

New Governance of the Transnational Variety: Can Transnational Domestic Labor Regulation Harness the Power of Private Legal Regulation?

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Date : April 25, 2011

David J. Doorey, *In Defense of Transnational Domestic Labor Regulation*, 43 **Vand. J. Transnat'l L.** 953 (2010), available at [SSRN](#).

In his new paper, *In Defense of Transnational Domestic Labor Regulation*, Professor David Doorey has written a meticulously footnoted and researched article on an important issue that is increasingly facing modern democratic economies: to what extent should such countries seek to use their influence to improve labor practices in economically-developing countries? As Doorey explains, the answer is not as simple as merely deciding you want a labor side agreement to the latest free trade agreement. No, in addition to more formal legislative enactments, Doorey thoroughly explains the developing trend of using techniques which exist outside of formal state action, but nevertheless serve to influence and regulate working conditions and employer-employee relationships in third-world countries. Examples of this “de-centered legal orientation” range from nongovernmental organizations (NGOs) monitoring and investigating multi-national corporations (MNCs), industry-led initiatives seeking to eliminate sweatshops, and consumer boycotts of MNCs that employ abusive labor practices. Doorey explains that these types of non-state activities are here to stay and the central issue is whether these informal practices can be put to good use to advance progressive labor policies in third-world countries.

The topic is complex and Doorey should be congratulated for bringing his impressive transnational labor law knowledge to bear on this area of law. It is certainly a must-read paper for anyone who is seriously engaged with workplace issues in the global economy. For instance, Doorey exhaustively reviews the literature in favor of, and against, using legislation that harnesses the power of these more informal practices to push foreign third-world countries to develop more worker-friendly labor policy in their countries. Nevertheless, one is left with at least two compelling questions after reading this thoughtful paper: (1) Will the more informal, new governance-influenced practices which Doorey seeks to harness really lead to the necessary workplace changes that workers’ rights advocates seek in developing countries?; and (2) Given the troubling labor situation in “developed” countries, should such countries not focus more on their own shortcomings when it comes to workers’ rights in order to gain more credibility with nations around the world?

As to the first question, it is interesting that Doorey decided to title his paper: *In Defense of Transnational Domestic Labor Regulation*. Transnational domestic labor regulation (TDLR), as described by Doorey, is “unilateral” regulation introduced by a government to influence labor practices in foreign jurisdictions. He certainly does discuss TDLR in much detail, but the more interesting and provocative part of the paper, I believe, involves his discussion of how TDLR can harness the power of private labor regulation (PLR), with the aim of improving foreign labor practices. As Professor Kevin Kolben has aptly explained: “[PLR] in the context of transnational labor encompasses a broad range of practices, generally outside of the strict purview of the State, that serve to regulate working conditions and the employer-employee relationship.”

In short, PLR represents a cluster of de-centered and reflexive legal approaches consistent with the new

governance school of workplace governance. Professor Cynthia Estlund has described new governance theory in her recent and equally provocative book, *Regoverning the Workplace* (Yale Univ. Press 2010):

[New Governance theory has] two interlocking themes: the idea of “decentering the state” and elevating the regulatory role of other nongovernmental actors, including regulated entities themselves; and the idea of “reflexivity” in law—of replacing direct regulatory commands with efforts to shape self-regulation and self-governance within organizations. (*Regoverning the Workplace* at 136).

As I wrote in review of *Regoverning the Workplace*, Estlund’s embrace of “regulated self-regulation” or “co-regulation” in the workplace may inevitably lead to further employer domination of the workplace. This is because United States history is replete with examples that limitless employer power, constrained only by market forces and reputational costs, leads to the worst forms of employer opportunistic behaviors and employee abuses. So, my fear is that just like de-centered or new governance schemes are unlikely to have their intended effect in the labor context in the United States, PLR-centered strategies in foreign countries will also lead to problematic outcomes.

I am highly skeptical that PLR initiatives and campaigns will be able to effectively focus “on empowering workers at the factory level and building a climate in which the governments of host states and factory owners are prepared to recognize labor rights.” (P. 1006.) Instead, such an approach is more likely to “to perpetuate a dysfunctional model of labor governance in which disproportionate power rests in the hands of corporations and employers who are unmotivated to effect any real, sustainable change that empowers workers.” (P. 976.) Consequently, I tend to side with those who believe that, “an effective industrial relations system ultimately requires a strong local government prepared to bolster and control worker power through protective labor legislation that facilitates independent union representation and other labor standards.” (P. 976.)

This all leads me to my second point: who are we, the developed countries of the world, to think we know what’s best for these other countries? First, as Doorey himself points out, these third-world countries have their own complex cultural, political, and economic systems and we might do more harm than good through TDLR employing PLR strategies (think unions in China). But additionally, shouldn’t we first focus on our own shortcomings in the labor area before preaching to others? I mean just consider labor and employment law in the United States and the question of whether those laws do nearly enough to protect the interests and rights of the average worker.

Traditional labor law is failing workers in the United States in providing adequate voice in the workplace through union representation (private sector union density is now down to 6.9%). Its *de facto* replacement, “employment law,” is a multi-headed hydra made up of a confusing array of minimum labor standards and workplace rights where many times employees choose to accept employer abuses rather than to negotiate the legal landscape. Moreover, the ability of private litigation in the labor and employment area to secure rights for United States workers has been substantially diminished by a United States Supreme Court seemingly set on an anti-litigation agenda in the civil rights context. Now, I am in no way suggesting that we should ignore the worst types of worker exploitation in the world like oppressive child labor and sweat shops, but wouldn’t developed countries have more credibility internationally on the labor relations front if they did not treat their own workers so abysmally?

Doorey’s comprehensive TDLR discussion provides important food for thought in how to use current trends in the global workplace for the benefit of workers throughout the world. And to that extent, we certainly agree that workers’ rights continue to be a human and civil rights issue that requires

substantial attention from governments around the world. Yet, we split company over the utility of new governance methods in assuring pro-employee outcomes in foreign jurisdictions. I believe Doorey is simply overly optimistic with regard to PLR's utility in developing labor rights in third-world countries. We also part ways perhaps on where labor reform energies should be directed (and I do believe that developments in one of these areas necessarily diminish the possibility of development in the other). In short, I worry that focusing prematurely on labor rights in foreign jurisdictions gives the false impression to our own citizens that our own "labor house" is in order.

Cite as: Paul M. Secunda, *New Governance of the Transnational Variety: Can Transnational Domestic Labor Regulation Harness the Power of Private Legal Regulation?*, JOTWELL (April 25, 2011) (reviewing David J. Doorey, *In Defense of Transnational Domestic Labor Regulation*, 43 **Vand. J. Transnat'l L.** 953 (2010), available at SSRN), <https://worklaw.jotwell.com/new-governance-of-the-transnational-variety-can-transnational-domestic-labor-regulation-harness-the-power-of-private-legal-regulation/>.