Perspectives on the regulation of working conditions in times of globalization

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1 Introduction

1 Labor Law in the Era of Globalization

This seems to be the worst of times for labor law. In this era, labor law is confronted with an unprecedented crisis; it is immersed in lasting controversy and challenged on both external and internal dimensions (See, e.g. Coutu et al. 2013; Coutu 2013; Davidov and Langille 2011; Estlund 2006; O'Higgins 2004; Davies 2002). The typical aggressive criticisms of labor law usually concern how the values cherished by most economies have been impeded, such as efficiency, flexibility, equality, and employment, and how inadequately the rationality, self-consistency and normative legitimacy of the discipline itself have been maintained (see Davidov and Langille 2011).

The current situation firstly results from the problems inherent in labor law. As analyzed by Davidov (2016: 1-4), the distributional function of labor legislation incurs opposition and elusion, thus generating perpetual challenges for implementation and a continuing need for the justification of lawmaking in this realm. Furthermore, labor law is supposed to be dynamic for the purpose of adapting to the labor market. Any adaption may have to go through objections or criticisms, and consequently, lawmaking always lags behind what reality requires. Over time, doubt has been cast on the efficacy of labor law. The extent to which 'soft' regulations should be adopted in labor legislation has been considered questionable. Most importantly, how to match the goals and means of labor law has been problematic (see Davidov 2016: 1-4).

What is notable is that the above problems embedded in labor law are amplified due to the social and economic changes in the contemporary world. Globalization leads to the free movement of capital, information, human resources, and products, expands within-border competition to worldwide rivalries, and sets higher requirements for the core competence of a business and an economy. Such a process of global integration is accompanied by the flourish of so-called neoliberalism – a revival of the *laissez-faire* economic liberalism of the 19th century. A significant effect on government policymaking is the shift to cutbacks in public expenditure and to the minimization of restrictions on free trade, taxation and the labor and capital markets (see Goldstein 2011: 30). In addition, new challenges have been posed to labor legislation by rapid technological innovation, the change in business management ideas, and many other factors, such as the swiftly evolving structures of business ownership and the unparalleled development of the mechanisms and instruments for raising capital (see Weil 2014).

As a consequence, labor law is called into question on many levels. Firstly, the basic ideas and purposes of labor law seem to have become obscured. Are the reasons for intervening in employment relationships limited to protecting the safety, health and human dignity of employees, satisfying their basic material needs, and making up for their disadvantaged position in collective bargaining (see Weiss 2011; Sinzheimer 1927)? If the answer is in the affirmative, it will be difficult to interpret the far-reaching alterations to the labor law within some countries over recent decades. An example is the emergence of mechanisms that reflect growing emphasis on employee rights to influence managerial decision-making and seek to connect individual and business interests (e.g. employee share ownership plans and profit sharing schemes) or to unite labor law and social security law (e.g. employee pension plans). These changes may be deemed as adaptations to the external environment which would leave the fundamental thoughts and goals of labor legislation intact (see Davidov 2011; Weiss 2011). However, they may also stimulate a broadening of the ideas and functions of labor law. Some scholars therefore propose to update the foundations of labor legislation (e.g. Langille 2011; 2006), and some call for switching attention from the traditional role of labor legislation in 'correcting' and 'limiting' employment relationships to its potential to constitute the markets and to promote development (e.g. Deakin 2011).

Furthermore, it has become more complicated to determine the correctness of the methods employed by labor legislation. The efficiency and appropriateness of the way a country exerts control over domestic workplaces need to be reflected on more seriously, due to the growing volatility of the external environment and the increasing difficulty in balancing the social and economic values of labor legislation.

The worsening ambivalence in terms of the goals and means of labor law has inevitably resulted in an aggravation of the doubts surrounding the actual impact. This raises a string of tough questions concerning the practicability of labor legislation in the presence of strong market forces and about the extent to which setting certain legal constraints may destroy employment and erode the competitive power of an economy.

However, by stepping back and making a macroscopic observation, one may decide that the current situation could also be seen as the best of times for labor law. The problem with labor legislation is by and large related to the way it responds to the changes in historical and political circumstances. Compared with most other branches of law, the making and evolution of labor law have been seriously shaped by the level of economic development, relevant policymaking, the varying nature of the state, employer and employee interactions, the increasing influence of civil society, and the ideological shifts (Hepple 2011). Labor law *per se* is 'part of an historical process and the outcome of struggle between different social groups and of competing ideologies' (Hepple 2011). This indeed implies the plasticity and adaptability of labor law. Facing the unequaled complexity of economic and social transformations, almost every country has experienced tension,

qualms, and even turmoil, occasionally or frequently, due to deep-rooted uncertainty over the foundations, approaches, and results of labor legislation. This painful struggle gives rise to the on-going crisis within labor law, but simultaneously induces motivation for reinvigoration and renewal (Davidov and Langille 2011). Endeavors to update perceptions of the existing paradigms of labor law, to fully reveal the diversity of problems and solutions, and to search for new possibilities of the legal order, may brighten the prospect of labor law and inject new energy into this field. More significantly, the real potential of labor law as well as its inability can be better comprehended because of these efforts.

2 Regulation of Working Conditions

Working conditions can be defined in a narrow sense, as 'the conditions under which employees have to work', including 'matters such as permitted breaks, the state of heating, lighting, and ventilation of workplaces, the safety and comfort of machinery, vehicles, and other equipment, normal manning levels, and disciplinary procedures'(Black et al. 2013). According to this definition, working conditions comprise two parts: the physical environment and working time arrangements. However, in recent literature, increasingly more importance is attached to the psychosocial characteristics of a job, enlarging the scope of the indices of working conditions (e.g. Kalousova and Mendes de Leon 2015; Wahrendorf et. al 2012; Gillen et al. 2007). The current trend is to consider 'working conditions' as a wider concept that contains extensive physical and psychological factors in the workplace. In the European Working Conditions Survey (EWCS) by *Eurofound* (2016; 2012), a wide set of indicators are investigated to measure the level of working conditions across European countries, covering physical environment, work-related risks for health and safety, working time and intensity, earnings, worker participation, access to training and learning, work-life balance, and financial security etc. This basically accords with what the International Labour Organization (hereafter 'ILO') has endorsed.[1] Such a broad interpretation of the meaning of working conditions is adopted by this research, although not every sub-issue under the concept is examined.

Working conditions are the essential elements of employment relationships. Despite historical and regional differences, conflict surrounding working conditions has been the main point that legal interventions have been seeking to mediate. From the perspective of the labor contract, working conditions are relevant to the considerations offered by the employer in exchange for an employee's work, deciding the substantial transaction fairness in employment. From the point of market regulation, working conditions are among the most significant factors that potentially affect

1 See http://www.ilo.org/global/topics/working-conditions/lang--en/index.htm (accessed 5 August 2017).

the direction and frequency of capital flows and meanwhile exert effects on labor supply. Working conditions are also a primary concern for public policy, due to the direct bearing on the living standards and well-being of a sizable majority of population in a country.

Correspondingly, the regulation of working conditions is at the core of labor legislation, and is more likely to trigger political uproars. It is no exaggeration to say that working conditions legislation finds itself in the center of the current crisis where labor law is procrastinating and tends to vacillate, and the challenges faced by labor law are better embodied in working conditions legislation than anywhere else. A crucial and inescapable undertaking for labor lawyers is to figure out sensible principles and practical methods for regulating working conditions. Thus, this research focuses on the regulation of working conditions whiling omitting other issues of labor law.

Despite being conducted against a global backdrop, this research confines itself to observations of the domestic legislation of certain countries, with the exception of the international trade agreements and ILO conventions mentioned in Chapter 2 and 4. Besides, working conditions law in this research only refers to a country's legislation (statutory law) on working conditions, regardless of other types of law, such as case-law, customs, etc.

3 Research Aim & Central Questions

This research has no intention to stay at the level of an abstract depiction of the predicament for a country to regulate working conditions, but aims to draw attention to the practical difficulties that contemporary countries are being confronted with under the combined effects of deepening globalization and characteristics of domestic legal systems. It probes into five heated debates: a general discussion over the foundation and feasibility of regulating working conditions in an era of globalization, followed by four parallel studies that respectively concentrate on China's legislation on construction safety, Germany's minimum wage law, the parental leave policies of the US and Sweden, and Great Britain's experiences with employee participation. By dissecting the situations in which divergent stances, defective mechanisms and practical straits are entangled, the crisis of labor legislation in times of globalization is concretized into specific problems while at the same time opportunities for change are uncovered.

One may wonder about the connections between the five studies included in this research. Indeed, the first study respecting the foothold of working conditions law in times of globalization attempts to address some common concerns of policymakers, and the general observations made in this study are responded to by the findings of the following studies, to different extent. Based on the foundation laid by the first study, the latter four studies go deep into construction safety, minimum wage, parental leave and employee participation successively. These specific topics involve the

most significant material and spiritual facets of working conditions, including the protection of occupational safety, working environment, employee remuneration, work-life balance, gender equality, and employee right to influence organizational decision-making. China, Germany, the US, Sweden and Great Britain are selected to be observed because they feature quite controversial and representative legislation or practices in terms of the forgoing topics, which will be clearly explained in each of the four studies. Such an exploration is not a discursive one that collects together the debris of the current broken picture of global lawmaking on working conditions. Rather, a couple of questions continue to hover in the background throughout:

1 *What is the main dilemma facing the regulation of working conditions in times of globalization?*
2 *How effectively have policymakers reacted to the foregoing dilemma?*

For the above queries, conclusions will be drawn at the end of the research by reflecting on the primary findings of the five studies, which are devoted to deal with more concrete issues and provide no direct responses though.

4 Research Methods

Several different research methods are employed in the five independent studies. The first study concerning whether and where working conditions law can gain a foothold in globalization is mainly based on a retrospect of a substantial amount of academic contributions in the recent three decades (1980s-2010s) which in some sense demonstrate or attempt to disprove the necessity, influence or viability of labor legislation from philosophical, social or economic perspectives. Opposite views on working conditions legislation in times of globalization are initially extracted from the literature as the starting point for the subsequent observation, which comprises three levels. On the first level, current mainstream approaches to justifying the intrinsic foundation of working conditions law are reflected on. What follows is an examination of some typical criticisms of the efficacy and economic effects of working conditions legislation. On the basis of the previous two layers of discussions, the last section provides a tentative suggestion with regard to how working conditions legislation may gain a reliable foothold in the present era.

The remaining four studies deal with certain countries' specific legislation, and an obvious similarity between them is that they all include normative analyses: value-based comments are made on the relevant provisions and institutional arrangements, despite the utilization of factual evidence, such as authoritative statistics suggesting the implementation status, effects and public acceptance of the legislation. However, there are also evident differences among these studies respecting the approaches. To be concrete, in the second study, China's defective legislation on construction safety is analyzed from a comparatively macroscopic perspective and regarded as one of the many reasons that have given rise to the serious construction

safety problem in the country. Hence the bunch of proposals put forward in the last section contribute to the establishment of a framework for legislative reforms in the future, instead of giving concrete advice on the revision of specific regulations.

The third study assesses Germany's legislation on minimum wage in a more detailed manner. By identifying the entry point, the minimum wage rate and coverage, the adjustment mechanism, and the implementation system as the essential components of a minimum wage regime, the corresponding provisions in the German Minimum Wage Act are examined thoroughly.

The fourth study adopts a comparative approach. Swedish and American legislation on parental leave are compared throughout in terms of the models, underlying ideas, and economic effects and social responses. In addition, within the American part, the legislation of a few states that provide parental benefits beyond the federal level is analyzed. Adopting this method effectively disproves the presupposed tradeoff between the level of parental benefits and economic performance of a country.

Based on British legislation and practice, the last study reflects on the three main channels of employee participation and the possibility of cultivating their symbioses in one system, for the purpose of balancing enterprise desire for higher productivity and employee right to exert influence on organizational decisions. Observing Great Britain's experience with the three channels of employee participation is not the purpose, but these channels must be materialized and contextualized before their interactions can be virtually discerned and the proposition of establishing a ternary system of participation channels can be evaluated in a concrete way. Analogous with the first study which draws on research achievements from several other areas, this study is interdisciplinary in that many findings of earlier research in the fields of economics, sociology, and human resource management are taken advantage of.

5 Book Structure

The five studies mentioned above make up the main body of this book, from Chapter 2 to Chapter 6.

In Chapter 2 – "Gaining a Foothold: Working Conditions Law in Globalization", the following principal questions are dealt with:

- *What is the intrinsic foundation for working conditions law?*
- *To what extent do the propositions that predict the negative economic influence of working conditions legislation prove correct?*
- *What can generate a real foothold for working conditions legislation as the international competition and cooperation patterns are transformed with the march of globalization?*

The most important contribution of this chapter is the suggestion of an alternative construction that manages to overcome the salient defects of

the mainstream approaches to justifying working conditions legislation. In addition, it argues that the role of working conditions law in promoting the economy has been underestimated, while the harm has been overstated. A brief and tentative analysis is presented, replying to the question of how an ultimate foothold can be gained by working conditions legislation in times of globalization.

Chapter 3 – "A Legislative Perspective on Construction Safety in China, against the Backdrop of an Industry-wide Labor Shortage" – has been submitted to the ***Journal of Workplace Rights*** and is presently being given consideration for publication in SAGE Open. Two questions are tackled in this chapter:

– *What are the defects in Chinese legislation on construction safety?*
– *Are there any strategies that can ameliorate the crisis?*

The major deficiencies of Chinese construction safety legislation include the impracticability of the construction safety rules, the malfunctions of labor contract law and regulations on work-related injury insurance, and the undermining of the accountability system. In turn, five reformative measures are proposed. Selection of this research subject is due to the fact that the construction industry is one of the prime pillars underpinning the Chinese economy, but the overall working conditions are very gruelling in this section, and the occupational safety and health (hereafter 'OSH') issues are particularly harsh. The growing resistance of the potential labor force to construction jobs has resulted in a grave shortage of manpower across the industry in recent years. Improving the OSH level and other working conditions within the construction sector is imperative from both ethical and economic perspectives.

Chapter 4 was published on ***European Labour Law Journal*** in January 2018, titled as "An Incomplete Breakthrough: Questioning the Momentum and Efficiency of Germany's Minimum Wage Law". This study concerns the following questions:

– *Does German minimum wage legislation have any merits in comparison with the legislation of its counterparts within the European Union (hereafter 'EU')?*
– *Are there limitations that detract from the efficiency of the German minimum wage regime?*

This topic is worth examining in that Germany had been an exception to the widespread implementation of a national minimum wage within the EU, mainly due to fear of the negative influence on employment. After years of delay a national minimum wage was finally introduced against the backdrop of an irreversible decline in trade unions and collective bargaining. The newly established wage floor was expected to prevent serious unfairness in wage setting and to alleviate nationwide in-work poverty. However, the fact is that the previous conservative attitude has not been abandoned, but is reflected in many provisions of the new minimum wage law. It is questionable whether this landmark legislation is able to realize its original legislative intention.

In Chapter 5 – "A Tale of Two Models: Ideas and Results of the Swedish and American Legislation on Parental Leave", the central questions are:

– *What are the differences between the two countries' regulations on parental leave?*
– *What are the ideas that drive the two countries to take different routes?*
– *Is there a tradeoff between the level of parental leave benefits and the economic performance of a country (e.g. enterprise competitiveness, and the employment rate)?*

Sweden provides one of the most generous parental leave policies in the world and therefore forms a stark contrast with the United States (hereafter 'US'), a country that has failed to mandate paid parental leave hitherto. The meaning of this study is to highlight: 1) compared with the differences between objective conditions, cognitive discrepancies may play a more vital role in molding hugely diverging legal frameworks; 2) the belief that the social and economic benefits of satisfactory working conditions outweigh the costs may lead to well-designed rules that are conductive to achieving desirable consequences; 3) it is hard to eliminate policymakers' unreasonable pessimism on the potential effects of generous labor protection, despite the contradictory results shown by empirical evidence.

In Chapter 6 – "Coordinating the 'three channels' of employee participation? Focusing on the British Practices", the following questions are dealt with:

– *Why is it desirable to coordinate the three channels of employee participation?*
– *What is the foremost practical difficulty realizing the theoretical proposal to unite the three channels?*

This chapter firstly analyzes the potential of representative participation and direct participation to complement each other to achieve better results, for which there has been a tendency to bridge the divisions between these two channels in recent years. On this basis, it is argued that representative participation and direct participation are not able to enhance each other in every respect, and that FP needs to be incorporated into the alliance because of the way it affects power sharing and the redistribution of economic fruits. Lastly, it is stated that even in Great Britain the three channels often have little or no overlap in the workplace, however, legislation can hardly exert direct influence in this regard.

Chapter 7 summarizes the findings of the five studies introduced above, and answers the two main research questions that connect these topics.