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International Labour Rights: Legitimising the International Legal Order?

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Abstract

This paper considers the role of international labour rights in an era of globalisation. It begins from Patrick Macklem's definition of that role in terms of providing the international legal order with a measure of normative legitimacy. It then interrogates the relationship between sovereignty and international labour rights in an era of globalization, highlighting the particular significance, in this context, of the voluntary surrender by nation states of elements of their sovereignty. It questions whether Macklem has given due consideration to this phenomenon, and to its consequences for the rights and interests of workers; whether, therefore, he has succeeded in providing an account of international labour rights that is at once descriptive and normative, as he intends it to be. Having drawn attention to the limitations of international labour rights, the paper concludes by commenting briefly on the desirability of a body of *transnational* labour law, of which international labour law would form only one part.

Introduction

In *The Sovereignty of Human Rights*, Patrick Macklem's primary aim is to provide an account of international human rights that is 'distinctively legal'; one which comprehends international human rights as an element of the wider international legal order.¹ I will describe in greater detail what I understand Macklem to mean when he speaks of providing an *account* of the field; for the moment, let us note his stated intention that this should be at once both descriptive and normative, speaking both to the nature and to the purpose of the rights in question. It is in purported fulfilment of this objective that Macklem develops his central argument, that international human rights are best understood as international legal entitlements, which 'monitor the distribution and exercise of sovereign power to which international law extends legal validity', 'mitigate adverse consequences produced by the

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¹ Patrick Macklem, *The Sovereignty of Human Rights* (Oxford: Oxford University Press, 2015) at 2.

international deployment of legal sovereignty’, and ‘express – imperfectly – what is required of the international legal order to enable it to acquire a measure of normative legitimacy’.² In the scheme of the book, international *labour* rights figure as one example of several which Macklem uses to explain and substantiate his main thesis. In a chapter entitled, ‘International Rights at Work’, he argues that international labour rights vest the international legal order with a measure of normative legitimacy by fulfilling various functions, all of which may be grouped together under the notion of monitoring the exercise, and the distribution, of sovereign power to which international law extends legal validity.³

In what follows, I take this claim about the legitimising function of international labour rights as the starting point for my discussion. Having commented briefly on the broad ambition of the book to provide an account of international human rights, I focus my attention on the relation of sovereignty to international labour rights in an era of globalisation, highlighting here the significance of the voluntary surrender by nation states of elements of their sovereignty.⁴ As a result of such surrender, actors, actions and spaces appear which do not fall squarely – or at all – within the jurisdiction of any nation state. National governments take steps to weaken existing worker protections, not in a bid to attract capital investment, but *because they are legally bound to do so* – under the terms of international trade agreements, or loan agreements, to which they are signatories. International and regional legal and institutional frameworks are developed which allow for the re-characterization of labour as services, and the consequent circumvention of otherwise applicable labour laws. As a result of these steps, companies and transnational corporations (TNCs) are further empowered to configure relations with workers to their own benefit. Referring both to Macklem’s description of international labour rights and his illustration of those rights ‘at work’ in the international legal order, I raise the question whether he has given due consideration to this aspect of the relation of sovereignty to labour rights, and to its consequences for the rights and interests of workers. Though he goes some way to acknowledging the capacity of free trade agreements and other aspects of the liberalization of trade and finance to disadvantage workers, it seems to me that he then overestimates the capacity of international human rights to guard against this danger, or to mitigate its consequences. In this respect, Macklem’s

² Ibid at 1-2.

³ Ibid at 101.

⁴ Eg Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization* (New York: Columbia University Press, 1996)

account may be contrasted with the work of those scholars who have identified a need, in an era of globalization, for *transnational* labour law, of which international labour rights would form only one part.

1. Accounting for International Labour Rights

In introducing and developing his theory of international human rights, Macklem situates himself as charting a path between moral and political conceptions of the field. He characterises moral accounts as dominant when it comes to identifying the *normative* foundations of international human rights law. According to such accounts, he suggests, ‘the existence or non-existence of a human right rests on abstract features of what it means to be human and the obligations to which these features give rise. The mission of the field is to secure international legal protection of universal features of what it means to be a human being’.⁵ In contrast, political conceptions are primarily concerned to define the *nature* of human rights, which they do with reference to the function of those rights in global political discourse. International human rights are understood, accordingly, to represent ‘reasons that social, political and legal actors rely on in international arenas to advocate interfering in the internal affairs of a State and to provide assistance to States to promote their protection’.⁶

The criticism that Macklem makes of each of these approaches is revealing. At the risk of oversimplifying his nuanced and valuable discussion, I would suggest that the key problem that he identifies with the moral conception is that it fails adequately to *describe* the law; the political conception, on the other hand, describes without identifying a normative account that is sufficiently independent of the description. ‘If human rights in international law are not those that moral theory generates, then moral accounts of human rights are not normative accounts of international human rights law’.⁷ ‘Relying’ as political conceptions do ‘on practice to identify the normative dimensions of human rights – that is, the role they should play in the international arena ... potentially drains human rights of their capacity to act as instruments of critique of existing practices’.⁸ In Macklem’s view, then, it is clear that a

⁵ Macklem, *Sovereignty of Human Rights*, supra note 1 at 5.

⁶ Ibid at 13.

⁷ Ibid at 13.

⁸ Ibid at 16.

scholarly account of a field of law ought to have *both* descriptive and normative properties. ‘An account ... of the field should not conflate fact and norm by equating legal validity with moral legitimacy, but nor should it lose sight of the object that it seeks to describe’.⁹

In order that his own account should adequately describe international human rights, Macklem begins from the positivist assertion that it is international law – and not moral theory or political practice – which determines the existence of international human rights.¹⁰ A norm is an international human right if it has been enacted, promulgated, or specified as such in accordance with the rules that international law lays down for the creation of specific legal rights and obligations.¹¹ (‘An international right to food, for example, exists because the International Covenant on Economic, Social, and Cultural Rights enshrines such a right’.¹²) That is not the end of the story for Macklem, however, for the straightforward reason that a positivist account leaves the ‘content’ of international human rights underdetermined. ‘The interests that a human right protects, the nature of the obligations to which it gives rise, the actors who bear these obligations – these and other questions typically remain open to legal interpretation’.¹³ The practice of legal and political actors becomes relevant now, in ‘illuminating a right’s content’.¹⁴ And moral theory is looked to in order to provide a normative account of its purpose, albeit from a perspective that is strictly internal to international law. ‘Human rights in international law are not so much formal expressions of what justice requires as a matter of abstract morality as they are legal instruments that aim to do justice in the actual international legal order in which we live’.¹⁵

As Macklem himself highlights, the task of providing an account of a field of law that is at once descriptive and normative is not necessarily an easy one.¹⁶ It requires the identification of a normative principle or set of principles, which is in some measure independent of the rules at issue – so that it might serve as a means of interpreting and critiquing those rules, of arguing for legal reform, and of providing the ‘field’ with a measure of coherence – but

⁹ Macklem, *Sovereignty of Human Rights*, supra note 1 at 13.

¹⁰ Ibid at 18.

¹¹ Ibid at 18.

¹² Ibid at 18.

¹³ Ibid at 21.

¹⁴ Ibid at 21.

¹⁵ Ibid at 22.

¹⁶ For a discussion of various attempts to achieve the same feat in respect of labour law see Ruth Dukes, *The Labour Constitution: the Enduring Idea of Labour Law* (Oxford: Oxford University Press, 2014), especially chapter 8.

which, at the same time, is sufficiently closely informed by the terms of those rules that it can be understood adequately to describe them. Fact and norm must not be conflated, but neither can the distance between them be stretched so very far. With this point in mind, it may be noted that the ambition which Macklem ascribes to international human rights is far from modest. ‘Their true significance’ he writes, ‘lies in their status as international legal entitlements that call for *radical* revision of the ways in which international law organizes global politics into an international legal order’.¹⁷ Their ‘mission’ is to ensure the legitimacy of that order.¹⁸ Turning now to his treatment of international labour rights, I wish to pose the question whether Macklem’s account nonetheless succeeds in being at once normative *and* descriptive of those rights; alternatively, does it run the risk, as Macklem himself puts it, of losing sight of the object that it aims to describe?

2. Sovereignty and Labour Rights

As the title of Macklem’s volume suggests, his theory of international human rights is developed with reference to the notion of *sovereignty*. He defines the role of such rights, as we have seen, in terms of monitoring the distribution and exercise of sovereign power to which international law extends legal validity and, by doing so, furnishing the international legal order with a measure of legitimacy. By the ‘distribution’ of sovereign power, Macklem means the determination by international law of who possesses sovereignty; what constitutes a state.¹⁹ When he refers to its ‘exercise’, he clarifies that he does not mean only the exercise of sovereign power by a state over its own people or territory.²⁰ In addition, he identifies a need for international human rights to monitor and mitigate what he calls the *external* exercise of sovereignty, which he understands to include the entering into by states of legally binding bilateral and multilateral agreements.

Because international law vests States with international legal personality, a State is legally entitled to expand or restrict the scope of its sovereign power by entering into a treaty with one or more sovereign States... A treaty can create legally binding

¹⁷ Macklem, *Sovereignty of Human Rights*, supra note 1 at 1.

¹⁸ Ibid at 2.

¹⁹ Ibid at 45-50.

²⁰ Ibid at 31-7.

obligations on signatory States to exercise their sovereign powers in certain ways and not others and in relation to certain matters and not others.²¹

When addressing international labour rights in particular, Macklem describes their role with reference to the internal and external exercise of sovereign power. (The ‘distribution’ of sovereign power is returned to in later chapters dealing with minority rights and the rights of indigenous peoples.²²) As he explains in more detail, international labour rights:

‘interrogate ... the legitimacy of international legal arrangements that potentially authorize a State to adopt measures that adversely affect the interests of workers inside and outside its jurisdiction. They require States, when participating in the formation of such international arrangements, to take into account the labor rights of all individuals and not simply the rights of individuals under their domestic sovereign power. They require international institutions to exercise international legal authority in ways that respect the interests of workers. And they require States, when exercising domestic regulatory authority, to legislate in ways that respect the rights of workers at home and abroad.’²³

By way of illustrating the descriptive as well as the normative force of his theory in this context, Macklem provides a number of examples of labour rights performing the identified functions. Noting that economic globalization has ‘increased the power and managerial freedom of capital’, and that this has occurred as a result of processes validated by international law, for example, he suggests that international labour rights ‘enable employees to offset some of the [consequent] inequality of bargaining power they experience in the workplace’.²⁴ As a result of the regional and international liberalization of trade, services and investment, also facilitated (‘validated’) by international law, the exit-opportunities of capital have increased, he observes, so that states have become reluctant to create and enforce worker-protective norms for fear of capital-flight. Here, international labour rights again mitigate the potential for workers to be disadvantaged, he argues, by restricting the ability of states to deregulate in a bid to attract or retain foreign direct investment.²⁵ This is particularly

²¹ Ibid at 34.

²² Ibid chapters 5-7, ‘The Ambiguous Appeal of Minority Rights’, ‘International Indigenous Recognition’, ‘Self-Determination in Three Movements’

²³ Ibid at 101.

²⁴ Ibid at 96.

²⁵ Ibid at 96.

visible in the context of bilateral and multilateral trade agreements to which labour ‘side agreements’ are often appended, committing the parties, for example, to respect ‘core’ labour rights (so designated by the ILO).²⁶ Increasingly, too, he points out, international development finance institutions require borrowers to comply with international labour rights as a condition of their loan agreements.²⁷

There is thus a quite striking sense of optimism in Macklem’s presentation of international labour rights: a happy coincidence of the ought and the is. As a scholar of labour law, one cannot help but question whether such optimism can truly be justified; and, further, if it cannot, what this might imply for Macklem’s claim to have *accounted for* international human rights. With these thoughts in mind, I turn now to consider recent developments in European Union (EU) law, which speak to the relationship between sovereignty and labour rights in an era of globalization. My argument, which I develop in this and the next part of the paper, is that although Macklem acknowledges the potential for free trade agreements and other aspects of the liberalization of trade and finance to disadvantage workers, he appears to overestimate the capacity of international human rights to guard against this danger; to ‘mitigate’, as he puts it, the consequences.

(i) *The embedded liberalism of the European Union: Keynes at home, Smith abroad*

At the heart of the European Union lies a project to create a single market within which goods, services, capital and labour can move freely across borders. In the mid-1950s, as the foundation of the Union’s forerunner (the European Economic Community or EEC) was debated, a decision was taken to make only very limited provision in the foundational Treaty for the creation or enforcement of labour standards at the ‘European’ level. The intention was that these should remain squarely within the jurisdiction of the member states. While economic rights to free movement for goods, services, capital and labour should be enshrined as fundamental within the Treaty, labour rights and rights to social welfare need barely figure

²⁶ Ibid at 97-8. The meaning of ‘core’ ILO conventions or ‘core’ labour standards is addressed in part 3 below.

²⁷ Ibid at 99.

at all. Referring to the work of Karl Polanyi and John Ruggie, Ashiagbor has spoken in this context of the ‘embedded liberalism’ of the EU.²⁸

The European integration project involved embedding the [supranational] internal market within national social policy. This was predicated on the ability of these industrialised nations to alleviate any adverse impact of market integration through national systems of employment protection and social welfare, and to fund social policy interventions.²⁹

Without recounting in any detail the history of the EU since 1957, it may be observed that there has been significant movement away from the original constitutional settlement in respect of social policy and labour law. Acting over the course of several decades on the basis of a complex set of rationales and political objectives, the European institutions have greatly extended their ‘legislative competence’ in the field, adopting a sizable body of legislation such as could fill a whole textbook devoted to the subject of ‘European Labour Law’.³⁰ In respect of its specific subject matter, however, this is a strange body of law indeed.³¹ As Freedland noted in the late 1990s, EU labour law deals with, ‘collective dismissals and acquired rights on the transfer of undertakings, rather than with the termination of the employment relationship generally; with particulars of the terms of the contract of employment, rather than with the terms themselves...’; with worker rights to be informed and consulted by the employer, but not with collective bargaining or the right to strike.³² Notwithstanding the development of shared competence over labour law and social policy, certain matters – including, importantly, freedom of association – remain outside the legislative competence of the EU, and instead within the jurisdiction of the various member states.³³ Moreover, as Ashiagbor notes, ‘attempts at the EU level to shore up working and

²⁸ Diamond Ashiagbor, ‘Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration.’ (2013) 19 *European Law Journal* 303, citing Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston MA: Beacon Press, 2001); John Ruggie, ‘International Regimes, Transactions and Change: Embedded Liberalism in the Post-War Economic Order,’ (1982) 36 *Int’l Organization* 379.

²⁹ Ashiagbor, ‘Unravelling the Embedded Liberal Bargain’ supra note 28 at 307.

³⁰ The leading text in English is Catherine Barnard, *EU Employment Law*, 4th ed. (Oxford: Oxford University Press, 2012)

³¹ Mark Freedland, ‘Employment policy’ in Paul Davies *et al* (eds), *European Community Labour Law: Principles and Perspectives* (Oxford: Clarendon Press, 1997).

³² *Ibid* at 278-9.

³³ Art 4(2) of the Treaty on the Functioning of the European Union [TFEU] provides for shared competence. Freedom of association is a fundamental right under EU law, but its protection as such is limited. See eg Art 28 of the EU Charter of Fundamental Rights, which states: ‘Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective

living standards in the face of economic liberalisation have principally taken the form of supporting the Member States in so doing'.³⁴ For these reasons, the broad pattern of cross-border trade liberalisation 'embedded' in national systems of social welfare and labour rights (Adam Smith abroad, John Maynard Keynes at home) continues to be quite easily discernible in the EU today.

The pattern is also discernible, of course, in the international order as it was designed in Bretton Woods.³⁵ By virtue of the operation of the General Agreement on Tariffs and Trade (GATT), and by reason of the nature of international labour standards (addressed as they are to nation states), the pursuit of social justice was confined within national borders, while economic activity was allowed, increasingly, to ignore them. The pattern is reflected again in the – by now fairly standard – practice, noted by Macklem, of appending to bilateral or multilateral trade agreements 'side agreements' by which signatory states bind themselves to respect and enforce their own *national* labour laws. The rationale underlying such agreements is that an undertaking of this type should guard against the possibility of a race to the bottom, or any other form of social dumping that might be occasioned or encouraged by the freeing up of trade across national borders. Even as trade and trade law become increasingly global, so the reasoning seems to go, labour law can remain national and yet effective.

Not addressed by such labour side-agreements (and neither by Macklem) is the possibility that the terms of a trade agreement might positively require a signatory state to lower, or disapply, its national labour standards. It was just such a possibility that fell to be considered by the Court of Justice of the European Union in the landmark cases of *Viking* and *Laval*, both of 2007.³⁶ In the first of these, the Court ruled that when organising industrial action in a manner that was lawful under the relevant *national* rules, a trade union had breached the freedom of establishment of a shipping company, which had sought to replace its Finnish flag with an Estonian one.³⁷ In the second, the Court found similarly that by – otherwise lawfully – organising industrial action, a trade union had breached the freedom to provide cross-border

action to defend their interests, including strike action'. My emphasis. The significance of this phrase is discussed below.

³⁴ Ashiagbor, 'Unravelling the Embedded Liberal Bargain' *supra* note 28 at 308.

³⁵ Adelle Blackett and Anne Trebilcock, 'Conceptualizing Transnational Labour Law' in Adelle Blackett and Anne Trebilcock (eds), *Research Handbook on Transnational Labour Law* (Cheltenham, UK: Edward Elgar, 2015) at 22.

³⁶ Case C-341/05 *Laval v Svenska Byggnadsarbetareförbundet* 2007 ECR I-11767; Case C-438/05 *International Transport Workers' Union v Viking* 2007 ECR I-10779.

³⁷ Freedom of establishment is guaranteed under Article 49 TFEU.

services of a Latvian construction company, which had contracted to build a school in Sweden.³⁸ In both cases, the Court thus held that the relevant (EU) market freedom was applicable horizontally such that it ought to have been respected by the trade union. Nationally protected labour rights, including the right to strike, should only be exercised, according to the Court, in ways which respected the supranationally protected market freedoms of others.

As the extensive and ever-growing literature on these cases suggests, there is very much that could be said about the Court's reasoning and its implications for the legal systems of the Union and the member states.³⁹ For present purposes, the most significant aspect of the decisions is their apparent contradiction of the logic that informed the foundational Treaty of Rome, that economic integration through the creation of a single market did *not* require the harmonization of social standards throughout the Union.⁴⁰ In *Laval* and *Viking*, and in the subsequent case of *Rüffert*, the Court reasoned contrary to that logic that differences in labour standards between member states can give rise, in and of themselves, to restrictions of free movement.⁴¹ Where that is the case, such differences ought to be removed. And if they are not to be removed by means of upwards harmonization – which is highly unlikely given the political and practical difficulties involved in drafting and agreeing common labour standards, all the greater in an EU of 28 member states – then the Court is quite prepared to oversee the dismantling or weakening of established national standards. The fact that the national standards in question have the status of fundamental rights in the EU legal order will not prevent them figuring as unlawful restrictions of free movement, since fundamental rights have only to be protected 'in accordance with Community law'.⁴²

In his hugely insightful analysis of the *Laval* and *Viking* decisions, Fritz Scharpf has highlighted the stark 'institutional asymmetry' in the European Union.⁴³ The Court of Justice,

³⁸ Freedom to provide cross-border services is guaranteed under Article 56 TFEU.

³⁹ For an excellent overview of the jurisprudence and most important lines of academic enquiry see Catherine Barnard, 'Labour Law and the Internal Market' in Barnard, *EU Employment Law*, supra note 30.

⁴⁰ Catherine Barnard and Simon Deakin, 'European Labour Law after *Laval*' in Marie-Ange Moreau (ed), *Before and After the Economic Crisis: What Implications for the 'European Social Model'?* (Cheltenham, UK: Edward Elgar, 2011) at 261.

⁴¹ Ibid at 261. Case C-346/06 *Dirk Rüffert v Land Niedersachsen* [2008] ECR I-1989

⁴² For discussion see Tonia Novitz, 'The Right to Strike as a Human Right' (2007-08) 10 *Cambridge Yearbook of European Law*

⁴³ Fritz Scharpf, 'The Asymmetry of European Integration' (2010) 8 *Socio-Economic Review* 211 at 211-4.

he suggests, is impelled by a ‘liberalizing’ dynamic of its own making.⁴⁴ The questions and cases which come before it tend always to ‘reflect the interest of parties who have a major economic or personal stake in increased factor or personal mobility as well as the financial and organizational resources to pursue this interest’.⁴⁵ Parties with an interest in the maintenance of existing national laws and regulations are not heard. Moreover, the only remedy that the Court can offer private litigants is to disallow those national regulations that are found to hinder free movement. ‘What the Court cannot do is to establish a common European regime that would respond to some of the values and policy purposes, which, as a consequence of its decisions, can no longer be realized at the national level.’⁴⁶ Nor can the Court’s inability to rule in a way that would create common labour standards at the supranational level be easily addressed by political action. Given the ever-increasing diversity of national interests and preferences in an enlarged EU, political agreement on common labour standards is likely to be ‘nearly impossible’ to achieve.⁴⁷ For as long as that is the case, Scharpf concludes, a European ‘social market’ economy simply cannot be.⁴⁸

What of the capacity of international, as opposed to supranational, law, to mitigate against the ‘adverse consequences’ for workers of the law of the single market: the weakening of rights to take collective action and the consequent lowering of terms and conditions? In the aftermath of the *Laval* and *Viking* decisions, appeals were made to the International Labour Organisation (ILO) by national actors claiming that national labour laws no longer conformed with international labour rights. In the case of Sweden and of the UK, the Committee of Experts on the Application of Conventions and Recommendations (CEACR) confirmed that this was the case.⁴⁹ With that, the ball was placed squarely in the courts of national governments: would they now legislate so as to bring their laws back into line with international standards? At the time of writing, the answer to this question remains to be seen.

⁴⁴ Ibid at 222. In Barnard’s opinion, the adoption by the Court of the ‘market access’ approach made it inevitable that collective action should be judged a restriction on freedom of establishment and the freedom to provide services: Barnard, ‘Labour Law and the Internal Market’ supra note 39 at 207.

⁴⁵ Scharpf, ‘Asymmetry of European Integration’ supra note 43 at 221.

⁴⁶ Ibid at 223.

⁴⁷ Ibid at 217.

⁴⁸ Ibid at 217, referring to the commitment in Article 3(3) of the Lisbon Treaty to create a European social market economy.

⁴⁹ ILO, 99th Session, Report of the Committee of Experts on the Application of Conventions and Recommendations (2010), and ILO, 100th Session, Report of the Committee of Experts on the Application of Conventions and Recommendations (2011) (United Kingdom); ILO CEACR, *Report of the Committee of Experts on the Application of Conventions and Recommendations International Labour Conference*, 102nd Session, 2013 (Geneva: International Labour Office, 2013) (Sweden)

In Sweden, it seems that further reform of the law is likely, and that the report of the CEACR may have some influence in shaping the nature of the reform.⁵⁰ In the UK, in contrast, legislation to bring the law into line with international standards is extremely unlikely, barring the fairy-tale ending of an election of a Labour Government under Jeremy Corbyn. Whatever the policy objectives of a particular national government, however, it remains the case that any constraints upon a government's freedom of action that exist by reason of international trade or loan agreements will apply as much to law reform as they did to the original set of labour standards. It is notable, in this context, that when proposals were made in Romania recently to amend laws to bring them back into conformity with international labour standards, the IMF and European Commission were quick to warn the national Government that it should: 'limit any amendments ... to revisions necessary to bring the law into compliance with core ILO conventions'.⁵¹

(ii) Ceding sovereignty to one's creditors

Quite independently of the Court of Justice, the freedom of EU member states to shape their labour laws and labour market institutions has been restricted since 1992 by reason of the adoption of the programme for economic and monetary union.⁵² As was explained by commentators at the time, the terms of the programme tied member states into a macroeconomic policy framework, dictated from above, which drastically limited their autonomy to manage their economies.⁵³ In particular, the framework obliged member states to keep budget deficits and public debt low, to restrict public borrowing and fiscal adjustments, and to adopt interest rates set by the European Central Bank (ECB), in line with its obligation to prioritise price stability *over* other objectives, including full employment. As a result, the framework served to rule out many of the instruments traditionally employed by

⁵⁰ See the Report of the Committee on Posted Workers, "SOU 2015:83 Översyn av Lex Laval" (Overview of Lex Laval), presented to the Swedish Government on 30 September 2015. For discussion see: http://www.labourlawnetwork.eu/national%3Cbr%3Elabour_law/national_legislation/legislative_developments/prm/109/v_detail/id_6321/category_1/index.html accessed 20 June, 2016.

⁵¹ Confidential document leaked to the International Trade Union Confederation, cited by Keith Ewing, 'The Death of Social Europe' (2015) 26 *King's Law Journal* 76 at 91.

⁵² Incorporated into the Treaty of Maastricht. For discussion, see Zoe Adams and Simon Deakin, 'Structural Adjustment, Economic Governance and Social Policy in a Regional Context: The Case of the Eurozone Crisis' in Blackett and Trebilcock, *Research Handbook*, supra n 35.

⁵³ Wolfgang Streeck, 'Neo-Voluntarism: a New European Social Policy Regime?' (1995) *European Law Journal* 31 at 56.

countries seeking to stimulate growth and job creation. Of course, the very idea of economic and monetary union ruled out the option of devaluing a national currency as a means of improving competitiveness and stimulating growth. That being the case, the most obvious alternative left open to countries seeking to improve their competitiveness relative to other member states was to adjust welfare state provisions and labour rights and standards *downwards* in order to compete on the basis of low labour costs.

Prior to 2009, the impact of economic and monetary union on the labour laws of member states appears to have been limited.⁵⁴ On the face of it, at least, national labour laws remained mostly stable throughout the 2000s, albeit within a context of trade union decline and growing inequality between lower and higher earners. Beginning in late 2009, however, the sovereign debt crisis which followed the public bail-outs of the ‘too big to fail’ banks, resulted in quite radical changes to national labour laws.⁵⁵ In response to the crisis, the EU pursued policies of ‘internal devaluation’, imposing these more or less directly on member states. In the case of Portugal, Ireland and, most dramatically, Greece, the ‘Troika’ of the European Central Bank, the European Commission and the IMF required, *as a condition of loans*, that existing labour laws, terms and conditions of employment, and social benefits be cut.⁵⁶ In respect of countries which were not in receipt of loans, Spain and Italy, the Troika otherwise exerted significant pressure in favour of similar drastic measures. Even in non-Eurozone countries, such as the UK, its blueprint of deregulation as the best means of addressing budget deficits and public debt was influential in shaping proposed reforms of labour laws.⁵⁷ The logic behind these policies was a straightforward extension of the logic embodied in the original programme for economic and monetary union: with the aim of restoring the competitiveness of national economies and ensuring economic growth, states should undergo a process of internal devaluation so that they could compete with wealthier states on the basis of low labour costs.

⁵⁴ Simon Deakin and Aristeia Koukiadaki, ‘The Sovereign Debt Crisis and Evolution of Labour Law in Europe’ in Nicola Countouris and Mark Freedland (eds), *Re-Socializing Europe in a Time of Crisis* (Cambridge, UK: Cambridge University Press, 2013) at part 2.

⁵⁵ For an excellent overview see Stefan Clauwaert and Isabel Schömann, ‘The Crisis and National Labour Law Reforms: a Mapping Exercise’ ETUI Working Paper 2012.04, and associated national reports available: www.etui.org/Publications2/Working-Papers/The-crisis-and-national-labour-law-reforms-a-mapping-exercise

⁵⁶ Ibid; Deakin and Koukiadaki, ‘Sovereign Debt Crisis’ *supra* note 54 at 333-43; C Barnard, ‘The Financial Crisis and the Euro Plus Pact: A Labour Lawyer’s Perspective’ (2012) 41 *Industrial Law Journal* 98; Aristeia Koukiadaki and Lefteris Kretsos, ‘Opening Pandora’s Box: The Sovereign Debt Crisis and Labour Market Regulation in Greece (2012) 41 *Industrial Law Journal* 276.

⁵⁷ Barnard, ‘The Financial Crisis and the Euro Plus Pact’ *supra* note 56

To a Troika apparently convinced that its policy prescriptions reflected what was necessary to ensure the recovery of national economies, and the repayments of their loans, the labour rights of workers in the debtor nations of Greece, Ireland and Portugal, have been of little import. Neither the terms of the European Union's Charter of Fundamental Rights – legally binding since 2009 – nor additional EU Treaty commitments to respect the values of 'human dignity, freedom, democracy, equality, the rule of law and ... human rights' have acted as any kind of brake on those intent on pursuing deregulatory reforms. Confirmation, if any was needed, that the reforms breach the labour rights of workers – European, national, and international labour rights – came after the event, from the European Committee of Social Rights, the Greek Council of State, and the ILO's CEACR.⁵⁸ Commenting on Greek measures aimed at decentralizing collective bargaining, the CEACR concluded that these were 'likely to have a significant – and *potentially devastating* – impact on the industrial relations system in the country'; that 'the entire foundation of collective bargaining in the country may be vulnerable to collapse under [the] new framework'.⁵⁹ Far from acting to reverse the changes in light of the ILO's conclusions, however, the Greek Government has been working in recent years – on the instructions of the Troika – on proposals to restrict labour rights yet further, especially rights to protection against unfair dismissal and to take collective action.⁶⁰

3. Monitoring and Mitigating the Consequences of the Exercise of Sovereignty?

The Declaration of Philadelphia of 1944 contains an expression of the aspiration of the ILO which resonates with Macklem's articulation of the normative basis of international labour rights, emphasising the potential significance of the 'external' as well as 'internal' exercise of sovereign power by nation states for the human rights and interests of workers.

'[A]ll human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and

⁵⁸ ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations* (Geneva 2012): Greece, 159-64; Decision of the European Committee of Social Rights on collective complaints no. 65/2011 and 66/2011; Decision of the Greek Council of State regarding the constitutionality of Law 4046/2012.

⁵⁹ ILO, 101st Session, *Report of the Committee of Experts on the Application of Conventions and Recommendations* (Geneva: ILO, 2012) (Greece), my emphasis

⁶⁰ I'm grateful to Fotis Vergis, University of Manchester, for this information.

dignity, or economic security and equal opportunity... [A]ll national and international policies and measures, in particular those of an economic and financial character, should be judged in this light and accepted only in so far as they may be held to promote and not to hinder the achievement of this fundamental objective'.⁶¹

Today, the Declaration continues to form part of the Constitution of the ILO. It is quite clear, nonetheless, that the capacity of international labour rights to fulfil these aims is limited. As drafted in the form of Conventions or Recommendations, international labour rights are intended for incorporation by nation states into their own individual domestic legal systems. They are not addressed to private or non-state actors – transnational corporations, banks and other financial institutions, supranational regulatory bodies – and do not, of themselves, create duties binding upon such actors.⁶² Their potential reach is coextensive with the – separate – jurisdictions of those Member States which are bound to incorporate them, and limited just as those jurisdictions are limited. So, for example, while Convention 87 directs Member States to ‘take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise’, it does not contemplate a right to collective bargaining, or to organise or take part in industrial action, *beyond* the borders of the State in question.⁶³ It does not require Member States, in other words, to guarantee the rights of workers to take part in coordinated transnational industrial action, or international collective bargaining.

In 1998, the ILO adopted a Declaration on Fundamental Principles and Rights at Work.⁶⁴ Under the terms of that Declaration, four international labour standards were designated as *core*, which all member states had an obligation to respect: freedom of association, the prohibition of forced labour, the effective abolition of child labour, and the elimination of discrimination in employment.⁶⁵ Here, as Macklem notes, was an attempt, ‘to achieve a

⁶¹ ILO, *Declaration of Philadelphia*, paragraph II.

⁶² The international instruments that *are* addressed to transnational corporations are not legally binding – eg the ILO *Tripartite Declaration on Multinational Enterprises and Social Policy*, the UN *Guiding Principles on Business and Human Rights* – and the norms contained within them are not usually thought of as international labour rights.

⁶³ Keith Ewing, ‘International Regulation of the Global Economy – the Role of Trade Unions’ in Brian Bercusson and Cynthia Estlund (eds), *Regulating Labour in the Wake of Globalisation* (Oxford, UK: Hart, 2007)

⁶⁴ *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up*, adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998

⁶⁵ The Declaration itself does not use the term ‘core’, but this has become the universally accepted way to refer to the 4 labour standards.

degree of moral, political and legal consensus on what constitutes universally recognized labor rights'.⁶⁶ In creating a short list of four standards, the ILO implicitly extended an invitation not only to member states, but to a much wider range of public and private actors to acknowledge and respect them. It appeared to recognise, in doing so, that these standards might assume different institutional forms in different economic contexts. For some commentators, this represented a positive move towards ensuring the continued relevance of the ILO and international labour standards in a globalized world.⁶⁷ Others feared that detaching the standards from the Conventions in which they were embodied, and thereby allowing actors' significant freedom to interpret them themselves, might result in the standards becoming 'hollowed out'; that, anyway, the designation of four standards as 'core', would imply necessarily the lesser importance of all other 'non-core' standards.⁶⁸ The concern, then, was that the Declaration might serve to provide actors with an easy way of cloaking themselves in a rather thin veil of legitimacy: that of respect for core labour standards very narrowly understood.⁶⁹

As narrated above, recent developments in the EU may be understood to highlight certain features of the relation between sovereignty and international labour rights in an era of globalization, which explain why – from a perspective of concern for the interests and fair treatment of workers – the limited reach of those rights has become a matter of growing concern. The failure of international labour rights to 'mitigate adverse consequences produced by the international deployment of legal sovereignty' (to use Macklem's words) is not due simply to the fact that those rights are not always respected as they ought to be. Rather, it follows from the nature of the rights themselves, from the limitation by nation states of their sovereignty, and the consequent liberation or empowerment of a variety of public and private actors, who are not bound by international law. As states act in ways which restrict their ability to enact and enforce labour rights, or to retain and enforce existing rights and standards, continued respect for the four core labour standards is now routinely emphasised.

⁶⁶ Macklem, *Sovereignty of Human Rights*, supra note 1 at 92, citing Kevin Kolben, 'Labour Rights as Human Rights?' (2010) 50 Va. J. Int'l. L. 449, 454

⁶⁷ Brian Langille, 'Core Labour Rights – the True Story' (2005) 16 Eur. J. Int'l. L. 409

⁶⁸ Phillip Alston, 'Core Labour Standards' and the Transformation of the International Labour Rights Regime' (2004) 15 Eur. J. Int'l. L. 457

⁶⁹ CF the obligation placed on Colombia under the terms of its free trade agreement with the US, and in the name of respect for core labour rights, to reform procedures to enable the effective prosecution of cases of unionist homicides: Macklem, *Sovereignty of Human Rights*, supra note 1 at 98

(i) Trade agreements and labour standards

In the process of signing free trade agreements, nation states may surrender elements of their sovereignty, voluntarily restricting their ability to raise labour standards or even maintain and enforce existing standards. They do this not only by creating economic conditions which may encourage a race-to-the-bottom, but also by legally binding themselves to dismantle barriers to trade and market freedoms, even if such barriers take the form of labour rights or long-established practices of collective bargaining. Within the EU, as we have seen, the designation of labour laws or collective bargaining practices as barriers to free trade is facilitated by the particular architecture of the Union: the ‘asymmetry’ identified by Scharpf. Free trade rules are entrenched as fundamental in the supranational Treaty, labour standards are protected by national law, and – by reason of the development by the Court of two legal doctrines, the doctrine of direct effect and the doctrine of the supremacy of EU law – the former have ‘constitutional priority’ over the latter.⁷⁰ EU law – and rights to free movement in particular – figure as a form of higher law within the legal systems of Member States: as a set of norms which national institutions are powerless to amend or overrule, but obliged to enforce. It follows that where the exercise of labour rights conflicts with the exercise of free movement rights, the former are understood to breach the latter – and not vice versa. This asymmetry poses a significant challenge to the continued viability of the embedded liberalism that has formed the basis of the European Social Model, undermining the capacity of nation states to maintain the systems of social protection which the notion of embeddedness presupposes. We find ourselves threatened instead with the disembedding of the single market, with increased levels of market exposure, and the disappearance for many of the normative stability and material security that they require in order to live a decent life.⁷¹

Scharpf’s notion of ‘institutional asymmetry’ may be observed to have application beyond the particularities of the Constitution of the European Union. Considering such matters from a Canadian perspective, for example, Eric Tucker has identified a similar, significant imbalance in the Canadian Constitution – and, at a regional level, NAFTA and its labour

⁷⁰ JHH Weiler, ‘A Quiet Revolution: ‘The European Court and its Interlocutors’’ (1994) 26 *Comparative Political Studies* 510; Scharpf, ‘Asymmetry of European Integration’ supra note 43.

⁷¹ Polanyi, *Great Transformation*, supra note 28; Wolfgang Streeck, *Re-Forming Capitalism* (Oxford 2009)

side-accord the NAALC – between the protection of private economic interests, on the one hand, and social and labour rights on the other.⁷² For Tucker, one of the most striking aspects of both the national and the supranational legal orders (the ‘new constitutionalism’) is the way in which they place the rights of capital *beyond the reach of local or national state interference*.⁷³ Though the national Charter of Rights and Freedoms does not expressly protect property rights, for example, it does allow private actors to contest state restrictions of those rights.⁷⁴ Legislation aimed at removing barriers to inter-provincial trade, meanwhile, limits the sovereignty of federal and provincial government to enact legislation that is restrictive of free trade rights.⁷⁵ On the international stage, there are very obvious asymmetries between the legal rules and procedures which protect the free movement of goods and capital as compared with the free movement of workers, the rights and interests of investors as compared with those of workers.⁷⁶ The huge difficulties involved in agreeing new international labour standards within the ILO, or even maintaining longstanding agreement over the interpretation of existing standards,⁷⁷ contrast starkly with the pace and reach of market liberalisation and expansion which once ‘unleashed’ acquire a momentum of their own.⁷⁸

Despite the threat which it has been shown to pose to labour standards within the EU, the model of a multilateral trade agreement which grants justiciable rights of free movement to private actors looks set to be mirrored in a number of international trade agreements, including the Transatlantic Trade and Investment Partnership (TTIP), and the investor-state dispute settlement (ISDS) which the Partnership is understood to comprise. The text of the TTIP has not yet been published but, on the basis of other trade agreements being negotiated by the EU, it may be assumed that the TTIP will include a commitment on the part of signatory states to respect core labour standards.⁷⁹ Again on the basis of these other

⁷² Eric Tucker, ‘Labor’s Many Constitutions (and Capital’s Too)’ (2012) 33 *Comparative Labor Law and Policy Journal* 355.

⁷³ Ibid at 105, citing Stephen Gill, ‘Globalization, Market Civilization, and Disciplinary Neo-Liberalism’, (1995) 24 *Millenium. J. Int’l. Stud.* 399

⁷⁴ Tucker, ‘Labor’s Many Constitutions’ supra note 71 at 107-8.

⁷⁵ Ibid at 108-10.

⁷⁶ Blackett and Trebilcock, ‘Conceptualizing transnational labour law’ supra n 35 at 6.

⁷⁷ Claire La Hovary, ‘Showdown at the ILO? A historical perspective on the Employers’ group’s 2012 challenge to the right to strike’ (2013) 42 *Industrial Law Journal* 338.

⁷⁸ Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalisation* (Oxford, UK: Oxford University Press, 2012).

⁷⁹ Keith Ewing and John Hendy, *TTIP and Labour Rights* (London, UK: Institute of Employment Rights, 2015). Ewing and Hendy refer to the EU/Canada trade agreement, CETA, and the EU/Korea trade agreement, EUKFTA.

agreements, it may be assumed that TTIP will not, however, provide for supranational machinery for the adjudication of disputes arising in connection with this commitment. Nor will it commit private actors, including transnational corporations, to respect labour rights. Instead, signatory states will be required to promote compliance and effectively enforce their own domestic labour laws by permitting legal action within national courts and tribunals, and requiring the provision of labour inspectors. Herein lies the asymmetry. As Ewing and Hendy explain:

[U]nlike the citizens of Europe and the workers whom the labour chapters feign to acknowledge, corporations will be empowered by ISDS to sue States in secret arbitrations, in respect of democratically adopted policies and laws. In doing so, they will be able to override national, and indeed, Europe-wide courts, and so will be enabled to attack the very laws that the labour chapter is designed to promote.⁸⁰

(ii) Loan agreements and labour standards

The recent history of the EMU involves two further instances of the voluntary surrender of elements of national sovereignty with implications for the ability of nation states to create and enforce labour standards: the European agreement on economic and monetary union, and the bail-out loans advanced by the Troika in the aftermath of the financial crisis of 2008. In the first instance, member states signed up to tight, centralised controls of monetary policy and elements of economic policy, significantly limiting the range of options available to them as means of increasing their economic competitiveness. Later, in the face of the more or less immediate threat of sovereign default, debtor states ceded autonomy over large areas of social and economic policy in exchange for financial assistance. In their discussion of these events, Adams and Deakin have characterised the actions of the Troika in respect of Greece and other states with reference to the notion of ‘structural adjustment’, emphasising similarities with the structural adjustment programmes (SAPs) imposed by the IMF on developing countries from the 1980s.⁸¹

If the experience of SAPs in the developing world is anything to go by, Europe’s

⁸⁰ Ewing and Hendy, *TTIP and Labour Rights*, at 7.

⁸¹ Adams and Deakin, ‘Structural Adjustment’ supra note 52.

experiment in structural adjustment is likely to lead to higher unemployment, lower growth, and increased inequalities ... A fundamental overhaul of economic and monetary policy is needed if the European social model, and with it the wider European project, is to survive and prosper.⁸²

The picture drawn by Adams and Deakin appears at first sight to contrast starkly with Macklem's discussion of the practices of international lenders and their growing tendency, which he highlights, to require debtors to *respect* core labour rights as a condition of loan agreements.⁸³ Further light is cast upon the matter by Franz Ebert.⁸⁴ Focusing on the IMF, Ebert describes the 'ambiguous character' of the institution's attitude to labour standards, involving *both* the promotion of certain minimum standards *and* the 'flexibilisation' of domestic labour law. Importantly, Ebert concludes that while the IMF has 'sporadically' promoted minimum standards, 'its role as a labour law deregulator has prevailed, often with significant effects on the protection of workers'.⁸⁵ So, for example, between 1998 and 2005, almost a third of all Letters of Intent addressed to the IMF included commitments to render domestic labour markets more 'flexible'.⁸⁶ In other cases, deregulatory reforms were not explicit conditions of the programmes but were pushed through formal or informal political channels.⁸⁷ Subsequent to the implementation of its proposed labour law reforms by debtor nations, the IMF did not take steps systematically to assess the effects thereof on workers.⁸⁸

(iii) Cross-border services and labour standards

A final element of the recent history of EU law which speaks to the relation of sovereignty and international labour rights is the treatment of workers in the context of the cross-border provision of services. As interpreted by the CJEU in the case of *Laval*, the Posted Workers Directive may be understood to place significant limits on the sovereignty of a 'host state', requiring it to ensure that workers 'posted' from outside its borders benefit from a fixed list

⁸² Ibid at 123.

⁸³ Macklem, *Sovereignty of Human Rights*, supra note 1 at 99.

⁸⁴ Franz Christian Ebert, 'International Financial Institutions' Approaches to Labour Law: The Case of the International Monetary Fund' in Blackett and Trebilcock, *Research Handbook*, supra note 35 (discussed Blackett and Trebilcock, 'Conceptualizing transnational labour law' supra note 35 at 11).

⁸⁵ Ebert, 'International Financial Institutions', at 125.

⁸⁶ Ibid at 130.

⁸⁷ Ibid at 130.

⁸⁸ Ibid at 131.

of national minimum standards, and preventing it from imposing anything over and above those standards.⁸⁹ The Directive does this by treating posted workers differently to other workers (who have rights under EU law to free movement and equal treatment), defining them instead primarily as a resource of the service-providing employer. The interest of the posted worker in being paid a fair wage is categorised by the Court accordingly as potentially restrictive of the employer's right to provide cross-border services (protected as fundamental in the Treaty). And it is on that rationale that the posted worker is accorded no right to equal treatment with workers in the host state, but only to the limited set of minimum standards enumerated in the Directive.

As a consequence of these European rules, it has become increasingly easy for employing companies to evade local terms and condition of employment, hard won in many cases through the efforts of trade unions, and guaranteed by national law or collective agreement.⁹⁰ Instead of hiring local workers, a company may choose to contract with an employment agency situated in a low-wage country to provide it with cheap labour – the employment agency being categorised in this context as a legal person exercising its freedom to provide cross-border *services* (and not cross-border labour). Alternatively, it may establish a 'letter-box' subsidiary in a low-wage country, from which it can 'post' a cheaper workforce back to itself. Given the terms of the ruling in *Laval*, it will likely not be possible in such cases for trade unions to organise industrial action in an effort to persuade the service provider to pay the locally agreed going rate; nor for a local or national government to require the same.⁹¹ Notwithstanding the threat that this model brings with it, then, of the undermining of local and national wage settlements and the lowering of wages for the many, the pattern has again been repeated at international level in the form of 'Mode 4' of the General Agreement on Trade in Services, or GATS.⁹² The rule there is that 'posted' workers should remain subject to the labour law applicable in their home state and their original contract of employment.

⁸⁹ Directive 96/71/EC. Broadly speaking, the Directive aims to clarify, in the case of employees being sent abroad by their employer for a project (posting), which labour standards will apply – those in force in the country of origin of the employing service-provider or, alternatively, those of the country where the work is actually carried out.

⁹⁰ Tonia Novitz, 'Trading in Services – Commodities and Beneficiaries' in Blackett and Trebilcock, *Research Handbook*, supra note 35.

⁹¹ C-446/06 *Rüffert v Land Niedersachsen* [2008] IRLR 467

⁹² Novitz, 'Trading in Services' supra note 89.

(iv) *International labour rights, transnational labour law?*

In the story of the ‘unravelling’ of the embedded liberal bargain of the EU, the limited reach of international labour rights reveals itself.⁹³ Such rights did not prevent Member States from signing the Treaty of Rome, or more recently the bail-out loan agreements, since in neither case did the act of signing itself constitute a breach of labour rights. (Indeed, the consequences for labour standards of the creation of a ‘common market’ were not even fully understood, or acknowledged, at the time of signing.⁹⁴) Nor did international labour rights bind supranational institutions, such as the CJEU or EU legislature, when adjudicating or legislating to resolve conflicts arising between the exercise of market freedoms, on the one hand, and labour standards, on the other, since such rights, by their very nature, are addressed only to nation states. Instead, international labour rights were appealed to by trade unions and others *only after* domestic labour standards had been lowered in Member States, and worker protections weakened – either as a result of the CJEU ruling that they constituted breaches of companies’ rights to free movement, or as required by the Troika as terms of bail-out loans. In several cases, this resulted in a finding of the CEACR that national law breached international labour standards. Notwithstanding such findings, however, member states remained bound by the terms of the same trade agreements or loan agreements that had required them in the first place to weaken their labour laws. As it set out to legislate so as to remedy its breach of international law, Romania, it may be recalled, was directed by its institutional creditors to do no more than was necessary to bring the law into compliance with *core* ILO conventions.⁹⁵ Greece, meanwhile, was instructed to weaken its labour protections yet further.

Among scholars in the fields of both international law and labour law, the limitations of international labour rights that I describe have long been recognised.⁹⁶ In recent years, it has become quite commonplace to speak not only of international labour law, but also of

⁹³ The idea of an ‘unravelling bargain’ is taken from Ashiagbor, ‘Unravelling the Embedded Liberal Bargain’ supra note 28.

⁹⁴ See the terms of the Ohlin Report, discussed Dukes, *Labour Constitution*, supra note 16 at 159-61.

⁹⁵ Confidential document leaked to the International Trade Union Confederation, cited by Keith Ewing, ‘The Death of Social Europe’ (2015) 26 *King's Law Journal* 76 at 91.

⁹⁶ Blackett and Trebilcock cite work written in the 1950s by C. Wilfred Jenks and Phillip C. Jessup, Blackett and Trebilcock, ‘Conceptualizing transnational labour law’ supra n 35 at 22-3.

transnational labour law.⁹⁷ In recounting the story of the protection of workers interests at the supranational level, we may still begin with international labour rights (as Dave Trubeck put it), but we do not anymore end with them.⁹⁸ What is meant by transnational labour law? Sometimes the term is used descriptively of existing rules or institutions, sometimes to announce a kind of desiderata: the rights and regulation that would be necessary to deliver social justice in a globalised world. In either case, it would be wrong to assume that scholars have in mind a coherent *system* when they speak of transnational labour law. In stark contrast to the ILO and to the impressive body of international labour rights that it has authored over the decades, there is, of course, no transnational labour code in existence, and no transnational regulatory body capable of issuing or supervising one. The label ‘transnational labour law’ is applied instead to a wide range of separate endeavours in which scholars may discern an emerging body or bodies of law capable of both buttressing domestic laws and supplementing ILO standards:⁹⁹ regional trade agreements and labour side accords, but also corporate codes, consumer-led or -focussed initiatives, international framework agreements reached between TNCs and trade union federations.¹⁰⁰ The vision is decidedly pluralistic, embracing activities at many levels, and actors of many types: private, public, local, national and supranational. Nation states figure as centres of political power, but there is recognition at the same time of the polycentrism and fragmentation that are defining features of globalization.

4. Conclusion

In the introductory chapters of his book, Macklem explains in general terms what he understands to be the relation between sovereignty and international human rights. Referring to the external as well as internal exercise of sovereign power, he acknowledges the possibility of what I have referred to in this paper as the ‘voluntary surrender’ by nation states of elements of their sovereignty. ‘A treaty can create legally binding obligations on signatory States to exercise their sovereign powers in certain ways and not others and in relation to

⁹⁷ See eg Bob Hepple, *Labour Laws and Global Trade* (Hart 2005); Dave Trubek, ‘The Emergence of Transnational Labor Law’ (2006) 100 *American Journal of International Law* 725-33; Blackett and Trebilcock, *Research Handbook*, supra note 35.

⁹⁸ Trubeck, ‘Emergence of Transnational Labor Law’, supra note 96 at 726.

⁹⁹ Ibid at 727. This is especially true of Hepple’s vision of transnational labour law: Hepple, *Labour Laws and Global Trade*, supra note 96.

¹⁰⁰ See further Blackett and Trebilcock, *Research Handbook*, supra note 35.

certain matters and not others.’¹⁰¹ When the discussion focusses upon international labour rights, however, it is as if this insight has been partially forgotten, or its implications not fully interrogated. While Macklem recognises that free trade agreements might encourage a ‘race to the bottom’, for example, he makes no mention of the possibility that they might require a signatory state to lower, or disapply, its labour standards.¹⁰² When considering the significance of international loan agreements, he emphasises the fact that creditors may sometimes require borrowers to comply with core international labour rights as a condition of their loan agreements, but omits any reference to the arguably more common practice of the imposition by creditors of SAPs.¹⁰³

When states act to limit their own capacity to enforce labour standards, spaces are created within which private actors are empowered to structure working relationships to their own benefit beyond the reach of ‘state interference’ in the form of national labour laws. The absence at a supranational level of democratic institutions with the capacity to enact – and enforce – supranational labour standards means that the surrender of national sovereignty cannot easily be compensated for at the supranational level. The result is the kind of ‘asymmetry’ identified by Scharpf, Tucker and others. If international labour rights were to perform the role ascribed to them by Macklem of legitimising the international legal order then they would have to address such asymmetry, placing limits on the exercise of economic as well as sovereign power, binding, especially, transnational corporations and serving to limit the exercise of their legal rights when it conflicted with the rights and interests of workers. They would have to be addressed to, and respected by, supranational as well as national actors.

There is then, I would suggest, a significant measure of divergence between the normative dimension, or *mission*, that Macklem assigns to international labour rights and the capacity of those rights to fulfil that mission; between the ought and the is of international labour rights, as he defines them. Perhaps Macklem would defend his account by arguing that the mission he identifies is more modest than I have suggested here: that international labour rights, and international human rights more broadly, have only to furnish the international legal order

¹⁰¹ Macklem, *Sovereignty of Human Rights*, supra note 1 at 34

¹⁰² Ibid at 96.

¹⁰³ Ibid at 99.

with a ‘measure’ of legitimacy in order to fulfil their role.¹⁰⁴ Perhaps he would remind me that he seeks to construct a theory of international human rights that is internal to public international law, arguing, for that reason, that my talk of private actors and non-state power is misplaced. Doubts would remain, I suggest, regarding his claim to have identified a ‘truth’ about international labour rights.¹⁰⁵ In an era of globalization, these are better understood as one very important element of a nascent – as yet underdeveloped but patently necessary – system of transnational labour law.

¹⁰⁴ Ibid at 2.

¹⁰⁵ Ibid at 1.