LABOUR LAW AND POLITICAL ECONOMY

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PUBLISHED 09.26.22

What happened to work and workers as the state-managed capitalism of the postwar era – the postwar settlement as it is sometimes called – was replaced by neoliberal capitalism? What were the losses, the gains if any, and how if at all can the losses be recovered? Are growing inequality, widespread precarity, stepped-up market pressure on wages and employment conditions, the intensification of work, declining social protection and mounting tensions between work and family life inevitable or incurable, or can they, do they need to, be mitigated? In short: can remedies be found for the ailments of a neoliberal labour regime, and how exactly should they be conceived and applied?

To address these questions is to address the fundamental matters of desirable ends and the construction of capacities to devise and to pursue them. In both respects, we believe that labour law, broadly understood, has an important role to play. At the same time, however, we also believe that labour law, if it is to survive as a discipline related to but separate from private law, must be analysed and conceived in the context of political economy and the dynamic process of capitalist development: of economic constraints and opportunities, of politics and power, of government policy and political democracy. It is from this perspective that we attempt in our new book, *Democracy at Work: Contract, Status and Post-Industrial Justice*, to reconstruct the mission and the substance, the function and the structure of labour law as a regulatory institution in a capitalist economy and society, existing recently but surely not forever in a neoliberal form.

By contextualizing labour law in this way, we are in essence treating it as an historical phenomenon, by which we mean more than simply that it changes over time. Putting labour law in an historical perspective means conceiving of it as embedded in the development and the changing forms of modern industrial capitalism. This reveals its specific normativity, its foundational mission to distinguish contracting for work from contracting for any other commodity, to devise a special contracting regime for that special, imperfect, fictitious commodity that is labour. It is not so long ago that labour law as a matter of course used concepts like industrial justice and industrial democracy; that it distinguished between fair and unfair contracts for work and sought remedies to balance what it considered an asymmetrical relationship of power between employers and workers. In *Democracy at Work*, we ask whether these concepts and the ideas that they house are still applicable today, even if in light of present conditions, they can appear out of time. Indeed, our main concern in the book is with concepts, and not with statistics, values or prices; and with examples of new work and work relations rather than comprehensive theories of contemporary working life. Our aim is to understand law as an institution, as an instrument of social regulation, rather than to devise a theory of, say, new technology changing old or new work settings, or of the labour process in a post-industrial era.

Law is a highly complex, methodically and logically disciplined engagement of concepts – concepts that aim to capture both what the world *is* and what it *ought to be*, and to do so coherently, free of contradictions. Insofar as concepts meet that aim, they enable the legal system to adjudicate disputes on what is and what ought to be in such a way that those involved, and those looking on, can at least for the time being accept or approve what has been ruled as an objective condition of life as it continues. The part of the world where the conceptual abstractions of labour law meet reality used to be called industrial relations: the tripartite

encounter of business, labour and government in organizing the intertwined processes in a capitalist society of production and capital accumulation, and provisionally settling the conflicts of interest that arise there, for the purpose of facilitating cooperation on terms acceptable to all three sides. Following the partial deindustrialization of our economies and disorganization of labour and business, the term industrial relations may no longer be appropriate, but the confrontation of labour law's conceptual abstractions with reality remains a matter of great importance.

Under capitalism, labour law regulates society's paramount conflict line, its breaking zone, its most critical cleavage, where peaceful exchange and cooperation are forged, or fail to be forged, under conditions of distributional conflict among unequally powerful class interests. As a social and economic institution, labour law must serve two purposes at once: *social integration* through legally enforced conformity with collectively held values of social justice, giving rise to a legitimate social order providing for social peace, and *capital accumulation*, demanding a social order that must first be profitable before it can be just. Using the language of Karl Polanyi, this locates labour law at the crossroads of movement and countermovement as driving forces in capitalist development. There, it is under pressure simultaneously to reflect, interfere with and provisionally settle the conflictual-cum-cooperative relationship, the main site of social reproduction in a capitalist society, between capital and labour, indeed between capitalism and society.

As a field of law, labour law draws it legitimacy from its capacity to impose a stable and predictable order on a conflictual relationship of power and exploitation, to institutionalize such order as one of justice, of right, not only between individuals but also between classes. Due to the nature of contracting for work, which at the individual level typically proceeds between parties of unequal power, this has historically required labour law to differentiate itself from private law, turning itself into something like public and indeed democratic law: the law of 'industrial citizenship', designed to create, with institutional means, something like a level playing field between workers and employers. This was most pronounced in the postwar political economy, when the holders of state power felt unable to pacify the conflict between capital and labour by turning it over to either a 'free play of market forces' or the criminal law and the police. More so even than other fields of law, this made labour law more than just a superstructure reproducing an underlying power structure while dressing it up as a normative rather than merely a factual order. Because of the conflictual and tendentially explosive nature of the social field that it is to regulate, labour law is and must be open to contestation and change by those affected by it, responsive at least in part to pressures not just for internal dogmatic consistency or external economic efficiency but also for human interests and demands for non-commercial social justice. Potentially, that is to say, labour law must be capable of performing a progressive function under capitalism where capitalism is at its most capitalist, in the selling and buying of labour as a commodity.

Our book, then, is the outcome of a meeting between two disciplines, labour law and political economy, and is intended to be productive for both. What is gained from placing labour law in the context of a theory of capitalist political economy? First, the fundamental distinction between labour law and contract law is thrown into stark relief — the inability of contract law to recognize or address the unequal power of the parties to a contract for work and the limited freedom of contract on the part of the weaker of the two. Likewise, the uniquely political nature of labour law is brought to light, as well as its partly contrarian position in a political economy and mode of production that reproduces itself through treating human labour power as a commodity, if an imperfect one. One is also reminded that collective labour law, and the collective rather than individual negotiation of contracts for work – amounting to something like publicly empowered private law-making for the workplace or sector in question — are neither historical curiosities nor an ephemeral sideshow of what might be mistaken for 'labour (or employment) law proper'. Here again, labour law's profoundly political character comes to the fore; its contribution in democratic capitalism to the functioning of a 'second tier of government', bearing primary responsibility for effecting a redistribution of incomes and other elements of class compromise, in the process providing the first, parliamentary tier with legitimacy and stability. Trade unions figure here as political as well as industrial bodies, serving – together with churches, political parties and other bodies – a vital intermediary function between society and politics; not only giving necessary substance to the powerful but abstract concept of 'the people' but also functioning as collective political actors capable of effectively demanding social justice.

Alignment with political economy helps labour law rediscover its particular nature: its twofold role as a contracting regime between individual buyers and sellers of labour power, on the one hand, and as a core element of the institutional endowment of capitalist, that is, of specifically class-conflictual modern societies, on the other. Seen this way, labour law appears as decidedly more than a handbook for contract adjudication by legally trained experts applying complex conceptual techniques to derive specific rulings from general principles. Nor does it consist only of a monitoring of legal developments in contracting for work to ensure that the body of law regulating it remains consistent, without internal contradictions. That objective in particular has always been difficult to achieve in labour law because the law governing contracts for work is not only the result of court decisions and legislation. Another, often unpredictable source of labour law is the politics of the workplace, driven in part by the collective democratic participation of workers in law-making

and law enforcement, rooted in the last instance in workers' capacity to withhold their cooperation collectively if their sense of industrial and social justice is too severely violated. In the field of work relations, as a House of Lords judge put it in 1941, 'the rights of the employer are conditioned by the rights of the men to give or withhold their services'. As a main pillar of Rokkan's second tier of democratic government, we argue, labour law as a legal system must be open at the bottom where it meets the realities of industrial life, including the possibility for those subject to it to make themselves heard, if need be, through industrial action. Labour law thus doesn't only regulate class conflict, it evolves with it and through it – in the struggle over legal change as social progress, driven by the countervailing power of the sellers of that imperfect commodity, labour.

Similar considerations apply to political economy. Nothing is better suited than the study of labour law to draw attention to the fact that political economy does not only concern efficiency — meaning, in a capitalist society, profitability — but also, necessarily, justice, perceived or sought, as a precondition of predictable, stable cooperation, if only for the time being until work and industry will, again, have changed. Much in the study of political economy focuses on conflict and power, less on the institutions, set up or certified by the state, within which conflicts are fought out and mediated or settled under agreed or imposed rules of engagement. Some of those rules are informal; others, and in a modern society often the more important ones, are formalized in law. This means that conflicts and their outcomes are shaped not only by the expectations and power resources of those directly involved but also by the logic of law, of legal systems and how they generate, apply and update the formal rules created and administered through and within the law. Historical-institutionalist political economy has yet a long way to go to understand exactly what difference it makes if institutions are enshrined in formal law — how they emerge, are laid down, enforced and, importantly, changed in response to changing conditions surrounding them. In a capitalist society, that is to say, political-economic theory is inevitably also a theory of institutional change, which in turn must, to an important extent, be a theory of law and legal change.

Law is easily the most sophisticated institution in a modern society and political economy. If only for this reason, the study of law needs to be integrated in the study of political economy, with law taken seriously as formal law, distinguished from but related to the informal rules and norms emerging in social life. As an institution in political economy, labour law in particular offers itself as an ideal subject for exploring the interaction between legal systems and emerging norms of social justice, as they grow out of practical experience and are translated, or not, into binding regulations enforced by state power. With its broad interstitial zone with social life and collective action for social justice, labour law in particular would appear to be an ideal subject for theoretical and empirical research on the sources and limits of social stability amidst social conflict, and on the dynamics and directions of institutional change in capitalism, historical and contemporary.

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