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Critical Labour Law: Then and Now

Ruth Dukes*

Introduction

Labour law is unusual among legal disciplines in that its mainstream tradition is critical (Klare 2002). It was conceived originally as an intervention in a mode of production in which, for structural reasons, the worker was in a position of weakness relative to his employer and consequently vulnerable to ill or unfair treatment. The purpose of labour law was widely understood in terms of addressing the imbalance of power in the employment relationship so as to protect and emancipate the vulnerable worker. Early scholars in the field observed that law could achieve this goal in two ways; either directly – by way, for example, of minimum wage, or health and safety legislation – or indirectly, by providing for the collectivization of workers and the collective regulation of workers' terms and conditions of employment. In either case, the desired result of legal intervention was that the freedom of the employer to impose terms unilaterally should be limited and the freedom of the worker correspondingly augmented.

The mainstream tradition in labour law scholarship could not rightly be called Marxist, but it was heavily influenced in its original conception by Marx's writings; above all, perhaps, in its insistence on the human quality of labour – 'this peculiar commodity, which has no other repository than human flesh and blood' (Marx 1849). From the essential fact of labour's humanity followed the concern with the worker's welfare and dignity: the injunction not to treat him as a commodity like any other but somehow to shelter him from exposure to raw market forces. Labour law scholars followed Marx, too, in their comprehension of the defining features of relations of production under capitalism: the existence of distinct social

* Professor of Labour Law, University of Glasgow. I'm grateful to Karl Klare for very helpful comments on an earlier draft.

classes (the owners and non-owners of capital) with oppositional political interests; and the subordination of the working class to the capitalist class, the worker to his employer. A second rationale for labour law was often located with the need to establish means of resolving conflicts of interest between capital and labour, management and the workforce, in a way that avoided unconscionable disruptions to production.

In what follows, the mainstream, critical tradition in labour law is further elaborated by way of the identification and discussion of four key elements of that tradition, in addition to those already mentioned. These are (i) a (partial) rejection of the public/private divide in law; (ii) a commitment to legal pluralism; (iii) legal scepticism; and (iv) the adoption of socio-legal methods. Throughout, reference is made primarily to the two 'founding fathers' of the field with whose work I am most familiar, the German-Jewish scholars Hugo Sinzheimer (1875-1945) and Otto Kahn-Freund (1900-1979), and to examples drawn from UK and German law. My suggestion is nonetheless that these four elements were common to mainstream labour law scholarship on both sides of the Atlantic, in the Antipodes, and in other jurisdictions which modelled their labour laws on those of European or Anglo-American nations (eg Japan, South Korea). In the second part of the chapter, I explain the threat posed in recent decades to the continued viability of systems of labour law that are broadly-speaking protective of workers interests, and emancipatory of workers, by myriad pressures associated with globalization and deindustrialization. Again, the discussion proceeds by way of consideration of the four key elements of the critical tradition identified in Part I. The main question addressed is that of how scholars have sought to adapt their approaches and methods so as to continue to make interventions that are critical in nature and concerned, still, with the transformative potential of labour law.

Especially in a contribution to a volume on critical legal theory, it is important to clarify at the outset the precise sense in which I use the term *critical* in connection with the mainstream tradition in labour law. As is developed in what follows, my point is that labour law scholarship was critical primarily of the substance of laws and legal systems which placed workers in a situation of vulnerability and subordination relative to their employers. Against laws and regimes which entrenched hierarchy and domination, leading scholars in the field argued for the protection and the empowerment of workers, and for the spread of democracy from the public to the private sphere, primarily through the institution of collective bargaining and other forms of collective representation. For the most part, they did not take a

critical view of law, legal discourses, and legal practices in a manner that would have warranted their designation as *critical legal scholars*. In the postwar decades, moreover, and allowing for some variation across jurisdictions, it is probably fair to say that the critical edge of labour law scholarship became blunted. In some cases, in the 1970s and 80s, mainstream scholars found themselves denounced from the left for their conservative legitimation – even glorification – of established industrial relations institutions; for cloaking what were argued to be, in fact, repressive practices and regimes with fulsome expressions of approbation (Hyman 1978); for overlooking or obscuring the extent to which trade unions failed to serve the interests of particular categories of workers, including categories that were predominantly or wholly populated by women, and by racial and ethnic minorities (Conaghan 1986). In the USA, prominently, such criticism was internal to the field of labour law, so that a gap opened up between two schools: the liberal mainstream, and an identifiable 'left' that was *critical* in both senses identified above – on substantive issues, and on jurisprudential questions (Klare 1982b; Fischl this volume). In other jurisdictions, leftist objections were raised primarily from the side-lines of labour law, by scholars of industrial relations or sociology (eg Hyman 1978; Streeck 1984). While the main aim of this chapter is to characterise mainstream approaches *as* criticism, I also refer throughout to such criticisms *of* the mainstream approaches, insofar as space allows. In Part II, I demonstrate how the space for critical interventions of a kind that was originally typical of the mainstream has been narrowed in recent decades, their force weakened, their substance hollowed out. The consequent search for new critical approaches must encompass a root-and-branch reconsideration of the whole outlook and methodology of scholarship in the field.

I. The Critical Tradition in Labour Law Scholarship

Labour law first emerged as a distinct field of scholarship around the beginning of the twentieth century. Of course, laws had long been in force by then which we might today categorise as labour laws: laws which sought to regulate aspects of relations between workers and those for whom they worked, such as pay; to permit the creation of associations of workers and the taking by them of industrial action; to create mandatory safety standards in mines and factories; and to provide for pensions and welfare for unemployed workers. It was not until the beginning of the last century, however, that – in Germany first of all – anyone thought to consider such laws together, as a single, coherent body of law. What leant the

otherwise apparently disparate collection of laws the requisite sense of coherence was precisely the notion of *intervention*, or 'vocation', referred to above: labour laws were those laws which sought, directly or indirectly, to right the imbalance of power in the worker/employer relation, to address the subordination of the working to the capitalist class, and so to protect the otherwise vulnerable worker from ill or unfair treatment (Collins 1989). Also fundamental to labour law scholarship, as it developed across jurisdictions during the course of the following decades, were an at least partial rejection of the public/private divide in law; a recognition of, or commitment to, legal pluralism; a degree of legal scepticism; and the adoption of socio-legal methods.

i) Rejection of the public/private divide

Writing in the 1920s on the political significance of labour law in the Weimar Republic, Ernst Fraenkel highlighted as a precondition of the emergence of labour law the 'preparatory work' of developing socialist legal concepts and modes of legal reasoning (Fraenkel 1932). 'There have long been legal relations which we would now characterise as institutions of labour law. But it was not until the peculiarity of labour law relations was recognised, not until the employment relationship was disconnected from the abstract rules of the law of obligations ... that labour law as such was discovered' (Fraenkel 1932). As Fraenkel explained, the need for new 'socialist legal concepts' resulted from the inadequacy of the existing institutions of private law when it came to the task of reflecting the economic and social reality of employment relations, and of regulating those relations justly. The individual employment relationship, for example, was only formally a legal contract; substantively it was a relation of dictatorship of the economically strong employer over the economically weak employee. In bargaining collectively, employers and trade unions did not enter into *contractual* relations but, rather, engaged in the autonomous creation of norms governing the relations of third parties (Fraenkel 1932).

Responsible in no small part for undertaking this 'preparatory work' of analysing employment relations and inventing appropriate legal concepts was the legal scholar and practitioner Hugo Sinzheimer. In common with other theorists in the late nineteenth and early twentieth centuries, Sinzheimer conceived of labour law, in essence, as a corrective to private law. In doing so, he was directly influenced by Marx and Karl Renner, and above all,

perhaps, by Otto von Gierke (Sinzheimer 1922). Writing towards the end of the nineteenth century, Gierke argued in favour of the creation of a body of law to be known as 'social law', which would address the inequities arising from the formalistic separation of private and public law that was embodied in the German Civil Code (Seifert 2011). Social law would protect the economically weak by ensuring a greater degree of 'balance' in private law transactions; tempering the power of the economically stronger party.

In the work of Sinzheimer, as in that of Beatrice and Sidney Webb before him, the imbalance of power in the employment relation was understood to merit the drawing of an analogy with the sovereign and subject, or state and citizen. In this way, again, the public/private divide was disputed, and the case made instead for the necessary application of 'public law' concepts – democracy, participation – to the economic sphere. To wage labourers, wrote the Webbs, 'the uncontrolled power wielded by the owners of the means of production, able to withhold from the manual worker all chance of subsistence unless he accepted their terms, meant a far more genuine loss of liberty, and a far keener sense of personal subjection, than the … far-off, impalpable rule of the king' (Webb and Webb 1897). In demanding freedom of association and factory legislation, workers demanded, in effect, a 'constitution' in the industrial realm. The legal recognition of collective bargaining and the gradual elaboration of a labour code signified the concession of a 'Magna Carta' to the entire wage-earning class, and the extension of the values of liberty and equality from the political into the industrial sphere. For Sinzheimer, as for the Webbs, it was important that the state – as representative of the common interest – should be recognised as the ultimate guardian and architect of the system of collective bargaining and labour law: the economic constitution ought to be subordinate, in other words, to the political constitution. As a matter of principle, and as prescribed by law, economic actors should be autonomous from the state but at the same time dependent upon it as the ultimate source of their legislative powers (Sinzheimer 1927). For Kahn-Freund, Sinzheimer's one-time student, in contrast, collective bargaining was a process decidedly private to the collective parties engaged in it. The parties should enjoy the freedom to decide on the content of negotiated agreements, and on the methods of their negotiation and enforcement, without undue 'interference' from government. But this did not alter the perception that what was being brought to the economic sphere through the spread of collective bargaining was a measure of *democracy* (Davies and Freedland 1983). Indeed, this was a commonly held view in the postwar decades, not only among scholars of labour law, of

course, but also those sociologists, and social and political theorists, who advocated economic or industrial democracy and industrial or social citizenship.

Whether and to what extent these 'public law' ideas – democracy, citizenship – were also accepted and utilized by governments and policy-makers as a means of understanding and justifying labour laws and collective bargaining no doubt varied from jurisdiction to jurisdiction. Insofar as relations between workers and their employers continued to be conceived of as essentially *contractual* in nature, however, and employers to be thought of still as the *owners* of the employing organisation or workplace in question, private law concepts and principles remained highly relevant, even central, to the interpretation of labour law. In the common law courts of Anglo-American jurisdictions, they were used (still are used) quite routinely to justify the imposition of limits on workers' collective rights, and narrow interpretations of their statutory employment rights (Wedderburn 1986). In 1982, Karl Klare famously analysed such tendencies on the part of the judiciary with direct reference to the 'public/private distinction in labor law' (Klare 1982a).

> The essence of the public/private distinction is the conviction that it is possible to conceive of social and economic life apart from government and law, indeed that it is impossible or dangerous to conceive of it any other way. The core ideological function served by the public/private distinction is to deny that the practices comprising the private sphere of life – the worlds of business, education and culture, the community and the family – are inextricably linked to and at least partially constituted by politics and law (Klare 1982a).

In truth, argued Klare, there was no 'public/private distinction'. but instead 'a series of ways of thinking about public and private that are constantly undergoing revisions, reformulations, and refinement'. The distinction posed as an analytical tool in labour law but functioned instead, 'as a form of political rhetoric used to justify particular results' (Klare 1982a; Fraenkel 1932).

(ii) Legal pluralism

In conceiving of collective bargaining as a *regulatory* process – of terms of collective agreements as *norms* having application to third parties – scholars of labour law claimed, or assumed, the legitimacy of the involvement of non-state actors in law creation and law

enforcement. Often, the notion of 'industrial pluralism' was used to describe and analyse systems of collective bargaining, implying, again, a set of analogies with democratic institutions from the political sphere.

> The collective bargaining process is said to function like a legislature in which management and labor, both sides representing their separate constituencies, engage in debate and compromise, and together legislate the rules under which the workplace will be governed. The set of rules that results is alternatively called a statute or a constitution – the basic industrial pluralist metaphors for the collective bargaining agreement (Van Wezel Stone 1981).

The characterization of collective bargaining as regulation was underpinned by the fact that – in a variety of ways, depending on the jurisdiction in question – the normative terms of collective agreements were accorded the force of law. Relying quite directly on Sinzheimer's analysis of collective agreements, for example, a provision was enacted in Germany in 1918, which accorded such terms 'automatic compulsory normative effect' in respect of all workers and employers bound by the agreement. Under UK law, the normative terms of collective agreements were understood to be implied terms of the relevant contracts of employment and binding, as such, on the parties to those contracts. Moreover, it was not only the terms of collective agreements which were recognised to have legal force, but also in certain circumstances, norms originating from the 'custom and practice' of a particular trade, from the rulebook at a factory or plant, or from the constitution, or rule book, of a trade union. Used descriptively, or analytically, then, the terms 'pluralism' or 'industrial pluralism' were intended to capture something of the 'complexity, heterogeneity and internal diversity', as Harry Arthurs put it, of the regulation of working relations:

> the inability of overarching normative regimes to penetrate and transform all contexts, such as places of work, and the persistent tendency of such contexts themselves to generate and enforce distinctive norms expressing values which are, at least in some respects, different from those of the encompassing society. (Arthurs 1985)

Used normatively rather than descriptively, the notion of industrial pluralism tended to imply or explain the user's approval of systems of collective bargaining. Writing about British society in the first half of the twentieth century, for example, Kahn-Freund famously described with admiration what he understood to be the tendency for interest groups to participate increasingly in a variety of 'governmental' functions – 'the "pressure" of the

pressure groups has been so organised as to work inside the legislative, administrative, judicial and policy making processes' – a tendency which had been of particular significance, he observed, for the development of collective bargaining (Kahn-Freund 1959). Arriving in London in 1933 from Germany, Kahn-Freund believed himself to have encountered in Great Britain, 'an inherited political and social culture in which everyone participated, including the workers in the unions' (Kahn-Freund 1981). This was the type of democracy which was furthered, in the pluralist's vision, by the institution of collective bargaining.

Developed in response to the fascism of the Nazis, and informed by the writings of Harold Laski, Kahn-Freund's pluralism was of a firmly social democratic variety. It drew criticism, nonetheless, from the left as resting on a set of highly questionable assumptions: that through the unionization of workers a balance of power was achieved between labour and capital; that the 'legitimate' interests of labour were only those that could be accommodated through the process of collective bargaining; that workers valued trade unions first and foremost as a means of participating in the regulation of jobs, and not as a means of securing improvements in their working and living conditions (Hyman 1978). Similar objections were raised elsewhere to US scholars' use of the 'industrial pluralism' label, in their case not as a refutation of Nazism, but rather a celebration of the superiority of the American way to the 'totalitarianism' of the USSR (van Wezel Stone 1981; Hyman 1978).

(iii) Legal scepticism

In its original conception, as we have seen, the very idea of labour *law* inferred a belief in the transformative potential of new legislation; of new legal concepts and principles. At the end of the First World War and in the early days of Weimar social democracy, Sinzheimer's writings were striking for the extent to which their argument relied upon the presumed ability of the people to construct a better and fairer way of life for themselves, harnessing the power of the state, and the law, in order to do so. In the 1930s, mass unemployment and the ensuing 'crisis in labour law' led him to question what he had previously taken for granted: the capacity of law to mould or transform social life (Sinzheimer 1933). In the first years of the Republic, as Sinzheimer saw it, labour rights and collective institutions had been introduced in the belief that these could achieve the resolution of conflicts of interest between the social classes, allowing for the regulation of production and work in the interests of all. Bringing

with it steeply declining wages and catastrophic levels of unemployment, the economic crisis of the early '30s cast doubt on the capacity of labour law to function as intended within a capitalist – 'private law' – economy. A renewal of labour law no longer appeared possible without the renewal of the entire economic order.

Influenced by his own experiences of the decline of the Weimar Republic, Kahn-Freund later developed a theory of labour law in the UK that was premised on a very marked degree of scepticism regarding the capacity of law to influence social behaviour. 'In labour relations', he wrote, 'legal norms cannot often be effective unless they are backed by social sanctions as well, that is by the countervailing power of trade unions and of the organised workers asserted through consultation and negotiation with the employer and ultimately, if this fails, through withholding their labour' (Kahn-Freund 1972). For Kahn-Freund, it was a mark of the comparative maturity of trade union organisation and collective labour-management relations in the UK that these functioned with little need for *legal* sanctions (Kahn-Freund 1954). 'British industrial relations have, in the main, developed by way of industrial autonomy… [E]mployers and employees have formulated their own codes of conduct and devised their own machinery for enforcing them' (Kahn-Freund 1954).

While remaining more sanguine about the potential of legislation to effect change, others directed their scepticism more specifically at the involvement of the *courts* in labour law. Pointing, in the first instance, to the essentially political nature of employment relations courts were argued to be fundamentally unsuited to the task of deciding work-related disputes and interpreting labour law. 'It is not good for trade unions that they should be brought in contact with the courts', commented no lesser a figure than Winston Churchill in 1911, 'and it is not good for the courts' (Kahn-Freund 1959). Even if outright class bias on the part of the judiciary could be discounted, it was elsewhere argued, it remained the case that judges were trained first and foremost in the *common, or civil, law*. To them, then, labour law – and, especially perhaps the branch of it pertaining to trade unions and collective bargaining – appeared to consist of a set of 'artificially' imposed and essentially inequitable contraventions of common (civil) law rules and principles. That being the case, it was argued further, justice in the sphere of labour law could only be achieved through the creation of specialist labour courts or tribunals to hear labour disputes. Only by removing labour law from the purview of the ordinary courts, could the necessary *autonomy* of labour law from private law be secured (Bogg, Costello et al 2015).

(iv) Socio-legal method

The perception that private law was not up to the task of regulating working relationships; that concepts drawn from the public sphere – democracy, constitution – could rightly be applied to the organisation of work and production; that the common or civil law courts had better not be entrusted with that task – all of this followed from the apprehension of a few essential truths about working relations: that labour was human, and not a commodity like any other, that it was inherent to capitalism that the interests of the social classes should conflict, and that the worker was subordinate to the employer, as labour was subordinate to capital. For some scholars writing at the beginning of the twentieth century, these truths had little direct relevance to the discipline of labour law. In line with the notion of *law as science*, it was argued that scholarship in the field should limit itself quite decidedly to treating in depth the *legal* aspects of the material at hand (Nogler 1996). Sinzheimer and his followers differed from these scholars most decidedly in their adoption of a sociological approach to the study of the law. For them, it was of fundamental importance that 'the law' (that which was embodied in legislation and court judgements) should be recognised to differ in its nature from 'legal reality' (the norms which governed social action). Laws did not always take effect as intended by the legislature or the courts; moreover, norms could develop in the course of economic and social interactions that were not always recognised by the legal order. Analysis of the law had then to look beyond the law books at 'concrete' legal forms and arrangements, and to analyse these and their relationship to formal law. It had to consider 'the social effect of the norm ... the way in which it appears in society and ... its social function' (Kahn-Freund 1981). Where discrepancies could be identified between the formal law and social actors' understandings of the norms which governed their behaviour, these could be used to inform policy formation.

In his work on English labour law, Kahn-Freund employed an approach similar to Sinzheimer's, drawing a distinction habitually between 'the law' and a separately identifiably social reality: 'the actual state of affairs' (Kahn-Freund 1954). While the former could be read from the statute books and case reports, the latter, it seemed to be assumed, was a question of 'the facts' as revealed through observation or empirical investigation. In seeking to ascertain the relevant facts, in England in the 1950s and 1960s, Kahn-Freund found that he

was unable to rely on the work of fellow legal scholars. Most legal scholarship, at the time, was 'positivistic, setting out and analysing the conceptual detail of legal rules, with scant recognition of history or sociology' (Hepple 2013). Instead, he turned to academics working in the field of industrial relations, especially the 'Oxford School' led by Allan Flanders and Hugh Clegg. Normatively, these scholars shared with Kahn-Freund a pluralist outlook that was rooted in a traditional liberal distrust of power (Hyman 1978). Broadly speaking, their preferred methodology was sociological, or 'multi-disciplinary'; characterised, above all, by a preference for empirical methods and by a degree of scepticism regarding the usefulness of 'grand theory' (Brown and Wright 1994). The priority, as Richard Hyman once wrote of Clegg, was 'to get the facts right' (Hyman 1994).

During the course of the 1950s, 60s and 70s, the collaboration between Kahn-Freund and members of the Oxford School extended beyond those particular individuals to encompass a whole generation of British and Irish labour law scholars and 'industrial relations scholars with a legal bent'; chief among them Bill Wedderburn, Paul O'Higgins, Roy Lewis, Jon Clark and Bob Hepple (Davies and Freedland 2002). When Wedderburn published the first edition of his famous textbook, *The Worker and the Law* in 1965, he quite consciously emulated Kahn-Freund's method, placing the institution of collective bargaining at the heart of the analysis, rather than any statute or body of case law, and referring throughout the text to the work of historians and other social scientists, as well as to primary and secondary legal materials (Hepple 2013). In 1983, he continued to advocate this approach, writing, with Lewis and Clark, that 'the lawyer who ignores the insights into the problems of industrial relations offered by colleagues in the social sciences will never make, by the standards which Kahn-Freund set, a labour lawyer worthy of the name' (Wedderburn, Lewis et al 1983). He also defined the purpose of labour law scholarship in a way that echoed Sinzheimer's identification of a concern with policy as inherent to the field: the role of the scholar, in Wedderburn's opinion, was to assess the consequences for workers of particular laws and social arrangements with a view to influencing the formation of legal policy, legislation, and legal precedent. 'Projects for new labour laws must be tested in concrete terms by their effect upon real people, the condition and quality of their lives, their prosperity and their – real, not theoretical – liberty' (Wedderburn 1986).

Reflecting the extent to which this kind of socio-legal or 'law-in-context' approach became mainstream not only in the UK but throughout western Europe, a similar method was adopted

and elaborated by a group of leading scholars embarking in the 1970s on a major comparative research project (Hepple 1986a). For these scholars, it was of fundamental importance that labour law should be recognised to be part of an historical process, and not as a relatively static and neutral set of rules and institutions intended to regulate employment.

> [T]he rules and institutions are shaped by the historically given possibilities within which various sectional groups pursue their often-conflicting objectives. Labour law is made by men and women in a society not of their own making (Hepple 1986b).

Resisting any suggestion that the development of labour law within capitalist societies was *universal* – that in all jurisdictions it would develop along the same lines for the same reasons – the authors sought instead to address the question of how particular measures came to be introduced within each country at particular points in time. The crucial element in the making of labour law, they believed, was power. Labour legislation was best understood as the outcome of a process of struggle between different social groups – monarchy, bureaucracy and middle-class; bourgeoisie and working class; townspeople and countryfolk – and of competing ideologies of conservatives, liberals and socialists, and of religious and secular groups. What any particular group of people got from the struggle was not just a matter of what they chose or wanted, however, but what they could 'force or persuade other groups to let them have' (Hepple 1986b).

II. Labour Law Today

As elaborated above, the mainstream tradition in labour law scholarship was influenced very profoundly by the political economy of the time. This was an era in which Fordist methods of production predominated, with stable, full-time employment for male breadwinners, managerial hierarchies in vertically-integrated firms, and high levels of trade union membership. Employer-producers and worker-consumers alike were largely nationally based and confined, as were the labour and product markets within which they operated. During the course of the past half century, the organisation of work and production has been transformed as part of broader trends associated with deindustrialization and globalization. A particular brand of neo-classical economic thinking about working relationships and labour law has asserted itself as orthodox, shaping the policy and legislation of governments of both the centre right and centre left, and even, over time, workers' own perceptions of the world of work – increasingly, we have come to self-identify as entrepreneurs of ourselves, entering the

labour market (rather than looking for a job), making ourselves 'marketable'. Each of these developments has posed significant challenges to traditional ways of thinking about labour law, occasioning much soul-searching on the part of scholars in the field. The dominant discourse in recent decades has been one of *crisis*: old ways of thinking about the subject, of describing and analysing it, have seemed increasingly inadequate, but new ways have yet to be found (Davidov and Langille 2011).

(i) Reassertion and shifting of the public/private divide

It is definitive of the new economic orthodoxy that the desirable role of the state in the economy generally, and in the regulation of work more specifically, should be recast in primarily negative terms. In order to ensure economic growth and job creation, so the line of reasoning goes, governments should take steps to maximize entrepreneurial freedom, liberating business from the unnecessary and damaging 'red tape' of worker-protective laws and institutions. Previously state-owned industries (in which unions were traditionally strong) should be sold off, and in the remaining rump of a public sector, the logic of competition should be forcibly introduced, with services (and therefore jobs) contracted-out to whomever can promise to provide them most cheaply. If support is to be given at all, any more, to trade unions and other forms of worker representation, then this should be done not in the name of furthering industrial democracy, but with reference instead to the economic benefits of facilitating (strictly limited and neutered) expressions of employee 'voice'. If rights are to be accorded, still, to individual employees – rights to a minimum wage or to parental leave – then these should be tailored to ensure that the burden on employers is not too great, the benefit to 'the economy as a whole' sufficiently well established.

Insofar as national governments accept and adopt the appealingly simple logic of such arguments – and most of them do – the implications for the labour law of the country in question will likely be severe. Where there is opposition from the electorate to the dismantling of hard-won labour rights and protections, reference may be made by government to the stark realities of the globalized world: the increased mobility of capital and the intensification of global competition that result from the liberalization of trade (Klare 2002). Because capital is free to threaten or choose relocation, thereby resisting or circumventing the strictures of national laws and institutions, national governments are under

significant pressure to lower labour standards and corporate taxes as a means of retaining or attracting capital investment. The liberalisation and integration of finance, meanwhile, create a new source of discipline for national governments, which must now either tow the orthodox economic line or face the – potentially devastating – prospect of capital flight, or an increase in the rate of interest charged on government bonds. As the example of the European Union illustrates, governments might choose to enter into multilateral or bilateral trade agreements which place further limits on their capacity to retain or enact labour rights and standards, as such rights and standards come to figure as prohibited breaches of the contract, or property, or free trade rights enjoyed by private actors under the terms of the trade agreements (Dukes 2017). States in need of financial aid from international organisations such as the World Bank or IMF, meanwhile, may quite routinely be required to agree to programmes of deregulation or 'flexibilisation' of their labour markets as conditions of loan agreements (Adams and Deakin 2015).

With reference to the public/private divide, these developments may be apprehended as the recolonization of the public by the private, the political by the economic; the extension of markets and economic rationalities into spheres that were previously ordered according to alternative logics. While scholars of labour law have criticised governments for the political use which they've sought to make of the 'globalization' narrative – our hands are tied! – while they have emphasised the extent to which nation states are themselves the authors of that narrative, they have not, for the most part, contested its essentials. On the part of scholars too, then, the language of industrial democracy is rarely used anymore, unless it is to mourn all that has been lost. Across the field, a fairly widespread change in approach has been discernible from the study of labour law understood as the law of work, to the analysis of those laws (including social welfare, immigration) which regulate labour markets. Utilizing economic methods and modes of analysis, some scholars have turned their attentions to constructing a defence of what were originally understood to be – *celebrated as* – market-correcting institutions, on the basis, now, of their putative, or even demonstrable, economic benefits: labour laws are beneficial because they address negative externalities, provide solutions to collective action problems, minimize transaction costs. Others have used a 'market' framing of the field to call into question matters which, traditionally, were taken as read: for example, the treatment in law of some work (jobs) as paid employment and other work (domestic and reproductive labour) as an unpaid and untaxed contribution to the household (Fudge 2011). More generally, questions have been directed at the constitution of

labour markets by law and other social norms: not only labour law, but also social welfare, immigration and – of course – private law. In contrast to scholars in the postwar decades, at least some of those working in the field today have placed a rather clearer emphasis on the contingency of private law as well as labour law rules, treating the former not as a pre-existing field in which labour law then intervenes, but as themselves embodying contestable political judgments regarding the definition and attribution of privileges, powers and entitlements (Klare 2002). An important task for critical scholars is then to identify the distributive consequences of *all* market-constituting rules – private law, labour law, social welfare law – and to consider their variation as a potential route to achieving particular goals (Klare 1982).

(ii) Legal pluralism continued

As a result of the lowering of labour standards and the weakening and marginalization of trade unions – the recommodification of labour – the contract is emerging as the primary source of legal norms in the organization of work. As systems of collective industrial relations are replaced by professionalised human resource management, it is more and more often the case, moreover, that the choice of form of work contract, and the drafting of specific terms, is in the power of the employing organisation alone. On the part of the worker, there is very little, if any, scope for negotiating improved terms and conditions. Motivated in particular by a desire to maximize 'flexibility', employers have made ever greater use of a variety of forms that do not fall within the legal category of 'contract of employment'. Throughout the developed world, there has been a significant rise in the number of workers hired through agencies, or as part-time, or casual, or zero-hours workers, or as formally self-employed 'entrepreneurs', paid by 'clients' for the performance of discrete tasks or 'gigs' (Stone and Arthurs 2013). By workers, this has been experienced first and foremost as a loss of security in employment; as the substitution of *precariousness* for security. Because they are not 'employees' in the eyes of the law, employment protection laws do not apply.

Notwithstanding this resurgence of the contract as the primary means of regulating working relationships, legal pluralist perspectives remain important to the study of labour law. The terms of collective agreements are after all still legally binding and still significant in substance, albeit for a shrinking proportion of the workforce. In the face of the retreat of the

state from the economic sphere, meanwhile, there has been a proliferation of private orderings of working relations and labour standards, not only by means of contract, but also, significantly, corporate codes, multi-lateral 'accords' or 'alliances' and – rather less frequently – supranational collective agreements. At the supranational level, too, labour standards are now routinely addressed by trade agreements, or 'side agreements' appended thereto. In an influential study of 2007, Bob Hepple surveyed these developments and inferred from them the emergence of a 'spider's web' of hard and soft transnational labour standards regulation, woven around domestic labour laws and influencing them profoundly (Hepple 2007). Less optimistic accounts have criticised corporate codes, accords and alliances as 'vague, horatory, and not well suited to compelling compliance' (Arthurs 2004), and labour side agreements for being soft in nature and thin in substance, especially when compared with the trade agreements to which they are appended (Church Albertson and Compa 2015). In such circumstances, the existence of a plurality of regimes and orderings has been identified by some as itself a threat rather than a boon to the maintenance of labour standards (Alston 2004). Absent a body capable of exercising state-like powers of coordination and enforcement at the supranational level, who will decide which rules apply in case of conflict, other than the employing organisation itself?

(iii) Legal scepticism of a different sort

In the current political context, where the word is with Friedman and Hayek and not with Keynes, scholars of labour law do not always view the courts with the same degree of suspicion that they once did. Instead, many look to the judiciary as a potential force for good when it comes to the furtherance of workers' interests: as a potential brake on the deregulatory impulses of legislatures. In exercising such powers of control, or review, courts should have reference, it is argued, to the human rights or fundamental rights guaranteed in one or other of a wide range of international, regional, or national charters and treaties, and even by the common law (Bogg 2018). Whereas Wedderburn once observed a pendulum of statutory rules swinging between the progressive intentions of Parliament and the reactionary interpretations of the judiciary, today we should rather expect a similar kind of motion, but with a reversal of the poles (Wedderburn 1986). Scholars frequently engage in the important work of analysing the extent of the constraints posed by human rights on the freedom of action of a legislature; of identifying the fundamental rights and principles inherent or

emergent in the common law and pointing the way to their future development (Bogg 2016). In doing so, they may hope to assist courts or potential litigators, but also perhaps to strengthen political arguments for legislative change or – where deregulation is threatened – more modestly, for maintenance of the status quo.

Of course, many voices continue to be raised warning of the likely limits of a 'human rights strategy' when it comes to the furtherance of workers' interests. In an oft-cited paper, Kevin Kolben identified a problematic lack of fit between labour rights and human rights which, in his opinion, threatened a 'weakening commitment to the economic justice and workplace democracy principles that have long underpinned labor rights thought and practice' (Kolben 2010). Others have given renewed emphasis to lessons learned long ago regarding the inherent conservatism of the courts, and the ineffectiveness of individual litigation as a means of furthering the interests of a whole class (Arthurs 2007). Case studies have been developed demonstrating that, on the part of legislatures, the notion of human rights breaches can tend more easily to criminalization of the worst kinds of abuses, rather than to the raising of standards across the board (Fudge 2018). It is quite possible, on the other hand, to be both cognisant of the limitations and stumbling blocks in the way of advocating for workers' human rights, and nonetheless to seek to do so – partly, perhaps, because other strategies and courses of action appear, in particular contexts, even less likely to succeed (Klare 2014). In the field of labour law, as elsewhere, moreover, and in the face of the apparent futility today of arguments which speak to workplace democracy and social citizenship, human rights discourse provides an alternative – and widely understood – language with which to insist upon limits to the otherwise inexorable spread of markets and market thinking (Ewing 2010). It follows that a sizeable proportion of labour law scholarship now includes at least an invocation of human or fundamental rights, if not a detailed consideration of their relevance to the question at hand.

(iv) Methodological innovation?

Together with the turn to human rights, on the one hand, and to labour markets, on the other, there has been a growing perception among scholars of labour law of the need for methodological innovation in the field. Seeking a firmer basis for the normative claims inherent in any argument for the protection of workers' rights, some have looked to

philosophy and political theory – mostly of the liberal variety, but sometimes also socialist or social democratic in persuasion (Collins, Lester et al 2018; KD Ewing 1995). On the part of those who have sought directly to refute the orthodox position that labour standards inhibit economic growth – that, at best, they benefit a few 'insiders' to the cost of all 'outsiders' – there has been greater recourse to economic methods and modes of reasoning. Microeconomic models, game theory, econometrics, new institutionalism – all have been used to garner evidence that labour laws can help to improve productivity levels, reduce unit labour costs and increase the profitability of businesses, and the competitiveness of whole sectors and national economies (Estlund and Wachter 2012).

Acknowledging the importance of labour markets as elements of the field of study, but finding the critical potential of even heterodox economic approaches to the analysis of 'labour market regulation' to be limited, others have identified the challenge of identifying or developing methods which might better allow for the analysis of the role of law in constituting markets and, at the same time, for recognition of the inherently *political* nature of the manner of such constitution: of the questions, how markets are combined with or constrained by 'non-market' institutions and modes of action and interaction; of who falls to benefit and who to be disadvantaged by particular market configurations and orderings (Chapman, Landau et al 2017; Fenwick and Marshall 2016). Of course, this is not a challenge that is particular to the field of labour law. Right across the social sciences, the colonization of the public by the private, as it was termed above – the 'interpenetration of the social and the market' (Rittich 2014) – has called into question the well-established practice, in both economics and sociology, of treating the economy as a social domain differentiated from the rest of society, and subject to its own rules (Beckert and Streeck 2008). If the dividing line between the economy and society has broken down in practice then it requires, too, it has been argued, to be broken down in theory. An approach or set of approaches is needed which will allow researchers to explore the social logic and the social nature of the economy – of economic institutions and economic action – and to revisit the question of the essential relationship between economy and society. A promising first step might be to return to the classical traditions of sociology and political economy represented in the work of Durkheim, Weber and the institutional economists of the early twentieth century (Beckert and Streeck 2008; Coutu 2011; Stone 2014).

From the point of view of the analysis of labour law, political economy approaches are useful for the attention which they draw to the role of the state, and to legislation and public policy as expressions of struggles between different actors over political influence (Menz 2015). Using such approaches, scholars can analyse labour markets as they are configured within particular economies and not as ahistorical, apolitical entities with their own 'natural' logics. They can assess the impact of particular laws and policies over a period of real time, and not only in the 'snapshot' view presented by economic modelling (Robinson 1980); and they can again utilize the kind of comparative and historical methodologies that have long been typical of mainstream labour law (Marshall 2014). Economic sociology, meanwhile, seeks to understand behaviour that is economically motivated but configured, at the same time, by social norms, institutions, and understandings, so that the fit with working relationships and the behaviour of parties to them is clear (Swedberg 1998; Bandelj 2009). Scholars of labour *law* are, of course, also concerned to understand how (economic and social) behaviour is shaped – directly and indirectly – by applicable laws and regulations; and, at the same time, how human agency pervades the construction of social and legal orders (Klare 1982b). Methods are required that will allow for the investigation of actors' perceptions of the law and the ways in which those perceptions shape their behaviour in the world of work, while taking account also of their economic interests and motivations, and of social norms and shared understandings of what is standard or fair in any given situation.

III. Conclusion

My principal objective in this chapter has been to present the mainstream tradition in labour law as critical, and, in Part II, to demonstrate how, in the course of deindustrialization and globalization, changing practices, procedures and perceptions have rendered traditional lines of argumentation increasingly redundant or unlikely to be heard. Highlighting four central elements of labour law scholarship, I suggested that the mainstream tradition was critical, primarily, of the *substance* of law and legal regimes which placed the worker in a situation of subordination and vulnerability relative to the employer. In the Weimar Republic, scholars called for the democratization of the economy as a means of emancipating workers and securing greater substantive quality between the social classes. In the postwar decades, scholars used a similar language of industrial democracy or industrial pluralism to express and explain their support for collective bargaining, and other mechanisms for the collective

representation of workers. If the Weimar scholars understood – albeit too late – the ways in which the 'social' rationality of labour law would forever be undermined by the 'individualistic' rationality of private law and the capitalist economic order (Sinzheimer 1933; Fraenkel 1932), a central shortcoming of mainstream labour law scholarship in the postwar era was its partial blindness in this respect: its assumption that an effective system of labour law could be rigged on top of systems of private law and corporate law that were otherwise essentially unchanged (Klare 1982b). Building on the work of past and current scholars of labour law, but also on critical approaches in legal theory, political economy and economic sociology, a renewed and reimagined critical labour law today must grapple more comprehensively with questions of the legal construction of labour markets, of relations of work and of production.

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