to the fact that experts are tired of seeing how governments are going further than necessary in their relations to other governments, but also to the new leading role played by multinational companies, as powerful as governments themselves – or sometimes even more –, and the new formulas of private regulation of economic and production relations. It is this core matter what Transnational Labour Law focuses on, because over the last twenty years we have seen that this place has been taken by multinationals and the way they interact with other subjects, among which international trade unionism has experienced a huge development.

A horizontal perspective that cannot be limited to the classic of International Private Law, with its conflict-of-law rules broken down up to the smallest detail, it shall rather reach beyond the debate on applicable law and court of jurisdiction in international litigation. Private relations dwell on the public legislation on which they are based, not losing their private their private nature for this mere reason and at transnational level there is also a legislation stemming from public authorities and

international organizations laying the foundations or basic standards for supplementary private regulation. In our case, transnational institutions ranging from fundamental labour rights to employees' rights in corporate crises or cross-border collective bargaining are governed by regulations stemming from different sources of Public Law. And as it is usual practice in Private Law the analysis of such rules remains with their private nature provided that we do not go into analysing the structure of decision-making processes of public entities; i.e., the Public Law elements. Here we can find the second difference with the more classic monographs of European Social Law or especially, International Labour Law: we shall not address the ins and outs of the governing bodies of the ILO or the EU, or the way by which Conventions or Directives are adopted, because our interest focuses on the regulation of private entities by these and other international organizations. In turn, we shall address the structure of the trade unions and employer organizations that will be discussed in the text, although we shall try not to tire readers with unnecessary details. For example, it might be very illustrative to see how the International trade Union Confederation is structured or the composition of a negotiating commission under the regulations on European works councils.

The transnational – cross-sectional – perspective of employees' problems in their relations with employers at supranational level allows us to detect the presence of other 'social' and not political subjects, in the everyday functioning of industrial relations. First of all, multinationals of all kinds with their labour conflict and negotiation patterns that in many cases have originated spontaneously over centuries, in that *Lex Mercatoria* where we can find so many surprises in the field of labour. This might be the reason why other works similar to this have overlooked the aspect of global and regional employer organizations, and even the emerging topic of corporate social responsibility, which is typically defended by the large multinational companies ..., at least in present time. And in front of them the collective subjects of workers, from the European works councils to the Global Unions, with an interesting and rather unknown field of collective agreements, framework agreements, joint declarations and codes of conduct that are becoming increasingly important. With them come transnational collective agreements, which are starting to reach surprisingly precise levels in global and regional regulation of working conditions. And also collective conflicts and the different ways to settle them, ranging from direct action measures to the recourse to international courts or out-of-court settlements, i.e., mediation and arbitration.

There are three main areas analysed in this book which have been addressed as comprehensively as possible: on the one hand, the ILO with its conventions and its committees specialized in the implementation of regulations; on the other hand, the European Union with its Directives and Regulations, its dialogue and all its other labour institutions; finally a wide deregulated and anomic space, which notwithstanding is starting to assume some kind of rules, as a result of the pressure put by either trade unions, or the international public opinion or the effort of international organizations. It is fascinating to view the current deployment of negotiation and conflict relations in some of the most unequal frontiers in the world, as for example, in the Baltic or in Mesoamerica, and the large number of private and public institutions involved in trying to overcome tensions. And even more interesting, but with a

disheartening opacity, is the bustle of institutions in other continents, in which the meaning of concepts such as collective agreement or social dialogue is barely known.

It seems obvious that the three areas that have been mentioned cannot be addressed in the same manner. ILO Conventions have got a quite well-established doctrine, stemming mainly from the Committee on Freedom of Association and the he Committee of Experts on the Application of Conventions and Recommendations, and they enjoy a nearly religious respect in Latin America, where most of the countries apply Conventions directly, after having them ratified by their Parliaments, without any domestic transposition laws. Moreover, a ninety-year long history has forged traditions and an enviable international presence, with clear and well-delimited action protocols. However, the European Union after some hesitation has decidedly entered the field to regulate labour institutions and its Directives and the judgments of the European Court of Justice provide us by a rich stream of ideas and conducts that are likewise clear enough to gain a good knowledge and present it here. Along with it the Council of Europe performs an additional task that sometimes stands out above that of the EU in addressing certain aspects, thanks to its European Court of Human Rights. But beyond these centres of legal production and the comprehensive literature that stems from them, the rest of the world is subject to the peculiar features and private scope between stakeholders that are seldom at collective scale. In this large chunk of labour relations there are barely any structures and little is known from them, and transnational studies are difficult to find and soon become outdate due to the rapid development of events. For this reason in some cases we will only be able to provide an *événementiel* study of the situation, give some information about the OHADA or the standard collective agreement for flag of convenience vessels, without going into detail on the problems for their implementation or legality issues for example.

The discussion on labour and industrial relations at global scale has got the disadvantage of taking place at times of rapid change. The production of regulations by the ILO and the EU seems to have entered a stage of lingering enjoyment in what they have already achieved; nothing to do with the dynamics of the 1990s. It would seem that the Termination of Employment Convention 158/1982 and the Charter of Fundamental Rights of the European Union have exhausted the force of both institutions, while within their boundaries there is a groundswell. But, however, in regions in which Labour Law was traditionally conspicuous by its absence, it is the same multinational companies that used to disregard fundamental rights who nowadays rush to proclaim their respect to ILO Conventions and to require their suppliers and auxiliary companies to enforce them.

Antonio Ojeda-Avilés
Punta Peginas, July 2014

List of Abbreviations

ATCA	Alien Torts Claims Act (USA 1789)
BusinessEurope	European Employers Union (formerly UNICE)
CAS	Court of Arbitration for Sport
CC	Civil Code
CCFSRW	Community Charter of the Fundamental Social Rights of Workers
CFREU	Charter of Fundamental Rights of the European Union
CE	Spanish Constitution
CEACR	Committee of Experts on the Application of Conventions and Recommendations (ILO)
CEEP	European Centre of Employers and Enterprises providing Public services
CFA	Committee on Freedom of Association of the ILO
CSR	Corporate Social Responsibility
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECJJ	European Court of Justice Judgment
ECSR	European Committee of Social Rights of the Council of Europe
EFA	European Framework Agreement
ET	Statute of Workers Rights
ETUC	European Trade Union Confederation
EU	European Union
GSP	Generalized Systems of Preference
GU	Global Union
IFA	International Framework Agreement
ILO	International Labour Organization

IOE	International Organisation of Employers
ITUC	International Trade Union Confederation
LJS	Labour Jurisdiction Act
LOPJ	Judicial Power Organization Act
MLC	ILO Maritime Labour Convention of 2006
NGO	Non-governmental Organization
OISS	Ibero-American Social Security Organization
R	Number of Registration of a Case at the Relevant Court
SC	Supreme Court
SEA	Single European Act of 1986
TC	Spanish Constitutional Court
TEA	Temporary Employment Agency
TEU	Treaty on European Union
TLL	Transnational Labour Law
TFEU	Treaty on the Functioning of the European Union
UEAPME	European Association of Craft, Small- and Medium-Sized Enterprises
UN	United Nations Organization
UNICE	European Employers Union, Presently BusinessEurope
WTO	International Trade Organization

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