

## A PERSPECTIVE ON THE NEXT QUARTER CENTURY OF COMPARATIVE LABOR LAW

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### I. THE SETTING

Before offering speculations as to what will happen in the field of comparative labor and employment law in the next quarter century, it should be helpful to examine what we might expect to be the environment in which the law of work will be functioning by that time.

#### A. *Population and Physical Environment*

Currently, the U.S. Bureau of the Census estimates that world population is approaching 6.4 billion.<sup>1</sup> In twenty-five years, it estimates that world population will be over eight billion. Absent drastic changes in migration patterns, the bulk of population growth will be in the Southern Hemisphere and Asia.

We can only begin to appreciate the magnitude of the problems of feeding, housing, and providing employment for this burgeoning population when we also consider that the International Labour Office estimates that more than 8.5% of the people in this world try to survive on an income of less than a dollar a day.<sup>2</sup> About a third of the current adult global workforce is unemployed or underemployed<sup>3</sup> and those who are employed include an estimated 111 million children under age fifteen engaged in hazardous work, about half of whom work twelve to fifteen hours a day, and some 8.4 million of whom are

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1. For readers from countries that do not use the U.S. definition of billion, this figure is 6,400,000,000. See the population clock at <http://www.census.gov>.

2. International Labour Office, *Global Employment Trends*, ILO, at 1 (2004).

3. Press Release, Brian Halweil & Lester Brown, Unemployment Climbing As World Approaches 6 Billion, World Watch Institute (Sept. 2, 1999). The bulk are underemployed or have stopped looking for work. Those looking for but not finding any work, no matter how little, constituted 6.2% of the world workforce in 2003. In the Middle East and North Africa, the figure was 12.2%. In much of the world, the unemployed receive no government benefits. ILO, *Global Employment Trends*, 1-2 (2004)

held in some form of bondage, often including sexually exploitive activities.<sup>4</sup>

Of the current world population, 1.2 billion are between the ages of ten and nineteen, a group that largely will enter the available work force in the next half dozen years.<sup>5</sup> Thus, the world's population is already heavily skewed in a way that is providing an over-abundance of new workers. Projected continued rapid population growth ensures that that characteristic of world demographics will have increased by the year 2030.

But this is only one part of the equation representing the future's challenge. Another part is the rate at which essential natural resources—the raw materials for food, shelter, and leisure—are being depleted or destroyed.

Although there continues to be responsible debate over whether the earth has begun to experience atmospheric warming caused by the increase in human generated greenhouse gases, a clear consensus of scientists supports that view.<sup>6</sup> The “good” news is that global warming holds some promise of curbing population growth since it threatens to increase exposure to cancer-causing ultra-violet light and bring about climate modifications that will cause heightened frequency of devastating floods, droughts, and famines.<sup>7</sup> But science marches in many directions at once, so that advances in methods of preventing and treating disease hold promise of continuing to outpace the destructive effects of technological “progress.” Should that occur, increased life spans could result in population expansion beyond current projections.

It is more than greenhouse gases, however, that are depleting the materials needed for survival. Only about half of the forests that existed when human habitation began still stand, and all but 20% have been seriously downgraded to the point of substantially impairing biodiversity due to partial harvesting, drought, erosion, and air pollution. Close to 40% of the remaining natural forests are under threat from large scale logging, mining, urban and suburban growth,

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4. International Labour Office, *A Future Without Child Labour*, at 17 (2002); F. Hagemann, *Action Against Child Labour: An International Perspective*, in *THE ILO AND THE SOCIAL CHALLENGES OF THE 21ST CENTURY* 137 (R. Blanpain & C. Engels eds., 2001).

5. United Nations Population Fund [hereinafter UNPF], *State of World Population 2003*, at 1 (2003).

6. Andrew C. Revkin, *Unfrozen North May Face a Navy Blue Future*, N.Y. TIMES, Jan. 13, 2004, at F3; Fred Pearce, *Longer Summers Shrink Arctic Ice Cap*, NEW SCIENTIST, Nov. 1, 2003, at 12; Michael Hanlon, *Is this the Dawn of a New Ice Age?*, DAILY MAIL (London), Jan. 13, 2003, at 11.

7. Barry James, *Environment*, INT'L HERALD TRIBUNE, Aug. 30, 2002, at 1.

and from expansion of agricultural and industrial sites.<sup>8</sup> Much of the forest devastation, furthermore, has not improved living standards; rather, it has been used to merely sustain the ever-increasing number of people who must eat and be sheltered.

About 70% of areas deforested in the 1990s were changed to permanent agricultural purposes.<sup>9</sup> However, agricultural use, especially modern industrial farming, generally depletes soil quality, reduces the generation of oxygen, and has other adverse effects.<sup>10</sup> Added to this threat to natural forests is the fact that an estimated 1.6 billion people today have no access to electricity and that 2.4 billion rely on primitive biomass for cooking and heating—a further cause of forest destruction.<sup>11</sup>

Exacerbating this situation is the rapid exhaustion of the supply of natural oil and gas. Some say these supplies will peak in 2010, others that the peak is three or more decades away.<sup>12</sup> Either way, in the next two and a half decades the effects on economic activities, job opportunities, lifestyles, and personal wellbeing are bound to be enormous and should increase as awareness of the impending crisis grows.

In addition, the world's environment will be further degraded by the expected significant increases in carbon dioxide and related emissions (for example, sulfur dioxide) which, at present growth rates,

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8. DANIEL B. BOTKIN & EDWARD A. KELLER, ENVIRONMENTAL SCIENCE: EARTH AS A LIVING PLANET (2d ed. 1998); U.N. Food and Agriculture Organization [hereinafter FAO], *State of the World's Forests, 2001*, at 15–18, 58–67 (2001); World Resources Institute, *World Resources 2002-2004*, at 262–65, 270–73 (2003).

9. United Nations Environment Programme [hereinafter UNEP], *Global Environment Outlook-GEO-3*, 92 (2002).

10. The environment already receives huge quantities of naturally-generated nitrogen from the expansion of agriculture, changes in farming patterns and techniques, and supplemental fertilization with nitrogen-based chemicals and derivative nitric acid. Resulting chemical runoffs and wastewater infusions significantly raise nitrogen levels of water supplies to the point of producing excessive algal growth that destroys and threatens fisheries and adds to acid rain, the greenhouse effect, and photochemical smog. These nitrogen level increases also threaten biological equilibrium and diversity by favoring the few species that can adapt to environments with excessive nitrogen. Perhaps even more threatening, supersaturation of nitrogen causes fundamental damage to ecosystems by increasing the leaching of soil minerals, such as potassium and calcium, which promote plant growth and are essential buffers against acidity. Leaching of such protectors leads to tree and plant root damage and kills fish. UNEP, *supra* note 9, at c. 2.

11. International Energy Agency [hereinafter IEA], *Energy and Poverty*, in *World Energy Outlook 2002*, c. 13, at 5 (2002).

12. B. Stanley, *Oil Supply Seen Set to Fall*, ASSOCIATED PRESS, May 29, 2002; Robert Little & Lorraine Mirabella, *The Pain of Skyrocketing Gas Prices Could Save Us from Economic Disaster*, BALTIMORE SUN, May 28, 2004, at 1A; Colin Campbell, *Oil Supply: Flawed Concepts and Unattainable Forecasts*, NEWSL. NO. 14 (The Ass'n for the Study of Peak Oil & the Oil Depletion Analysis Ctr., [hereinafter ASPO]), Feb. 16, 2002, available at <http://www.econresearch.com/CJC020214.html>.

are projected to expand by close to 70% in the coming quarter century.<sup>13</sup>

Additionally, it is estimated that if current consumption patterns continue, two-thirds of the planet's population will live in water-stressed conditions by 2030. In much of the world, water tables are declining both due to increased demand and loss or reduction of impounded water caused by floods and excessive runoff that are by-products of reduced forest cover, poor land management, and paving-over of land for roads and buildings.<sup>14</sup> In large areas of Africa and Asia, deserts are displacing tillable land.<sup>15</sup> Scarcity of water also makes it very difficult to maintain clean water. Here, too, if we take a dark view of life, technology may provide its own "corrective" since pollution from inadequate or over-burdened sanitation controls and industrial sewage promote the spread of population-reducing epidemics through contamination of food, bathing waters, and air by toxins and disease-spreading organisms.<sup>16</sup> Moreover, nature sometimes reaches a tipping point at which it no longer makes slow, incremental adjustments but rather succumbs to relatively dramatic change.<sup>17</sup> This poses the possibility of an acceleration of nature's own corrective measures; measures that could eliminate large portions of the human race.

Nevertheless, it is not in the nature of human social systems to complacently let natural or man-made disasters rectify ecosystem imbalances. Accordingly, in the next quarter century, we can expect humanity to search for ways to adjust to or modify the new pressures of population abundance and resource scarcity. However, it is not inevitable that this search will be directed at, or result in, ensuring that suffering will be forestalled.

### *B. Political and Ideological Environment*

The cognitive revolution introduced by the Age of Enlightenment is still in process and has yet to be adopted into the values of much of the world. Authoritarian hierarchies dominate most societies, whether they are based on economic or military

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13. UNEP, *GEO: Global Environment Outlook 3: Past, Present, and Future Perspectives*, at 105 (1999).

14. UNEP, *Global Environment Outlook-2000*, at c. 2 (1999)

15. *Id.*

16. *Id.* at c. 3.

17. Francis Heylighen, *Punctuated Equilibrium*, PRINCIPIA CYBERNETICA WEB, Jul. 22, 1999, at <http://pespmc1.vub.ac.be/PUNCTUEQ.html>; If Price & Lilly Evans, *Punctuated Equilibrium: An Organic Model For The Learning Organisation*, 93 FORUM 31, 34 (1993).

intimidation or on broad acceptance of religious orthodoxy or other ideological or pragmatic alliances. Majorities, as well as oligarchs or dictators can rule without allowing for the liberty of dissent, variation, or deviation. And, the rule of law, an instrument of social alliances, can achieve consistency and enforce responsibility without tolerating diversity or autonomy.

Moreover, although the Everyman of Western Enlightenment seeks rational means to achieve prosperity, security, and enjoyment;<sup>18</sup> the Everyman of Fundamentalism (western as well as eastern) lives by values or a conditioned psyche that regards suffering, martyrdom, and fatalism as a normal, acceptable social condition.<sup>19</sup> To use a psychotherapeutic device that was popular a quarter century ago,<sup>20</sup> the world is divided into cultures in which the ideal personal-social orientation is “I’m o.k., you’re o.k.” in contrast with those in which it is “I’m not o.k., you’re not o.k.,” or, perhaps, “you and I are o.k. only when we obey.” Although the balance of that division likely will shift one way or the other in the next quarter century, it is doubtful whether sufficient hearts and minds will have been won, or coerced, to produce a globally predominant cultural profile.

## II. THE CHOICES

If current trends continue and there is no extraordinary scientific breakthrough in energy production, in the next twenty-five years’ expected population expansion, coupled with dramatic reduction of usable natural resources, will build economic pressure for a race to the bottom.<sup>21</sup> That is, in the competition for scarce resources, more workers can be expected to accept less so long as they can survive. Can or will law intervene to reduce suffering and ensure equitable distribution of available resources until the time when population growth is reversed and humankind learns to preserve or regenerate essential resources?

History and contemporary social conditions teach that suffering resulting from under-abundance will not be equal; some will prosper

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18. In the words of America’s enlightened early patriots: “life, liberty and the pursuit of happiness.” THE DECLARATION OF INDEPENDENCE ¶ 2 (U.S. 1776).

19. Louis Menand, *The Devil’s Disciples: Can You Force People to Love Freedom?*, NEW YORKER, Jul. 28, 2004, at 83.

20. THOMAS ANTHONY HARRIS, *I’M O.K., YOU’RE O.K.* (1969).

21. Although market economists generally contend that global free markets benefit everyone in the long run, of late there have been theoretical challenges to that postulate of economic orthodoxy. See RALPH E. GOMORY & WILLIAM J. BAUMOL, *GLOBAL TRADE AND CONFLICTING NATIONAL INTERESTS* (2000); DANI RODRIK, *HAS GLOBALIZATION GONE TOO FAR?* (1997).

on the misery of others. Based on the world as we know it and have known it, we can also anticipate that, although in some societies law will try to rationally overcome the causes of suffering, in others it will be content with ensuring stability.

In the past century, in most Western European and North American societies, the core economic and social units have become the individual and the household. In other societies, it continues to be the extended family, the village, or the tribe.<sup>22</sup> Reason suggests that political pressure to combat the effects of a race to the bottom will be greatest in those societies in which the individual or household must fend for itself and in which the values of Western Enlightenment prevail. It is there that the expansion of working and non-working poor is likely to become more dramatically visible and vocal. Accordingly, it is in such societies that new approaches will most often be tried and debated and will dominate the attention of students of comparative labor law.

At the same time, however, those same nations, because of their current wealth and power, will be best able to forestall the impact of a world economic crisis. Much of the debate, therefore, can be expected to center on the degree to which the current community of wealthy industrial nations<sup>23</sup> should select one of two basic courses of action. They can try to isolate themselves from expanding misery by reversing the current globalization trend and look, more and more, to regional alliances for the bulk of their trade, or they can adopt a course of sacrificing a significant portion of their wealth and income to ease the burden in other nations (and, perhaps, the growing threat from such nations).

Under either regimen, there will have to be some changes in the role of employment as an instrument of wealth distribution. Although work is a very important instrument of social structure and intercourse, for most people its essential function is to generate goods or services and receive compensation for those activities. Work, however, is not the sole means of distributing what is paid for the goods or services it produces. Income produced by work is also distributed through the rental of property—the right to extract a payment for use of resources. It also is distributed through transfers made by personal alliances, such as families and tribes, by conscience-

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22. GEERT H. HOFSTEDE, *CULTURE'S CONSEQUENCES: COMPARING VALUES, BEHAVIOURS, INSTITUTIONS AND ORGANIZATIONS ACROSS NATIONS* c. 5 (2001).

23. This term is used in order to exclude the handful of nations whose high average incomes are provided by the exploitation of oil and gas reserves.

based voluntary transfers (charity), and by transfers required by governmental authority.

In individualistic cultures, in order to maintain the stability that comes from ensuring that people are fed, clothed, and housed, as work becomes more scarce or the wages earned become less generous, social and political institutions will have to rely more heavily on broader distribution of property income and transfer payments in order to preserve the social-political compact. This, in turn, should lead to new or modified legal policies that will attract the attention of scholars of comparative labor and employment law.

As noted, one change that may come about in the next two and a half decades is a shift by industrial democracies away from the push for globalized free-trade to a system of trade alliances with regional and similarly situated nations. The main impetus for such a strategy would be to halt a race to the bottom. If this happens, interest in comparative scholarship can be expected to follow a pattern similar to recent European labor and employment law scholarship which, with the maturing of the European Community (EC), although not ignoring outside systems, understandably has given primary attention to understanding the similarities, differences, successes, and failures of the approaches taken by legal systems of the primary trading partner nations.

Another change suggested by the recent European experience may be increased emphasis on examining the possibilities for harmonizing the laws and strengthening minimum social standards of nations whose trading ties will place their workers in direct competition with one another.<sup>24</sup> Comparative labor and employment law scholars no doubt will be examining the successes and failures of the EC's efforts at legal and institutional harmonization in order to assess the wisdom of attempting to duplicate these efforts.

An analogue of harmonization of laws is found in the International Labor Organization (ILO)-promoted international labor law conventions and the voluntary codes promoted by a variety of non-governmental organizations to establish universal minimum employment standards that will guaranty a life of dignity for those whose labor transforms capitol into products and services. This is an alternative effort to halt a race to the bottom; one that, if successful, would support continued market globalization. However, empirical

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24. A recent step in this direction is the EU's European Social Fund for 2007-2013, announced on July 15, 2004.

inquiries into the realities of compliance will be a key factor in deciding whether these efforts deserve greater or lesser attention.

Efforts to spread employment opportunities through regulations that reduce work hours have already attracted attention and will continue to be an area of comparative analysis to determine how well they accomplish their goals. As with minimum standards, the success of spread-the-work strategies are dependent on the ease or difficulty of evasion through the age-old tactics of smuggling, illegal migration, barter, and black market transactions as well as through outsourcing. An advantage of regional pacts may be to strengthen barriers to such evasive activities by providing an incentive for reciprocal vigilance for all of the trading partners, by making a greater range of trade legitimate and migration less compelling through those borders that are most easily breached, and by providing adequate social benefit incentives to participate in legitimate transactions. Thus, weighing the relative effectiveness of inducing or compelling legal compliance will be another important area for future comparative analysis.

The need to cope with potential economic desperation will turn scholarly attention in additional directions. In feudal societies, employment relationships are integral to social responsibilities. When necessary, the political hierarchy, and often its partnered religious hierarchy, manages what is exchanged for work either by imposing rules of mutual responsibility or by sponsoring institutions to provide minimal care, subsistence, or training to those who cannot provide for themselves.

Although the development of industrial and mercantile systems gave rise to political arrangements that displaced feudal hierarchies, work remained a locus for assisting those in need. For almost a century and a half, industrial nations have developed various government-imposed or sponsored insurance schemes in which premiums are paid by employers, workers, or both, to ensure some financial security to those who are temporarily or permanently disabled from earning income due to illness, injury, infirmity, or lack of work opportunities. Also, places of employment have been expected to provide specialized job training; sometimes encouraged by government tax or subsidy incentives. And, government has accepted the responsibility of providing the more generalized training required to sustain a competent workforce.

Because future opportunities for well-compensated employment can be expected to decline, industrial democracies will have to rely more heavily on broader distribution of property income and transfer payments (including governmental services) in order to preserve the



stability of the social-political compact. A second impetus for shifting this financial burden from the workplace to broader revenue sources is that it will ease the cost competitiveness for enterprises doing business in regional or global markets. For example, in a time of heightened international competition and high unemployment, in order to reach the entire workforce, the costs of financing income security, health care, and continuing training programs, must be provided by sources other than the place of employment. This might involve governmental transfer payments that find their resources in new or increased forms of property, income, or consumption taxation or that accomplish this goal through tax credits or subsidy payments. It also might involve legal rules changes that will restore to owners, as contrasted with managers and de facto self-perpetuating governing boards, the real power to determine whether profits will be reinvested, be awarded as super-compensation for executives, or be distributed as dividends. And, it might involve new methods of divesting ownership so that the general population has a financial stake in the successes of private enterprises. Therefore, if the welfare of workers continues to be a prime concern of those studying both domestic and comparative labor and employment law, scholars will have to expand their sphere of knowledge and analysis. Accordingly, in order to better understand the available options and strategies, researchers in the field of comparative labor and employment law will become more attentive to such areas as tax law, the law of business associations, the regulation of competition, education law, and social security and social benefits law.<sup>25</sup>

In addition, in future years, the law of international trade and immigration will have a growing effect on comparative labor and employment law because, in a world in which workers are increasingly more abundant than productive resources, there will be more intensive political pressure to resort to such regulations in an effort to preserve or combat the competitive advantages of enterprises that operate free from the constraints of decent living standards.

The dire projections upon which the foregoing prognostications are based may be too pessimistic. While the earth awaits stabilization or reversal of population growth, much of the burden of shrinking

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25. Generally, in the United States, social security and social benefits law (such as pension, unemployment compensation, workers' compensations, minimum wage law, mandatory health insurance, and the like) have long been largely neglected sub specialties of labor and employment law, though a few legal scholars have adopted some of these areas as separate fields of teaching and scholarship. In European countries, they are generally treated as separate, though related, fields of study.

resources can be absorbed if those living in wealthier countries learn to enjoy life more while consuming less, and if those in developing nations can be persuaded to avoid becoming caught-up in the delusions of consumerism.

Market economies, as we know them, are largely driven by growth, and to encourage that growth the producers and merchandisers expend substantial resources creating the illusion of new consumer needs. The rate at which landfills fill up in the United States and other "advanced" economies attests to the excesses of consumption by Western civilizations. But prosperity of this nature does not necessarily provide comfort and enjoyment. There are ample examples of ills and discomforts brought on by over-indulgence of food, drink, and high-powered machines. High speed, over-powered, fuel guzzling automobiles do not get you to work or to the beach or mountains any faster on congested highways than do more modest means of transportation. And, of course, one need not be a daydreamer to recognize that many of life's greatest pleasures (a sunset, a warm bath, a friend's laughter, a cool drink on a hot afternoon, or a hot drink on a cold morning) are enjoyed at little or no cost.

It will take a substantial cultural change to overcome the lust for "things" and to shift the attention of those who lead and shape market institutions to the virtues of quality, stability, and the challenges of conservation. In the long run, worker interests should be served by such changes and the law of work no doubt will adapt if these cultural modifications develop. Possibly, legal policy can induce and guide such changes much as it has done in encouraging greater communal concern for worker safety and health, and for increased workplace attention to merit, rather than status, as the basis for recruitment, promotion, and remuneration. Because no one legal system is likely to discover all the formulas for stimulating this reorientation of cultural values, comparative study of labor and employment law will need to be a source for encouraging experimentation and adaptation.