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Introduction to Special Issue, *Labour Laws and Labour Markets: New Methodologies*

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The six papers contained in this special issue result from a collaborative research project carried out between 2015 and 2017, with funding from the *Adam Smith Research Foundation* and *John Robertson Bequest*. The papers were first presented at the University of Glasgow in November 2016.[1]

In the context of financial crisis and ensuing austerity, the research project was born out of a shared concern, empirical and normative, with the continued viability of systems of labour law that are broadly protective of workers' interests. Such systems would aim, typically, to ensure a set of at least minimum terms and conditions – minimum wages, maximum working hours, holidays and sick pay, job security etc – and, at a societal level, some measure of wage and income equality. For several decades, the continued existence of protective labour laws – together with institutions designed to allow for the collective interest representation of workers and collective regulation of working relationships – has been widely understood to be threatened as a result of myriad pressures associated with globalization and deindustrialization (eg Bercusson and Estlund, 2008). Following the economic crisis of 2008, the threat intensified. Across the globe, and especially in parts of Europe, a body of received knowledge regarding labour law and labour markets was used by national governments and supranational institutions alike to legitimise the lowering of labour standards and the dismantling of collective institutions for the regulation of employment terms and conditions and the resolution of disputes (Bruun et al., 2014). The purported 'truth' about labour markets was that legal rights and labour market institutions constitute undesirable 'rigidities' and, as such, barriers to increased employment levels and economic growth. But this truth was not always supported by empirical evidence – countries which weaken their labour laws in a bid to encourage growth do not always achieve that aim. A second motivation for the project, then, was the observation that a lack of empirical

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knowledge and evidence regarding the effects of legislation and other regulatory institutions on working relationships can allow for the emergence of erroneous and potentially harmful understandings of the capacity of law and government to address social and economic problems.

Among scholars of labour law, the reorientation of public policy in the field of employment in line with new economic orthodoxies has occasioned much soul-searching. The dominant discourse in recent decades has been one of *crisis* in the discipline: 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). The starting point for this research project was to understand the crisis in the field of labour law as having at its heart a *crisis of methodology*. In the past three or four decades, we have witnessed, across the developed world, both the marked decline of institutions for the collective regulation of employment relations and the demise of industrial relations as a field of scholarship. A crisis in methodology arises, in the first instance, because of the resultant change in the context within which employment contracts and other contracts for work (casual work, zero hours work etc) are formed: from a 'system' of (collectivised) industrial relations, to highly professionalised practices of human resource management (HRM). It is important to recognise, here, that the trajectory has not been, as might have been expected, from collective bargaining to the type of individual negotiation of contractual terms invoked by the notion of 'deregulation' and 'free' markets (Brown et al., 2000). The regulatory vacuum that appeared in the absence of trade unions and collective bargaining has been filled instead by HRM practitioners and their legal advisers exercising formalised *unilateral* control over the employment relation, using a variety of techniques – standard form contracts, substitution clauses, declarations of self-employment – to minimise the portion of legal and economic risk and responsibility to be borne by the employing organisation (Barmes, 2015).

Far from treating labour law and industrial relations as discrete systems with their own particular logics, meanwhile, governments of both the right and centre-left have tended instead to use labour legislation as one tool among several available to them to assist in the achievement of various macro-economic objectives: lower inflation, cuts in welfare spending. Since the 1990s, the need to address unemployment levels has assumed a growing prominence in government agendas. Job creation has been pursued for the most part not through publicly funded demand management, but through attempts to ensure the broad

economic conditions deemed conducive to private sector growth and employment – chief among these, *labour market flexibility*.

So understood, the changing nature of both work contracts, and the context within which they are formed and managed, can be seen to imply the increased importance of labour markets as objects of analysis for scholars of labour law. In contrast to the worker in the Fordist factory, who in the normal course of things could be reasonably sure of a job for life, workers today will likely have direct experience of (external) labour markets several times throughout their working lives. Increasingly, moreover, not only governments and policy-makers, but also workers themselves have begun to think about contracting for work, and about the laws and other institutions that regulate that process, with reference to the labour market within which they perceive themselves to act. In a variety of ways, workers are encouraged to identify – first and foremost – as market actors; as entrepreneurs of themselves (Rittich, 2014). If jobs are to be applied for, the worker must 'market' herself to the HR department of the employing organisation; if jobs do not exist, she should 'employ' herself: identify a 'gap in the market', and arm herself with the skills – 'human capital' – necessary to fill it.

Beginning in the 1990s, scholars of labour law began to re-orientate their scholarship to include consideration of labour markets, in addition to the more traditional objects of analysis: contracts of employment, collective bargaining and representative institutions, and statutory and common law rules. In explaining their reasons for doing so, they noted especially the increased prominence of economic considerations and rationalities in policy discourse and government decision-making. More prosaically, there was a suggestion that – especially in the absence of sectoral collective bargaining, regulatory in substance and reach – to neglect to consider labour markets was tantamount to neglecting to consider work contracts at all from a macro perspective: neglecting to consider, as Davies and Freedland put it, 'the larger social and economic consequences of legal controls over the constituting of the employment relationship' (1984: 11). In some quarters, the turn to the market was accompanied by an expression of dissatisfaction with sociological methods. Hugh Collins, for example, suggested that the traditional sociological approach to the study of labour law had caused 'other external analyses such as those provided by economics and liberal political theory [to be] largely ignored, so that the analysis offered by labour law was deaf to their rival interpretations of practice' (1997: 297). Others including Simon Deakin and Davies and Freedland argued, rather, that sociological approaches to the study of labour law ought to be

supplemented with economic methods (Deakin, 2007: 1170-71; Davies and Freedland, 1983: 5). If the Government's policy objectives in the field were primarily economic, wrote Davies and Freedland, then the description and analysis of them, and any associated legislation, would require engagement with economics – among other things – and in particular, labour market economics (1993: 3).

As I have argued elsewhere, it is difficult to combine economic methods and frames of reference with sociological and/or legal methods without the former becoming dominant; without economic efficiency figuring as the *key* criterion by which rules, policies and institutions ought to be judged, rather than simply one consideration among several. Where scholars of labour law adopt the labour market and the idea of labour market regulation as primary points of reference in their analysis, it is striking how non-economic considerations – such as the question of whether more, or more centralized, collective bargaining might improve working lives, securing more dignity for workers, or more democracy at work – can seem to lose their force (Dukes, 2014: 110-11. The kinds of normative argument that can be constructed, and the kinds of rule, policy and institution for which the case can be made, appear limited, accordingly (Dukes, 2014). Where goals such as worker participation, or decent wages are still spoken of, they come to be understood primarily in terms of economic rationality as 'objectives to be realised in conjunction with, even directly through market forces' (Rittich, 2014: 335). Distributive justice, social solidarity, substantive equality etc are quickly eclipsed, meanwhile, as quite secondary to the imperative of efficiency, unless they manifest in the form of an extreme 'core labour rights' or 'human rights' violation (Rittich, 2014: 335). In this way, the desire to combine economic with other methods results in a form of interdisciplinarity, which, as Michael Fischl has observed, '[harnesses] the social in service of the market, elevating economics to the role of . . . *disciplinarian*' (Fischl, 2018).

Recognising the importance of labour market analysis to a full and useful understanding of law and policy in the field of work and employment, the central aim of our research project was thus to give consideration to methodologies applicable to the study of labour laws *and* labour markets: methodologies drawn, in particular, from the fields of institutional economics, economic sociology and political economy. The intention was that the research undertaken in the course of the project would contribute to the longer-term research goal of identifying and refining a methodology or methodologies that would allow for the analysis of the role of (labour) law in constituting markets and, at the same time, for recognition of the

inherently political nature of the question *how* labour markets are constituted, *how* they are combined with or constrained by non-market institutions and modes of action and interaction, and *who* falls to benefit and who to be disadvantaged by particular market configurations and orderings.

In the first contribution to this issue, Judy Fudge focuses her attention on 'Modern Slavery, Unfree Labour and the Labour Market'. She addresses the question of the particular conception of the labour market that informs contemporary approaches to labour legislation and public policy in the UK, using the example of the legal characterization of labour unfreedom as a means of doing so. Her method is to examine the Modern Slavery Act 2015, and what she terms the 'social dynamics' of legal characterization involved in its drafting and adoption. In contrast to positivist accounts of unfree labour, which tend to be concerned with assigning the appropriate legal categories to different forms (slave labour, forced labour etc), Fudge develops an account of legal characterization and *jurisdiction* that is attentive to modes of governing and the role of political and legal differentiation both in *producing* labour exploitation and unfree labour, and in developing strategies for their elimination. Her central argument is that the modern slavery paradigm tends to reinforce the view that labour exploitation and unfreedom are the result of morally culpable individuals, whose behaviour ought to be criminalized, rather than systemic and institutional.

In Diamond Ashiagbor's contribution, the aim lies with 'Theorising the Relationship between Social Law and Markets in Regional Integration Projects'. Referring to the work of Karl Polanyi and Sabine Frerichs, Ashiagbor seeks to test the benefits of an 'economic sociology of law' as a methodological approach through which to rethink the relationship between law, markets and the state. Her focus is on social rights or labour rights conceived as a means of mediating the operation of markets, or as we might otherwise say, of limiting the reach of markets. The regional integration projects referred to in the title of the piece are the European Union and the African Union. As Ashiagbor clarifies, however, she is not concerned to compare the two regions, as such, but rather to interrogate the utility which accounts of the interaction between markets and (social) law, developed for and applied in the context of the global North, can have in application to the global South. She asks, specifically, then: what is the ameliorative potential of regional collective action by developing states, which are industrialising as they integrate into world markets?

In debates regarding the purported crisis in the discipline of labour law, Simon Deakin has been prominent among scholars who have sought to challenge 'head-on' the standard economic view that protective labour laws create unnecessary rigidities, inhibit economic growth, and ultimately harm those who they are intended to protect. In his contribution to this issue, 'The Use of Quantitative Methods in Labour Law Research: an Assessment and Reformulation', Deakin turns his attention to quantitative methods and, especially, the use of indicators to assess the effects of labour law rules on employment, productivity and efficiency. His focus here is with the technical or methodological foundations of indicators, and while he is generally positive about the utility of indicators as a means of gathering new evidence on the nature and effects of labour law rules, he is strongly critical of the use made of them by various actors including the World Bank in its *Doing Business* reports. The empirical studies relied upon in advancing the claim that protective labour laws damage economic growth are now 'mostly a decade or more old, used statistical techniques which were not particularly advanced for that time, and have been superseded since'.

Shelley Marshall makes the case in her article for the benefits of 'Using Mixed Methods to Study Labour Market Institutions'. In order to do so, she reports findings from an ongoing research project involving the International Labour Organisation's *Better Factories Cambodia*. As Marshall explains, the latter was launched in 2001, as a direct result of a trade agreement between Cambodia and the U.S. which secured Cambodia better access to the U.S. market in exchange for improved working conditions. Today it provides not only monitoring, but also training and advisory services. Building on work published in 2017, Marshall's main contention is that an historical institutionalist approach of the kind developed by political economists, including Kathleen Thelen, combined with repeated fieldwork can provide novel insights into an institution such as *Better Factories Cambodia*, giving us a much better understanding of its potentialities and limitations.

With a focus on the field of parental rights in working life in Sweden, Jenny Julén Votinius explores the existence and significance of 'Normative Distortions in Labour Law'. Her aim is to reveal how conflicting norms – both social and legal in nature – can tend to hinder or distort the effective application of protective labour law; how, in that way, the *mediating* potential of labour or social rights, as Ashiagbor put it, can be undermined. With reference to Max Weber, Julén Votinius begins her discussion by identifying three ideal-typical norms prominent in the regulation of parental rights at work: the parenthood norm, which suggests

that care obligations are born by both parents; the motherhood norm, which suggests rather that parenting is primarily the duty of the mother; and the primacy of working life norm, which directs that parenting commitments must not encroach upon work. Through an examination of the functioning of these principles in Swedish workplaces, she constructs her main argument: that assessment of the relative strength of conflicting norms is crucial to an accurate assessment of the efficacy of particular (labour) rights.

Finally in this issue, Robert Knegt takes a socio-historical approach to consideration of 'Labour Constitutions and Market Logics'. He begins by referring to the hegemony of the kind of economic perspectives on labour markets outlined in this Introduction, and sets himself the task of evaluating labour law's strategies for realizing justice in the fact of this significant challenge. In order to identify the consequences of the new economic 'common sense' for the identification of a methodology appropriate to labour law, Knegt engages critically with earlier writing by Deakin, on the legal regulation of labour markets, and with my work on the enduring importance of the idea of the 'labour constitution', first developed by the German-Jewish scholar, Hugo Sinzheimer, in the Weimar Republic (Dukes, 2014). Knegt's main argument is that a socio-historical perspective on the role of legal models in actually shaping labour relations can enrich the analytical potential of the concept of a 'labour constitution'. Proper account must be taken of the fact that labour relations and the normative models that partly constitute them are subject to persistent change.

References:

Barmes L (2015) *Bullying and Behavioural Conflict at Work*. Oxford: Oxford University Press.

Bercusson B and Estlund C (2008) *Regulating Labour in the Wake of Globalisation*. Oxford: Hart.

Brown W, Deakin S, Nash D et al (2000) The Employment Contract: from Collective Procedures to Individual Rights. *British Journal of Industrial Relations* 38(4): 611-29.

Bruun N, Lörcher K, Schömann I (eds) (2014) *The Economic and Financial Crisis and Collective Labour Law in Europe*. Oxford: Hart.

Collins H (1997) The Productive Disintegration of Labour Law. *Industrial Law Journal* 26(3): 295-309.

Davidov G and Langille B (2011) *The Idea of Labour Law*. Oxford: Oxford University Press.
Davies P and Freedland M (eds) (1983) *Kahn-Freund's Labour and the Law*. London: Stevens.
Davies P and Freedland M (1984) *Labour Law: Text and Materials*. London: Weidenfeld and Nicolson.
Davies P and Freedland M (1993) *Labour Legislation and Public Policy*. Oxford: Clarendon.
Deakin S (2007) A New Paradigm for Labour Law. *Melbourne University Law Review* 31(3): 1161-73.
Dukes R (2014) *The Labour Constitution: the Enduring Idea of Labour Law*. Oxford: Oxford University Press
Fischl RM (2018) Efficiency and its Discontents. *Jurisprudence*, forthcoming
Rittich K (2014) Making Natural Markets: Flexibility as Labour Market Truth. *Northern Ireland Legal Quarterly* 65(3): 323-344.