

Workplace Law Without the State?

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In a series of articles now spanning almost twenty years Harry Arthurs has argued that the “new economy” is leaving labour law - and workplace law more generally - increasingly without norms authoritatively pronounced and enforced by state institutions.¹ In his analysis, the new economy and its consequences for social, economic and political life have left states and in a politically weak position to enact and enforce workplace laws. Further, globalization powerfully constrains the prospects for their renewal by generating a “conditioning framework” that habituates us to a particular set of values and baseline assumptions about what is possible and desirable: “that the nation’s economy, the quality of life it can sustain, and the personal well-being of each worker and entrepreneur depend upon a favourable business climate; that capital is global, highly mobile, and climate-sensitive; that investors will not come to or remain in Canada, or invest in given Canadian enterprises, unless assured of favourable prospects; and that in the workplace, as in the political forum, one acts at one’s peril to diminish those prospects”.²

In his academic writings Harry argues that this framework derives its force from two potential sources. On the one hand, enhanced capital mobility may enable investors and employers to bargain harder with governments and workers over the content of state and workplace level labour laws, by expressly or implicitly threatening to relocate. On the

¹ Harry Arthurs, *Labour Law Without the State?*, 46 U.T.L.J. 1 (1995); *Landscape and Memory: Labour Law, Legal Pluralism and Globalization* in Ton Wilthagen ed., *Advancing Theory in Labour Law in a Global Context*. (Amsterdam: North Holland Press, 1998); *By What Immortal Hand or Eye? – Who Will Redraw the Boundaries of Labour Law?* in G. Davidov and B. Langille eds. *Boundaries and Frontiers of Labour Law* (Oxford: Hart Publishing, 2006); *The Transformation of Work, the Disappearance of “Workers”, and the Future of Workplace Regulation* (Paper delivered at St. Johns’s College, University of Oxford, 26 November, 2009); *Labour Law After Labour*, in G. Davidov and B. Langille, *The Idea of Labour Law* (New York: Oxford University Press, 2011); *Making Bricks Without Straw: The Creation of a Transnational Labour Regime*, Osgoode Hall Law School Comparative Research in Law and Political Economy Research Paper Number 28/2012 (2012).

² *Labour Law Without the State?*, supra note 1, at 26. The concept of a conditioning framework is borrowed from R. Grinspun and R. Kreklewich, *Consolidating Neoliberal Reforms: “Free Trade” as a Conditioning Framework*, 43 St. Pol. Econ 33 (1994).

other, ideas about globalization may also independently shape perceptions held by workers, employers, policy makers, and politicians of what the possibilities for such laws are. Within this “globalization of the mind”, the economy becomes the “secret police of our desires”.³

Nevertheless, in *Fairness at Work*, his 2006 report to the Canadian federal government on modernizing the labour standards under the *Canada Labour Code*, Harry noted that states appear not to have lost international market share or investment as a result of specific labour protections that raise production costs, and concluded that the Canadian federal government has significant room to maneuver in setting labour standards.⁴ His analysis and its recommendations suggested that governments can act upon the needs and desires of working Canadians notwithstanding globalization, if they want to, and that clearly saying this may be a first step towards making it happen.

However, as Harry would later remark, the Report “sank like a stone”⁵. This may have been nothing more than an artifact of the political conditions of the time. But it may suggest, as Harry does at times,⁶ that governments really cannot act on such recommendations without risk of capital flight. In this short essay I will argue that states are more constrained by a “globalization of the mind” than by hard economic facts. On the other hand, collective bargaining does often find itself at the hard edges of economic realities. As a result, insofar as it remains a potentially progressive actor, it is the state that increasingly finds itself without labour law, and indeed without labour, rather than the other way around. Progressives might therefore turn their attention to how democratic politics might once again envision, mobilize around and deliberate upon better alternatives.

1. The State Can Still Regulate Workplaces, When It Wants To

³ Landscape and Memory, supra note 1, at 22.

⁴ Federal Labour Standards Review Commission, *Fairness at Work – Labour Standards for the 21st Century* (Gatineau, Quebec: Human Resources and Skills Development Canada, 2006), at 31-34.

⁵ The Transformation of Work, supra note 1, at 9.

⁶ Making Bricks Without Straw, supra note 1, at 6.

Fears that globalization would lead to a “race to the bottom” or, more modestly, to a policy convergence on low labour standards have influenced public policy debate in industrialized countries since the mid-nineteenth century.⁷ They rest fundamentally on four propositions: (1) that unit labour costs matter in international competition for jobs and investment; (2) that jobs and investment can and do move towards jurisdictions with low unit labour costs; (3) that labour and employment laws increase unit labour costs enough to matter this competition; and (4) as a result international economic integration will drive a global market in workplace regulation.⁸ For this logic to operate, at least two conditions must be met. First, the labour and employment laws in question must actually raise unit labour costs. This means that they are enforced, and raise employer costs in a way that is not charged back to workers or offset by productivity gains. Second, the unit labour cost increases attributable to workplace laws must be significant in relation to other factors affecting decisions to locate jobs and investment.

There have been times and still are places within the modern global economy in which these conditions have held or now hold, and as a result the development of protective workplace laws has been checked, or levels of workplace legal protection have declined.⁹ Yet, for the most part, there is little evidence of this in the industrialized world.¹⁰ The reasons for this are many.¹¹ Workplace laws often do not raise unit labour costs. Sometimes costs of legal compliance are simply charged back to workers in the form of lower wages (which may nonetheless leave workers better off if legislation is providing higher value goods that cannot be contracted for individually, such as health and safety protections). More often than contemporary economic discourse tends to suggest, well-designed laws can improve productivity.¹² Even where legislation raises unit costs, as it no doubt sometimes does, other factors tend to matter much more to international competitiveness. These include access to large markets, resource and technical

⁷ See John W. Follows, *Antecedents of the International Labour Organization* (Oxford: Clarendon Press, 1951).

⁸ K. Banks, “Must Canada Change Its Labour and Employment Laws to Compete with the United States?”, 38 *Queen’s Law Journal* 419 (2013), at 427.

⁹ Follows, *supra* note 7; Banks, *supra* note 8 at 433-446.

¹⁰ Banks, *supra* note 8, at 436-446.

¹¹ *Ibid.*, at 429-432.

¹² *Ibid.*, at 45-453.

endowments, good infrastructure, a skilled workforce, political stability and the rule of law.¹³ Moreover, labour costs are often a relatively small fraction of overall cost structures in the leading export industries of industrialized countries, which tend to be capital-intensive. Some of the most competitive countries in the world, according to the World Economic Forum, rely on good government, the quality of their education and health systems and a sound financial sector as competitive advantages, while maintaining labour and employment laws that employers find onerous by international standards.¹⁴

There is in fact no evidence that Canadian governments have been required to change their laws to compete internationally. My own review of changes to labour and employment legislation across Canada between 2001 and 2011 found that in quantitative terms reforms have tilted heavily towards adding rather than removing employee protections.¹⁵ Laws have responded, albeit cautiously, to the issues of the day, including work-life conflict, the erosion of the value of the minimum wage, and the effects of bullying in the workplace. Even in areas of the law that tend unequivocally to raise costs, such as collective bargaining protection or rights to overtime pay, one finds no pattern of change attributable to economic integration. Instead, what one observes in the laws affecting traded sectors is that reforms move in different directions corresponding to the political stripe of governments.

I do not take issue with Harry's observations that the profile, prestige and enforcement budgets of labour ministries in Canada have suffered in recent decades.¹⁶ But in light of the foregoing analysis, there seems to be no reason to attribute this decline to matters of economic necessity. To the extent that globalization matters to the capacity of the state to regulate the workplace, its effects would seem to be derived from how it is understood in the policy discourse of technocrats, politicians and the general public, rather than from its economic logic.

¹³ Ibid, at 430, 448-451.

¹⁴ Ibid. at 449.

¹⁵ Ibid. at 453-459.

¹⁶ By *What Immortal Hand or Eye?*, supra note 1.

2. But in Important Ways the State Is Without Labour Law

It is important to put this observation in context however. As Harry would no doubt remind us, an analysis of the effects of globalization on workplace law is incomplete without turning our attention to law that is without the state, in the sense that it is privately bargained. Here we find that conditions are quite different. In internationally integrated industries employers are often in a position to reproduce both the technological sophistication of production facilities and the training of their workforce in many locations around the world. Compensation costs can matter a great deal at the margin in determining the location of production. The offshoring of manufacturing is of course well advanced in the industrialized world. The offshoring of services has only just begun, and is likely to accelerate with increased internet connectivity.¹⁷ The growing mobility of investment and production thus enhances employer bargaining power.

These mobility effects are amplified by changes in the relative scarcities of capital and labour in the internationally traded economy. As Richard Freeman points out, the integration of China, India and the former communist bloc countries into the international trading system effectively doubled the global labour supply while adding relatively little capital.¹⁸ Emerging economies in which labour is relatively abundant often have significant unit labour cost advantages in particular economic sectors. The forces of supply and demand can therefore exert downwards pressure on wages in traded industries.

Furthermore, unions not only find it harder to get more for their members, but also to pursue redistribution within the workforce. The globalization of production has been accompanied by a wave of skill-biased technological change that generates higher returns to skill, and thus promotes greater dispersion in earnings among workers. These effects

¹⁷ Alan Blinder, *Offshoring: The Next Industrial Revolution?*, *Foreign Affairs*, April/May 2006.

¹⁸ Richard Freeman, "The Great Doubling: The Challenge of the Growing Globalization of Labor Markets to Economic and Social Policy" in Eva Paused. *Global Capitalism Unbound: Winners and Losers from Offshore Outsourcing* (New York: Palgrave MacMillan, 2007)

may have been compounded in countries with unequal access to higher education, contributing significantly to increased inequality within the workforce.¹⁹

Not surprisingly then, the globalization of production appears to be in part responsible for the stagnation of middle class incomes, increased income inequality and an increase in capital's share of national income in the industrialized world.²⁰ The effects of the globalization of production on the workplace bargain are further compounded by three developments elsewhere that have left less money on the table for employers and workers to divide up. First, recent decades have witnessed what Thomas Picketty has termed the rise of the "super-manager" in the Anglo-American world.²¹ There, changes in the norms and practices governing executive compensation have enabled top managers at major private corporations to capture a very disproportionate share of the gains from economic growth in recent decades, and are the primary reason for increased income inequality in recent decades.²² Second, long run declines in demographic and economic growth in the industrialized world have caused an increase in the ratio of the capital stock to national income, while technological advances continue to enable capital to be put to a growing number of valuable purposes. As a result, capital's share of national income will tend to increase. Since ownership of capital is highly unequal, and negligible in the bottom half of the income distribution, these long run developments stand to increase income inequality dramatically.²³ Finally, financial globalization, and the resulting mobility of finance capital are associated with reductions in the wage share of national incomes.²⁴ While the reasons for this require more study, it appears that in the industrialized world they include the switch in the 1980s to corporate governance systems based on maximizing shareholder value and the rise of aggressive returns-oriented institutions, including private equity funds, hedge funds and institutional investors that put pressure on firms to increase

¹⁹ Claudia Goldin and Lawrence Katz, *The Race Between Education and Technology: The Evolution of U.S. Educational Wage Differentials, 1890-2005* (Cambridge, MA: Belknap Press, 2010).

²⁰ International Labour Organization, *Global Wage Report 2012/3* (Geneva: International Labour Organization, 2013) at 49-50; Martin Wolf, *Why Globalization Works* (New Haven: Yale University Press, 2004) at 166-170.

²¹ Thomas Picketty, *Capital in the Twenty First Century* (Cambridge, MA: Belknap Harvard, 2014), at page 315

²² *Id.*

²³ Picketty, *supra* note 21, chapters 5,6, and 10.

²⁴ International Labour Organization, *supra* note 20, at page 49, and sources cited therein.

profits, especially in the short term.²⁵ As a result a greater share of corporate profits is paid out as dividends. These last two developments are good candidates to be most significant causes of a decline in the share of national income accruing to labour (and a corresponding increase in the share accruing to capital) across the industrialized world.

This is not to say that labour laws no longer influence income distribution. Labour laws can influence union density rates, and higher union density remains associated with a more egalitarian distribution of labour income, and with smaller reductions in the wage share of national income.²⁶ Other workplace laws can also operate in the service of equality. Anti-discrimination laws can alleviate wage gaps arising from discrimination against women and minority groups.²⁷ Laws reducing the gap between the wages, benefits and other protections available to permanent and temporary workers also stand to reduce inequality.²⁸

But it does appear that increasingly the strongest dynamics responsible for the growing inequality in the industrialized world are far removed from the workplace, as are the major corresponding policy levers and debates. Executive compensation is as much or more a matter of corporate governance than it is of employment contract. Equal opportunity and equitable income distribution in the labour market have come to depend more heavily than ever on equality of access to higher education, access to affordable child care, and publicly supported pension and benefit programs. Countering the erosion of labour's share in national income may depend more on tax policy or financial sector regulation than on law in the workplace. Workplace bargaining, once able to deliver equality of opportunity and income redistribution to a very significant fraction of the workforce, now finds these goals increasingly out of reach.

²⁵ Ibid, at 51.

²⁶ Simon Deakin, Jonas Malmberg, and Prabirjit Sarkar, How Do Labour Laws Affect Unemployment and the Labour Share of National Income, 153 *International Labour Review* 1 (2014); Isabell Koske, Jean-Marc Fournier and Isabelle Wanner, *The Distribution of Labour Income*, in Peter Hoeller and Isabelle Jourard eds. *Income Inequality in OECD Countries – What are the Drivers and Policy Options?* (Singapore: World Scientific Publishing, 2014).

²⁷ Koske, et al, *supra* note 26, at 62-63

²⁸ Ibid. at 57-8

3. Crisis and Opportunity

As Harry points out, this presents labour law with a crisis of purpose.²⁹ It is a crisis raising profound questions for workplace law more generally, with the potential to land difficult public policy problems in the lap of the state. Labour law can continue to enable workers to organize, bargain collectively and thereby gain access to a measure of procedural justice, voice, and enhancements in pay and benefits. But it is impaired as a means of enabling workers to obtain a fair share – however defined - of the prosperity generated by a modern economy, a purpose long underpinning labour law’s claims to centrality in bringing social justice to modern capitalist democracies. The effects of the new economy on labour law may thus call for both a rethinking of both workplace law and social policy - of what constitutes a just bargain in the workplace, of what constitutes social justice for working people, and of what institutions inside and outside the workplace might implement it.

This is not an impossible task, and indeed scholarship and research have already made significant contributions towards accomplishing it. Some have located significant parts of workplace law within the landscape of human rights.³⁰ Others have turned towards notions of human dignity or decency at work.³¹ Some have extended these inquiries, asking what capabilities individuals should carry into the workplace in order to have full opportunities to develop as human beings.³² While much work remains to be done, it is probably fair to say that such intellectual foundations will prove capable of justifying both the facilitation of collective bargaining and the continued and evolving direct regulation of the employment relationship.

The more difficult questions may lie in the reordering of implementing institutions. It is important to ask what responsibilities employers should bear and which ones should be

²⁹ Labour Law Without Labour, *supra* note 1, at 16-18.

³⁰ See for a discussion Judy Fudge, *The New Discourse of Labor Rights: From Social to Fundamental Rights?*, 29 *Comp. Labor Law and Policy Journal* 29 (2007)

³¹ Federal Labour Standards Review Commission, *supra* note 2, at 47.

³² See for example Virginia Mantouvalou, *Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation*, 13 *Human Rights Law Review* 529 (2013).

socialized in light of the increased competitiveness and volatility of product and service markets. We should consider whether new or changed models of union representation might provide more workers with access to voice in the workplace than is available under the current North American dispensation, in which decentralized union strength interacts very uneasily with the employer incentives generated by integrated product and service markets.³³ It is imperative to ask how workplace rules can be set, modified where appropriate, and effectively enforced, particularly in the absence of union representation. Here again, researchers have begun to generate well-reasoned and viable alternatives.³⁴ In *Fairness At Work* Harry explored such questions as far as his mandate allowed.³⁵

It is true that none of these inquiries is likely to lead to a workplace law capable of the robust redistribution once achieved at the bargaining table. But redistribution is returning elsewhere to the political agenda in industrialized countries. Growing inequality preoccupies intellectual leaders and has made a runaway best seller out of a nearly 700 page economic treatise.³⁶ There are coherent proposals for the regulation of finance,³⁷ the taxation of capital,³⁸ the restructuring of the global trading system,³⁹ the management of financial crises so as to distribute their costs more evenly,⁴⁰ and for reform of executive compensation.⁴¹ It is not difficult to see how renewed workplace laws could form part of a larger policy vision. I would submit that the real question is not whether

³³ See Matthew Dimick, *Productive Unionism*, 4 U.C. Irvine L. Rev. 679 (2014)

³⁴ See for example, Cynthia Estlund, *Regoverning the Workplace: From Self-Regulation to Co-Regulation* (New Haven: Yale University Press, 2010); David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can be Done to Improve It* (Cambridge MA: Harvard University Press, 2014)

³⁵ Federal Labour Standards Review Commission, *supra* note 4, especially in Chapter 7.

³⁶ Emily Cohn, Thomas Piketty is No.1 on Amazon Right Now, Huffington Post, April 22, 2014, http://www.huffingtonpost.com/2014/04/22/thomas-piketty-amazon_n_5191566.html

³⁷ See for example, Joseph Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers our Future* (New York: W.W. Norton, 2012), 336-340.

³⁸ See for example Piketty, *supra* note 21, chapters 14 and 15.

³⁹ See for example Dani Rodrik, *One Economics, Many Recipes: Globalization, Institutions and Economic Growth* (Princeton: Princeton University Press, 2007), chapters 7 to 9; Joseph Stiglitz, *Making Globalization Work* (New York: W.W. Norton, 2007).

⁴⁰ See for example Roberto Mangabeira Unger, *The Really New Bretton Woods*, <http://www.law.harvard.edu/faculty/unger/english/pdfs/progressive4.pdf>

⁴¹ See for example Roger Martin, *Fixing the Game: Bubbles, Crashes and What Capitalism Can Learn from the NFL* (Cambridge, MA: Harvard Business Review, 2011); Lynn Stout, *Killing Conscience: The Unintended Behavioral Consequences of "Pay For Performance"* 39 *Journal of Corporation Law* 525 (2014)

attractive, realistic and progressive options for labour law, workplace law and complementary social and economic policies and programs and can and will be devised, but rather when or even whether democratic politics can grasp and implement them.

4. Who will Deliberate Upon and Act for Social Justice?

Here we need to take Harry's recent and, by his own admission, somewhat lugubrious assessment very seriously.⁴² As he points out, the working class, if it ever was constituted and conscious as such, is no longer. Manufacturing, the geographic centre of union organizing and worker solidarity, is now globally dispersed into supply chains. Working people are increasingly dispersed in other ways too, both legally (employee - temporary, part-time or permanent; own-account self-employed; dependent contractor, etc...) and culturally (through identity politics, consumerism and so on). To this I would add that, in our contemporary media environment, the dispersal is also intellectual. We are scarcely able to sort and absorb the flood of constantly available information and distractions. Faced with incessant and effective bids for our attention, we do not linger on complex problems. We move on, as a matter of cultural practice. As Thomas De Zengotita observes, depth is to our lives what dead air is to a talk show.⁴³ How then are complex solutions to complex social problems to find a time and place for democratic deliberation and collective mobilization?

Those who care about the future of workplace law thus find themselves seeking a new legal landscape while carrying a burden of doubt. But here we continue to find Harry, steadfast, patient and vigorous despite his misgivings, directing attention to the "defiant publics" arising in response to the most recent financial crisis, to advances in economic theory and empirical research revealing capitalism's instabilities and flaws, to encouraging the creativity to propose plausible improvements, and to the importance of freedom of association, expression and assembly to creating a safe space within which

⁴² Making Bricks Without Straw, supra note 1.

⁴³ Thomas de Zengotita, *The Numbing of the American Mind: Culture as Anesthetic*. Harper's Magazine, April, 2002.

critics and protesters can do their work.⁴⁴ And we are grateful for his insight, his perseverance, and his company.

⁴⁴ Harry Arthurs, *The Majestic Equality of the Law: Why Constitutional Strategies do not Produce Equality* (2014) at pp. 12-14.