Hybrid Global Labour Law

You all know Alphonse Daudet’s famous tale “La chèvre de M. Seguin”. You had to read it at school as I did. Do you still remember the story? Daudet sends a letter to Pierre Gringoire, a « poète lyrique à Paris ». Gringoire had been offered, by a well-situated Paris newspaper, a post as « chroniqueur », but he refused to accept. He did not want to be employed, “tenure”, he wanted to remain, freelance, “free”. Daudet told him the story of M. Seguin’s goat to teach him: “Tu verras ce que l’on gagne à vouloir vivre libre”. You remember what happens. The goat desires freedom, even risk, she is attracted by “Hou ... hou ... faisait le lou.” She frees herself from the shackles in M. Seguin’s courtyard and escapes into freedom. She enjoys this new freedom with enthusiasm not recognising that the wolf is shadowing her. When she gets aware of the danger she begins to fight against the wolf. But: “Alors le loup se jeta sur la petite chèvre et la mangea.”

Daudet made up an alternative between freedom and security. He described a constellation where the working man (the poet) had a real option whether to become an employee (in “subordinated labour” we would say as labour lawyers) or to stay free-lance. But was this alternative between freedom and security really an option or is it, at least in our days, only a myth?

Whatever the merits of this quotation was, it referred to conditions and risks of working people in the developed world – in western Europe und the United States. We are nowadays living in times of globalisation. This is why we are more and more confronted with, and aware of, conditions and risks of working people all over the world. Is there a case for alternatives (options) between freedom and security – is there a case for “la chèvre de M. Seguin”?

1 Race to the bottom – Race to the Top?

Globalization is increasingly moving to the centre of the current discourse on labour law and industrial relations, with the works of Bob Hepple (2005) and Marie-Ange Moreau (2006), together with the collections edited by John Craig and Michael Lynk (2006), Roger Blanpain et al. (2007), and Brian Bercusson and Cynthia Estlund (2008), playing a dominant role. Whereas labour law used to be centred on the nation state, globalization goes hand-in-hand with a ‘decentring’ of the nation state, leading to an erosion of national labour law (Mückenberger, 2008a). At the same time, international labour law has not yet reached a state
where it can effectively compensate for such erosion. The predominant question in the academic discourse is whether globalization leads to a ‘race to the bottom’ with respect to employment and working conditions and standards, or to a ‘race to the top’, or to something in between.

This question has to be answered in a differentiated way, taking into account the diversity of different countries around the world: i.e. whether a developed country, an emerging power (such as China, India, Russia or Brazil), or a developing country. The current academic discourse tends to concentrate on the first two categories, as found in the three above-mentioned collections. By contrast, the books of Teklè (2010) and Pries (2010) either focus on or at least devote a large amount of space to developing countries in as far as working conditions there are affected by globalization.¹

I started my considerations by stating that the predominant question was whether globalization leads to a ‘race to the bottom’ with respect to employment and working conditions and standards, or to a ‘race to the top’, or to something in between. The two books mentioned last provide evidence that there is a wide variety of developments in the different regions of the world affected by globalization, meaning that simple ‘either-or’ answers cannot be seriously upheld. Two still more important findings of both studies are that we do not yet have sufficient empirical material on what is happening to labour in the different areas of the world, and that the theoretical criteria and tools we use to analyse these developments remain weak and too much influenced by the traditional northern understanding of labour law and industrial relations. ‘Informal work’ and ‘the informal sector’, two areas emphasized in both studies reviewed here, are the best examples of this twofold research deficit and need to be more deeply analysed in any future research.

2 Generations of CSR

The expectation of an improvement of labour law in the world traditionally were directed at nation-states and their cross-border interaction in International Organisation (like the ILO and the UN). Most of these expectations failed – due to both the lack of effectiveness of ILO und UN social norms and the increase of power of the WTO since its creation in 1994 and its reluctance to integrate social standards in the quickly growing global trade activities. Therefore expectations now moved to the side of social self-regulation by multinational

¹ Cf. my review of the two books in Transfer 2011 (forthcoming).
companies (MNC’s), via codes of conduct or other means of Corporate Social Responsibility (CSR).

CSR is commonly characterised by three properties (cf. Mückenberger/Jastram 2010). i. The enterprise behaves in a way which takes into account its responsibility vis-à-vis ecological, social or, in a wider sense, societal progress. ii. This behaviour respects, but goes beyond what is properly regarded as a legal obligation of the firm. iii. This going beyond legal obligations in favour of society is based on a voluntary decision of the enterprise rather than on a statutory duty. What we are interested in here, is CSR as a source of transnational social standards.

We can collect some lessons learnt from the conventional CSR studies in order to assess whether CSR which might be on interest for the emerging global labour law. With a view to transnational social standards brought about by enterprise self-regulation (cf. Estlund 2008), Nadvi and Wältring (2004) provide for a useful panorama. They identify five generations of CSR which form succeeding historical layers, though they are not schematically separated from each other.

The first layer is company codes of conduct (coc). Individual firms define standards (quality, transparency, accountability, social or ecological ones) which they intend to make applicable and to implement firm-wide. The means to make them enforceable are firm-defined codes of conduct which receive legal validity vis-à-vis employees via their incorporation into the individual contracts of employment. As far as these codes of conduct are directed to outside-firm actors (e.g. supplier firms, self-employed homeworkers etc.) they are incorporated into the contracts for services or suppliers contracts and thus achieve legally-binding character according to the law of contracts and the law of torts. The standards are thus linked to the legal enforcement structure via courts – an enforcement structure, however, of the nation-state, normally the one where the lead firm is based. We shall find that this leads to problem in the case of transnational social standards.

The second layer is sector codes and labels. Standards are no longer defined by the individual firm, but rather by a plurality of firms of the same branch and/or by sectoral associations of firms or employers. This second layer has purely political or cultural particularities rather than legal ones, compared to the first. A broader economic interest is involved, not only the one of

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2 For a recent account of these CSR-properties cf. Mückenberger/Jastram 2010.
3 In the following, I go a bit beyond Nadvi/Wältring when using their typology in that I add some observations to the legal character of these standards. This seems to be crucial for trade union expectations and impacts concerning CSR.
the individual firm and its chase for competitive advantage – a bit more “Gesamtkapital” rather than “Einzelkapital”. This involves a propensity for more medium- and longterm considerations rather than pure short-termism (à la shareholder value) vis-à-vis social standards. Concerning legal enforceability sector codes operate exactly like the form codes – internally (employees) as well as externally (suppliers etc.). Another particularity lies in “labels” which involve a mechanism totally foreign to coc’s. Labels are visible on products and express the certification, by the label provider, that the products were produced according to the label provider’s social (or ecologic) standards. Labels never achieve nor intend legal validity. They aim at consumers preferences on the commodity market – that those consumers wanting to behave “socially ethically” will give preference to those (even if more expensive) commodities which are labelled to have been ethically produced (“consumocracy” with the weapons of boycott (negative) and “buycott” (positive) according to Martin Dumas 2010). Although empirical experience with “ethical consumption” as a means of enforcement of social stands is not too encouraging we can maintain that consumers’ behavior becomes more and more important in the field of transnational standards operating in a legal “no-man’s-land” beyond borders of the nation-state. But keep in mind: Labels have no legal enforcement of standards in mind – they aim at empowering these standards via ethically or politically conscious purchase preferences of consumers.

Layer number three is business-defined international standards. Here for the first time the transnational enters the playing field. The type and the legal validity of the coc’s is similar to layer One. The intended standards are defined by the firm on its own and they enter into the legal sphere via incorporation into employment and/or suppliers contracts. Layer Three, however, is an increasingly important case for transnational social standards. This is the field of what has been thematised as “global value chains” (gvc’s) (Gereffi 2005, Humphrey 2004). Gvc’s are characterized by the increasing transnational “disintegration of production and integration of trade” (Gereffi 2005). They are either buyer-driven or producer-driven. They span over a variety of countries and continents and assemble components and values added all over the world. With coc’s, the lead firms tries to set and implement standards like in the case

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4 Here and in the following, I use the term „transnational“ in the sense I defined it in an earlier paper (Mückenberger 2008b). „Transnational” refers to cross-border relationships which involve not (only) states and governments but also (or only) non-state actors (like firms and/or civil society/NGOs). As opposed to that „international” refers to state/government (only) relations according to international law whereas „supranational” refers to the relationships of Member States and/or their non-state actors to an encompassing unit (like the European Union) to which (e. g. via primary European law) parts of the sovereignty of the Member States have been conferred and the decisions of which therefore and insofar have priority („supra”) over the sovereignty of Member States and the autonomy of their citizens. A discussion of this terminology is neither possible nor necessary here.
of layer One, however, in a much more complex and sophisticated manner. The standards have to meet the requirements of a multicultural work situation and environment – and so has their enforcement. Towards the remote members of the gvc there is much less chain transparency than within a purely national context – eg apparel suppliers and sub-suppliers in Bangladesh or Sri Lanka or elsewhere are self-employed or homeworking families.\(^5\) Whether or not e g child work or discriminatory work practices were involved in the earlier in-firm and outside-firm stages of the gvc\(^6\) is by no means evident and transparent. Lead firms of gvc’s (eg Karstadt has around 200 suppliers, sub-suppliers etc. all over the world) often have a serious interest in compliance with their coc’s. They want to sell high-quality products in the western hemisphere. In order to do so they need to ensure product quality, skills and diligence along the entire gvc. For achieving that they are prepared to meet a certain amount of elevated social standards. But despite this interest lead firms are often not capable of monitoring and enforcing the standards of their coc’s. Apart from that the legal environment is becoming more and more complex. Frequently foreign jurisdictions and conflicts of law are at stake which make recourse to the courts difficult (cf. contributions in Teklè 2010).

In the fourth layer we find business and Non-Governmental Organisation (NGO)-defined sector-specific transnational codes and labels. The first three layers were all voluntary in the sense that business alone (firms or groups/associations of firms) decide upon whether or not a standards is binding and should be complied with. Whereas the legal properties regarding coc’s and labels remain like in the layer mentioned before the big difference of layer four lies in third party-involvement. That NGO’s are participating in the articulation of social standards frequently proves to be more effective rather than in the case of articulation of business alone or even of business and trade unions. It is true that NGOs represent a great variety of actors and actors’ constellations – ranging from mafia-like and business-prone till those favouring universal public goods. Nevertheless: NGO’s can have and frequently possess an independent opinion and voice (Jakobeit et al, 2010). They can – whereas business and unions may take a limited sector-oriented industry policy-stance – have a wider societal perspective and with that take a more long-term and sustainable approach. This is why, in the case of transnational social standards, they often will be in favour of their application because they know that short-termism and pure exploitation of workers is unsustainable for society – even for

\(^5\) The case is becoming still more intransparent when the gvc is „interrupted“ or „commissioned“ by a firm like Li & Fung (Hongkong) which acts as a comprehensive trajectory between the West (as a plurality of demanders) and Asia (as a plurality of suppliers).

\(^6\) For an empirical account of the efforts of Rugmark to control carpet production in India with a view to the prohibition of child-work cf. the dissertation of M. Dumas (2010).
business itself. NGO involvement in transnational social standards can be observed in two ways both of which are important. NGOs can partake in the formulation of social standards in coc’s. But they can equally be involved in the supervision and monitoring – hence the enforcement – of already fixed standards. The latter function has been studied under the heading of “advocacy networks” (Keck/Sikkink 1998), the former under the heading of “transnational norm-building networks” (Mückenberger 2008b; Jakobeit et al, 2010).

Bob Hepple (2005) when summarizing the existing empirical literature dealing with the effectiveness of coc’s finds indicators correlating compliance with third party-involvement: The more third parties were involved in the formulation and supervision of transnational standards in coc’s the more rose probability that these standards were effectively implemented. The third party involvement can have legal implications – in that eg NGOs help to appeal to factory inspectors or courts when binding standards are not complied with by certain employers. Third party involvement can equally function beyond the legal sphere – eg in the case of contraventions against legally non-binding standards. In this case their weapon often is “naming and shaming”. They make public and transparent certain hidden contraventions, by multinational firms, against recognized though not legally binding social standards and thus put a pressure on the enterprise to comply with the standards in order not to lose their public prestige (like in the Nike-case, member-firm of the UN Global Compact, which was publicly accused to tolerate children’s work in its value chain-suppliers in Asia).

The last layer in Nadvi/Wältring (2005) is generic social standards defined in a tripartite manner. In the CSR-case, with transnational coc’s and labels, tripartism can mean involvement of employees/unions and third parties. Practically third party can mean NGO’s, but also scientific experts, consultant or certification representatives, or even state/government actors. As to the legal validity of standards there again is no proper transnational way of enforcement. Standards have to be incorporated in a way which makes them applicable and enforceable before national courts. Otherwise they have no legal support. Same is the case with labels which do not even have the objective to be legally binding – they want to function via markets and ethical preferences of clients.

This quick overview over the historical build-up of CSR-based transnational social standards gives an insight which is of importance for the assessment of transnational social standards contained in CSR-based coc’s and labels. The more we approach the transnational sphere the “thinner the air” becomes with a view to legally binding character of these standards and the chance to make use of recourse to courts and other enforcement actors. That means that we
have to look for enforcement strategies that clearly differ from those we know, with a European background, from the enforcement strategies provided by the nation-state. Out of the five CSR-layers identified by Nadvi/Wältring (2004) only the last two (which involve other actors, beyond business, into norm-building and norm-enforcement) can be called “standards” in the sense which we are looking for.

Before turning to that again I would just like to attract attention to another historical CSR-typology, however, with a similar conclusion. Hepple (2005) when synthesizing the post-World War II CSR- und coc-development identified four phases. In the years between 1944 and 1960 ILO conventions and recommendations are emerging. Then, from the 1960s till the 1980s, the initiative is shifting away to the MNCs. The late 1980s show an increase in private coc’s. This was as Hepple argues a sort of MNC “prevention” against public statutory intervention. Finally, from the late 1990s onward, a new start of public supervision in enterprise coc’s can be observed (ILO, UN Global Compact, OECD, ISO, trade union efforts regarding International Framework Agreements – IFAs -). The overall tendency according to Hepple reads: “From public to private, from external to internal.” What is of interest for my focus, again, is the emergence of a new mode of public supervision of global enterprise behaviour. This new mode builds the public counterpart to the emerging civil society-activities in the transnational norm-building field. What becomes visible here are the two components – public/private - of what I mean by “global hybrid labour law”.

Both historical typologies confirm our interim result concerning transnational social standards. To expect – or wait for – top-down public regulation and its enforcement via legal rules and institutions seems rather implausible and “unhistorical”. We should – as a complement to attention paid to state activities vis-à-vis the sustainable firm on a global level – draw the attention to non-state ways of norm-building and norm-compliance. They are transnationally operating in the private sphere and make use of the internal structures, interests and motivations within the MNCs and their global commercial networks. Do MNCs have any incentives to comply with transnational social standards – and how to enhance these incentives? How to link these norm-building processes with state and inter-state activities?
3 Factors in favour of effectiveness of transnational standards

There are not many reliable empirical data about the factors which positively impact compliance with transnational norms. This holds for both legally binding and legally not-binding norms. This is why we are bound to use hypothetical assumptions which have a certain empirical plausibility but require solid empirical verification in research to come (cf. Mückenberger 2008a and 2011a). Such assumptions made by Amitai Aviram (2003) contain important policy implications for global labour law.

Aviram deals with the question why and under which circumstances legally non-binding norms, despite their voluntary character, tend to be complied with. The way in which these norms are executed often does not require formalisation or official sanction armouring. Transnational networks guarantee their implementation and enforcement, without any third party intervention. Private ordering gains validity – remember that this is hypothetical, not empirically profoundly tested - through three mechanisms. The first mechanism is “repeated game”. Actors who have a (mainly economic) desire for repeated transactions with other actors will be led to an adherence to the norms of the other actors without the formal threat of sanctions. In order to continue the contractual relationship they comply with legally non-binding norms. The second, and most well-known, mechanism is “reputation”. Actors, above all global players desire to maintain a certain reputation – a “corporate identity” both internally vis-à-vis employees and externally vis-à-vis clients, media, and the public in general. They therefore tend to comply with the norms they are expected to comply with, by the media, epistemic communities, and the general public. In order to maintain their prestige they are prepared to comply with though legally non-binding norms. The third mechanism is “network advantages”. Many MNCs belong to networks providing information, benefits, cooperation etc. Therefore the actors tend to comply with the network norms whether legally binding or not. The advantage that comes with belonging to the network outweighs the advantages of norm-deviating, of opportunist action. Eventually they comply voluntarily, without any legal constraint, with the norms.

Scope and effectiveness of such mechanisms deserve to be subject-matters of research. They are equally important for considerations about effectiveness of transnational social standards.

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7 From a legal point of view cf. Aviram 2003; Hepple 2005; Blackett 2010; with a geographically more limited scope also Zürn/Joerges 2005.
8 Commercial lawyers observe that nowadays contract linkages tend to shift from once-for-all singular isolated contracts to continuously repeated “chains” of contracts between the same parties – contract which they call “relational contracts”. These relational contracts seem to gain ground in global value chains which are characterised by global “disintegration of production” and “integration of trade” (Gereffi 2005).
The mechanisms, though hypothetically, demonstrate that there are levers against selfish opportunistic behaviour of firms which society can profit from in order to achieve norm compliance. The power of these levers depends on two fundamental conditions: information and networking. There have to be centres of knowledge about opportunistic behaviour of actors in order to make missing compliance transparent – ie to make other actors aware of it. There have to be networks of information and cooperation which care for transparency of misbehaviour in repeated game and network-structures and where firm prestige is at stake. This networking is useful within the workforce of the global value chains and their unions. It may be still more effective when networking takes place with actors outside trade unions: journalists, scientists, NGOs, public officials, churches etc. External networking increases public pressure and thus enhances probability of compliance with social norms.

4 Obstacles against effectiveness

Let us, however, not neglect obstacles which norm compliance face. In a recent literature review concentrated on compliance with rules contained in coc’s in the apparel industry Naoko Ogawa (2009) identified five factors hindering actual compliance. Let me call the first one “double bind”. MNCs in their coc’s set up rules say for suppliers or sub-contractors concerning social or ecologic standards. At the same time, however, they put so much pressure concerning price or time of delivery on their suppliers that the latter become unable to comply with the coc-rules. We know double bind as a synchronous command “Don’t do that” and “Do that”, from the schizophrenia research. It makes the addressee of the synchronous double command incapable of acting at all.

The second factor, mirror picture of the first one, is “missing help”. According to what we know from literature suppliers and sub-contractors of lead firms in most cases are not capable of mastering the implementation of rules set up in MNCs’ coc. They need education and technical support. Instead of providing help the MNCs are over-demanding performance from suppliers’ side (cf. first factor).

The third factor is external: “ineffective ethical consumer behaviour”. It is true, consumers in the western hemisphere often criticise unethical production and propagate “ethical consumption” – i.e. boycotting unethically produced commodities. But when it comes to terms with the purchase behaviour of these consumers, they prefer low-price programmes to fair-production-standard programmes. In the outcome, market pressure on suppliers of unfairly produced goods which could result from ethical consumerism is inexisten.
The fourth factor against compliance is the weakness of the institutional monitoring and sanctioning mechanisms of international organisations: “mismatch between norms and enforcement levers”. The ILO possesses, beyond “naming and shaming”, no sufficient means to effectively induce norm-compliance. The WTO possesses such means – the trade norms have the same power as the “repeated game”-rules! -, but they resist to make use of these means for social or economic purposes. Eventually social standards and effective enforcement levers are systematically in mismatch – ie decoupled from each other.

The fifth factor lies in the countries of the third world themselves: “missing enforcement infrastructure”. Many non-OECD countries are characterised by precarious government and/or failing states. They may, in their post-colonial phase, have established progressive, pro-labour norms and statutes. But they do not possess the infrastructure to enforce them. Or, even worse, they are under pressure of globalisation and exempt export-oriented production zones from these norms (cf. also the chapters in Teklè 2010; Mückenberger 2011). In both cases a widening gap between norms and implementation is to be observed.

5 In Search of Hybrid Global Labour Law

In the foregoing reflections we have been able to study the shortcomings of both traditional approaches to global social standards. Public legal regulations are either non-existing in the global sphere or their enforcement power is more or less totally missing. The reason for that is very simple: There is no world-state with competencies and power to regulate and to enforce. Nobody wants a world-state. This is why this deficit of regulation and enforcement seems not only temporary but long-lasting. Any expectation for a global labour law can therefore not rely on that public angle. As against that, private ordering exists on a global level and its power seems substantial. However, shortcomings here seem to touch both legitimacy and effectiveness. MNC self-regulation may or may not include sustainable social and societal standards. And if they are included (eg in MNCs’ codes of conduct) is seems to depend on very particular mechanisms (like repeated game or prestige) whether these standards are effectively respected or not. There seems to be much space for opportunism in both self-regulated norm-building and self-regulated norm-implementation.

Despite of these shortcomings I do not identify only two deadlocks with a view to global labour standards. I see emerging trends which I label “hybrid”. Hybrid in the general sense means cooperation and interaction of hitherto not only separate, but even incompatible components. In our context it means a sort of “backing” between legal sources which both exist apart from each other – public regulation on one side, private ordering on the other – but
which both separately are not capable of overcoming their shortcomings. As against that, “hybrid global labour law” suggests that possibly the connection between the two - transnational private ordering and public social norm-building - leads to surprising synergies which are worth studying. When studying this I refer (besides several other authors) particularly to Marie-Ange Moreau and her seminal book « Normes sociales, droit du travail et mondialisation » (2006).

Three criteria have to be met in order to call a global social order reasonable and satisfying.\(^9\)

a. The standards building this social order need legitimacy – ie must be democratically founded and acceptable. 
b. The standards require effectiveness – ie they have to be practically respected and/or enforced. 
c. The normative order so built needs a certain norm consistency.

Before becoming a bit more concrete I would like to though shortly describe the three prerequisites.

Ad a. Democratic legitimacy requires a specific nexus between rights and opportunities of articulation, organisation and participation (“voice”) and related secured advantages, guarantees, and rights (“entitlement”). This nexus involves that people are recognised as both subjects (authors) and objects (addressees) of rules. It has not been just a political one pertaining to the relationship between the state and the citizens; it has also been an economic nexus influencing the relationship between Capital and Labour as well as a social nexus relating to the lifeworlds of people—family, generation, and gender relationships. The nexus (which is surely rich in variation), in the developed democracies, has been secured through the nation-state. It will obviously be different in global social relations. But the global social order can only be called „just“ when based on and experienced, by the people, as such nexus of voice and entitlement.

Ab b. The term „effectiveness“ has been made more precise by O. R. Young (1999), in the context of environmental standards. Norms are effective when they meet three criterias. There is an „output“, caused by the norm addressee, which corresponds to the norm – eg the MNC gives practical information and advice to suppliers about how to apply their coc. There is an „outcome“ corresponding to the norm – eg the lead-firm actors in the global value chain are convinced of the values contained in their MNC’s coc and want to make them practically effective. And there is an „impact“ of the norm application which goes in the direction to achieve the objectives of the norm – eg suppliers or subcontractors of the MNC use less child

\(^9\) The following deliberations are developed in Mückenberger 2008b and more systematically Mückenberger 2011a.
labour or no child labour at all, when producing their components. Only when output, outcome and impact correspond to the norm the latter can be labeled to be „effective“.

Ab c. „Consistency“, in my concept of hybrid global labour law, admittedly still is a black box. The consistency of the legal order is a normal requirement in the nation-state – it comes with the „unity of the legal order“ in Hans Kelsen’s sense. In a global order with a plurality and variety of norm-building actors „unity“ is no longer evident. „Regime collisions“ (Fischer-Lescano/Teubner 2006) occur and require reconciliation. Outlines for a collision law are even required for the multitiered European system (Joerges/Rödl 2009). Still more is it necessary for the emerging global order. I shall not deal with this problem here at all – only underline that is has to be dealt with once my considerations on hybrid global labour law are taken seriously.

6 The ILO-Core Labour Standards as a Catalyst of Hybridisation

Let me take the well-known example of the four ILO core labour standards – prominent candidates for global labour law.10 According to conventional international law the 1998 Declaration is legally not binding. Only few legal scholars claim their bindingness.11 Independantly from this dispute the core labour standards have certain gained legitimacy and effectiveness in the world. This has to do with the fact that they found access to other legal sources. Many of them were private or equally private law sources. To take just examples for this type of incorporation:

1. Enterprises acceding to the UN-Global Compact have committed themselves to respect the ILO core labour standards because they entirely belong to the eleven Global Compact principles.

2. European works councils, equally World work councils have incorporated the core labour standards into their constituting or current agreements with management. International Framework Agreements followed the main objective to insert the core principles into the IFAs (Zimmer 2008).

10 The ILO, in 1998, declared that the core labour standards freedom of coalition and free collective bargaining (C.87 und C.98), prohibition of forced labour (C.29 und C.105) and of child labour (C.138 and – since 1999 – C.182) and prohibition of all forms of discrimination (C.100 und C.111) are universally applicable in all Member States, irrespective of ratification of the eight conventions, according to national law.

3. Particular transnational normative codes (like ISO-standards or the renewed OECD-guidelines) refer to the core labour standards.

4. Singular components of the core standards were integrated into regulatory frameworks other than the ILO framework. Eg Freedom of coalition forms part of the USA – Cambodia – textile agreement, with technical assistance provided by the ILO, which provided for an increase of textile import quotas from Cambodia to the US in case of compliance (monitored by the ILO) with certain labour standards (cf. Hepple 2005). Another example is the activity of RugMark which provides labels to those carpet producers in India which, after supervision by Rugmark inspectors, produce carpet without child work (cf. Dumas 2010).

5. An interesting legal source for the (potential of) development of global labour law are investment agreements (cf. UNCTAD 2010). They determine the legal conditions which host states have to guarantee in case of Foreign Direct Investment. International Investment Agreements (IIAs), particularly Bilateral Investment Agreements (BITs), after the failure of the Multilateral Agreement on Investment (MAI) show a slight tendency – after hitherto having just regulated protection of foreign investment, lateron free trade conditions – to incorporate social standards, and here again the core labour standards.

6. Many coecs in global value chains contain the core labour standards. They go back to lead-firms which often have their head-offices in Europe.

These are examples of what I call „global hybrid norms“. The ILO core standards as – ie as international norms - such do not enjoy legal vigour as long as they have not sanctioned by the sovereign Member State. However, in combination with other legal sources as demonstrated above the picture is changing. The core standards enter into legal realms the jurisdiction of which they then share and through which they gain access to certain – normally nation-state provided – means of enforcement. They do not remain any longer purely ILO instruments with all the shortcomings we know from the ILO instruments. On the contrary: they begin to share the legal and enforcement vigour of the legal sources they become integrated in. To give three or four examples:

- Labour standards incorporated into European works councils agreements have the legal power and the enforcement procedures, no longer only of the ILO constitution, but also of the European and Member State rules for enforcement of works councils agreements.
Labour standards incorporated into lead-firms’ codes have the legal power and the enforcement procedures, no longer only of the ILO constitution, but also of the nation-state where the lead-firm has its headquarters. They can be enforced according to national commercial and contract and international private law.

Interesting the case of investment agreements. Should the core labour standards find access to IIAs or BITs, then they would share the legal power and the enforcement procedures, again no longer only of the ILO constitution, but also the one provided in the investment agreements. This would involve states (as parties of the BITs) in the process of implementation of the core standards.

Etc.

Many other examples can be added. They have in common what may sound trivial at first glance: All legal sources existing in the world have their particular means and procedures of implementation and enforcement. But what makes them interesting in our context of the search for hybrid global labour law – and no longer trivial at all! – is that all of them have a single catalyst, that they refer to, and incorporate, one single substantive area of law: the ILO core labour standards (or parts of them). This makes the core labour standards something like a „common law“ („gemeines Recht“ in the German meaning, before the BGB codification).

This law is common to different jurisdictions despite the fact that there is no common legislator. It is hybrid in character because it emerges and gains legal vigour in a multifold interplay of public and private actors in the processes of norm-building and norm-implementing. That this type of common hybrid global labour law draws its legal power from different jurisdictions leads to difficulties mentioned earlier in this essay: All these jurisdictions follow different legal cultures and substantive and procedural programmes so that a „unity of the legal order“ is hard to expect. Notwithstanding that, what is new is that they have, for the first time in legal history, one common denominator, in the ILO core labour standards. That allows to label these standards candidates for a common global labour law, however, hybrid in its shape.

In my view, other scholars have the same tendency in mind, however, label it differently. They speak about the new category of „soft law“ – besides the existing „hard law“ (eg Hepple 2005). I find the category „soft law“ more misleading than clarifying. For theory of law, the category of „law“ and the dichotomic distinction of law to „non-law“ is essential. Soft law is either law or non-law. I fit is non-law it should not be called law. I fit is law it should not be called soft. Then it may be labeled generic, general clause with much space for interpretation –
but it is law and follows the rules of interpretation, application and enforcement as other pieces of law do.

The term „hybrid“ does not confuse law and non-law. It is much more exact in determining the legal character of global labour law. It says, in our case, the 1998 ILO Declaration was not a law creating declaration, therefore it is neither „soft law“. But the legal contexts within which, by means of reference, the core labour standards are incorporated form part of a variety of mainly national laws and this gives to them a very clear though contextually varying legal validity and power. In this understanding there is no need for a distinction between hard and soft law – the distinction between law and non-law is necessary and sufficient.

7 Hybrid Global Labour Law – a Workshop for Further Research

It goes without saying that this new understanding of the hybrid character of the emerging global labour in order to gain validity requires further research. The direction of this research was outlined above (section 5) when the requirements of a just and reasonable world order were mentioned: legitimacy, effectiveness, consistency. What is needed with a view to hybrid global labour law was outlined is an inquiry into the processes of transnational norm-building and of norm-implementation under these three points of view:

1. Do the standards so emerging enjoy democratic legitimacy in that they provide the mentioned nexus between rights and opportunities of articulation, organisation and participation („voice“) and related secured advantages, guarantees, and rights („entitlement“)?

2. Can we empirically reliably verify or falsify that these standards, in their field of application, produce output, outcome and impact which corresponds to the norm – so that we call lable the norm to be „effective“?

3. If we take as granted that this emerging global order goes along with a plurality and variety of norm-building: Has it to and can it provide a unity of the legal order – or: Are there chances for a transnational collision law coping with regime collisions?

The research to be proposed along to these lines is obviously pluridisciplinary. Questions 1 and 3 clearly require law competence. Is has to be found out and determined in which legal frameworks eg the ILO core labour standards are incorporated and what means of enforcement they gain in and due to these frameworks. I have done a first study on the voice-entitlement-nexus with respect to ISO 26000 (Mückenberger/Jastram 2010) – but the issue of
effectiveness could not yet be studied because ISO 26000 passed in the year 2010 only. The issue of the unity of the legal order or alternatives of collision law has to be approached by legal theory and philosophy. As against that question 2 clearly requires social science competence. What has to be determined here is which social and societal impact norms so created practically have. The mentioned assumption about motivation factors – like repeated game, prestige, network effects – which lead, or lead not, to the desired impact have to be mustered and systematised. This requires solid social science methodology.

I hope to have been able to show that this large and sophisticated research is worth doing. I have been working, in the last couple of years, on the emergence and the potential of transnational norm-building networks (TNN) (Mückenberger 2008b; Jakobeit et al. 2010; Mückenberger 2011a). They are characterised by new actors constellations, interactions, networking, public/private mix. In these networks, there seems to emerge chances for a democratic nexus between voice and entitlement – chances which were more or less lost by the norm-building activities of states and international organisations. At the same time, in the course of globalisation, we can observe a new transgovernmentalism which circumvents democratic fundaments of the nation-states. And we can observe a transnationalisation of courts which transcends their local (ie constitutional) responsibilities set the nation-states (Goldstein/Steinberg 2009; Mückenberger 2010). These trends contain an undemocratic potential which find a countervailing power in TNN. Networks on their own, however, equally cannot guarantee democratic legitimacy. This is why a proper connection, linkage, with formally legitimated institutional frameworks is necessary.

All these question are not at all solved yet. But it is time to approach them. Because globalisation is taking place – what is missing are answers democratically civilising it. Steps towards a hybrid global labour law could be one answer among others – an important one.

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Let us come back to Alphonse Daudet’s tale “La chèvre de M. Seguin”. Obviously, the alternative proposed therein between freedom and security, sympathetic as it is, is still less convincing in the current world of labour than it used to be at Daudet’s times. Security of employment is clearly decreasing in the western hemisphere. And what is resulting from that decrease is not an increase of freedom, but a further decrease of freedom as well. The call “Hou ... hou ..., faisait le lou” has lost its charme …
Is there an alternative to this tale which might better fit in our world of labour? Gerald Hüther, a well-known German professor of neurobiology and a “health philosopher” (if the label is admitted) often teaches personnel managers the principles of modern human resource management by explaining the difference between the brain size and performance of “wild/savage donkeys” compared with those of “tame/domestic donkeys” (you see we follow the path of animals, donkeys rather than goats!). He states that working people develop and make use of their brain only when they are continuously challenged by management and are made autonomous in their decision-making. To confirm that Hüther comes up with a neurobiologic finding. Scientists when comparing the brain size of domestic and wild donkeys expected that the brains of domestic donkeys, due to their well-being, are better-off than the ones of the wild. The contrary was the case: Wild donkeys have the double brain size of domestic ones. The explanation: the daily constraint to look for food and shelter develops the wild donkeys’ brains, whereas the indolence and the missing challenges paralyse those of their domesticated counterparts and lead them to regression. So far our health philosopher…

To be honest: I believe neither in health philosophy nor in simple analogies between animals’ and humane behaviour. This is why Hüther’s observations do amuse rather than convince me. But I frankly admit one thing: Came once (in a dream or in real life) a fairy to me and granted me a request I would wish that all exploited and miserable working people in the world discovered their brain, their power, their capability and their solidarity in order to resist the conditions, institutions and persons exploiting them and making them miserable. I would wish that in the hope (inspired by Hüther or not) that these oppressed people could activate more brain (and muscle) than their tamed workmates in the developed parts of the world often do. This is not just a joke (or a dream): The (re-)discovery of brain (and muscle) as a tool for solidarity is equally a precondition of the programme of a hybrid global labour law as I sketched it in this paper.

References


