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Book Review

Book Review: Globalisation and Labour Rights: The Conflict between Core Labour Rights and International Economic Law

Aussenwirtschaft

Provided in Cooperation with:

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Suggested Citation: Pillai, Rekha Oleschak (2008) : Book Review: Globalisation and Labour Rights: The Conflict between Core Labour Rights and International Economic Law, Aussenwirtschaft, ISSN 0004-8216, Universität St.Gallen, Schweizerisches Institut für Aussenwirtschaft und Angewandte Wirtschaftsforschung (SIAW-HSG), St.Gallen, Vol. 63, Iss. 1, pp. 104-108

This Version is available at:

<https://hdl.handle.net/10419/231145>

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Kaufmann, Christine (2007)

Globalisation and Labour Rights: The Conflict between Core Labour Rights and International Economic Law

Hart Publishing, Oxford and Portland, Oregon, ISBN 9781841135991, £50.00

“... and it was arranged that Oliver should go to him that evening ‘upon liking’ – a phrase which means, in the case of a parish apprentice, that if the master find, upon a short trial, that he can get enough work out of a boy without putting too much food into him, he shall have him for a term of years, to do what he likes with.”
(DICKENS 2003)

OLIVER TWIST is one of the most well known examples of the situation of children at work in 19th century England. One could say that in England, the situation has changed; however, the 21st century cannot be seen as having brought much improvement to the situation of workers, adults or children in other parts of the world. In addition to news reports about child labour in India, Pakistan, Uzbekistan and Ghana, in the recent past, one has been faced with incidents of forced labour in Brazil and Burma/Myanmar. At a time when labour rights are being perceived as an impediment to competitiveness and efficiency, this book by CHRISTINE KAUFMANN is timely as it deals with ‘core labour rights’ and the effects of globalisation.

Part of the series ‘Studies in International Trade Law’, and written from an international law perspective, it places the issue of core labour rights into the broader debate on the fragmentation of international law, which is a hot topic of discussion among international lawyers today.¹ What are the broader implications of fragmentation of international law? For economists, regulation is a restriction. If regulations at different levels and in different regimes are in conflict, it leads to a situation where the usefulness of regulation starts to be questioned. Therefore, it is necessary that regulations at the international level should be consistent and not in conflict with each other.

KAUFMANN’S book examines the tensions between the interests of the human rights regime on the one hand and international economic law on the other. Specifically, she deals with core labour rights and the interests of international economic institutions like the World Trade Organisation (WTO), the International Monetary Fund (IMF), the World Bank and the Organisation for Economic Co-operation and Development (OECD) as well as the role of multinational enterprises (MNEs). The main message of the book is that underlying the conflicts between the different regimes are the objectives of the various regimes, which manifest themselves as policies followed by these regimes. The aim of the book is to “bring the different legal systems into a coherent framework, a consistent legal order” (p. 11).

The book starts off with an almost textbook-like narration of the legal framework of labour rights. KAUFMANN classifies these into two levels, that is, the national and international level. Quite uncommon for lawyers, KAUFMANN provides the economic rationale underlying national economic and social policies. She also provides a comprehensive outlook on the Swiss system relating to labour rights, which should be extremely helpful for students of

1 For these discussions see inter alia: KOSKENNIEMI (2006), PAUWELYN (2003), WOLFRUM and MATZ (2003), JENKS (1953), MATZ (2005), van AAKEN (2008), MARCEAU (2002) and FISCHER-LESCANO and TEUBNER (2004).

comparative law. At the international level, KAUFMANN discusses the various human rights instruments that touch upon labour rights and the International Labour Organisation, which has the international mandate for the promotion of labour rights. It is interesting to note that when most international organisations only allow for participation of states, the International Labour Organization (ILO) is the only organisation with a tripartite approach, where member states are represented by a delegation comprising of two government representatives, one representative for workers and one for the employers. At a time when there are huge debates on the legitimacy of international organisations, this tripartite approach provides the ILO with more legitimacy than other international organisations. KAUFMANN points out that the ILO's approach to dealing with labour rights has been pragmatic in that it designs legally binding instruments with a limited scope, which has higher chances of ratification and leaving more specific issues to non-binding instruments. However, this pragmatism can prove to be harmful in the long run for labour rights themselves. This can be seen in the light of the observation that when labour standards are primarily considered as tools for economic efficiency, this does not guarantee the upholding of these rights. On the other hand, when labour standards are formulated as human rights, workers are entitled to a regime that enforces these rights regardless of the effects on trade (p. 234).

The second chapter deals with conflicting interests of international economic organisations and core labour rights. KAUFMANN examines various approaches to labour rights, that is economic rationale employed in dealing with labour rights, mainstreaming labour rights as part of an organisation's policies and using constitutionalism as a process to incorporate labour rights. She then examines how these approaches can be used in the context of the Bretton Woods Institutions and points out the shortcomings of using these approaches and the need for a legal framework. In her examination of the World Bank's stand on human rights, she critically notes how cautious the World Bank is in applying labour rights, at the same time promoting vigorously the establishment of an independent judiciary (p. 125). This could be due to what PHILIP ALSTON has pointed out elsewhere (ALSTON 2005), that only an effective and independent judicial system can protect property rights, which of course is aimed at protecting the legal rights of property owners.

This chapter also deals with the framework of world trade law and the main principles involved. KAUFMANN examines the WTO and its dispute settlement system, to look for various options for the application of labour rights in this process. She then deals with the OECD and labour rights within this organisation.

In the following chapter three, KAUFMANN adds a third angle to the conflicting obligations of states regarding labour rights and international economic law, by taking up the role played by multinational enterprises and how labour rights could be applicable to these. She examines the various international standards being promulgated to somehow bring MNEs within the purview of international law. This chapter also deals in detail with the links between free trade and labour rights. Her examination of social labelling programmes in the context of the Agreement on Technical Barriers to Trade and the Government Procurement Agreement is extremely interesting. Using Belgian and US legislations, she points out the different nuances of the actual and potential issues involved.

In Chapter four KAUFMANN tackles the difficult issue of reconciling conflicting interests, that is the role of nations and states and the international community. She makes this analysis at a horizontal and vertical level, with the former providing a framework for inter-

pretation of conflicting international norms and the latter by examining the actual role of states vis-à-vis international organisations. KAUFMANN highlights that the state's room for manoeuvre with regard to core labour rights is increasingly being influenced by international institutions (p. 250). She finds a similar trend regarding a state's powers in economic matters, for example by IMF's consultations regarding policies, which are not limited to macroeconomic ones but rather touch on all policies that may have significant effects on the macroeconomic performance of a country (p. 251). In what she terms as 'regulation by expertise', she highlights how international economic organisations influence a country's economic and legal situation, at the same time reducing the role of national institutions like the parliament to that of supporting actors. She rightly points out that such regulation by experts also results in a 'democratic deficit' as these experts normally operate behind closed doors and provide limited opportunities for public participation (pp. 254, 267).

KAUFMANN sees a potential way to resolve the problems she identifies by proposing a system of multilevel consistency which encompasses the principle of a consistent legal order. As the Appellate Body of the WTO has pointed out, the WTO does not operate in 'clinical isolation'². KAUFMANN also uses this approach to reconcile and find ways in which the conflicting interests could be accommodated, namely, by rules of treaty interpretation. Critics would of course find this problematic, as interpretation could become yet another instrument in the exercise of power (KLABBERS 2007). As opined by KLABBERS, "with so much power resting in the hands of the interpreter, the crucial question is not so much how interpretation should proceed, but who gets to undertake the interpretation" (KLABBERS 2007, p. 161). The ILO as an international organisation does not stand on par with the WTO, the exercise of power of these two organisations are very unequal. In this situation, if the WTO's Dispute Settlement Body exercises its powers of interpretation, it certainly would have its objective of promoting international trade in the forefront.

Her proposals for a system of multilevel consistency is an interesting one (the figure on p. 290 is helpful). However, one can be sceptical of whether such a system is workable, except if we were to have a world constitution.

There are certain matters which this book reminds the reader of problems on the international plane. These shall be mentioned below:

- On the one hand, developing countries fear that labour standards could be used by developed countries as protectionist measures and on the other hand, developed countries fear competitive disadvantages to their trade and industry by the existence of lower labour standards in developing countries.
- Increasing globalisation also brings with it increasing interconnectedness between international and supra-national organisations, states and multinational enterprises. KAUFMANN highlights this aspect in her discussion of the case of Burma/Myanmar in various contexts: as a controversial case before the ILO (pp. 55–58); as part of a tort claim against a multinational company (Unocal) in the US courts (pp. 181–184) and as part of a controversial legislation in the US, which ultimately had purported effects on WTO law (pp. 139–140).
- KAUFMANN takes up the highly debated topic of whether or not labour rights should be included in the world trade agenda. The PHILIP ALSTON – ERNST-ULRICH PETERSMANN³ debate on linkages between trade and human rights is familiar to international

2 United States – Standards for Reformulated and Conventional Gasoline (AB-1996-1) p. 17.

3 See PETERSMANN(2002) and ALSTON (2002).

lawyers. KAUFMANN supports the position that there is a linkage, that there should be one (PETERSMANN's position) and finds that ALSTON is mistaken as he has not understood PETERSMANN. I find this to be in itself a mistaken position. It is true that this debate will not be resolved as it is something in the nature of which came first, the chicken or the egg? You either support one position or the other. She contends that the conflicting interests can be reconciled by interpreting international economic law in the light of the existing human rights obligations of the parties involved (p. 284).

- Underlying the book is the message that globalisation has also resulted in a change in international relations. On the one hand, the notion of Westphalian sovereignty is changing, exemplified by the trend towards integration going beyond international cooperation and bringing about a shift from the national legislator to the international expert (pp. 245, 250, 261). And on the other hand, international law is becoming increasingly fragmented with the development of highly specialised regimes (p. 245).

On starting to read this book, one has the impression of sitting and listening to a bland lecture on labour law, however, this changes very quickly. While reading, one becomes ever more aware of the interconnectedness and interdependence of the various actors on the international plane. One is also time and again reminded of the blurred boundaries between the 'national' and 'international' and how they both are influenced by each other.

A couple of missing points are, firstly, that in her examination of the OECD Guidelines on Multinational Enterprises, she fails to mention that the National Contact Points do have an important role to play in that they are empowered to handle inquiries relating to the Guidelines and that NGOs and other interested parties have been using this mechanism.⁴ For example, in 2001, a case of use of forced labour in Myanmar was submitted to the French National Contact Point. Similarly, various cases involving the use of child labour and non-compliance with labour rights have been brought before the National Contact Points. In my view, these are important developments, especially in the context of labour rights.

Secondly, and especially because the book is titled 'Globalisation and Labour Rights', what is missing is an examination of the conflicts that may arise in the context of migration and labour rights under the General Agreement on Trade in Services, which the author explicitly avoids discussing.

This book deals with the fragmentation of international law, which can manifest itself in at least two fundamental ways. Firstly, in that the various regimes of international law are thought to become self-contained regimes (KLABBERS 2007). Secondly, through the threat posed to the unity of international law by the fact that non-state centred regulation is on the increase (KLABBERS 2007). In her book, KAUFMANN attempts to examine these two manifestations of fragmentation. She is much more successful in dealing with the former than with the latter.

The book is useful for students and scholars of international law. It is well-structured and one can follow the line of thought in an adequate manner. In conclusion, it would be fair to say that this book offers a solid and detailed inquiry into the conflicts between core labour rights and international economic law.

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⁴ For a list of all complaints submitted, see OECD (2007).

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