Democracy at Work

Contract, Status and Post-Industrial Justice

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Preface

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?

If this book is centrally concerned with these questions, and with work and workers before, during and after the neoliberal era, it is categorically not another book about 'the future of work', as that topic has come to be defined (Srnicek and Williams 2015; Mason 2016; Benanav 2020). Nor is it an inventory of new kinds of jobs and forms of contracting for work, or a collection of recipes, a catalogue from which to pick 'solutions' to 'problems', such as how to set up an effective collective bargaining regime for a restaurant chain or the domestic care sector.[1] Our concern, instead, lies with the more fundamental matter of building the capacities needed to devise and apply such solutions and the ends we would wish to pursue with them. In both respects, our focus is on labour law, on the role it could and would have to play in regulating, or re-regulating, the world of work after the neoliberal revolution. At the same time, however, our central message, and the guiding idea of the book, is 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 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 (Polanyi, 2001 [1944]). It is not so long ago that labour law as a matter of course used concepts such as 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 this book we ask if these concepts and the ideas 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 de-industrialization 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 (Polanyi, 2001 [1944]). 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 its 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.

This book, then, is the outcome of a meeting between two disciplines, labour law and political economy, and is intended to be productive for both. But what does it mean for one scholarly discipline to learn from another? Theories always come with hidden, unrecognized assumptions or with premises believed to be self-evident, not or no longer in need of examination. Theoretical progress can be made when for whatever reason such assumptions and premises are forced into the open, making them visible and debatable. Brought to the surface, they can be clarified, corrected, confirmed or thrown out; the theory can thereby be improved, narrowing or, to the contrary, widening its scope. An encounter with a related discipline and its conceptual reconstruction of the world can be helpful in this respect; for example, when the second theory treats as a variable what the first treats as a constant. It is true that 'interdisciplinarity' all too often serves as an excuse for, as it were, a lack of discipline. But this is not the case if the disciplines in question happen to complement each other, enabling them to detect and fill with substance gaps in the other's account. Then external conditions hitherto submerged in a *ceteris paribus* clause may be incorporated in the theory, or unproductive simplifications may have to give way to a more complex conceptualization of reality.

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 (Weber, 1978 [1922], pp.

730–1). 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.[2] 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 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'[3] bears 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' (Rosanvallon, 1998) 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' (Lord Wright, *Crofter Hand Woven Harris Tweed Co Ltd* v *Veitch* [1941] UKHL 2 (15 December 1941)). 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.[4]

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 concerns not only 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, both 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.

Before turning in chapter 1 to the task of developing the main themes and arguments of the book, we would like to acknowledge the generous support of colleagues, including researchers and members of the advisory board of the Work on Demand research project (workondemand.co.uk) and at the Max Planck Institute for the Study of Societies in Cologne. As is reflected in the following pages, we have learned a great deal over the years from discussions with colleagues in different disciplines and from reading their work. Emily Grabham, Richard Hyman and Karl Klare are owed particular thanks for providing helpful comments on a draft of the manuscript, as are George Owers and four anonymous readers at Polity. Special thanks are also due to our research assistant, Rex Panneman, who with his customary painstaking diligence formatted our references and put together our bibliography. The book is dedicated to Paul Dukes (1934–2021), who would have been its first reader.[5]

Notes

1 For either a theory of the evolution of work regimes or a praxeology of their regulation, we think it is rather too early, just as it is too early for a lasting assessment of the consequences of Covid-19 for work, the organization of work, and the position of workers in relation to employers. This book suggests that we, as legal scholars and social scientists, should not lose sight of, but rather draw attention to, the longer-term trajectories and tendencies in the evolution within modern capitalism of work relations and their regulation in law and politics.

2 A brief note on terminology: it was above all Karl Marx who emphasized the distinction between labour and labour power, the latter rather than the former being what is traded in markets for waged labour; not a particular work performance but an unspecified capacity to do work, to be currently specified by the ‘employer’ in a hierarchical relationship of authority. Marx scolded the economists of his time for not understanding the distinction between labour and labour power, which prevented them from understanding the nature of exploitation inherent in what later came to be called the ‘labour process’. Here, we do not stick strictly to the Marxian terminology, trusting that it will be clear from the context whether we speak of waged or subcontracted labour. Moreover, and more importantly, there are significant tendencies today in the practice of employers to fudge that distinction, tendencies with which we will take issue. In any case, when we speak of ‘contracting for work’ – which is our preferred term – we include both waged and subcontracted work, or labour, and the various intermediate forms between the two, in an effort to shed light on the way employment regimes have changed and are changing. We use ‘labour law’ broadly to refer to what is sometimes today called ‘the law of work’, namely the law regulating relations between workers and employers (not only employees and employers).

3 The concept is from Rokkan (1966).

4 In the German legal tradition of the early postwar decades, ‘Rechtsfortschritt durch Gegenmacht’ (legal progress through countervailing power).

5 The book draws in places on previously published work: Dukes and Streeck (2020a; 2020b; 2021). The research received funding from the European Research Council

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1
Introduction

While this book is ultimately concerned with the future of work relations and labour law, it largely comprises a considered look back to the postwar era of industrial democracy and to developments since that time. Viewed from this perspective, work relations today may be characterized by their impermanence and precariousness, by the weakened state of organized labour and by the ability of many employing organizations to offer terms and conditions on a 'take it or leave it' basis. Labour law may be understood to be in crisis: no longer fit for its original and defining purpose of protecting workers from unfair and unequal treatment at the hands of employers, ensuring decent work and a decent standard of living (Klare, 2004).[1] In the midst of the current decline of neoliberalism, there has been much talk of a necessary reconstruction of more sustainable and equitable forms of work and work relations.[2] While we certainly support these views, we wish at the same time to make clear how daunting the task is, involving nothing less than a reorganization of the relationship between capital and labour in line with norms of what we call social and industrial justice, to the extent that and in the way this is possible in a capitalist political economy. Just as today's labour regime has evolved in an historical process away from regulated to neoliberal capitalism, we argue that fixing it requires institutional reconstruction on a major scale and over an extended period of time, not just of work regimes but also of capitalism as a socio-economic order.

As the reference to postwar industrial democracy already indicates, there is nothing new about arguments in favour

of democracy at work. For much of the twentieth century, the many benefits of delegating decision-making in industry to trade unions and employers' associations were routinely recited in schools of industrial relations and law departments, and even by economists for as long as Keynes-the-corporatist ruled the day. The purported benefits included not only an increase in the capacity of workers to fight exploitation and seek a fairer share in the product of their labour but also improvements in production and economic efficiency. Clearly it would not do simply to reprise these old arguments without consideration of their fit with the changed circumstances of the new century, but neither should we assume that it has become necessary to reinvent the wheel. What has changed, and how, in the employment and labour market regimes of the industrialized – or, rather, de-industrializing or post-industrial – countries of democratic capitalism? Only by reaching an understanding of longer-term trends and developments in the field can we begin to address the question of how to secure, or restore, what used to be called industrial justice: dignity for working people and democracy at work.

Already in this introduction we would like to emphasize that our primary interest lies with the benefits of industrial citizenship and industrial democracy to workers, or 'the working class', as distinguished from its contributions, real or not, to economic efficiency and economic growth. Often efficiency is claimed to benefit not only employers but, automatically, workers as well, and indeed society as a whole, however defined, implying that the most desirable forms of work relations and labour law are those that best promote industrial performance. At a minimum, however, this requires institutions to be in place that provide for an equitable distribution of efficiency gains. Whether industrial rights for workers enhance productivity, rather

than productivity allowing for a better treatment of workers, as is sometimes claimed – and certainly was claimed by trade unionists and social democrats in the 1970s and 1980s – we leave for later discussion. In any case, we prefer to recognize that gains for workers may not translate into gains in efficiency; that some may even come at a price in terms of efficiency and, certainly, profitability.

Given our aim to identify what is of enduring relevance in the arguments of those who advocated, several decades ago, industrial citizenship and democracy at work, it follows that we are interested not just in developments 'on the ground' but also in how these were conceived at the time by scholars working in associated fields, especially political economy, industrial or employment relations, and labour law. With regard to geographic scope, the book focuses on the countries of the global North. While there are of course important differences between them, it is also the case that the same broad trends have been and are playing out across borders: varieties of capitalism, perhaps, but also important commonalities in the development of the institutions that govern it or govern it no longer (Thelen, 2014). We are aware of the interconnections between the condition of labour in post-industrial and in industrializing countries, and we also know that there is no neoliberal free trade solution to the issues of industrial justice across borders. The regulation of global value chains and the design of a trade regime that would allow workers in the South as well as the North to improve their situation are topics of great importance, but they are not and cannot be our primary topics here.

Concepts, institutions, ideological frames