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Harry Arthurs: "The Role of Global Law Firms in Constructing or Obstructing a Transnational Regime of Labour Law"

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Series Editor's Foreword

Business transactions across national borders in contemporary life face both new challenges and those that have confronted domestic exchanges for centuries. Though there continues to be concern with problems of trust, predictability and dispute processing, there are new hurdles imposed by the speed and volume of business in the modern world. This book explores the roles that various institutions play in making international business transactions possible, institutions that partially substitute for national law and legal institutions in the case of domestic exchanges. In this effort, it focuses on the capacities and limitations of international law, the private law of business sectors (lex mercatoria), international law firms, and personal networks as well as highlighting the continuing relevance of national law. It is the first sustained effort to explore this territory simultaneously from the perspectives of legal reasoning, formal law, empirical sociology, economics and relational anthropology. The contributions to this book, by leading scholars in these fields, are an important first step in developing an interdisciplinary discourse on the globalisation of law.

The book is the product of a workshop held at the International Institute for the Sociology of Law (IISL) in Oñati, Spain. The IISL is a partnership between the Research Committee on the Sociology of Law and the Basque Government. For more than a decade it has conducted an international master's programme in the sociology of law and hosted hundreds of workshops devoted to sociolegal studies. It maintains an extensive sociolegal library open to scholars from any country and any relevant discipline. Detailed information about the IISL can be found at www.iisl.es. This book is the most recent publication in the Oñati International Series in Law and Society, a series that publishes the best manuscripts produced from Oñati workshops conducted in English. A similar series, Colección Oñati: Derecho Y Sociedad, is published in Spanish.

Eve Darian-Smith
The Role of Global Law Firms in Constructing or Obstructing a Transitional Regime of Labour Law

HARRY ARTHURS

Abstract

Some business transactions are more global than others; so too the normative systems by which they are governed. This study examines a deviant type of transaction—employment relations in transnational companies—and proposes that a number of forces tend to reinforce its local character. While a lex mercatoria may be emerging, even a jus humanitatis, few observers detect evidence of an inchoate lex laboris. Global law firms are important agents of this localising tendency. Despite their documented contribution to the creation of a system of transnational law in other contexts, interviews with some 40 lawyers in seven countries revealed an almost unanimous view that labour law was not only local in fact, but inevitably and properly so. Nonetheless, it is clear that the political economy of globalisation has affected the labour strategies of transnational corporations, the content and administration of local labour law and the moral economy of legal practice in the field.

INTRODUCTION

The Legal Culture of Global Business Transactions

To suggest that there is something called “the legal culture of global business transactions” is to invite debate on a series of dubious propositions: that “legal” is a useful descriptor, that there is a unified—presumably global—“legal culture”, that the “global” can be distinguished from the domestic or national legal culture, and that all “business transactions” can...
be treated alike. By examining the activities and beliefs of labour lawyers who act for transnational corporations, I hope to contribute to that debate.

To begin tritely, law does not produce and reproduce itself. Few scholars would suggest that the law of business transactions is made exclusively by or for those transactions, that is nothing to do with the complex and volatile environment—with the polity, society, culture and economy—in which those transactions occur. As I have argued elsewhere, three powerful forces—analytically distinct but mutually supportive—have shaped that environment: globalisation, to be sure, but also neo-liberal policies and a revolution in production, transportation and information technology. These forces have wrought profound changes in legal institutions, public administration and the legal profession (Arthurs and Kreklewicz, 1996; Arthurs, 1997a, 1997c), in corporate functions and structures (Arthurs, 1997b, 1997c), in employment (Arthurs, 1996b, 1997a, 1997b), in the social and economic structures of local communities (Sassen, 1994, 1998), in the physical environment (Dolzer, 1998), in virtually everything. However, it is not possible to disaggregate globalisation effects from the others.

Moreover, as Santos reminds us, globalisation is not a single phenomenon, but many—"globalized localisms" and "localized globalisms"—which manifest themselves in different ways in different sites and circumstances (Santos, 1995). In such an environment, the search for a single, unified legal culture can only be viewed as quixotic. After all, if legal pluralism has taught us anything, it is that even domestic legal systems encompass a multiplicity of state and non-state legal fields, each with its own norms, institutions, processes and cultures (Griffiths, 1986; Merry, 1988), and that we ought to focus on internormativity, rather than assume coherence (Belley, 1996). Indeed, investigation of legal cultures in various contexts has often produced similar conclusions (Gessner, 1994; Plett and Menschiewitz, 1991; Ogliati, 1995; Friedman, 1994). Finally, the concept of business transactions needs to be problematised. I will do this by examining a deviant species of that genus—employment relations in transnational companies. Some business transactions, we shall see, are more global than others; so too the normative systems by which they are governed.

The Legal Culture of Transnational Labour and Employment Relations

Essentially, then, as part of a broader inquiry into what normative systems regulate employment relations in transnational enterprises, my more specific concern is to discover what role global law firms play in constructing those normative systems.

In this formulation, the question implicates especially the work of scholars who have explored the role of law firms, consulting firms and corporate cadres in producing the congeries of legal regimes which support global business transactions (Garth, 1985; Trubek et al., 1994; Dezalay and Sugarman, 1995; Dezalay and Garth, 1996; Flood, 1996; Teubner, 1997). Such regimes include the complex regulations of the WTO, international conventions on civil aviation and copyright, the trading rules of the great stock and currency exchanges, the arcane and specialised rituals of the International Bank for Clearances and the diamond trade, the constitutional protocols of the EU and NAFTA, the governance structures and networks of transnational corporations, and the contracts, compromises and arbitral jurisprudence which give shape and definition to global business transactions. In the creation and administration of these regimes, as noted, the great transnational law firms and consulting firms have played a leading role, as advisors and negotiators for governments, business, international agencies and social movements, as strategists, lobbyists and intermediaries, as advocates and arbitrators, and especially as architects of regimes of private ordering and authors of the documents which express them. However, as I will attempt to demonstrate, these firms have not played the same facilitative and creative role in constructing a global regime of labour law. In apparent contrast to the law of commercial contracts, intellectual property, banking and insolvency, the law of employment and industrial relations remains resolutely local in character.

This in itself is not an idiosyncratic conclusion. It represents the consensus of virtually all observers, whether of the global economy (Santos, 1995; Boyer, 1995) or of its principal regions (von Maydell, 1993; Teague, 1993; Ojeda-Aviles, 1993; Baldry, 1994; Sciarra, 1998; Streick, 1995; Wedderburn, 1996). However, it does seem odd that no overarching regime of labour law exists to regulate various aspects of employment in transnational labour markets. Labour, as an important factor of production, is one of the variables captured by the principle of comparative advantage, the leitmotif of globalisation. Labour, as a class or movement, professes—if it does not actually practise—principles of international solidarity. And individual employees—those with certain kinds of talents, skills and knowledge—commute physically and electronically from one country to another, providing technical, professional and managerial services to their transnational employers, quite indifferent to local labour markets, laws or customs.

Moreover, there is a long history of attempts to regulate employment relations beyond the juridical space of particular states. Some of the earliest international conventions dealt with labour—child labour, slave labour, labour at risk on the seas and in dangerous occupations—and from its inception in 1919, the ILO has worked to secure adherence to internationally accepted norms of

1 But see contra Guiry (1992), Bercussion (1995).
2 See e.g. Declaration Relative to the Universal Abolition of the Slave Trade (1815) (signed by eight European powers at the Congress of Vienna); Berne Conventions of 1886 (world's first two multilateral labour conventions); C.5 Minimum Age (Industry) Convention, 1919, ILO (First Session, International Labor Conference, Washington); C.6 Night Work of Young Persons (Industry) Convention, 1913, ILO (First Session, International Labor Conference, Washington); C.7 Minimum Age (Sea) Convention, 1920, ILO (Second Session, International Labor Conference, Geneva).
employment. But still we have no system of transnational labour law. Despite almost 200 Conventions and an equal number of “recommendations”, despite scores of reports emanating from investigative committees, despite the eloquent remonstrations of its Governing Body, the ILO has not managed to construct an effective juridical regime of employment law or industrial relations. The EU—otherwise almost manic in its regulatory exertions—has been uncharacteristically indifferent in the realm of individual and especially collective labour law; one observer suggests that at best it has moved recently from a “non-regulatory” to a “pre-regulatory” posture (Sciarra, 1995). And NAFTA—a powerful engine of hemispheric integration—has developed an elaborate evasive strategy to avoid even the appearance of intruding on the domestic labour practices of its member states (McGuiness, 1994; Cook, 1994; Robinson, 1994).

Nor, finally, should national sovereignty be regarded as an insuperable obstacle to the creation of a transnational labour law regime. States can and do agree to subordinate their domestic legal regimes to global arrangements when it suits their purposes. They bind themselves—perhaps irrevocably—to international standards in fields such as human rights (Keith, 1997) and comprehensively amend their own laws to conform to treaty commitments, even to the point of permanently disabling their own regulatory functions (Schneiderman, 1996). They willingly harmonise their laws with those of their trading partners in order to facilitate business transactions (Bennett, 1991; Hoberg, 1991) or foreign investment (Rotstein, 1993; Horton, 1993). In countless, subtle ways they align their national legal values, norms, institutions and cultures more closely with those of the global hegemon (Arthurs, 1997b), not least by colluding or acquiescing in the creation of legal regimes by various non-state, transnational actors.

The resulting transnational legal regimes are often hybrids: they occasionally emerge in national forums and draw sustenance from state law; they are sometimes promulgated or promoted by international agencies; often, they thrive in the shadow of formal institutions. But their most salient characteristic is that they are ultimately generated by transnational corporations (Teubner, 1997), their law firms and consultants (Dezalay and Garth, 1996), and other non-state actors operating in the global economy including standards organisations (Salter, 1988, 1993), sectoral and professional bodies (Arthurs, 1999), non-governmental organisations (NGOs), social movements and advocacy groups (Santos, 1995; Merry, 1997; Trubek et al., 1998). As a contribution to the project of global governance, the proliferation of such regimes might seem desirable, even inevitable. It is certainly substantial: some observers contend that a new lex mercatoria already governs transnational business transactions (Trubek et al., 1994; Dezalay and Sugarman, 1995; Dezalay and Garth, 1996; Teubner, 1997); others even detect the appearance of a new jus humanitatis governing our common environmental and cultural heritage (Santos, 1995). But no knowledgeable observer claims that these non-state actors—otherwise so productive and prolific—are creating a new lex laboris.

Why not?

The short answer is that many states which compete for their “fair share” of opportunities in the global economy do so on the basis of lower labour standards. They reckon that introduction of transnational labour standards would force them to revise their own standards upwards, thus depriving them of their comparative advantage. Moreover, even if they wished to hold locally-based employers to worldwide labour standards, states cannot easily overcome the technical difficulties of extraterritorial regulation (Stone, 1993). The slightly longer answer is that transnational corporations do not wish to construct a new global regime of labour law. In general, they prefer to be able to shop among local labour regimes, resorting to transnational employment norms only when compelled to do so by public pressure (Compa and Hinchcliffe-Daricarrère, 1995), market forces (Baker and Mackenzie, 1998) or managerial convenience (Nielsen, 1999). The longest answer—though not necessarily the most cogent one—is that the principal architects of other non-state transnational regimes, lawyers and consultants, have no incentive to be similarly creative in labour matters. They have little to gain from inventing a new transnational labour regime when doing so risks a potential confrontation with the state, the displeasure of clients and the devaluation of their own professional capital. Nonetheless, by describing how labour lawyers locate themselves in relation to the legal culture of transnational business transactions, I hope to make some important points about both globalisation and lawyering.

THE ROLE OF LAWYERS IN LABOUR LAW

As Bourdieu contends in arguing for attention to the “legal field” (Bourdieu, 1987), as Teubner and his colleagues have tried to show with their studies of autoeposis in the global sphere, in transnational corporations and in workplaces (Teubner, 1994, 1997), as Garth, Dezalay, Sugarman and Flood have demonstrated in their work on professional labour markets (Dezalay and Sugarman, 1995; Dezalay and Garth, 1996; Flood, 1996), social fields and their normative systems are, to a large extent, constituted by co-operation and competition among strategically-located actors. The labour lawyers interviewed for this study certainly fit that description. They help to articulate the relationships between the global and local economies, between the expectations of their clients and the requirements of the national legal system, between the national legal system and substate normative systems generated within and amongst other social fields, including specific economic sectors and enterprises and, not least, between capital and labour. Moreover, when they represent transnational corporations they compete and collaborate in the legal field with a variety of other friendly professionals—public officials, consultants, local and head office

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3 See e.g. Act to Implement the North American Free Trade Agreement, Stat. Canada 1993, c. 44.
managers—and confront an array of potentially unfriendly professionals—officials of unions and social movements, journalists and politicians.

According to the literature, these strategic mediations, these formative encounters, ought to make lawyers as important contributors to a global legal culture of labour law as they have been to domestic labour law. Thus, if we want to comprehend their global contribution, or its lack, we must first understand the nature of their contribution to domestic labour law. McBarnet suggests, in a different sociological vernacular, that lawyers use the “tools” of legal form and ideology to work the “raw material” of law to serve their “dominant client”; capital (McBarnet, 1984). This indeed is what labour lawyers have done for much of the last 200 years. Most of them have worked skillfully and industriously on the raw material of the law to fashion doctrines and remedies on behalf of employers in order to suppress unions and deprive workers of their legal protections and moral entitlements both in the workplace and, often, as citizens. Naturally, there were exceptions: an oppositional minority of lawyers acting for “non-dominant clients”—workers, workers’ organisations and government regulatory agencies—tried to use law to alleviate the harshness and unfairness of industrial capitalism. But by and large labour lawyers were—in an ideological and highly partisan sense—employers’ lawyers.

This changed to some extent with the political disfranchisement of workers, growing revulsion against “sweated labour”, the growing acceptance of collective bargaining, the emergence of new legal structures of labour market regulation and especially the post-war “Fordist compromise” which incorporated workers and their unions into the capitalist system in exchange for the enhancement of their legal, social and economic rights. These developments, beginning in the early years of the twentieth century, expanded the state’s role in labour law and transformed the legal field of labour law in most advanced economies.

However, the extent and form of transformation varied greatly. Responding to pre-war precedents, both positive and negative, most Western European countries adopted social market or social democratic policies during the post-war period, with highly centralised collective bargaining systems, corporatist determination of labour market policies and an extensive emphasis on security and benefits for workers. The United States took a different route, with highly decentralised collective bargaining, regulated or poorly regulated labour markets and a modest menu of benefits for workers, provided primarily by employers rather than the state.

These divergent public policy experiences were reflected in different legal cultures and patterns of labour law practice. In the United States, the legal activism of the New Deal in the mid-1930s (Irons, 1982) was soon succeeded by a period of “deradicalisation” (Klare, 1978), and then by an anodyne era of “industrial pluralism” with its emphasis on private norm generation and dispute resolution (Stone, 1981; Barenberg, 1993). In terms of labour law practice, the tendency was towards “normalisation”—a decline in highly adversarial and ideological behaviours, enhanced adherence to a model of dispassionate professionalism, growing legal sophistication, and an increased emphasis on the role of labour lawyers on both sides of the equation as managers of conflict and architects of compromise. But this tendency has been reversed over the past 20 years or so. Under the pressure of technological change, the flexibilisation of production, deregulation of the labour market, intensified globalisation and juridification, the power of the American labour movement has declined considerably, and the meagre protections of state law have become yet more sparse. The result has been a change in labour law practice; capital is ascendant; accommodation with unions and government regulators is off the agenda in many industries; management lawyers are once again hammering fiercely at the “raw material of the law” to reduce its effectiveness (Weiler, 1990) and like other successful artisans who have brought about technological change, as we shall see, they may have made themselves dispensable.

American labour relations, labour law and labour law practice are notorious for their “exceptionalism”, although they have to some extent been reproduced in a few countries which have consciously borrowed American labour market policies and imitated or imported American patterns of legal and corporate practice. But unique American legal concepts and arrangements in the field of business law have been secreted in the interstices of corporate practice, only to emerge ultimately as Santos’ “globalised localisms”, as the dominant influence on the putative “legal culture of global business transactions”. Is the same turning out to be true in the labour field?

LABOUR LAWYERS IN THE GLOBAL ECONOMY: AN EMPIRICAL STUDY

The Lawyers

In search of an answer to that question, I interviewed 40 lawyers in seven countries* who ought to be knowledgeable about the possible emergence of a system of transnational labour law, the provenance of such a system, its effects on employers and employees, and its relationship to domestic regimes of labour law. All interviewees were labour law specialists; almost all acted exclusively for transnational and domestic corporations and executives; two acted only for unions and workers; and two acted for both labour and management.

Of course, their responses are not the last word on the subject. My sample may have been too small and insufficiently random; lawyers are not trained

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* Interviews were conducted in the United Kingdom, France, Belgium, the Netherlands, Mexico, the United States and Canada between May 1996 and December 1998. No Asian, Eastern European or South American lawyers were interviewed; conceivably they might have a different perspective on the intrusion of western labour law norms.

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* Each interview lasted 1½ to two hours. Almost all interviews were conducted in English, other than a few in French or Spanish; and all were taped and/or recorded in writing. All respondents were given assurances of confidentiality, which is why I have not identified individual respondents, their firms or clients.
sociological observers; their testimony is subject to the normal distortions of professional ideology, discourse and self-interest; and the pressure of their daily practice predisposes them to take a case-by-case view of events, rather than a systemic, long-term view. And, it might be argued, they are not necessarily the right people to ask about transnational law; only a scholarly minority would likely recognise the shaping influence on domestic law of international or foreign influences. However, given such potential distortions in their testimony, I did not simply ask these labour lawyers what they thought about the possible existence, source, content or consequences of a global regime of labour law. Rather, I tried to elicit revealing details about their professional formation and careers, the tasks they perform, the nature of their clientele, the fora in which they work, the sources of law and other norms which they invoke, their relationships with colleagues, clients, state officials and adversaries. To summarise their views: none felt that there was a new le
is laboris in the making. On the contrary, when asked the question directly, all respondents strongly asserted that domestic law—not transnational norms—governed labour and employment relations in his or her country. These views were not contradicted by their detailed accounts of the work they actually did, of the arguments and advice they provided to clients and of the legal sources they drew upon. Nor, for that matter, is there much scholarly evidence that transnational law has shaped domestic law: rather the contrary. Much of what passes for transnational law was no more than an export version of 'best practice' in Western Europe and the United States, a source of great controversy in the ILO at the height of the cold war (Cox, 1977). And leading scholars insist that more than most types of law, labour law is nonexportable (Kahn-Freund, 1976).

There are some obvious reasons why labour law has failed to acquire a transnational dimension similar to that of other fields of business law. Reciprocity is the paradigm around which commercial relations are organised; unequal power characterises the relations between employer and employed. Business disputes and contracts occur between firms; labour disputes and contracts occur within firms. State law may be somewhat peripheral to most conventional business arrangements; it is even more so to employment relations. Powerful corporations have the financial resources to invoke state labour law when it favours them, the political influence to change it when it does not, or in extremis the economic power to ignore it; workers seldom have any of these. For all these reasons, employment norms—derived from power, defined by contract, embedded in custom,utable in practice—tend to be firm-specific, even workplace-specific (Arthur, 1985, 1998c). No wonder, then, that many of my respondents were bemused by the suggestion that they may be important actors in shaping labour law regimes—domestic or transnational.

The Influence of Transnational Professional Contacts and Culture

Virtually all respondents had ample exposure to foreign—principally American—legal influences. As noted, they acted for (or, in a few cases, against) foreign transnationals doing business in the country where they practised. Most of the European and American (but not Canadian or Mexican) respondents also represented domestic transnationals doing business abroad. Most were members of transnational law firms or alliances of law firms, or maintained informal relationships with and received referrals from them. About a third of the European and Mexican lawyers were actually members of foreign-based law firms, in some cases working alongside American or British colleagues. About one-quarter of the Europeans and Mexicans had received academic training in, or practical exposure to, a foreign legal system, especially that of the United States. And of course, the Canadian lawyers practised under a labour law regime which was closely modelled on American legislation, and is influenced on an ongoing basis by American jurisprudence and academic literature. In short, if there were such a thing as a transnational legal culture, then these lawyers would be deeply involved in it.

However, if they are, they do not seem to know or believe they are. Few respondents were prepared to acknowledge that their professional formation, practical exposure, working relationships or clientele influenced their understanding of or response to legal issues. They generally reported receiving little substantive direction on legal matters from foreign colleagues; few of them worked closely or directly with lawyers based abroad; and only a few had more than sporadic contact even with their clients' foreign-based in-house counsel. Generally, they worked on a day-to-day basis directly with local corporate management and only occasionally dealt with head office management or with lawyers representing the same corporation in other countries. Only the Canadians—who reported the highest incidence of close contact with foreign lawyers and executives—were inclined to agree that their participation in a transnational legal field had given them a critical perspective on their own system or prompted them to "borrow" specific legal doctrines or strategies from foreign partners, contacts in practice or professional literature. (Ironically, those European and Mexican lawyers who acknowledged that they had been influenced by their contact with foreign law, lawyers and clients focused mostly on how they had reorganised their law practice to conform to an Anglo-American model.)

The Direct Application of International Legal Norms

None of the respondents believed that international legal norms had much effect on their advice to clients or in litigation. Their explanations varied. Some felt that national norms were higher than those decreed internationally, so there
was no need to have recourse to the latter. Others believed that labour lawyers know very little about international law in general and international labour standards in particular. Only a very few respondents, for example, acknowledged ever having raised or being directly confronted with a legal argument based on an ILO convention. As one said dismissively, “the ILO is not visible over the horizon”. None acknowledged having encountered the non-binding “codes of conduct” for MNCs operating abroad, which have been promulgated by the OECD, the ILO and the EU and adopted by many transnational corporations.

Virtually all respondents believed that labour law would remain national law in the near-term. Amongst the Europeans a few—but only a few—did regard EU directives as having a significant impact, but only on a short list of collective and individual labour law issues. Several also acknowledged that in the distant future there might be greater convergence of national systems under the influence of these directives, especially in regard to redundancies, the treatment of employees in corporate mergers, and European Works Councils. In the NAFTA countries, respondents obviously acknowledged the existence of a transnational labour law regime—the North American Agreement on Labor Cooperation (the NAALC)—but they generally tended to discount its juridical and practical significance. Several respondents had actually been involved in one or more of the dozen high-profile NAALC complaints initiated to that point, but even they denied that that regime was an important source of new labour law. Rather, they tended to regard the NAALC complaints as merely the continuation of politics by other means. It must be said, however, that several thoughtful Mexican and Canadian respondents did regard free trade under NAFTA as a catalyst for the restructuring of the national economy, policies and public policy and thus—in the end—of the existing regime of industrial relations and labour law.

The Indirect Influence of Transnational Legal Norms

Of course, at a high level of generality, most developed (and many developing) countries choose to commit themselves (if not always to adhere) to decent minimum labour standards, to acknowledge the right of workers to organise and bargain collectively and to prohibit the exploitation of vulnerable workers. In public policy debates or legislative projects, they may sometimes reference international norms, as well as the labour laws and policies of their neighbours or trading partners. And enterprising advocates may express in the vernacular of domestic labour law arguments which are actually derived from transnational labour regimes or foreign labour law systems. But neither the tendency of advanced economies to adjust their labour laws to prevailing Fordist (and now neo-liberal) understandings at about the same time, nor the occasional magpie display by clever lawyers of borrowed legal trinkets, is strong evidence of the emergence of a distinctive labour law of transnational business, a global field of labour law, or a transnational juridical system with widely accepted labour law concepts, rules, institutions or practices.

The Influence of Transnational Corporate Clients

If a regime of global labour law is not being created by lawyers and other professional actors in the transnational legal field, is it being created elsewhere by less obvious actors? Specifically, to what extent can we identify traces of such a global regime imbricated within the managerial and production processes of transnational corporations, slowly given shape and substance by human resources and industrial relations managers, unions and individual workers?

Some studies suggest that transnational companies exhibit national characteristics associated with their country of origin or the country in which their head office is located (Jackson, 1993; UNCTAD, 1994; Kustin and Jones, 1995; Bartlett and Ghosal, 1998). However, these characteristics are most likely to be manifest in relation to overall corporate strategies and governance structures (Kriger and Rich, 1987; Gillies and Morra, 1996) and arguably, by extension, to the primary agents of those strategies—elite executives, technical experts and professionals posted abroad (Trompenaars, 1992).

However, at the level of general human resources or industrial relations policies and practices, the picture seems different. While one series of empirical studies seems to point to “a broad yet tentative convergence” of patterns of workplace relations across national boundaries within a given transnational company, under specified conditions (Frenkel, 1994; Frenkel and Royal, 1997, 1998) more broadly-based analyses seem to point to the variability of certain “transnational channels of influence” across companies (Coller and Marginson, 1998). Thus, many studies stress variations within and amongst transnational corporations reflecting differences based on countries of origin, management philosophy, national and regional mandates and markets, sectoral factors, level of employee and other considerations (Morrison, Ricks, and Roth, 1991; Lorenz, 1992; Hoffman, 1994; Frenkel, 1994; Sölvell and Zander, 1995; Frenkel, 1997; Pauley and Reich, 1997), even within elements of the same firm (Milkman, 1991; Streeck, 1994; Drache, 1994) and its extended corporate family (Ghosal and Bartlett, 1990). Inter- and intrafirm variability is a particular feature of the structures of collective bargaining which, predictably, are regarded by most employers and governments as unsuited for, if not actually illicit in, the global economy (Enderwick, 1984; UNCTAD, 1994; Lucio and Weston, 1994; Boyer, 1995; Freeman, 1995). And specifically, TNC responses to labour law in general appear to be heterogeneous, complex and poorly documented (Florkowski and Nath, 1993).

On the whole, it seems, transnational corporations—which tend to think globally in most respects—seem to act locally when they deal with workers. But this is not an invariable rule: when local labour standards are less favourable to
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security and benefits. This explanation must be qualified in the case of the United Kingdom, which during the 1980s deregulated its labour market in a successful attempt to become an attractive gateway to Europe for American, Korean and Japanese transnationals.

Thus we see diverse tendencies within transnational corporations as they react to local labour standards derived from state law and industrial relations practice. Sometimes, TNCs comply scrupulously with local regulations, even in jurisdictions with high standards. For example, in the case of corporate restructuring, mergers and acquisitions in Europe, failure to address employment-related issues might jeopardise the whole transaction. However, they sometimes comply only in the formal sense. For example, some Mexican respondents claim to have made their clients understand that the costs of complying with apparently onerous local constitutional and statutory requirements were in fact relatively trivial, and that they could operate in Mexico pretty much unencumbered by what looked like considerable regulatory constraints. One way or another, though, local compliance seems to be the rule and the introduction of a global regime the exception.

But there are exceptions. In a few instances, lawyers do seem to be constructing something resembling transnational labour law or even worldwide corporate employment norms. For example, several respondents had been asked to adapt a corporation-wide employee handbook to local conditions, to vet standard contracts used to define the employment terms of peripatetic executives or to draft codes of employment practice to which off-shore subsidiaries and suppliers would be required to conform. And in the latter instance, as one respondent frankly noted, legal advice was sometimes sought for negative, not positive, reasons: clients feared that the failure of senior executives to perform due diligence by taking steps to prevent sexual harassment or promote safety standards might not only adversely affect their careers; it might lead to their being found civilly or criminally liable. For the most part, then, initiatives to move forward with explicit transnational strategies originated with the clients themselves, rather than their legal advisors. But not always: several respondents who practised in the same large transnational law firm reported that labour law practitioners in that firm met periodically to co-ordinate the advice they tendered to clients whom they represented in multiple jurisdictions.

Finally, most respondents agreed that the corporation, rather than the lawyer, not only initiated the underlying corporate strategy and made the final decision on adherence, non-adherence or nominal adherence to local labour law, but actively directed and orchestrated the activities of its legal representatives in various countries. For example, in the case of Europe-wide mergers and acquisitions, one respondent reported, while clients might ask a particular law firm to take the lead in bringing together the necessary legal services to deal with employment issues in each country affected, they would be just as likely to use their own legal or human relations departments to co-ordinate teams in different jurisdictions. This underlines the tendency of transnational corporations to
see themselves as primary authors of their own internal employment "law", often either ignoring their outside lawyers altogether or merely asking them to vet policy statements, contracts or operating manuals which were formulated internally.

**Other Influences**

This study has concentrated on management-side lawyers. Only four respondents acted for unions or individual rank-and-file workers, while about one-quarter acted on occasion for executives as well as corporations. Thus, the study does not directly take into account the contribution made to legal culture by a completely different group of lawyers—those who represent governments, international agencies, unions, social movements and other transnational advocacy groups in legal or political fora. However, the significance of that omission should not be overestimated. While some international union structures do exist (Bendiner, 1987) and while ad hoc transnational union co-operation is not unknown (Cook and Katz, 1994; Bercusson, 1997; Trubek *et al.*, 1999), none of the respondents reported having personally encountered much evidence of it and none foresaw the likelihood of it becoming a common occurrence, even in Europe. On the other hand, as is well known, transnational corporations have been successfully attacked by social movements (including unions) for specific abuses such as child labour, unsafe working conditions and other exploitative labour practices. Campaigns by these movements have led to consumer boycotts, political criticism and threats to ban goods produced in substandard conditions from the market-place. Moreover, social movements and NGOs—and their lawyers—have been actively promoting the adoption of global labour standards. Apart from occasional tactical victories, however, they do not have much so far to show for their efforts.

True, UN covenants and ILO conventions protecting labour rights are binding in international law, but only upon states which have ratified them, not upon employers. True, there have been proposals to strengthen international protection for workers by conditioning participation in trade regimes upon compliance with labour rights, but these have so far not succeeded. True, international bodies—the ILO, the EU, the OECD—have promulgated non-binding codes of conduct by which transnational corporations might commit themselves to observe basic labour rights such as freedom of association and the right to a living wage and safe working conditions, but these establish no enforcement procedures. True, significant numbers of transnationals and their sectoral organisations have recently adopted voluntary codes of labour standards (Rubin, 1995; Compa and Hinckle-Darracquere, 1995; OECD, 1998), but these do not yet appear to influence the day-to-day formulation and administration of human resources or industrial relations policies, and perhaps they never will (Arthurs 2001).

Thus, it seems likely that the testimony of lawyers who work on behalf of workers to limit the power of transnationals would not differ much from that of my management respondents: they too would acknowledge that no lex laboris is likely to emerge in the near future. Indeed, few labour side lawyers I talked to said as much.

**Conclusion**

To sum up, to the extent that transnational regimes of labour law have developed, transnational corporations rather than their lawyers appear to be their primary architects. The role of lawyers, at most, is to help create favourable conditions for these regimes by mediating between the employment practices and policies of their foreign-based, transnational clients, and the national legal systems in which they function. As we will see next, however, "mediating" does not simply mean modifying the behaviour of the client; it has definite consequences for law and lawyers.

**THE EFFECTS OF GLOBALISATION ON NATIONAL LABOUR LAW**

Given that 40 experienced labour lawyers could detect nothing resembling a distinctive transnational legal culture of employment relations, I asked respondents whether globalisation was affecting national labour law in some way. Their answers are revealing.

**The Dominant Influence on Labour Law of National Politics, Industrial Relations and Legal Culture**

Most respondents who commented on the point stressed that local labour law was profoundly influenced by national cultural, social and political history—Mrs. Thatcher's assault on union power in the United Kingdom, the revolutionary and republican tradition in Mexico and France, the post-war experience of communal and confessional solidarity in Holland and Belgium. This point seemed to have had least salience in Canada which, of course, adopted US-style labour legislation in the 1940s, and has experienced a pervasive American corporate presence for a century or more (Arthurs, 1996b). Canadian respondents did, however, cling to the national myth that Canada is (for now, at least) a kinder and gentler society than the neighbouring hegemon.
Many respondents also believed that special characteristics of their national legal tradition presented a formidable obstacle to the importation of foreign or transnational labour law or procedures citing, for example, the discursive nature of Anglo-American legal drafting, the comprehensive and highly prescriptive nature of the French Civil Code and labour codes, and the constitutionalisation of labour rights in Mexico. Furthermore, the tacit assumptions of each industrial relations system were perceived as virtually precluding penetration by outside influences. Thus, Mexican lawyers clearly help their clients by steering them through the channels connecting the state, the governing party and the PRI unions; Canadian lawyers know they have to deal with the realities of branch plant management; French lawyers are sensitive to the risk of social and political turmoil if established worker rights are significantly impaired; and Dutch lawyers are sensitive to the need for their small country to maintain a social consensus in order to adjust successfully to an inevitable process of regional and global economic integration. For all of these reasons, most respondents—except for Canadians—tended to claim there had not been, nor would there ever likely be, successful importation into their countries of the labour law arrangements and employment practices which transnational corporations had developed in their home countries. However, despite the belief of most respondents in the inviolability of their national labour systems, those systems are clearly changing.

Globalisation and the Legal Culture of Industrial Relations

Significant legal changes had occurred, or were in process, in the industrial relations systems of almost all countries where interviews were conducted. The American labour movement and collective bargaining system had been in decline over a lengthy period, with at best scant prospects for a near-term recovery (Hacker, 1999). The UK had just gone through a prolonged period of Conservative rule during which the power of trade unions was effectively destroyed, and the labour market was radically deregulated (Hepple, 1993). In Holland, several long-established labour market institutions were being overhauled or abandoned as the result of changes in employer practice, trade union policies, or the interpretation of state law by public officials (Van Peije, 1998). In Mexico, several projects of fundamental labour law reform seemed to be moving forward, in tandem with the general restructuring of the state and its governing party, the PRI; if implemented, these reforms would end the monopoly of the official trade union movement, encourage the growth and militancy of the new, independent unions, and normalise a system of arm's length labour-management relations (Bierma, 1998; Payne, 1998). In France, a proposed restructuring of labour market institutions was generating considerable controversy and unrest at the time the interviews were conducted. These reforms were not in fact implemented, and with the election of the Jospin government, the agenda changed; however, it remains to be seen whether, and to what extent, France will ultimately deregulate its labour market (EIRO, 1997, 1998). Finally, in Canada important legislative and administrative changes in labour law had been introduced in several provinces to create a more "business friendly" environment by deregulating the labour market and weakening the statutory regime of collective bargaining, much as has happened in the United States (Barkett, 1998).

Thus, it is clear that globalisation—with technology and neo-liberalism—actually is reshaping national labour law. Different national systems are responding with different degrees of urgency and through different modalities, but all seem to be moving generally in the direction of deregulated labour markets, disempowered unions, insecure job tenure and flexible, non-standard terms of employment. As one respondent stated, "the internationalization of problems has to end with the internationalization of law". But while the decline of workers' legal rights under neo-liberalism operates in the domain of state law, the enhanced ability of employers to dictate new workplace norms is located primarily in the domain of private ordering. The shift in corporate practice and procedure, in corporate treatment of employees and unions, reflects a shift in the balance of power between employers and workers which has been brought about not so much by new laws as by new technologies, delivery systems, management structures and, of course, globalisation.

Lawyers are seldom directly involved. Unlike the law of global business transactions, the new workplace norms are not primarily the result of changes in international standards or national labour law, or even in the professional praxis of employment contracts or labour negotiations. Nor can they be detected through close observation of the legal field as it is conventionally understood. In fact, legal forms and practices may remain unchanged even as the reality of conditions in the workplace is transformed. The new normative reality of employment in the global economy may originate in explicit human resource policies promulgated by TNCs and their subsidiaries; more commonly, it is merely experienced by workers as the after-shock of corporate pricing and production strategies designed to cut costs and boost flexibility and efficiency. Of course, states have some relationship to these corporate policies and strategies: they may impose discipline on workers who resist them, allow the machinery of labour market regulation to run down and rust, or even make futile efforts to cajole or threaten employers intent on exercising their power abusively. But in general either state labour law nor the activity of labour lawyers can be seen as major factors in the new norms of employment relations, the new laws of work, which have been emerging within global enterprises.

THE EFFECT OF GLOBALISATION ON LABOUR LAWYERS

This is not to suggest that labour lawyers themselves remained unaffected by globalisation. In two crucial respects, at least, globalisation is an important factor in their professional lives.
The Moral Economy of Normative Mediation

As suggested earlier, what labour lawyers do most crucially is to mediate amongst global and local economic interests, between the conflicting interests of management and labour, between their clients' economic interests and state law, between state law and non-state normative systems. In performing these mediatice functions, especially between different legal regimes, labour lawyers—as one respondent put it—sometimes perform like "fleas and wasps". They contribute to the cross-pollination of normative systems, using their exposure to the human resources policies and practices of domestic and foreign corporate clients to transmit innovations and best practices from one to another, thus helping to disseminate new workplace regimes as they evolve under pressure of the global economy. Similarly, lawyers—especially those who have worked or studied abroad—can in principle mediate amongst divergent state systems. They may use their knowledge of several systems to facilitate harmonisation or convergence of state law within trade blocs, or to promote the adoption of explicit transnational norms under the auspices of the ILO, the EU, the NAALC or some other agency. Several respondents—not all with the most obvious credentials—reported participating in such activities.

However, another aspect of "mediation" is more problematic. Both in Europe and in North America, "mediation" sometimes takes the form of active lobbying to align domestic law with the interests of transnationals, by reducing barriers to internationalisation and by promoting flexibilisation and the reduction of statutory protections and benefits. In effect, governments are persuaded to repeal or amend legislation, or change administrative practice, or otherwise to favour employers over employee interests. Some respondents—in Mexico and Canada, for example—justified such initiatives as part of a long-delayed and much-needed effort to liberalise the local economy and deregulate the labour market; ultimately, they contended, for the good of all, including workers. However, Canadian and Mexican workers seem unlikely to be grateful for this particular form of mediation.

Still, the picture is complex. Some respondents who acted exclusively or primarily for employers, claimed to favour equitable regimes of state law and corporate practice which respect workers' interests as well as those of their clients. Thus, some English respondents spoke critically of the anti-union excesses of the Thatcher era and looked forward to a rebalancing of state labour law; some respondents in Belgium, Holland and France indicated that despite their professional contribution to globalisation and neo-liberal policies, they remained personally committed to existing social democratic or social market policies; and several North American respondents expressed their commitment to regimes which ensured decent treatment of workers, on both principled and practical grounds.

Thus, as lawyers mediate between corporate, worker and state interests, they sometimes experience contradictions amongst their personal values, their economic interests and their professional obligations. For example, while none of the Mexican respondents acknowledged being involved in such practices themselves, all reported that "disreputable" labour lawyers arrange for spurious "protection agreements" to be signed between transnationals and compliant unions, to the prejudice of workers. Likewise, several Canadian lawyers reported that they had worked just within the letter, if not the spirit, of local law to achieve a "union-free environment" for transnational clients, and that they knew of other lawyers who were not quite so fastidious.

What might be called the moral economy of normative mediation obviously troubled many, if not most, respondents. They often stressed that they would not act for clients who wanted them to do things which violated the law or offended their professional or personal ethics. Indeed, several said that they had declined to act for clients who refused to accept their advice to comply with local law and industrial relations norms, and that they had invited obdurate clients to secure an opinion from another law firm confirming that a particular legal interpretation was the correct one. Two or three reported, with evident satisfaction, that transnational clients who had ignored their advice had later experienced labour conflict and legal difficulties. Respondents of this persuasion were, it seems, willing even at some risk to themselves to try to persuade foreign transnational clients to adjust their corporate practices to local state policies, rather than the reverse.

Labour Lawyers in the Political Economy of the Legal Profession

Relative to legal specialists dealing with other aspects of transnational business law, labour lawyers seem to occupy a peripheral role within the profession. That role, however, seems to vary from country to country.

Several US respondents suggested that the large, transnational Wall St. law firms—the putative architects of global legal regimes—have largely ceased to practise traditional labour law. In part the issue is demand: as union membership and power have dwindled in the past 20–30 years, fewer clients need the services of lawyers specialising in collective bargaining. In part it is supply: labour law practice cannot generate revenues comparable to other specialties or sufficient to pay the high salaries and overheads of Wall St. firms. Whatever the explanation, it seems that transnational clients are being served more cheaply and expertly in the United States by niche firms of labour law specialists, by "regional" counsel located near their production facilities and especially by in-house legal staff.

On the other hand, globalisation and other economic changes have generated lucrative new practice opportunities in what is now called employment law: entertainment and sports law; executive contracts, group pension and insurance contracts; and high profile civil and criminal litigation resulting from allegations of discrimination and harassment. These new fields of practice
certainly affect actors in the global economy, especially privileged actors, but it is by no means clear that they involve a new transnational legal culture. On the contrary, for Wall St. firms at least, they generally involve the application of US law either to US-based corporations or to foreign corporations operating in the USA. Such issues raise some problems of extraterritoriality—if, for example, a US corporation commits discrimination abroad (Stone, 1995; Starr, 1996)—but otherwise do not seem to be producing anything resembling a global regime of law.

There are some exceptions to this picture. As mentioned earlier, at least one large US-based global law firm in fact offers labour law advice to TNCs through most of its domestic and foreign offices. These offices attempt to serve clients in multiple locations, facilitate firm-wide consultation and co-operation on clients' labour problems, and provide global strategic and legal advice on labour and employment law issues. But even lawyers in this firm, in several jurisdictions, insisted on the quintessentially local character of their labour law practice. For European firms, the picture is somewhat different, perhaps because the public policy environment is different. Several large law firms, cross-border networks of mid-sized firms, and the legal departments of major accounting/consulting firms seem to pursue a somewhat more ambitious approach to transnational labour law issues, although they too claimed to be advising essentially on local law, except for the few important labour issues which have been addressed by EU directives. In none of these cases, however, could it be said that labour law was a major focus of the firm’s work.

Canada and Mexico—both recipients of considerable foreign direct investment, both hosts to many branch plants—also provide interesting insights into the role of labour law practice in the global economy. The Canadian case is rather closer to the European. Most large law firms do have labour departments, although several sizeable specialist labour law practices have also developed. As in Europe, the Canadian respondents generally provide advice on local law to local management, although some report an increasing incidence of direct involvement with US-based executives and, as noted, increasing client pressures to conform to US law and practice. The Mexican case is somewhat unusual in that several of the leading labour law practices are small firms built around two generations of family members. While some of the larger law firms also have labour law departments, these family firms do a considerable amount of labour

A possible exception relates to attempts to create transnational standardised or at least comparable compensation packages for the peripatetic executive and professional cadres of transnational firms. Anecdotal evidence provided during the interviews suggests that this issue is being addressed by means of contractual strategies, with dispute resolution dealt with according to "choice of law" provisions, rather than by means of arbitration, as in the case of other international contracts.


8 By and large, then, we can say that labour law practice—even on behalf of transnational corporations—does not entail the prestige, rewards and potential influence associated with transnational practice in fields such as insolvency, intellectual property, mergers and acquisitions or contract. Perhaps this marginal position in the political economy of the profession is an artifact of labour law's association with local, rather than transnational, law practice and institutions; perhaps it is simply a projection of the low esteem in which this field of practice is held domestically (Dezalay, 1986; Bourdieu, 1987); perhaps it is a recognition of the tendency of corporations to manage their own labour law problems without the help of the great Cravath firm law firms. Whatever the explanation, the marginal role of labour law practice tends to reinforce the impression that labour lawyers are not in fact engaged in the project of constructing a new regime of transnational labour law, a new lex laboris.

CONCLUSION

There is a good case for arguing that economic globalisation—especially in its local manifestations—is reinforced by what I have elsewhere described as "globalisation of the mind" (Arthurs, 1997), the embrace by strategic, knowledge-based elites in business, government, the professions, academia, and the media of a new set of values, processes, institutions and practices, of a new paradigm of governance. To this extent, I align myself with scholars who stress that the social field of law is constituted through the agency of professional elites, especially lawyers. But my study of labour lawyers moves me to propose a significant caveat: lawyers are not the primary actors and they do not act autonomously. Lawyers, rather, derive their influence from, and align their objectives with, the dominant forces in the society, economy and polity that they inhabit. For current purposes, those forces are epitomised by transnational corporations, the principal proponents and beneficiaries of globalisation, which neither need law nor are constrained by law in their dealings with workers. Thus, as McFarlane suggests, in this context at least, we see lawyers not so much using law as a tool to fundamentally alter social relations as working upon the malleable material of law to make it conform to the new realities of the global economy.
REFERENCES


— and (1998), “Corporate-Subsidiary Relations, Local Contexts and Workplace Change in Global Corporations”, Relations Industrielles-Industrial Relations 53 (1); 154–82.


Milkman, Ruth (1991), Japan’s California Factories: Labor Relations and Economic Globalization (Los Angeles, Cal.: Institute of Industrial Relations, University of California).


Plott, Konstanze, and Meschkevitz, Catherine (eds.) (1991), Beyond Disputing: Exploring Legal Culture in Five European Countries (Baden-Baden: Nomos)


Trumenaars, Frederik (1992), Riding the Waves of Culture (London: Nicholas Brealey).