1. **Aim and scope of this book**

This aim of this book is to examine the new methods of *transnational labour regulation* that are emerging in response to economic globalisation.

For the past two centuries the need for labour regulation across national boundaries has been fiercely contested. For extreme free trade advocates who favour the removal of all barriers on trade and investment accompanied by the déregulation of labour markets, the issue is simple. Transnational labour standards, at least if they are effectively enforced, undermine the comparative advantage of countries. According to this view, *domestic labour laws* are as much a determinant of comparative advantage as natural endowments, resources and preferences. At the other extreme, protectionists argue for the safeguarding of national markets and *domestic labour laws* against external regulation. For them too, the issue is straightforward. In the 1880s, the German economist Friedrich List, arguing for the protection of infant industries against British competition wrote: 'in order to allow freedom of trade to operate naturally, the less advanced nations must first be raised to that stage [to which] the English nation has been artificially elevated.' Today some economists contend that fast economic growth in the developing countries will automatically lead to the improvement of *domestic labour laws*. Many politicians in developing countries believe that transnational regulation is a cynical...
form of 'social imperialism' through which developed nations seek to exclude competition by imposing standards that they themselves ignored in the process of industrialisation. They say that pressure for free trade is often a case of 'do as I say, not as I do.' This can be illustrated by President George W. Bush's imposition of tariff increases to protect the uncompetitive US steel industry, a measure declared unlawful by the WTO in 2003. The revenues from the tariffs were not being transferred to protect the pensions and healthcare of the most vulnerable US workers; indeed, attempts in the US Congress to expand protection for workers displaced by trade agreements have met with resistance by the Bush Administration. This affected competition from countries like South Korea, Japan and Europe; the protection this gave US steel workers was both short-lived and illusory.

Most governments and policy makers, however, are neither pure free trade advocates nor pure protectionists. They do not think there is a simple choice between more jobs (free trade) and better jobs (protection). They do not want to enter a 'race to the bottom', the memorable phrase used by Mr Justice Brandeis in 1933 to describe the competition between states to reduce regulatory requirements so as to attract business. They are striving to achieve a balance between free trade and investment, on the one hand, and employment growth and the raising of social and labour standards, on the other hand. The South African Minister for Trade and Industry, for instance, said the only way for his country to achieve sustainable employment 'is to change the structural base of its economy, which had for too long relied on tariff protection and state subsidies.' The ANC Government in South Africa has accepted the need for 'flexible' labour markets in response to global competition. The burning question, contested with its trade union allies, is whether and how this can be reconciled with the hard-won labour standards embodied in South African legislation since 1995. Similar choices face governments, employers and unions in other countries. We are left, in Sciarra's words, with 'a hybrid labour law, torn between its old protective function and the new aspiration towards flexibility.'

These issues are not only at the heart of controversies about employment and social policy within states. They are also reflected on an international scale, within the World Trade Organisation (WTO), the International Labour Organisation (ILO), the International Monetary Fund (IMF) and World Bank (WB), and also within regional groupings such as the European Union (EU), North American Free Trade Agreement (NAFTA), the Mercado del Sur (MERCOSUR) in South America, the Asian Pacific Economic Co-operation Agreement (APEC) and the Southern African Development Community (SADC).

The questions with which this book is concerned should be of interest to all those who seek a path between the extreme versions of free trade and protectionism, irrespective of their political affiliation. It will be argued that the reconciliation of global trade and labour rights will not come from relocating labour law within the sphere of international trade law (chapters 4, 5 and 6, below). Instead, efforts should be directed at shaping the many new strands of transnational labour regulation that are emerging so as to spread the benefits of growing trade and investment to the poorest, to protect basic human rights, and to contribute to social justice and democracy. This is a complex and difficult process, to which there is no single solution.

Any study such as this must begin with the International Labour Organisation (ILO) which since 1919 has adopted international labour standards (ILS). The ILO is unique among international institutions both in its tripartite structure (governments, employers and unions), and in its supervisory system. The effectiveness of this structure, the content of the standards produced, and their implementation have been criticised from many perspectives. Can an early 20th century institution survive in the 21st century global economy, and, if so, how does it need to change? (chapter 2, below.) The methods of transnational regulation have multiplied in response to modern economic globalisation. These include corporate codes and labels, transnational collective agreements, and guidelines from international organisations (chapter 3, below), unilateral social clauses (chapter 4, below) and bilateral and regional agreements making trade conditional upon observance of specified labour standards (chapter 5, below). Some governments, notably that of the US with support from American unions and many NGOs, want the multilateral WTO trading system to link internationally recognised worker rights to free trade (chapter 6, below). There is an increasing number of disputes in national courts and tribunals involving a transnational element, for example when a claim is made against a transnational corporation (TNC) for wrongs committed in another country where it operates (chapter 7, below). The process of integrating free movement of goods, services and capital with a social dimension has gone furthest in the EU; a number of general lessons about successfully combining economic and social integration emerge from this experience (chapters 8 and 9, below).

A spider's web of hard and soft transnational regulation is being woven around domestic labour laws and is profoundly influencing them. In the light of the developments analysed in the earlier chapters, the final chapter offers a reassessment of the orthodox views on the effects of globalisation on labour laws, in particular from the viewpoint of the theory of comparative institutional
advantage, and suggests ways in which transnational labour regulation can be re-invented for the modern global economy.

A necessary preliminary, in this chapter, is to outline the nature of the new global economy and the dilemmas it poses for labour laws, and then to take a fresh look at the economic and moral case for transnational labour regulation.

3. The dilemmas of labour laws

The view from the developed countries

These features of the new economy mean that labour law is now inevitably global law and not just the concern of a particular nation-state. There are, however, different perspectives from the developed and developing countries about the impact of global trade. Understandably, workers and their unions in the developed countries threatened by cheap imports complain that competition from 'cheap labour' standards in developing countries and also in the emerging market economies of Central and Eastern Europe is unfair. They see this as a threat to their own employment, wage levels and bargaining strength.  

An unemployed US software applications developer is reported to have said: 'when our laws allow US corporations systematically to replace our workers with cheaper-waged [foreign] workers there is something wrong with our laws'.  

On the other hand, the President of Germany's largest employers' organisation has commented: 'In the old days, employers asked themselves "how bad is the wage agreement for me?". Today they say "I don't care about the agreement any more, because I have four or five excellent exit routes. I may simply relocate 10,000 jobs in the Czech Republic. Or I may outsource." The mere threat of a strike by capital (the 'exit route') is likely to secure concessions.  

Such threats of relocation by TNCs are greatly facilitated by the new mobility of international capital and by the legal guarantees in regional and international agreements of free movement of capital, goods and services (Box 1.3, above). The freedom of movement of individual workers across borders is

29 European Industrial Relations Review and Report, 279, 282, and 289.
32 Financial Times, 21 August 1996.
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severely limited, and in any event is no counterpart to the free movement of investors. Transnational industrial action, as a countervailing power to cross-border management decision-making in TNCs, has been a rarity. It is subject to severe legal restrictions, sometimes outright prohibition, in almost every country and these restrictions have increased over recent decades (chapter 7, below). This has compounded the problems for weak international unions representing an increasingly fragmented workforce. More generally the decline of organised labour’s political strength is reflected not only in the policies pursued by right-wing neo-liberal governments, such as the Republicans in the US, but also in those of the centre-left such as the Democrats in the United States, New Labour in the UK, the Social Democrats in Germany and Sweden and the Socialists in France, who have, to a greater or lesser extent, accepted the need for ‘flexible’ labour markets in response to the forces of global competition.

These developments have put national labour laws in the developed countries under irresistible pressures. The coverage of labour legislation has shrunk as the fragmentation of labour markets and the trends to more insecure, irregular, non-unionised forms of employment have increased, with about a third of all employed workers in most developed countries now being in non-regular, non-full time work.33 Union membership, collective representation, and collective bargaining have also declined. Bargaining in all industrial countries increasingly takes place under the shadow of threats to relocate or to merge with foreign corporations: domestic labour laws rarely offer rights to bargain about strategic corporate-level decisions such as these.

The view from the developing countries

There is a different perspective from the poorer developing countries. These states are under immense pressure to compete among themselves for access to world markets and investment. This is particularly the case in those export zones (EPZs) in which labour standards have been abandoned, and basic labour rights to freedom of association and effective collective bargaining are denied. In some cases (e.g. Myanmar, Sudan) there has been brutal repression.

However, most developing countries want to enhance and improve living and working conditions; in particular they are paying increasing attention to workers in the vast, heterogeneous, and still growing informal sector, which includes a wide variety of activities ranging from petty trade, service repairs and domestic work to transport, construction and manufacturing. It rarely involves a clear-cut employer-employee relationship. The diversity of jobs and employment status make it difficult for informal sector workers to organise themselves into unions; moreover patriarchal family and ethnic loyalties may count for more than solidarity between workers. The ILO points out that informal sector units ‘operate on the fringe, if not outside, the legal and administrative framework’, with many ignoring or paying scant attention to regulations concerning safety, health, and working conditions.

In the past few years a number of trade unions and NGOs around the world have supported initiatives to help informal sector workers. The state has a major role to play in helping informal sector workers overcome their disadvantages. This makes it a priority of national policy to establish and enforce a regulatory framework in which ‘the right of informal sector workers to join or create representative associations of their choosing, as well as state recognition of their role as interlocutors and/or partners in policy-making or programme implementation are … key enabling factors’.35

A threat to these essential national policies comes from the neo-liberal creed espoused by the IMF and World Bank. Stiglitz, former chief economist at the World Bank, has commented: ‘[A]s hard as workers have fought for “decent jobs”, the IMF has fought for what is euphemistically called “labour market flexibility”, which sounds like little more than making the labour market work better but as applied has simply been a code name for lower wages and less job protection.’36 The aim of these financial institutions is to encourage growth, but they have underestimated the effect of their actions in enriching political and military elites at the top while destroying those kinds of solidarity between states, communities and workers which might increase these countries’ bargaining power with investors. In recent years, the financial institutions have tried to redress the balance to some extent by making their funding conditional on the recipient country recognising basic labour standards. The familiar story is that a developing country seeking World Bank or IMF support or tariff preferences from the US or EU, is asked to produce what amounts to paper evidence that the country is observing basic labour standards. This leads to the employment of an ‘expert’ who rapidly drafts a Labour Code for the state in question. Aid or loans then flow, or trade preferences are granted, but the Labour Code remains unenforced. Behind the paper tigers of laws and codes of conduct, is the thriving jungle of the market. Where there is mass unemployment, difficult trade-offs have to be made between employers’ demands for ‘flexibility’ and workers’ demands for decent jobs. Unions, where they exist, may have little option but to accept worse employment conditions, and those workers who dissent have few if any rights (Box 1.4, below).

34 ILO (1997c) at 176; Schlyter (2003).
35 ILO (1997c) at 176.
36 Stiglitz (2002) at 84.
Labour laws serve vital economic functions. The employment relationship provides one of the essential foundations of the business enterprise. Labour laws determine the rights and obligations of the parties to that relationship. These affect the efficiency of the firm in a competitive market, and the redistribution of benefits and risks between employers and workers and between groups of workers. These laws may also provide incentives or disincentives for improving skills and productivity. Equally important, labour laws have moral functions, upholding human dignity and the notion that ‘labour is not a commodity or article of commerce’. Since people work not only to earn a living, but also to achieve personal fulfilment labour laws affect both their physical and psychological well-being. Labour laws uphold human rights in the workplace, such as the rights to equality, to associate in trade unions and to assemble peacefully, to privacy and free speech.

The case for transnational labour regulation rests on similar economic and moral grounds, but with the important qualification that locating regulation at the supranational level may sometimes have adverse consequences that may not arise from domestic labour laws. There is relatively little empirical evidence because of the absence of comparable cross-country studies of the enforcement of transnational standards. So many of the arguments remain speculative.

Social dumping: a race to the bottom?

The oldest argument for transnational regulation is that world trade is between countries with different levels of labour rights and labour costs. This can lead to ‘social dumping’, that is the export of products that owe their competitiveness to low labour standards. It may also encourage a race to the bottom. The frequently expressed fear is that low-wage imports from newly industrialising countries are causing rising unemployment and falling relative wages among unskilled workers, and that outflows of foreign direct investment (FDI) to these countries is destroying jobs in the industrialised countries.

A general definition of ‘social dumping’ is suggested by Grossmann and Koopman:

Unlike conventional dumping which means selling abroad below cost or at lower prices than charged in the home market, ‘social dumping’ refers to costs that are for their part depressed below a ‘natural’ level by means of ‘social oppression’ facilitating unfair

39 Hepple (2004b) at 18.
40 The words used in Art 427 Treaty of Versailles (1919), and in the Declaration of Philadelphia (1944).
pricing strategies against foreign competitors. Remedial action would either consist of the offending firms consenting to raise their prices accordingly or failing that, imposing equivalent import restrictions.

This approach depends on identifying those measures of 'social oppression' which cause wage costs and labour standards to be unfairly depressed. Put in economic terms, the 'social dumping' case for transnational labour regulation is that it is necessary to remove those distortions on competition which are not related to productivity. Such distortions occur when firms are able to utilise undervalued labour. By undervaluation is meant paying workers with comparable skills and productivity different wages simply by shifting demand for labour to a more disadvantaged group of workers who are unable to resist. Firms that can undervalue labour in this way can avoid more radical solutions to their competitive problems, such as by restructuring or investment in new technologies. Indeed, the availability of undervalued labour discourages innovation, and firms which are innovative face unfair competition from firms which are inefficient technically and managerially but are able to be profitable in the short-term by employing undervalued labour.\textsuperscript{42} This argument was the justification given for including in the Treaty of Rome of 1957 a provision requiring equal remuneration for men and women doing the same work (chapter 8 below). There are obviously greater opportunities for using undervalued labour in a system which discriminates on grounds of sex, race, or any other arbitrary basis. A similar argument justifies measures against other forms of social oppression such as forced and child labour.

It is doubtful, however, whether the notion of social dumping is adequate in itself to form the theoretical basis for a new approach to transnational labour regulation. First, it over-emphasises the role of labour costs in decisions about relocation. Enterprises are not likely to relocate to another state with lower nominal labour costs if those costs simply reflect lower productivity of workers in that state. This would mean that there is no net difference in unit labour costs. The basic point is that what matters is not the nominal level of wage costs in a firm or industry but the net unit labour costs, that is the costs of labour for each unit of production after taking productivity into account. If labour costs do not reflect the relative productivity in a particular state and enterprises relocate to that state, the result would be to increase demand for labour, with the likelihood of rising wage levels. This would, in due course, cancel out the advantages of a relocation which was based purely on low labour costs. The World Investment Report 1994, concluded that 'despite a few notable cases, TNCs do not often close down, on account of low labour cost considerations alone, production facilities in one country to re-establish them in another country...'.\textsuperscript{43}

Technological change and labour market inflexibilities are the principal influences on the growth and distribution of employment.\textsuperscript{43}

Secondly, there is little empirical evidence to support the claim that comparative advantage does in fact flow from social dumping, whether this is through the violation of core labour standards or simply because of the comparative advantage of cheap labour.\textsuperscript{44} An OECD study in 1996 (revised in 2000) argued persuasively that patterns of specialisation are mainly determined by relative factor endowments, technology and economies of scale. The study pointed to empirical research which indicates that there is no correlation between aggregate real wage growth and the level of observance of core labour rights, such as freedom of association. The balance of evidence suggests that trade and investment flows are only minor factors in the rise in unemployment and wage inequality in the industrialised countries, and that the benefits from increased exports of skill-intensive goods and services outweigh the disadvantages of liberal trading regimes.\textsuperscript{45} Moreover, aggregate data on FDI suggests that the presence or absence of core labour standards are not important determinants. Host states that observe core standards are not significantly worse in attracting FDI than those which systematically abuse these standards. Similar conclusions were reached by a report on labour standards in the Asia-Pacific region.\textsuperscript{46} This is not to deny that there are abuses of labour standards linked to export sectors (especially in Export Processing Zones, EPZs). The ILO has reported that many obstacles are placed in the way of enforcing labour laws in EPZs. For example, until 2004, in Bangladesh freedom of association was not recognised for workers in EPZs, and this was publicised as a 'non-fiscal' incentive to investment. When the Government lifted the ban, it faced a court challenge by 22 companies.\textsuperscript{47} Even worse abuses are usually found in domestic, non-trade sectors which do not rely on FDI.

This critique of the theory and practice of social dumping leads one to reject as inadequate, and ultimately illusory, the notion that transnational standards can or should provide a level playing field in respect of labour costs.

Improving economic performance

The argument about the race to the bottom can be turned on its head to contend that raising labour standards may raise productivity and so encourage FDI.\textsuperscript{48} Although the developing countries enjoy the comparative advantage of

\textsuperscript{42} Deakin and Wilkinson (1994); and Deakin and Wilkinson (forthcoming).

\textsuperscript{43} UNCTAD (1994) at xxvii.

\textsuperscript{44} Erickson and Mitchell (1998) at 170-71.

\textsuperscript{45} OECD (1996, revised 2000); Lee (1996) at 485.

\textsuperscript{46} Commonwealth of Australia (1996).

\textsuperscript{47} ILO (2004b) at 38.

\textsuperscript{48} OECD (1996, revised 2000).
low labour costs, high labour standards are conducive to high levels of labour productivity and hence long-term competitive advantage. A study by the International Institute for Labour Studies found a positive, though weak, correlation between the core labour rights of freedom of association and collective bargaining with FDI. Another study by the Institute, in 2003, based on data from 162 countries concluded that in general higher manufacturing exports occurred when there was democracy, freedom of association and collective bargaining rights. However, this conclusion has to be qualified in respect of labour-intensive exports, where the higher wages associated with collective bargaining can reduce exports; against this must be balanced the predictability of wage costs which may result from bargaining. High standards promote better labour relations, co-operation and sharing of information, all of which tend to enhance productivity.

However, it has to be conceded that even if the implementation of core international labour standards in developing countries does not necessarily affect the costs and patterns of production directly, there may be adverse indirect consequences in the short- or medium-term. In most developing countries only a small proportion of the labour force (on average 15 percent) is employed in the formal sector. Informal work is predominant, and there is a surplus of labour. Introducing international labour standards may raise wages in the formal sector, but at the cost of increasing economic segmentation of the labour market. A small elite of labour in some sectors of the formal economy (particularly in export industries) can extract rents while the informal sector and small producers continue to decline. International standards will not be effective without macroeconomic growth and structural changes. Formalising the informal sector is not within reach. For labour standards to be relevant to the majority of the world’s workers they have to be able to reach the informal sector. This means that the main goal of transnational regulation should be the reduction of poverty and inequality.

Reducing poverty and inequality

Can transnational labour regulation contribute significantly to the reduction of global poverty and inequality? The starting point is to recognise that increased participation in world trade can lead to dramatic reductions in poverty in developing countries. Compared with foreign aid, it has far more potential to help the poor; but aid and trade must go hand in hand, so as to give the poor capabilities which will help them to work in export industries. It has been suggested that a one percent increase in the world-export share for each developing country could reduce world poverty by 12 percent. Labour-intensive manufacture of exports can generate income and employment for the poor which will reduce poverty. There is convincing evidence from East Asia that export-led growth can have a dramatic effect on poverty. In the 1970s 6 out of 10 people in that region lived in extreme poverty; by the end of the 1990s fewer than 2 out of 10 were in that position.

However, the crucial point from the perspective of labour laws is that the benefits from trade to the poor are never automatic. For example, in Latin America despite a rapid growth in exports there has been rising unemployment and even before the Argentinian crisis, a disastrous drop in real incomes. In Latin America the pay gap between college-educated workers and unskilled workers increased by 18-25 percent in the 1990s. In China, income inequality and unemployment have also grown dramatically as that country has been integrating into world markets. In many developing countries, growth has been achieved at the price of deplorable working and living conditions.

Deregulation of labour markets has involved the dismantling or non-enforcement of minimum wage laws and wage protection. The entry of more women into the labour market—what has been called ‘global feminisation’—has been driven by their use as cheap labour, earning only about three-quarters of the average male salaries in manufacturing industries. There is much evidence of excessive working hours, poor levels of employment protection and weak trade union rights in those industries in which women are concentrated. In many countries women suffer the double disadvantage of poor working conditions and wages, and also being compelled by social norms to transfer their income to men.

Moreover, concentration on labour-intensive export industries can leave countries ‘trapped in low-wage, low-skill sections of the global economy’. An example is Bangladesh where foreign investors have been attracted by the combination of low wages ($1 to $1.50 per day, less than half that in India) and quotas imposed under the Multi-Fibre Agreement on more competitive suppliers such as India and China. As Europe and the USA phase out these quotas by 2005 under a WTO agreement, Bangladesh will lose markets and with them foreign investors.

50 Kucera (2004).
51 Kucera and Sarna (forthcoming).
52 ILO (2004b) at 15.
54 Singh and Zammit (2003) at 191-204.
56 DFID (2003) sees this as the main aim of transnational standards.
These examples reinforce the arguments made by some economists that national labour laws, such as a minimum wage and equal pay for women, are necessary in order to promote longer-term productivity and competitiveness. Under-valued labour leads to productive inefficiency, hampers innovation and results in short-term strategies and destructive competition. Basic labour rights are necessary in order to correct this market failure.

There is much debate among economists about the consequences of globalisation on both poverty and inequality. These concepts are often used together but they are distinct. Poverty refers to those who fall below a certain minimum standard. It can be measured first on an absolute basis, referring to people whose income is insufficient to cover basic needs; or it may be defined on a relative basis by referring to those people whose income does not allow them to function properly in their particular social environment. Sen argues persuasively that poverty should be seen as a deprivation of basic capabilities, rather than merely as low income. Although the system of social security in European countries may make up some of the deficiency in income of those who are unemployed, loss of work can have 'far-reaching debilitating effects on individual freedom, initiative, and skills'. It contributes to ‘social exclusion’ by reducing self-reliance, self-confidence as well as harming psychological and physical health.

Relative poverty within the world’s richer countries is put into the shade by the gap between rich and poor countries. The average income in the richest twenty countries is 37 times the average in the poorest twenty, a gap that has doubled in the past forty years. The increasing prosperity of an elite in the developed countries has ‘gone hand in hand with mass poverty and the widening of already obscene inequalities between rich and poor’. According to the World Bank, in 1998 almost half the world’s population were living on less than $2 a day and a fifth on less than $1 a day, the same figure as in the mid-1980s. Human development indicators, such as infant mortality, under-nourishment, adult illiteracy and access to clean water, reveal extremely high levels of deprivation in South Asia and sub-Saharan Africa. ‘The wealth that flows from liberalised trade is not pouring down to the poorest, contrary to the claims of the enthusiasts for globalisation.’

The concept of equality is elusive. Equality of what? This may refer to equality of income or resources, or it may be what Sen calls the ‘equality of capabilities’, such as education and training, human rights and democratic

freedoms. There is, of course, an overlap because lack of income may make it impossible to acquire capabilities and lack of capabilities affects the capacity to earn a living. Equality for whom? Some groups, such as women, disabled people and ethnic minorities are at a particular disadvantage and are victims of discrimination in respect of both income and capabilities. There is also general inequality of incomes. One way of measuring this is to consider separately the top and bottom income distribution (the top 10 percent expressed as a percentage of the median, and the median expressed as a percentage of the bottom decile). If we do this, then we find that since the 1970s there has been a rise in inequality in the top 10 percent in the USA, a rise in inequality in both in the top and bottom deciles in the UK, and relatively little change in other OECD countries such as Germany, Sweden and Canada.

Another way of measuring inequality in the EU—focusing on those with the lowest incomes—is through an indicator of social cohesion used by Eurostat, the so-called S80/S20 ratio—the ratio of total income received by the 20 percent in the country’s population with the highest income to that received by the 20 percent of the country’s population receiving the lowest income (so that if the share of the top 20 percent in total income is 45 percent, and that of the bottom 20 percent is 9 percent, then the ratio is 5). By 1997 and 1998, this ratio was around 5.4 for the 15 Member States, but with considerable variations ranging from 2.7 in Denmark to 4.4 in the Netherlands, 5.7 in the UK and 7.2 in Portugal. In a much earlier age, Plato proposed that the maximum limits between poverty and wealth in the citizen body should be set at 4 to 1 in order to avoid civil disintegration.

If our concern is with equality of capabilities, then our measures of inequality will relate not simply to income, but more broadly to opportunities to pursue an occupation or career of one’s own choosing, to freedom of association including the right to form and join trade unions, and to participate in economic and political decision-making that affect one’s life, as well as other rights now enumerated, for example, in the EU’s Charter of Fundamental Rights (chapter 9, below). A central task of transnational labour law in the era of modern globalisation must be to facilitate equality of capabilities. This involves designing an optimal system of regulation to reduce inequality by promoting fair representation and eliminating exclusion and institutional barriers to full participation (chapter 10, below).

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60 Atkinson (2001).
63 World Bank (2001) at 3.
64 World Bank (2001) at 65.
A race to the top?

A further argument for transnational labour regulation is to harness the processes within the market activities of TNCs which favour the raising of labour standards, that is a 'race to the top'. This has been called an 'instrumental' approach. The internal labour markets of TNCs usually provide better wages, conditions of work and social security benefits than those prevailing in domestic firms, due to the fact that they tend to be concentrated in industries which utilise high skills, are capital-intensive, and have superior managerial and organisational techniques. Indirectly, there may be a spillover of the best practices of these TNCs to domestic firms.

A great many consumer goods and other products are now produced through global commodity chains. Workplaces in different countries are connected by contractual or ownership links between enterprises that form a transnational 'chain' of production and distribution. For example, in 1961 only four percent of the clothes sold in the United States were imported; today imports account for over 60 per cent. Although often labelled as products of US TNCs, these clothes are mainly produced in developing countries either by a subsidiary of the TNC or by an outside contractor. The market is dominated by a few large retailers who set not only the price but also the design and quality of the goods, and this in turn affects the wages and conditions of workers who produce them.

On the one hand, these global commodity chains enable TNCs to dominate international markets. On the other hand, these very links provide new opportunities for solidarity between workers in different countries, and between workers and consumers. This provides a social basis for new forms of labour regulation. The legal sources for such regulation are to be found in the mechanisms for interpreting and enforcing contracts between enterprises in different countries. This type of production entails a distinct form of internationalised labour market, dominated by TNCs. These corporate giants can choose where to locate their sources of supply, as well as opting between outside contractors or setting up subsidiaries in which the TNC has an ownership stake. In both cases the different producers operate under various national systems of labour law. Even if the central management of a TNC lays down employment rules or codes of conduct, these have to be interpreted and enforced under the multiple national systems in which the TNC or its contractual suppliers operate. Thus, if a TNC decides to observe multinational codes of conduct, it will have to find managerial means of ensuring compliance with these labour standards within the affiliates of the TNC, and contractual means in relation to its suppliers. However, in both cases, it has no means of influencing entirely independent enterprises in the same country.

The global commodity chains dominated by TNCs generate employment through various linkages with enterprises in home and host countries. The World Investment Report 1994 reported that 'as a general rule, for each job directly generated by a TNC, one or two may result indirectly from backward and forward linkages.' Lall points out:

The attraction of developing countries is no longer the presence of large protected markets, cheap unskilled labour and exploitable natural resources. Increasingly, FDI flows into competitive and higher technology activities which require disciplined and productive labour, high skill levels, world-class infrastructure and a supportive network of suppliers.

Whether or not the quality of employment is raised throughout the global chain of production and distribution depends largely on corporate integration strategies. In the emerging model of complex integration—that is regionally or globally integrated production and distribution networks within function, product or process specialisation—there is likely to be a degree of convergence in the employment conditions of parent and foreign affiliates in order to maximise the global efficiency of the TNC. The TNC will increasingly rely on workforce quality in the host country, and this can be encouraged in order to generate positive effects on labour conditions throughout the global commodity chain, and hopefully also into the informal sector.

The task, therefore, is to create a transnational regulatory framework which encourages and develops the potential of TNCs to raise the labour standards of economically and socially disadvantaged groups of workers and producers, particularly in the informal sector. At national level, the application and elaboration of this framework has to take account of specific local cultural, social and economic features. We must, therefore, evaluate the emerging methods of transnational labour regulation according to their potential for the dissemination of 'best practices' and for developing solidarity between workers employed by TNCs in different countries.

Human rights and democracy

The international human rights movement has, until recently, paid relatively little attention to workers' rights. As Leary says, 'the human rights movement and the labour movement run on tracks that are sometimes parallel and rarely
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originally conceived as statements of human rights. The ILO's official compilation includes only three sets of instruments under the heading 'basic human rights'. These relate to freedom of association, forced labour and equality of opportunity and treatment. The ILO's 1998 Declaration of Fundamental Principles and Rights at Work (chapter 2, below) added the elimination of child labour to these categories.

Although the vast bulk of international labour standards are not classified as human rights, it is rights such as freedom of association that are crucial to the sustainability of economic development. In the words of the UK's Department for International Development:

[Core labour standards] reduce the risk of social and political instability by enhancing equity and social justice. Strengthening workers' rights also increases the ability of people to withstand the impact of shocks which often affect developing countries whether at macro level, such as financial crises, or household level such as illness. Freedom of association has been critical to the development of improved social protection of workers through political campaigning and other action by labour movements. Core labour standards provide a framework of rights and responsibilities for firms, governments and workers—to underpin production processes which assure the dignity and well-being of all parties.

Conclusion

The ghost of David Ricardo's theory of comparative advantage continues to haunt debates about free trade and transnational labour regulation. The theory, based on a simple numerical model of the manufacture of English cloth and Portuguese wine, holds that free trade does not impoverish nations by driving their production abroad but makes them richer by allowing each to specialise in the goods it makes more efficiently and to trade them for even more goods that it needs from other countries. Modern adherents of free trade view all restrictions on trade—including transnational labour regulation—as an attempt to protect private interests against the economic welfare of the public. The flaw in this argument, which becomes apparent if one revisits Ricardo's own text, is that the model is a static one based upon trading partners with a fixed mix of endowments. Moreover, Ricardo's model is expressly based on the assumption that capital is not mobile with 'most men of property [being] satisfied with a low rate of profits in their own country, rather than seeking a more advantageous employment for their wealth in foreign nations'.

A modern theory of comparative advantage has to take account not only of the fact that capital is global and a growing share of trade takes place within TNCs.

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74 Leary (1996b) at 22.
77 Ricardo (1817, 1971 ed) at 155.
It also has to consider the comparative advantages of the variety of national labour laws. Such a theory challenges the orthodox assumptions about the effects of labour laws on global trade, and points the way towards a modern re-invention of transnational labour regulation (chapter 10, below).

Transnational labour regulation does matter. This is not because there is a serious risk of ‘social dumping’; in any event, it would be impossible to achieve a level playing field in respect of labour costs. Transnational measures, if effective, may promote better economic performance, but it has to be recognised that, so far as the developing countries are concerned, these measures have to be carefully framed and targeted towards the informal sector, and to the reduction of poverty and inequality. The new methods of transnational regulation can be used to develop a ‘race to the top’ by spreading the best practices of TNCs, and by promoting sustainable development through fundamental human rights at work. These interventions have to be shaped in ways that not only fulfil these objectives but also maximise the comparative institutional advantages which countries enjoy as a result of their domestic labour law systems. How this can be done—and how it cannot be—forms the subject of this book.