

Dukes, R. and Kirk, E. (2021) Law, economy and legal consciousness at work. *Northern Ireland Legal Quarterly*, 72(4), pp. 741-770.

The material cannot be used for any other purpose without further permission of the publisher and is for private use only.

There may be differences between this version and the published version. You are advised to consult the publisher's version if you wish to cite from it.

<https://eprints.gla.ac.uk/258671/>

Deposited on 09 November 2021

Enlighten – Research publications by members of the University of  
Glasgow

<http://eprints.gla.ac.uk>

# Law, Economy and Legal Consciousness at Work

Ruth Dukes \* and Eleanor Kirk \*

## Abstract

Building on earlier work, we state the case for an economic sociology of labour law which recognises and investigates the co-constitutive nature of law and the economy. Reviewing recent literature which shares this ambition, we argue that an important element of a co-constitutive theory of law and the economy is an understanding of the ‘legal consciousness’ of economic actors, meaning, in essence, their participation in the construction of legality or legalities, defined here as social structures which both enable and constrain actors. While a small number of studies have sought to understand the legal consciousness of workers, none that we are aware of has investigated the legal consciousness of human resource managers. This is a significant omission. Drawing on existing research in the field, we demonstrate the importance of human resource management (HRM) as a site where legalities can become bound up with other, especially market-focused and managerial, rationales, with significant consequences for compliance and enforcement. As a first step towards understanding the legal consciousness of human resource managers, we then situate HRM within a context of contradictory professional discourses and ideologies, and of processes of justification and legitimisation of contemporary capitalism.

## Introduction

Scholars of labour law have traditionally been guided in their research by a concern to understand the effects of the law on real people.<sup>1</sup> Indeed, in the formative period of labour law scholarship, in the early and middle decades of the twentieth century, it was almost characteristic of the field that doctrinal analysis should be combined with sociological

---

\* School of Law, University of Glasgow. This project received funding from the European Research Council (ERC) under the European Union’s Horizon 2020 research and innovation programme (grant agreement No 757395). We are grateful to the following for constructive comments and criticisms: Nicole Busby, Emily Rose, Alessio Bertolini, Gregoris Ioannou, Ou Lin and two anonymous referees.

<sup>1</sup> KW Wedderburn, *The Worker and the Law* (3<sup>rd</sup> ed, Pelican, 1983) 860.

methods aimed at understanding not only the law in books but also the law in action.<sup>2</sup> When empirical study uncovered the limited reach of formal law – statutory and judge-made rules – in respect of the regulation of working relations, scholars widened their focus to include, in addition, the social norms that governed those relations and the day-to-day organisation of work. The contract of employment, it was noted, was technically speaking the key legal institution in the field; in substance, however, it was little more than an empty shell – a bare agreement to work in exchange for wages.<sup>3</sup> The rules that mattered were found, for the most part, not in the contract, in legislation or the common law, but rather in collective agreements, custom and practice, and the rule-books of workplaces and trade unions.<sup>4</sup>

In recent years, we have witnessed the beginnings of a new flourishing of socio-legal scholarship in the field of labour law, involving the utilisation of a range of sociological, ethnographic and socio-economic methods to shed light on the application and enforcement of the law in a range of settings.<sup>5</sup> In contrast to the largely collectivised field analysed by Otto Kahn-Freund and others in the twentieth century, employment relations today are shaped by the weakening and side-lining of trade unions and collective bargaining and by on-going processes of juridification and human-resource-managerialization. In place of the more or less unitary labour constitutions of the postwar decades, the organisation of work and working relations is highly ‘fissured’, with employing organisations making ever greater use – in the interests of maximizing flexibility and cutting costs – of a variety of casual and commercial contractual forms in preference to contracts of employment.<sup>6</sup> In policy-making circles and in firms, neo-classical economic thinking about working relations is dominant, together with the associated characterisation of labour laws as ‘red-tape’: unhelpful limitations on actors’ freedom of action.

Among the various empirical methods and framings adopted by scholars in an effort to make sense of these trends, a particularly promising, but as yet underdeveloped, line of research focuses on the *legal consciousness* of actors.<sup>7</sup> Having grown out of critical legal

---

<sup>2</sup> R Pound, ‘Law in Books and Law in Action’ (1910) 44 *Amer Law Rev* 12.

<sup>3</sup> O Kahn-Freund, ‘Legal Framework’ in A. Flanders and H. Clegg, *The System of Industrial Relations in Great Britain* (1954)

<sup>4</sup> H Arthurs, ‘Understanding Labour Law: The Debate over ‘Industrial Pluralism’’ (1985) 38 *Current Legal Problems* 83.

<sup>5</sup> E.g. A Ludlow and A Blackham (eds), *New Frontiers in Empirical Labour Law Research* (Hart, 2015)

<sup>6</sup> D Weil, *The Fissured Workplace* (Harvard, 2017)

<sup>7</sup> E Kirk, ‘Legal Consciousness and the sociology of labour law.’ (2020) *Industrial Law Journal* Advance article: <https://doi.org/10.1093/indlaw/dwaa020> .

studies of hegemonic legal narratives or rationales as expressed, especially, in the legal consciousness of members of the judiciary,<sup>8</sup> legal consciousness research (LCR) today focuses on laypeople's routine experiences and perceptions of law in everyday life. 'Legality' is defined here as a social structure of meaning and normativity and 'legal consciousness' as actors' participation in the ongoing production and reproduction of that social structure.<sup>9</sup> In the field of labour law, one recent study has focused on the legal consciousness of care workers and another on the legal consciousness of workers involved in disputes concerning their employment rights.<sup>10</sup>

In what follows, we consider the potentially much greater contribution that LCR could make to the study of labour law today. In doing so, we build on earlier work, which argued for an *economic sociology of labour law*, or ESLL, that would recover the tradition of socio-legal research in the field in a manner that allowed for account to be taken too of the increasingly prominent individualistic and commercial aspects of working relations.<sup>11</sup> The promise of an ESLL, as we explain in part one, is that it neither 'over-sociologizes' the study of law and the economy,<sup>12</sup> nor encourages the adoption of overly reductive conceptions of social action as 'rationally economic',<sup>13</sup> but instead treats law and the economy as two aspects of social reality, applying sociological approaches, concepts and methods to the two fields and to instances of their interaction.<sup>14</sup> LCR complements this approach, as we explain in part 2, helping to transcend conceptual gaps between the micro and the macro, and between agency and structure. In part three, we argue that the legal consciousness of human resource (HR) professionals is of particular interest to scholars of labour law, pointing here to the central role that the profession plays in implementing, translating, textualizing and

---

<sup>8</sup> K Klare, 'Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941' (1978) 62 *Minnesota Law Review* 265

<sup>9</sup> P Ewick and S Silbey, *The Common Place of Law: stories from everyday life* (Chicago University Press, 1998).

<sup>10</sup> On care workers see L Hayes, *Stories of Care: a Labour of Law* (Palgrave 2017). On disputes see E Kirk, 'The 'Problem' with the Employment Tribunal System: Reform, Rhetoric and Realities for the Clients of Citizens' Advice Bureaux' (2018) 32(6) *Work, Employment and Society* 975-91; N Busby and M McDermont, Fighting with the Wind: Claimants' Experiences and Perceptions of the Employment Tribunal, 2019 *Industrial Law Journal* <https://doi.org/10.1093/indlaw/dwz018>;

<sup>11</sup> R Dukes, 'The Economic Sociology of Labour Law' (2019) 46 *Journal of Law and Society* 396

<sup>12</sup> M Harvey, 'Productive systems, markets and competition as 'Instituted Economic Process' in B Burchell, S Deakin, J Michie and J Rubery (eds), *Systems of Production: Markets, Organisations and Performance* (Routledge 2003).

<sup>13</sup> F Block, *Capitalism: the Future of an Illusion*. (University of California Press, 2018)

<sup>14</sup> S Frerichs, 'Studying Law, Economy, and Society: A Short History of Socio-Legal Thinking' (2012) *Helsinki Legal Studies Research Paper* No. 19

encoding law. We demonstrate how an investigation of the legal consciousness of HR professionals could aid understanding of the manner in which legal rationales can become bound up with other, especially, market-focused and managerial rationales: how law can become ‘managerialized’,<sup>15</sup> and in the process, as Barmes put it, lose its normative integrity.<sup>16</sup> Such managerialization of the law has significant implications for questions of compliance and law enforcement. From the point of view of the researcher, however, getting at the legal consciousness of an individual or group of individuals is a notoriously difficult task, which typically involves semi-structured interviews carried out over a period of several hours. With such a programme of research in mind, we lastly take the preliminary step of situating HRM within a context of contradictory professional discourses and ideologies, and of processes of justification and legitimation of contemporary capitalism.<sup>17</sup>

## 1. The Economic Sociology of Labour Law

When legal scholars first conceived of labour law as a distinct branch of the law, around the beginning of the twentieth century, they characterised it in contradistinction to private law or economic law as *social law*, intending this characterization to have both descriptive and normative force.<sup>18</sup> In substance, the field encompassed all legal rules regulating relations between workers and employers and their respective representatives (trade unions, works councils, employers’ associations). By critical scholars, such as Hugo Sinzheimer, the overarching aim of these rules was argued to lie with the decommodification of labour and the decommercialization of employment relations.<sup>19</sup> By recognizing and guaranteeing the role of labour in the regulation, or ‘ordering’, of the economy, labour law sought to emancipate workers from their relation of subordination to employers, rendering them not only free from employer efforts to dictate the social and economic conditions of his existence,

---

<sup>15</sup> L Edelman, *Working Law* (Chicago, 2016)

<sup>16</sup> L Barmes, *Bullying and Behavioural Conflict at Work: the duality of individual rights*. (Oxford 2015)

<sup>17</sup> In a forthcoming article – ‘Law and Legalities at Work: HR Practitioners as Quasi-Legal Professionals’ (2021) *Industrial Law Journal* – Eleanor Kirk draws on interviews, observation and discourse analysis, to present rich qualitative data on the legal consciousness of HR professionals. In doing so, she builds explicitly on the extended discussion of conceptual and methodological issues contained in this paper.

<sup>18</sup> This part of the paper draws on Dukes 2019, as n.11.

<sup>19</sup> H Sinzheimer, *Grundzüge des Arbeitsrechts*. (2nd ed, Verlag von Gustav Fischer, 1927)

but free, too, to participate in the formation of those conditions. Accordingly, scholars focused their attentions on those laws that were intended to facilitate and encourage the emergence and ‘peaceful’ functioning of collective systems of rulemaking and dispute resolution. The individual contractual and market aspects (*Preiskampf, Konkurrenzkampf*<sup>20</sup>) of the employment relation were treated as having been largely suppressed by the collective and the social.

In the decades of political consensus that followed the end of the Second World War, labour law was defined again in contradistinction to private law, but now commonly as the body of law which addressed the imbalance of power in the employment relation.<sup>21</sup> A central weakness of the approach, and one which became increasingly obvious as consensus frayed, was its failure to take adequate account of economic change – encompassing developments and variations in the organisation of production – as a driver of social and legal change. With the beginnings of deindustrialization, the growth of services and the feminization of the formally employed workforce, the postwar framing of labour law became increasingly outdated, still tied to a static Fordist model of employment – or ‘industrial’ – relations, and a corresponding notion of the ostensibly ‘standard’ employment model. As governments of the centre left as well as the centre right embraced neoclassical economic precepts regarding the desirability of free markets and flexible businesses, scholars developed novel ways of framing their research that focused no longer on trade unions and collective bargaining but instead on the contract of employment and the labour market. It became increasingly common, as the decades wore on, to think of the subject not as labour law but as *labour market regulation*.<sup>22</sup>

In recent years, a small but growing number of researchers have looked to economic sociology and the economic sociology of law as offering an approach or set of approaches that might allow for adequate account to be taken of the social and legal, as well as the individual and economic aspects of employment relations.<sup>23</sup> Labour market framings, it has

---

<sup>20</sup> M. Weber, *Economy and Society* (University of California Press, 1978), pp. 92, 108

<sup>21</sup> P. Davies and M. Freedland (eds), *Kahn-Freund's Labour and the Law* (3<sup>rd</sup> ed. Stevens, 1983), 18.

<sup>22</sup> For discussion, see R Dukes, *The Labour Constitution: the Enduring Idea of Labour Law* (Oxford, 2014), chapter 5.

<sup>23</sup> eg N. Zatz, ‘Prison Labor and the Paradox of Paid Nonmarket Work’, in N. Bandelj (ed.) *Economic Sociology of Work* (Emerald, 2009); M. Coutu and T. Kirat, ‘John R. Commons and Max Weber: The Foundations of an Economic Sociology of Law’ (2011) 38(4) *J. of Law and Society* op. cit., n. 469; K. Rittich, ‘Making natural markets: flexibility as labour market truth’ 65(3) *Northern Ireland Legal Q.* 323; D Ashiagbor, ‘Theorising the

been argued, could tend to highlight economic motives and rationalities over others, focusing the researcher's gaze on the initial, transactional element of the working relation and underemphasising the importance of daily lived experience.<sup>24</sup> They could obscure the existence of deep-seated conflicts of interest and the inherently political nature of law, suggesting instead that policy- and law-making are essentially technical exercises, best left to the experts.<sup>25</sup> Drawing on the work of Max Weber, one of the authors of this article has argued instead for an ESLL that combines political economy framings with a sociological analysis of employment relations, defining these as at once economic, legal and social relations.<sup>26</sup> Law figures here as essentially contested, both politically in the sphere of policy making and legislation, and socially by the lay actors whose behaviour is on the one hand 'oriented to the law',<sup>27</sup> and who, on the other, reconstruct juridical rules in their daily lives as 'maxims of action'.<sup>28</sup> Law is not a simple external constraint on (economic) social action, in other words, but is internal to situated behaviour and social interactions. How people think about work and about labour law can be shaped by different rationales or logics; for example, workers might understand themselves to be motivated by a wish to maximize their income, or alternatively, to earn just enough to support themselves, their dependants and their existing way of life.<sup>29</sup> From the point of view of the researcher, lay conceptions, shared beliefs, dominant rationales and social norms are all recognised as centrally important to an empirical understanding of law.<sup>30</sup>

Dukes' ESLL is constructed around a primary focus on the key legal institution of the contract for work.<sup>31</sup> With Weber, the act of contracting for work is understood as *economic social action that is oriented to the legal order*. Contracting does not end with a one-off offer and acceptance of terms, it is emphasised, but rather continues to occur as the contractual framing of the work-for-payment bargain changes over time. As an aid to analysing the

---

relationship between social law and markets in regional integration projects' (2018) 27 *Social & Legal Studies* 435.

<sup>24</sup> Dukes, as n. 23, chapters 5 and 8

<sup>25</sup> Ibid; D Massey, 'Vocabularies of the Economy' in S Hall, D Massey and M Rusting (eds), *After Neoliberalism?* (Soundings, 2013).

<sup>26</sup> Dukes, as n.11.

<sup>27</sup> Weber, as n.20, 33

<sup>28</sup> M. Weber, *Critique of Stammler* (Free Press, [1905] 1977).

<sup>29</sup> M. Weber, *The Protestant Work Ethic and the Spirit of Capitalism* (Charles Scribner's Sons, 1930)

<sup>30</sup> R Dukes and W Streeck, 'Labour Constitutions and Occupational Communities: Social Norms and Legal Norms at Work' (2020) 47(4) *Journal of Law and Society* 612-38.

<sup>31</sup> Dukes, as n.11.

conditions under which contracting for work proceeds, Dukes' ESLL looks to Weber's notion of the *labour constitution* – the historically-given ensemble of rules, institutions, social statuses, economic and technological conditions, which together shape decision-making in respect of the question who gets what work under which terms and conditions.<sup>32</sup> It proposes that the labour constitution be used as a heuristic to map the various contexts, or regulated spaces, within which contracting takes place. This would allow for comparisons to be drawn between different workplaces, sectors, jurisdictions and between different points in time, in a manner that might aid the construction of hypotheses or the drawing of conclusions regarding the influence of particular laws and institutions on contracting behaviour. It would provide a means of moving beyond the micro level to the meso and macro levels of analysis, without defaulting automatically to 'the labour market' – and all which that might imply or obscure – as that which frames the field. As such, Dukes' ESLL could be helpful to scholars and policymakers alike in assessing the significance of particular labour market institutions to the achievement of policy goals, including but by no means limited to economic flexibility and growth.

An example of what is envisaged here can be found in Eric Tucker's work on the Uber model of taxi provision.<sup>33</sup> Seeking to place Uber in historical perspective, Tucker develops a stylized history of what he calls the 'taxi capitalisms' of twentieth century Toronto, from a largely unregulated sector, through various iterations of a medallion-, or permit-based, system, to the appearance most recently of Uber. In sketching these successive 'capitalisms' – or labour constitutions – Tucker's intention is to develop a heuristic that will allow him to identify the consequences for workers of changes to the regulation of the taxi sector, and to the business models adopted by enterprises in that sector, including the preferred form of (contractual) relationship with drivers. Particular attention is paid to the questions of how value was abstracted, or profits made, at specific points in time, and how business models and working relations ('social relations of production') were adapted in the light of new technologies, new rules, and changing levels of competition. A second point of focus lies with

---

<sup>32</sup> See especially M. Weber, *Verhältnisse der Landarbeiter im ostelbischen Deutschland* (1892); M. Weber 'Entwicklungstendenzen in der Lage der ostelbischen Landarbeiter', (1894) 77 *Preussische Jahrbücher* reprinted in M. Weber, *Gesammelte Aufsätze zur Sozial- und Wirtschaftsgeschichte* (Mohr, 1924) 498; discussed Dukes and Streeck as n.15 above.

<sup>33</sup> E. Tucker, 'Uber and the Making and Unmaking of Taxi Capitalisms' in D. McKee, F. Makela and T. Scassa (eds.), *Law and the 'Sharing Economy': Regulating Online Market Platforms* (University of Ottawa Press, 2019).



the changing opportunities for those creating value – the drivers – to collectivise and to fight for the right to a greater share of the farebox income. In order to fulfil the ambitions of an ESLL, Tucker’s sketch of labour constitutions could usefully be supplemented with analysis of the meaning which the contractual relations have for individual drivers and brokers, or drivers and medallion owners. (Does the driver understand himself to be contracting for work? Does he understand himself therefore to be owed a minimum wage and other employment rights? Alternatively, does he regard himself as truly self-employed? Which aspects of his working relationship does he object to and why? And so on.) The question would then arise whether these understandings had led to the emergence of particular practices or social norms; whether they had resulted in collective action, or in collective lobbying or strategic litigation in an effort to effect legal change.

A second example of what we have in mind we speak of ESLL can be found in Lydia Hayes’ 2017 book, *Stories of Care*.<sup>34</sup> Here, Hayes describes and analyses three sectoral labour constitutions which together chart the chronological progression in the care sector in England from a welfare state, citizenship model of care provision to a fully marketised one. In the first, local authorities are under a statutory duty to provide care for those in need of it, which they fulfil by employing care workers directly; in the second, the provision of care is outsourced by local authorities to private companies; in the third, individuals bear responsibility for purchasing their own care and the statutory duty of local authorities is reduced to an obligation to make individualised cash payments to service-users. With the aim of analysing the three labour constitutions and understanding the consequences – for workers, service-users and society as a whole – of the progression from one to the next, Hayes develops a method which juxtaposes what she calls ‘character narratives’ with detailed analysis of the policy, legislation and case-law relating to particular elements of care work and the terms and conditions of care workers. Each character narrative is compiled from the responses of multiple interviewees and, though presented as a single, coherent ‘story’, or report, is intended to communicate particular aspects of the *common* experiences of care workers and their *common* attempts to make sense of those experiences.<sup>35</sup> Out of several individual experiences, in Hayes’ terms, these ‘imaginative devices’ are used to present a ‘collective

---

<sup>34</sup> Hayes, as n.10 above.

<sup>35</sup> Ibid. 21-4

body of knowledge':<sup>36</sup> richly detailed descriptions of how it is to care for a living.<sup>37</sup> Proceeding from a recognition of the co-constitutive nature of law and social reality – 'law at work is ... intertwined with the materiality of paid caregiving' – Hayes seeks to uncover how social assumptions about care and care workers, about social class and gender, shape (formal) law. At the same time, she is equally concerned to understand how legislation and judicial decisions shape discourses which reinforce, or challenge, these social assumptions and workers' own perceptions of their jobs and working relations.<sup>38</sup>

'Legal thinking and experiential existence are mutually reinforcing; law and legal concepts shape the circumstances and situations in which paid care is produced. Homecare workers are conceptually located where the very fabric of legal ideas about employment begins to fray. However, 'being' a homecare worker is central to notions of personal identity and to understandings of the value and purpose of labour, community routines and the organisation of time. It is in the imbrications of law and experience – the overlapping, collisions and enfolding – that marginality attains its material construction.'<sup>39</sup>

In her analysis of policy, legislation and case law, Hayes proceeds by identifying the dominant narratives or rationalities surrounding care work.<sup>40</sup> Historically, she points out, economic rationales – including the core notion that work is sold by care workers in return for a wage – have been obscured in the law by narratives that foreground maternal nurture and female altruism: care is women's work, akin to mothering; it is owed by women to their families and even, perhaps, to their friends and neighbours. Today, echoes of such reasoning can be found in judicial decision-making concerning the right of care workers to a minimum wage, which taken as a whole tends to suggest that courts and tribunals regard unpaid labour as a component of care work; the cost of caregiving as one that should be borne, at least in part, by the working-class women who provide the care.<sup>41</sup> They can be found, too, in the pronouncements of politicians, who characterise care as something that should be provided 'within the family' and not by the state: in other words, by women, for free.<sup>42</sup> In the most

---

<sup>36</sup> Ibid. 24

<sup>37</sup> Ibid. 1

<sup>38</sup> Ibid. 4-5

<sup>39</sup> Ibid. 11

<sup>40</sup> Ibid. 11

<sup>41</sup> Ibid. 135-52

<sup>42</sup> Ibid. 202

recent, third sectoral labour constitution, economic rationales are emphasised rather than obscured in the legislation, as the imperative to create a market in care (so as to furnish individual care-users with *choice*) casts workers in the role of entrepreneurs.<sup>43</sup> What the dominant legal discourse masks, in this case, is the manner in which the construction of a market in care can render conflictual both the relations between workers and those for whom they care, and the relations among workers. Service-users have an interest in negotiating as low an hourly rate as possible so as to eek out their individual care allowance; they may prefer the care to be delivered at different times throughout the day, adding to care workers' travelling time; their care needs might conflict with the workers' needs for breaks, holidays, and sick leave. In a bid to secure sufficient hours' work in a week, and to extract a promise of future hours in weeks to come, meanwhile, workers may compete with each other on the basis of their willingness to work for wages below the legal minimum, to forego protections of their health and safety at work, and to undertake some tasks for no pay at all.<sup>44</sup> Whether the economic nature of the working relationship is obscured or emphasised in the law, then, wages and working conditions for the care workers remain singularly poor.

Throughout her book, Hayes' concern to understand the workers' own perceptions of care work is much in evidence: to treat them, as she says, not as the objects of legal regulation but as 'the participative and experiencing subjects of law at work'.<sup>45</sup> Through her character narratives, she reveals how the rationales dominant in the law and in media portrayals of care are internalised, or partly internalised, by the women, who come to view themselves as 'cheap nurses', as maternal nurturers, or as entrepreneurs. Sometimes the women voice prevailing narratives, sometimes they resist them, sometimes they do both, almost in the same breath.<sup>46</sup> A key term for Hayes is 'institutional humiliation', used by her to refer to the lack of respect afforded by the state to care workers as a collective group; to the workers' own recognition of being unjustly treated as a group; and to the lived reality of economic and social detriment.<sup>47</sup> She notes the workers' belief that they are low paid; that their training and skills are not recognised in their rate of pay;<sup>48</sup> that this can be explained, at least in part,

---

<sup>43</sup> *Ibid.* chapter 4

<sup>44</sup> *Ibid.* 164

<sup>45</sup> *Ibid.* 3

<sup>46</sup> *Ibid.* 22

<sup>47</sup> *Ibid.* 4

<sup>48</sup> *Ibid.* 48, 49

by the devaluing of female labour generally and homecare in particular.<sup>49</sup> In this way, Hayes deals creatively and highly effectively with questions concerning the law and the legal consciousness of a group of actors who do not necessarily think of their working relations in legal terms. It is not her intention in this volume to address questions of unionization or coordinated campaigns for better terms and conditions or changes to the law. Nor does she provide detailed descriptions or analyses of workers' experiences in challenging employers or taking legal claims to employment tribunals.<sup>50</sup> Such ideas, activities and activism, but also their lack, are vital to a full appreciation of legal consciousness, and constitute a central element of an ESLL. We believe it is important to open up and develop the conceptual resources associated with both.

## 2. Legal Consciousness and ESLL

Dukes' ESLL is interpretive in orientation, focused in the first instance on the act of contracting for work and the actors' own understandings of their contracting behaviour, and seeking thereafter to address the question of how that behaviour is shaped by the particular labour constitution(s) within which contracting takes place. It seeks to provide a framing for an empirical analysis of the law, moving beyond Pound's distinction between the 'law in books' and the 'law in action' to uncover the normative arrangements that govern everyday socio-economic life.<sup>51</sup> It is concerned, therefore, with how actors either reproduce or transform their socio-economic realities, with how they internalise or reject legal-economic rationales and ideologies, and with how such internalisation or rejection can serve to neutralise or embolden workplace and legal and political resistance.<sup>52</sup>

Legal consciousness is a concept that can assist with this task, in particular by transcending conceptual gaps between the micro and the macro, and between agency and structure, that might otherwise risk being reinforced by the notion of *contracting for work*

---

<sup>49</sup> *Ibid.* 37-8

<sup>50</sup> *Ibid.* 179-83

<sup>51</sup> M Krygier, *Philip Selznick: Ideals in the World* (Stanford University Press, 2012). 141, citing Pound as n. 2 and E. Ehrlich *Fundamental Principles of the Sociology of Law*. (Harvard University Press, 1936). For a recent discussion of Ehrlich in the context of labour law see E Rose 'Reinterpreting Law's Silence: Examining the Interconnections between Legal Doctrine and the Rise of Immaterial Labour'. (2021) *Journal of Law and Society*, forthcoming.

<sup>52</sup> M Archer, *Realist Social Theory: The Morphogenetic Approach*. (Cambridge University Press, 1995).

within a *labour constitution*. As we have seen, the term ‘legal consciousness’ is used quite specifically by those engaging in LCR to mean participation in the process of constructing legality, with legality understood as a structural component of society – participation, therefore, in the construction of economic and other social relations.<sup>53</sup> Importantly, then, legality figures here as an emergent feature of everyday life rather than an ‘external apparatus acting upon social life’.<sup>54</sup> More concretely, legality embraces ‘meanings, sources of authority, and cultural practices that are commonly recognized as legal, regardless of who employs them or for what ends’.<sup>55</sup> The primary focus is on society rather than law *per se*, implying a critique of alternative, ‘law first’ approaches that seek to track causal relations between law, on the one hand, and society on the other.<sup>56</sup>

LCR concerns the question of how figments of law are interwoven into worldviews, and into our very social fabric. In line with its methodological commitment to researching the meaning of social action from the perspective of lay actors, it seeks to honour those actors’ own conceptions of law, embracing legal pluralism and defining law broadly to include state law and multifarious forms of non-state law, from the more formalised realms of policies and procedures to more informal customs and practices and otherwise authoritative norms.<sup>57</sup> In LCR, law is recognised to perform an ideological function, and legal ideologies, containing clusters of discursive elements which may operate at a distance from doctrinal discourses, to contribute to socio-economic reproduction.<sup>58</sup> Notwithstanding the term *legal consciousness*, LCR recognises that most people rarely reflect upon, or become fully aware of, the ways in which their behaviour is legal, and therefore how they contribute to the reproduction of legalities in their everyday lives. Instead, people mostly take for granted the structures of legality within their lives, and legal ideologies form an unconscious though constituent and constitutive element of their lived-relations.<sup>59</sup> LCR therefore raises the question of legal domination, the lived experience of which ‘consists largely in a series of unreflective

---

<sup>53</sup> Ewick and Silbey, as n.8.

<sup>54</sup> *Ibid* at 17.

<sup>55</sup> *Ibid* at 22.

<sup>56</sup> D Cowan, ‘Legal Consciousness: Some Observations.’ (2004) *Modern law Review*. 67(6): 928, at 929.

<sup>57</sup> S Halliday, ‘After Hegemony? The Varieties of Legal Consciousness Research’ (2019) *Social and Legal Studies* 28(6) 859, at 863.

<sup>58</sup> A Hunt, *Explorations in Law and Society: towards a constitutive theory of Law*. (Routledge, 1993) at 7 & 148.

<sup>59</sup> L Althusser, *On the Reproduction of Capitalism: Ideology and Ideological State Apparatuses*. (Verso, 2014/1971). Ewick and Silbey as n.9 above at 15.

actions'.<sup>60</sup> It rejects simplistic notions of false consciousness, seeking instead, and attempting to understand, the complexities of legal consciousness in the perceptions and actions of humans as knowledgeable agents. Legal consciousness, it is recognised, may be 'complex, fragmentary and contradictory'.<sup>61</sup>

The concept of legal consciousness has been utilised in a variety of ways by different scholars.<sup>62</sup> In this article, we are primarily concerned with the critical tradition in LCR,<sup>63</sup> while also taking account of some recent critiques of that tradition.<sup>64</sup> Drawing on critical legal studies and legal realism, the critical tradition was born from a concern to explain why people tend to display considerable trust in legal institutions, despite what appear to be 'consistent distinctions between ideal and reality, law on the books and law in action, abstract formal equality and substantive, concrete material inequality'.<sup>65</sup> Addressing this puzzle in their seminal study of *The Common Place of Law*, Ewick and Silbey outlined three predominant 'metastories' found within popular consciousness, which express contradictions in the ideals of law, how it is engaged, experienced and resisted by laypeople.<sup>66</sup> These 'metastories' are interpretive frames which, 'represent and shape how people experience legality'.<sup>67</sup> People draw from these frames to form a 'a picture of how the law works', invoking different sets of 'normative claims, justifications, and values to express how the law ought to function'.<sup>68</sup> The metastories involve, firstly, reverence to the law and legal system conceived as transcendent, impartial and magisterial ('before the law'). Secondly, they involve a conception of law as a game in which winners and losers deploy skill, strategies and tactics to win, as they play 'with the law'. The third metastory takes a critical view of law or the legal system as oppressive, unfair and often discriminatory: here people find themselves to be 'against the law'. Individuals may have a predominant experience of some legal phenomenon, such as a brush

---

<sup>60</sup> Douglas Litowitz, 'Gramsci, Hegemony, and the Law.' (2000). *Brigham Young University Law Review* 2(1): 515 at 541.

<sup>61</sup> Halliday, as n55 above at 863, citing A Hall, *Cultural Studies* 1983 (Durham: Duke University Press, 2016). 167.

<sup>62</sup> Halliday, as n.55 above at 859; LJ Chua and DM Engel, Legal Consciousness Reconsidered.' (2019) 15 Annual Review of Law and Social Science. 335–53

<sup>63</sup> e.g. Ewick and Silbey as n.9

<sup>64</sup> e.g. M Hertogh, *Nobody's Law: legal consciousness and legal alienation in everyday life*. (Palgrave Macmillan. 2018).

<sup>65</sup> S Silbey, After Legal Consciousness. (2005) 1 Annual Review of Law and Social Science, 1: 323, at 326.

<sup>66</sup> Ewick and Silbey as n.9.

<sup>67</sup> P Ewick and S Silbey, 'Common Knowledge and Ideological Critique: The Significance of Knowing That the 'Haves' Come out Ahead.' (1999) 33 Law & Society Review, 1025. At 1028.

<sup>68</sup> *Ibid* at 1027-8.

with the criminal justice system in which they find themselves pitted against it, or positively disposed to the legitimacy of strong institutions in the name of 'law and order.' People may identify with and express more than one metastory at once, however, often drawing on all three within the same breath. For example, they might uphold the ideal of a transcendent 'law', while being critical of one or even all judges' capriciousness, or of lawyers as tricksters. Complexity and contradiction are what affords law its ideological hegemony. To paraphrase Susan Silbey, if law were experienced as solely god or solely gimmick, it would be fragile and prone to collapse.<sup>69</sup> Instead it holds a continual promise of reform and betterment.

While LCR constitutes a growing field of scholarship in North America,<sup>70</sup> it has received relatively scant attention in the UK;<sup>71</sup> nor has it been much employed by scholars of labour law and the sociology of work.<sup>72</sup> Hayes' research, reviewed above, stands out as offering a recent analysis of the legal characterisations of care workers and their place in the world, as experienced and partially-constituted by the workers themselves.<sup>73</sup> While she cites Ewick and Silbey in the course of her analysis, however, Hayes does not refer explicitly to the legal consciousness of those workers.

Only one recent labour law study that we are aware of frames its analytical approach expressly in terms of legal consciousness, namely an investigation of *Citizens Advice and Employment Disputes* led by Nicole Busby and Morag McDermont (CAB-EMP).<sup>74</sup> Tracking the experience of workers over the course of sometimes long-lasting employment disputes, the study investigated advice agencies specifically as new sites of legal consciousness. Outputs highlighted the nature of the barriers faced by individuals attempting to navigate the employment tribunal system; barriers that were especially difficult to overcome for those with little access to either a trade union or a solicitor. While workers' knowledge of the detail of their legal rights tended to be quite vague, they also had, in the main, a deeply held confidence in the law and its capacity to protect against ill or unfair treatment. Contradicting

---

<sup>69</sup> Silbey 2005 as n.64.

<sup>70</sup> Chua and Engel, as n.61.

<sup>71</sup> Cowan as n.55.

<sup>72</sup> E Kirk as n.7 above. There are a handful of North American studies of legal consciousness at work, but most focus on quite specific aspects of working life such as sexual harassment rather than the wider labour constitution. See for example AM Marshall, 'Idle Rights: Employees' Rights Consciousness and the Construction Of Sexual Harassment Policies' (2005) 39 *Law and Society Review* 83; and A Blackstone, C Uggen and H McLoughlin, 'Legal Consciousness and Responses to Sexual Harassment' *Law & Society Review*, 2009 43(3): 631–668.

<sup>73</sup> Hayes as n.10.

<sup>74</sup> Busby and McDermont, as n.10.

dominant policy discourses that characterise many litigants as ‘vexatious’, however, the study also unearthed the – sometimes extreme – reluctance of workers to raise or continue pursuing claims, fearing legal complexity and formality, having to face former employers, or doubting that they would receive justice.<sup>75</sup> Additionally, researchers traced the role of policy discourses and political rhetoric in shaping workers’ thoughts about their disputes and what right they had to pursue them. Many a would-be claimant was buffeted by the stigma of being deemed a ‘nuisance litigant’,<sup>76</sup> or discouraged more directly by the idea of costs to the taxpayer or employer.<sup>77</sup> The findings thus problematised a straightforward narrative of a growing legal-mindedness or litigiousness within society that has dominated policy discussions, demonstrating instead the complexity of workers’ understandings of their employment rights and entitlements.

The CAB-EMP research well demonstrates the potential of LCR in the field of labour law and employment relations: its capacity to shed light on how law and associated (economic) social structures relate to and shape people’s working lives. While legal consciousness operates in a particularly condensed fashion within formalised settings like courts or tribunals, ‘in the same way economic phenomena are associated with stock exchanges or factories’,<sup>78</sup> – questions of legal consciousness also arise much more frequently in the course of everyday life. Structures of legality are both more mundane and more pervasive, and hence more powerful, than a focus on legal disputes and law enforcement would suggest.<sup>79</sup> LCR is particularly well-suited to helping us to understand the ways in which laypeople enact and interact with labour law, legal norms and discourses, moving beyond the more obviously legal means by which people respond to a sense of injustice – for example, litigation – but also beyond conscious attempts to draw upon positive law or even rights discourses: to engage, as Colling puts it, in ‘legal mobilisation’.<sup>80</sup> That said, the further we move from the more obvious ways in which people invoke notions of justice, the more methodologically and analytically tricky it becomes to investigate this when law can be far from people’s conscious or explicit thoughts. This realm in which structures are (re)produced

---

<sup>75</sup> Kirk, as n.10

<sup>76</sup> *Ibid*

<sup>77</sup> E Rose and N Busby, *Power in Employment Disputes*. (2017) 44 *Journal of Law and Society*, 674.

<sup>78</sup> Hunt, as n.57 at 329.

<sup>79</sup> *Ibid*.

<sup>80</sup> T Colling, ‘Court in a trap? Legal Mobilisation by Trade Unions in the United Kingdom.’ 2009, Warwick papers in Industrial Relations, [https://warwick.ac.uk/fac/soc/wbs/research/irru/wp/irru\\_wp/91.pdf](https://warwick.ac.uk/fac/soc/wbs/research/irru/wp/irru_wp/91.pdf)



and hence socio-economic relations are ordered requires detailed, ethnographic study, painstakingly reconstructing the place and significance of law in the lives of laypeople.

To date, LCR in the field of labour law and employment relations has focused mostly on *workers'* legal consciousness with much less attention paid to employer perspectives. More specifically, the focus has lain with consciousness relating to employment (protective) rights and breaches of those rights, for example, employers' failure to pay the minimum wage. LCR has not been directed at the more diffuse creation among workers and wider society of a sense of what is legal, or just, or appropriate in any given situation, in terms of an offer of work, wage-setting, the drafting of contracts, policies or procedures or broader organisational design. The focus on workers may reflect a wider tendency in LCR to give voice to the 'have-nots' in society, typically at a further remove from legal knowledge, processes and power.<sup>81</sup> With regard to the reproduction of legality at work today, however, HR professionals are often the key players, having largely replaced trade unions as chiefly responsible for 'bridging' the law,<sup>82</sup> and mediating its progress into workplaces.<sup>83</sup> Workers themselves tend to know little about their legal rights at work, how to apply and enforce the law.<sup>84</sup> Available research suggests that when seeking information about the legality of their contract, correct payments and so on, they often turn, at least initially to their employer, or HR department, rather than engaging in their own research, or contacting a union or advice agency.<sup>85</sup> Within the 'victim-complaints' enforcement system that exists in respect of the vast majority of employment rights in the UK,<sup>86</sup> access to justice and the rule of law depend upon workers' individual legal literacy and vigilance. Deficits here may mean that people do not act upon injustices and may not even register them as such.<sup>87</sup> Much is therefore entrusted to HR professionals in terms of bringing employment law into the workplace.

---

<sup>81</sup> Hertogh as n.63.

<sup>82</sup> T Colling, 'Trade Union Roles in Making Employment Rights Effective,' in L Dickens (ed) *Making Employment Rights Effective: Issues of Enforcement and Compliance*. 2012. (Oxford: Hart).

<sup>83</sup> L Dickens, 'Women – a rediscovered resource?' 1989 20(3) *Industrial Relations Journal*, 167; E Heery 'Debating employment law: responses to juridification.' in: P Blyton, E Heery, P Turnbull (eds) *Reassessing the Employment Relationship*. (Palgrave Macmillan, 2010) 71.

<sup>84</sup> P Pleasance, NJ Balmer, and C Denvir, 'Wrong about Rights: Public Knowledge of Key Areas of Consumer, Housing and Employment Law in England and Wales.' (2017) 80 *Modern Law Review*. 836.

<sup>85</sup> N Clark, B Stumbitz, J Keles & J Woodcock 'Newham Working Student Pilot project: Summary Report (Middlesex University, 2020) [https://www.mdx.ac.uk/\\_data/assets/pdf\\_file/0021/567210/Newham-Working-Student-summary.pdf](https://www.mdx.ac.uk/_data/assets/pdf_file/0021/567210/Newham-Working-Student-summary.pdf) [14.8.20]; J Casebourne, J Regan, F Neathey, and S Tuony, *Employment Rights at Work – Survey of Employees*, (London: DTI, 2006).

<sup>86</sup> L Dickens (ed) *Making Employment Rights Effective: Issues of Enforcement and Compliance*. (Hart, 2012).

<sup>87</sup> Pleasance et al as n.82 at 838.

Given the importance of HR managers to employment law in these respects, questions arise regarding their own acquisition of legal knowledge and of their interpretation and application of the law. Human resource management (HRM) is a primary site where legalities can become bound up with other social structures; where law can become ‘managerialized’,<sup>88</sup> as we put it above, losing its ‘normative integrity’.<sup>89</sup> HR professionals and their professional bodies may be thought of as quasi-legal actors, with some level of legal expertise, who have a powerful role in disseminating symbols of labour law and shaping societal understandings. In addition to orally advising employees and managers (depending on the model of HR delivery), a crucial element of HR work involves textualization and record-keeping: writing contracts, offers of employment, policies, procedures, guidance and dismissal letters. LCR has emphasised that “‘getting it in writing” makes a difference. It makes what actors say more emphatic, more permanent, and more important (some say more “legal”)’.<sup>90</sup> Such textualization can accordingly bolster the apparent legitimacy of HR’s version of legality, conferring authority on their articulation of ‘the legal’.

A focus on the legal consciousness of HR professionals also allows for connections to be traced between the impact of law in particular organisational settings and the wider political economy. Managerial discourse is replete with justifications of capitalism,<sup>91</sup> and the HR variety, in particular, tends to involve legal ideology, incorporating elements of employment rights talk as well as economic rationalities. This blend can have a powerful influence on understandings of legality at work, providing an important part of the context which shapes ‘*our* beliefs about the experience and the capacities of the human species, *our* conceptions of justice, freedom, and fulfilment, and *our* visions of the future’.<sup>92</sup>

If LCR is to make the desired and fullest possible contribution to labour law scholarship, its focus must extend beyond workers to the legal consciousness of HR professionals. An ESLL framing highlights the importance of situating HR professionals and HRM within the wider political economy, and of considering their role in the ongoing renewal of legalities not only within organisations but also in society more generally. Not all employing organisations have

---

<sup>88</sup> Edelman as n.16.

<sup>89</sup> Barmes as n.17 at 183.

<sup>90</sup> Ewick and Silbey as n.9 at xii.

<sup>91</sup> L Boltanski and E Chiapello *The New Spirit of Capitalism* (Verso, 2018).

<sup>92</sup> K Klare, ‘The Public/Private Distinction in Labor,’ (1982) 130 *University of Pennsylvania Law Review*, 1358.

HR departments.<sup>93</sup> Nonetheless, the work of the profession and its professional bodies can powerfully shape shared understandings of what is ‘fair’ and ‘appropriate’, often codified as ‘best practice’ or standardised procedures, which extend beyond particular organisational boundaries or workplace experiences. Via its professional bodies, HRM provides much of the information and rhetoric around employee and worker entitlements, what they should expect and what is expected of them, thereby exerting a powerful influence over the contexts in which legal consciousness is (re)produced.<sup>94</sup> Such ideologies also involve political and economic elements which temper how the ‘legal’ is represented. Informed by and informing more general managerial discourses, HR professionals are the first audience and also important purveyors of *The New Spirit of Capitalism* which justifies and renews our ongoing participation in a system that reproduces profound inequalities.<sup>95</sup> In this sense they are a special case with regard to legal consciousness, having a powerful role both in shaping workers’ legal consciousness at work and, indirectly, in influencing our wider collective imaginary of law and the economy.

### 3. Situating the Legal Consciousness of HR Professionals

As a first contribution to the project of understanding the legal consciousness of HR professionals, we explore, in this final part of the paper, the social, legal and economic developments that occasioned the emergence and growth of HRM. We rely here in particular on Dobbin and Sutton’s analysis of the growth of HRM in the US, which demonstrates and explains the tendency of organisations to comply only minimally with employment laws as the rationalities associated with compliance become focused primarily on efficiency rather than justice or rights.<sup>96</sup> Shifting our focus to the HR profession in the UK, we then address the

---

<sup>93</sup> HR professionals are estimated to be present in around 81% of medium sized organisations, 47% of small and 29% of micro organisations. CIPD, *Making maximum impact as an HR professional in an SME*. (2016), 2. [https://www.cipd.co.uk/Images/making-maximum-impact-HR-professional-SME\\_tcm18-8791.pdf](https://www.cipd.co.uk/Images/making-maximum-impact-HR-professional-SME_tcm18-8791.pdf) [7.9.21]

While the figures are not directly comparable, trade union presence, measured on a workplace basis, was 51% overall in 2020, ranging from 31.5% in smaller establishments to 65.7% in larger ones:

<https://www.gov.uk/government/statistics/trade-union-statistics-2020> [7.9.21]

<sup>94</sup> Kirk as n. 18.

<sup>95</sup> Boltanski and Chipaello as n.90.

<sup>96</sup> F Dobbin and JR Sutton, ‘The Strength of a Weak State: the Rights Revolution and the Rise of Human Resources’. (1998) 104 *American Journal of Sociology* 441.

question of how compliance strategies and the knowing, conscious construction of legalities within organisations relate to more widely held understandings of law and justice outside of the organisations themselves. We consider the under-theorised processes through which legal ideology is ‘transmitted from the specialist arenas of legal discourse’, as Alan Hunt put it, installing itself within popular consciousness to varying degrees;<sup>97</sup> how, in the course of such processes, legal ideology is ‘struggled over and recombined with’ other – especially economic – ideological elements.<sup>98</sup>

### Legal proliferation and the rise of HRM

Outside of the specific field of LCR, a number of North American scholars have examined the operation of law within employing organisations. Building upon the seminal work of Philip Selznick, scholars have focused in particular upon the ways in which organisations implement, translate, textualize and encode law into organisational artefacts, routines, contracts, policies, procedures and rules, which come to inform notions of legality.<sup>99</sup> Organizations do not do this in a disinterested way. They construct and institutionalize forms of compliance with laws in a manner that mediates the impact of those laws on the economy and society.<sup>100</sup> This helps to explain why, after many decades of legal proliferation – more and more employment law – there is at the same time more low-paid, insecure, ‘indecent’ work and growing inequality, globally and nationally.<sup>101</sup>

From its roots in worker welfare, industrial relations and personnel management, the development and professionalisation of HRM was at least partially bound up with the expansion of labour law and attendant legal complexity, in combination with an increasing sophistication of management techniques. As related by Dobbin and Sutton, the boom in personnel – soon to be ‘HR’ – offices in the US between the mid-1960s and the mid-1980s followed particular legal landmarks involving non-discrimination, health and safety, and

---

<sup>97</sup> Hunt as n.57 at 149

<sup>98</sup> *Ibid.*

<sup>99</sup> P Selznick, *Law, Society, and Industrial Justice* (Russell Sage, 1969); LB Edelman, ‘Legal Ambiguity and Symbolic Structures: Organisational Mediation of Civil Rights Law,’ 1992 97(6) *American Journal of Sociology* 1531.

<sup>100</sup> Edelman as n.16 and n.96.

<sup>101</sup> ILO, *Decent Work Report*. 1999. International Labour Organisation. Geneva.  
[https://www.ilo.org/public/libdoc/ilo/P/09605/09605\(1999-87\).pdf](https://www.ilo.org/public/libdoc/ilo/P/09605/09605(1999-87).pdf) [14.8.20]

pensions.<sup>102</sup> The complex and ambiguous nature of regulations led employers to create new departments to manage legal compliance, 'not because the law dictated that they do so but because the law did not tell them *what* to do'.<sup>103</sup> In some organisations, a trade union presence may have created an additional impetus to HR to 'legalize' its procedures.<sup>104</sup> Soon, however, specialists promoted these departments as all-purpose solutions to management problems and, with that, the role of HRM became firmly established.<sup>105</sup> Management academics responded by offering new rationalities that would further HRM as a science, so that between 1975-85, there was a shift in emphasis, when it came to justifying specialist offices, from compliance with complex or ambiguous laws towards how they 'helped rationalize the management of human resources'.<sup>106</sup> As institutionalization proceeded, 'middle managers came to disassociate these new offices from policy and to justify them in purely economic terms' – 'efficiency' and cost-minimization.<sup>107</sup>

At the same time, legal proliferation combined with legal ambiguity prompted organisations to create compliance strategies that would 'stand up in court',<sup>108</sup> focusing routinely on *symbolizing* a commitment to compliance<sup>109</sup> rather than attempting truly to embed core principles in organisational decision-making and practice.<sup>110</sup> While the emerging paradigm of HRM certainly has variants, prominent tropes – for example, 'diversity and inclusion,' 'commitment', 'people are our greatest asset' – can be understood to fuse the twin discourses of progressiveness and high performance. Wherever such tropes were dominant, formal legal rules could become conjoined at organisational and workplace level with economic rationalities. Instead of emphasising the importance of compliance with equality law, for example, 'personnel specialists came to argue that diversity in the workplace increases efficiency in and of itself'.<sup>111</sup> Instead of acknowledging the importance of employee well-being, health and safety initiatives were framed as 'the key to winning employee commitment to the firm according to the HRM paradigm'.<sup>112</sup>

---

<sup>102</sup> Dobbin and Sutton as n.93.

<sup>103</sup> *Ibid* at 444, and 470.

<sup>104</sup> Selznick as n.96 at 154

<sup>105</sup> Dobbin and Sutton as n. 93, 471.

<sup>106</sup> *Ibid* at 475.

<sup>107</sup> *Ibid* at 441.

<sup>108</sup> *Ibid* 447.

<sup>109</sup> *Ibid* 449.

<sup>110</sup> Barmes as n.17.

<sup>111</sup> Dobbin and Sutton as n.93 at 445.

<sup>112</sup> *Ibid* at 456.

In explaining how law's normative force was thereby weakened or subverted, Dobbin and Sutton connect their analysis of organisations to the politico-legal regime of the US, in which 'the Constitution symbolizes government rule of industry as illegitimate'.<sup>113</sup> The federal state is administratively weak, they suggest, but normatively strong.<sup>114</sup>

[It] issues ambiguous mandates to organizations, changes rules frequently in response to protracted political negotiations and litigation, and enforces its rules in a fragmented and indecisive way. Although these features cause it to appear weak, we argue that they produce a peculiar kind of state strength.<sup>115</sup>

In this account, it is the regulatory framework that leads, or perhaps allows, managers to 'recast policy-induced structures in the mold of efficiency',<sup>116</sup> and it is the business-owned nature of demonstrating compliance that makes it inevitable that economic objectives overtake the legal. In administratively weak states, like the US, organisational compliance with the law comes to focus on preventing overt discrimination, or extreme risks to health and safety, while at the same time, compliance professionals increasingly suffuse business-case, market rationalities into organisational practices, policies and procedures. US organisations are able to construct the meaning of rights and the terms of demonstrating compliance, shaping the behaviour of formal legal institutions and the very meaning of law.<sup>117</sup> The mere presence of compliance procedures creates an 'illusion of fairness' that primes judges to expect compliance and non-discrimination.<sup>118</sup> In contrast, administratively strong states such as France are less prone to this divergence between normative rhetoric and reality. The French Constitution 'does not severely limit state control of private enterprise or fully separate state powers,' but rather the state 'tends to mandate substantive employment outcomes rather than creating ambiguous and complex regulations'.<sup>119</sup> As a consequence, 'until very recently, French firms had not developed the kinds of internal legal codes of employment that U.S. firms developed'.<sup>120</sup>

---

<sup>113</sup> *Ibid* at 441.

<sup>114</sup> *Ibid* at 441.

<sup>115</sup> *Ibid* at 442.

<sup>116</sup> *Ibid* at 443.

<sup>117</sup> Edelman as n.16 at 22.

<sup>118</sup> *Ibid* at 219.

<sup>119</sup> Dobbin and Sutton as n.93 at 445.

<sup>120</sup> *Ibid.* cf ACL Davies, 'Judicial Self-Restraint in Labour Law' (2009) 38(3) *Industrial Law Journal* 278-305 on the absence of robust scrutiny of managerial practices.

Dobbin and Sutton do not extend their analysis to other countries, but we might position the UK somewhere between these poles, with stronger labour laws than the US, but a much more fragmentary enforcement regime than France.<sup>121</sup> At the heart of that regime lies a system of specialist employment tribunals geared towards adjudicating the rights of working people without undue formality. Research suggests less judicial deference here than in American courtrooms to organisationally-defined compliance, with significant time and effort devoted to adjudicating the substantive and procedural fairness of organisational decision-making and behaviour.<sup>122</sup> Nonetheless legal scholars in the UK argue that the system is similarly effective when it comes to breaches of 'core' labour rights, human rights or modern slavery laws, while leaving widespread, lower-level violations and abuses largely unchecked.<sup>123</sup> In this way, over the course of many decades, workplaces have become increasingly sanitised and civilised, with the most extreme forms of abuse becoming less prevalent, while myriad inequalities and injustices have been allowed to persist.<sup>124</sup>

### Societal legal consciousness, managerial discourse and legal ideology

How do (conscious) compliance strategies and the construction of legalities within organisations relate to more widely held understandings of and interactions with the law? Dobbin and Sutton suggest a link between the two in the following terms:

[T]he administrative weakness of the state is the cause of its normative strength, for this weakness ensures that *Americans will come to see civil society and the market as the sources of social phenomena that are in fact generated by the state.*<sup>125</sup>

Quite generally, Dobbin and Sutton suggest, Americans have developed 'collective amnesia about the state's role in shaping private enterprises', swallowing more or less wholesale the theory that 'firms operate in a Hobbesian economic state of nature, in which behavior depends very much on managerial initiative and markets and very little on political initiative

---

<sup>121</sup> For a discussion of how Labour has had to struggle, in the UK 'against liberal constitutional values to secure: trade union freedom [and] economic democracy', see KD Ewing, 'Socialism and the Constitution' (2020) 73(1) *Current Legal Problems* 27-58.

<sup>122</sup> Barmes as n.16 at 247.

<sup>123</sup> V Mantouvalou, 'Legal Construction of Structures of Exploitation,' in H Collins, G Lester, and V Mantouvalou (eds). *Philosophical Foundations of Labour Law*. (Oxford University Press, 2018).

<sup>124</sup> Barmes as n.17.

<sup>125</sup> Dobbin and Sutton as n.93 at 443, emphasis added.

and law'.<sup>126</sup> This is, of course, an empirical question concerning legal consciousness and its interstices with political ideology, a conclusive answer to which would require careful study of the evolution of norms and attitudes among the great mass of society. Of particular interest, for our purposes, is the suggestion that the implementation of law by organisations can shape wider societal legal consciousness, so that people discern legality as organisationally given. What implications might this have for workers' conceptions of law and the reproduction of legality? How do HR professionals, implicated in these processes, themselves think of the law, regulation, the genesis of organisational legality and their reconciliation and interrelation with economic objectives and managerial priorities?

In addressing such questions, it is important to recognise HR's prominent role in consciously formulating, manipulating and projecting a particular version of legality, which is itself shaped by HR professionals' own sense of what is right and appropriate: by their legal consciousness. The professional project contains legal ideologies, 'a complex of distinct discourses operating at increasing distances from doctrinal discourses',<sup>127</sup> which bodies, like the CIPD in the UK, *produce* as well as transmit.<sup>128</sup> Such ideologies draw upon applicable law but are also inflected by institutionalised, professional interests. HR practitioners do not always toe the line of their professional bodies. Still, professionals are bombarded by particular discourses, selective information and explicit and implicit suggestions as to what an idealised HR professional looks like.<sup>129</sup> The growing influence of professional bodies over accredited courses in HRM in the UK and US has led to concern that 'the academy has entered into a Faustian pact whereby it adheres to an unreflective, unitary conceptualisation' of HR research and practice.<sup>130</sup>

Indeed, part of HR's claim to professional status relates to its professed legal expertise.<sup>131</sup> In the UK, the CIPD is a key actor in the field of employment relations and the law, as is Acas, a non-governmental body providing advice, conciliation, mediation and arbitration to employers and workers. Both Acas and the CIPD play a role in surveying the

---

<sup>126</sup> *Ibid* at 472.

<sup>127</sup> Hunt as n.57 at 7.

<sup>128</sup> Althusser, n.58 above. The CIPD, or chartered Institute of Personnel and Development, is the professional body for HR in the UK.

<sup>129</sup> Kirk as n.18

<sup>130</sup> S Gilmore and S Williams, 'Conceptualising the "personnel professional."' (2007) 36, 3 *Personnel Review*. 408.

<sup>131</sup> Kirk at n. 18



evolving legislative landscape and articulating accessible versions of legal knowledge for their members and the public respectively. The CIPD also regularly responds to governmental consultations and otherwise contributes to policy debates. Both institutions thereby interpret, translate and disseminate law into society. The CIPD positions itself as an expert on work, ‘setting standards,’ and providing ‘impartial research’ which ‘gives media and policy makers valued insights on the world of work’.<sup>132</sup> Its current slogan is: ‘championing better work and working lives’.<sup>133</sup>

HR practitioners are often looked to for advice on problems at work and employment law,<sup>134</sup> and they routinely inscribe law into organisational policies, procedures, practices and culture. While trade unions provide similar functions, and may present rival framings and interpretations, their declining reach into workplaces and industries is well documented, and they have anyway been less widely credited as ideologically *neutral* purveyors of information. Understandings of what is fair, standard, ‘the going rate’, reasonable and so on at work may therefore be increasingly shaped by HR discourses of what should occur. Given the location of HRM professionals as managerial agents, however, what should occur is always and everywhere interpreted as what is appropriate in light of ‘market realities.’<sup>135</sup> As such, the HR profession has an interest in regulation as part of their proffered professional ‘expertise’ and ‘legitimacy’, even possibly exaggerating the importance of law.<sup>136</sup> HR practitioners are often low status within organisations relative to other actors and seek ways to bolster their professionalism and necessity to the organisation. At the same time, their role as managerial agents may involve keeping compliance minimal where it otherwise threatens to interfere with profit or managerial prerogative.<sup>137</sup>

HR managers work within a context that is riven with contradictions.<sup>138</sup> At the same time as the profession strives to maintain a reputation as an employee champion it also

---

<sup>132</sup> <https://www.cipd.co.uk/>

<sup>133</sup> <https://www.cipd.co.uk/about/what-we-do/championing-better-work> [14.8.20]

<sup>134</sup> Clark et al as n.84.

<sup>135</sup> In interviews, as part of ongoing data collection for this project, the trope of ‘market realities’ is deployed repeatedly by HR professionals, often in answer to why moral considerations and legal aspirations *must* be tempered and subdued.

<sup>136</sup> Kirk as n. 18

<sup>137</sup> Ibid.

<sup>138</sup> P Thompson, ‘The Trouble with HRM,’ (2011).21 *Human Resource Management Journal*. 355; T Dundon and A Rafferty, ‘The (potential) demise of HRM,’ (2018) 28 *Human Resource Management Journal*. 337.

presents itself as a partner of business.<sup>139</sup> In recent years, such contradictions have become ever more apparent, to the extent that the profession now faces a profound crisis of social legitimacy.<sup>140</sup> Within intensified global competition and financialization, contradictory pressures have increased to the detriment of the 'employee champion' face of HRM.<sup>141</sup> While the CIPD aspires to be 'the moral compass of business,' organisations may not always heed its direction, and it has been suggested that the profession has not been able to address long-standing societal trends towards precarity, and the growing problem of in-work poverty.<sup>142</sup> While HR may not be in the driving seat with regard to societal trends towards precarisation,<sup>143</sup> neither are they in a position to put a hand on the brake. Few HR professionals think of themselves as 'employee champions,'<sup>144</sup> and as much as 'business partners,' they may in fact become the 'handmaidens of efficiency' within organisations.<sup>145</sup>

This growing 'crisis' of HRM threatens its status and the very legitimacy of the professional project.<sup>146</sup> The idea and rhetoric of HRM, critics argue, offers far more than it delivers, and possibly *can* deliver within a context of neoliberalism.<sup>147</sup> For Thompson, the 'trouble with HRM' is that 'HR managers are increasingly not the main architects of key work and employment trends'.<sup>148</sup> With financialisation and the rise of the so-called 'gig' economy in which platforms bypass employment protections, there may be a decreased reliance upon HR departments, and the high commitment management strategies upon which most HR models are premised may come under increasing strain. Finally, the way that HRM as a subject is taught in business schools can lack a sufficient diversity of perspectives and critical engagement with economic arrangements. Dundon and Rafferty warn of a potential

---

<sup>139</sup> H Francis and A Keegan, 'The changing face of HRM: in search of balance.' (2006) 163 *Human Resource Management Journal*, 231. ; S Gilmore and S Williams, 'Conceptualising the 'personnel professional': a Critical Analysis of the Chartered Institute of Personnel and Development's professional qualification scheme', (2007) 363 *Personnel Review*, 398.

<sup>140</sup> Thompson as n.129.

<sup>141</sup> P Thompson, 'Disconnected Capitalism: or Why Employers Can't Keep Their Side of the Bargain. (2003) 17 *Work, Employment and Society*, 359.

<sup>142</sup> Dundon and Rafferty as n.129.

<sup>143</sup> Thompson as n.129.

<sup>144</sup> D Nickson, S Hurrell, C Warhurst, K Newsome, D Scholarios, J Commander, and A Preston, 'Employee champion' or 'business partner'? The views of aspirant HR professionals.' (2008) CIPD Centres' Conference, <https://strathprints.strath.ac.uk/30970/> [12.8.20]

<sup>145</sup> T Kochan, 'Social Legitimacy of the HRM Profession: A US Perspective.' In P Boxall, J Purcell, and PM Wright (eds) *The Oxford Handbook of Human Resource Management*. (Oxford University Press, 2009).

<sup>146</sup> Thompson as n.129.

<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid* 364.

‘immiseration’ of the subject matter, and by extension the practice of HRM, unless a new professional focus can be carved out which is distinct from free market ideology.<sup>149</sup> This is tied more specifically to the idea of labour market flexibility as the fulcrum around which policy discourses revolve, trumping arguments in favour of worker-protective measures. Yet, the CIPD continues to voice commitment to a basic level of employment law protections, perhaps in part because the law forms a pillar of their claimed expertise.

Today, HR discourses tend to reflect what Fraser has termed ‘progressive neoliberalism’.<sup>150</sup> In line with the political contradictions of present-day financialised capitalism, and recalling ‘third way’ thinking, this mixes ‘truncated ideals of emancipation and lethal forms of financialization’.<sup>151</sup> A strongly market-framed conception of labour law runs through the professional project of the CIPD, for example, reflecting and encouraging a wider trend towards the marketisation of law, and employment law in particular, at the national and the supranational level.<sup>152</sup> With the ‘flexibility’ imperative always front and centre, legal rationalities are increasingly presented in ways that,

*must be so* because [the law] is crafted in response to the putative traits and truths of labour markets themselves... labour law as a subject of politics and contestation recedes while experts and technocrats step forward to elucidate and elaborate the rules and policies to govern labour markets.<sup>153</sup>

The objectives of labour law are thus ‘resituated’ in relation to the market.<sup>154</sup> Better working conditions may be achieved, it must be concluded, by facilitating rather than restricting the market. Objectives concerning the direct pursuit of distributive justice, social solidarity and the moderation of power asymmetries are, meanwhile, demoted,

as incompatible with markets operating in their ideal, most efficient mode unless they manifest in the form of an extreme or ‘core’ individual labour rights violation like child labour or forced labour.<sup>155</sup>

---

<sup>149</sup> Dundon and Rafferty as n.129.

<sup>150</sup> N Fraser ‘The End of Progressive Neoliberalism.’ (2017) *Dissent*, [https://www.dissentmagazine.org/online\\_articles/progressive-neoliberalism-reactionary-populism-nancy-fraser](https://www.dissentmagazine.org/online_articles/progressive-neoliberalism-reactionary-populism-nancy-fraser) [14.8.20] (Online publication)

<sup>151</sup> *Ibid.*

<sup>152</sup> Rittich as n.22.

<sup>153</sup> *Ibid* at 333.

<sup>154</sup> *Ibid* at 335.

<sup>155</sup> *Ibid.*

A place remains, exceptionally, for basic non-discrimination rights, since these 'aid in the normalisation and realisation of the dream of fully inclusive and pervasive markets'.<sup>156</sup>

That the emergence and professionalisation of HR departments has been bound up with legal proliferation, and that these departments may respond to ambiguous state law with minimally compliant social structures, may helpfully be considered as one part of a larger picture. 'Capitalism transforms itself by integrating critique',<sup>157</sup> and HRM can be an important part of that process. Boltanski and Chiapello view managerial discourses as the transmitter *par excellence* of *The New Spirit of Capitalism*, the ideology which justifies our continued engagement with that system.<sup>158</sup> Over time, a wide range of ideological justifications has been deployed to legitimise and bolster capitalism. Legal ideology has played a role here, articulated at times alongside or in combination with other non-legal ideologies.<sup>159</sup> Translation chains between normative discourses to economic practices are 'forged' through both political instruments and management tools; law is inscribed to greater or lesser degrees in management policies and procedures.<sup>160</sup> Tracing such discourses within management literature, Boltanski and Chiapello show these to reflect and inform employer thinking, reproducing and renewing capitalism, acknowledging past failings and problems and offering solutions which become seemingly enlightened fads and fashions.

As law is implemented, and as workers attempt to 'mobilise' their rights, actors such as HR professionals can,

shape rights holders' perceptions by referencing a range of available interpretive frameworks including not only law, but also other cognitive and normative structures that may undermine law. For this reason, informal rights negotiations can be understood as taking place not only "in the shadow of the law" (Mnookin & Kornhauser 1979), but also in the shadow of other social institutions.<sup>161</sup>

These other institutions such as 'the market,' can be wielded as ideologies which 'shape how actors understand workplace experiences in ways that legitimate and maintain

---

<sup>156</sup> *Ibid* at 336.

<sup>157</sup> Boltanski and Chiapello as n.90 xvii.

<sup>158</sup> *Ibid*.

<sup>159</sup> Hunt as n.57 at 134.

<sup>160</sup> Boltanski and Chiapello as n.90 at xv.

<sup>161</sup> C Albiston, 'Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights,' (2005) 39 *Law & Society Review* 11 at 16

domination’.<sup>162</sup> The task remains to investigate empirically how such processes, practices and discourses are experienced by HR professionals themselves, how law is implicated and how this contributes to societal legal consciousness. We must examine the work law does in concert with economic, political and cultural ideologies in settings such as workplace procedures and staff handbooks and in processes such as recruitment and selection, appraisal and performance management.<sup>163</sup>

As to the question of how HR’s constructions impact upon societal legal consciousness, we share Boltanski and Chiapello’s view that people are well able to discern the gaps between their lived experience and managerial discourses ‘to the point where capitalism must, in a way, offer – in practice – reasons for accepting its discourse’.<sup>164</sup> People are not dupes, but legal ideology is produced and employed precisely so as to bolster legitimacy and incorporate critique. The ensemble of discourses draw from as well as form elements of our cognitive frameworks, ‘some of which acquire greater purchase than others’.<sup>165</sup> Ideologies of the legal and economic ‘do not come into existence fully fledged and are not transmitted as complete ‘systems’ into the vacant consciousness of the subordinated’.<sup>166</sup> Rather, the reproduction of social order is a dynamic social process in which neither consent nor dissent are deemed to be ‘natural’, but instead ‘the result of the activities that constitute the hegemonic struggle in society, and in which law participates’.<sup>167</sup>

## Conclusion

If the aim, or one of the aims, of labour law scholarship is to assess the effects of the law on real people – workers, employers, society at large – then it would seem imperative that those people be treated as ‘participative and experiencing subjects of law at work’ and not simply as the objects of legal regulation.<sup>168</sup> As Adelle Blackett recently observed, scholars of labour law have long acknowledged the ‘socio-legal notion of the law of the shop’.<sup>169</sup>

---

<sup>162</sup> *Ibid* at 17.

<sup>163</sup> Hunt as n.57 at 135.

<sup>164</sup> Boltanski and Chiapello as n.90 at xxxi.

<sup>165</sup> *Ibid* at xv.

<sup>166</sup> Hunt as n.57 at 151.

<sup>167</sup> *Ibid* at 57.

<sup>168</sup> Hayes as n.10 at 3

<sup>169</sup> A Blackett, *Everyday Transgressions: Domestic Workers’ Transnational Challenge to International Labour Law* (Cornell University Press, 2019). 43

Labour law sources are acknowledged to be plural and the specificity of regulation emerges from the workplace... Social actors in labour law...are not merely one component among many in the legal process. Rather, they are labor law's center of gravity.<sup>170</sup>

It falls to scholars to investigate actors' perceptions of the law and their responses to it, but also how their legal behaviour can shape the very substance of the law. Legal change may occur when actors seek to enforce their rights, or to mobilise in order to effect formal legal change – through lobbying parliament, for example, or strategic litigation – and in their more quotidian interactions with the law: their choices routinely to respect the rules or to engage, alternatively, in everyday transgressions; their construction, in communication with co-workers or other employers, of alternative or additional social norms. The frameworks and methods that we adopt as scholars must allow us to recognise and pay attention to sites of law that are actor-centred as well as state-centred, and to the systems of meaning employed by employers and workers, as well as policy-makers and the judiciary, in their interpretation and application of the law.

In a 2019 article, Dukes proposed a framework for the study of labour law that was focused in the first instance on the contracting behaviour of workers and employers, conceiving of such behaviour, with Weber, as economic social action, and seeking to understand how it was shaped by the particular *labour constitution* or *constitutions* within which it proceeded.<sup>171</sup> 'Labour constitution' was defined here with reference to Weber as the historically-given ensemble of rules, institutions, social statuses, economic and technological conditions, which together shape decision-making in respect of the question who gets what work under which terms and conditions.<sup>172</sup> Dukes' *economic sociology of labour law* framing was interpretative in orientation, with law conceived as internal to situated behaviour and social interactions and categorically not as a simple external constraint on (economic) social action. Its construction around the two key notions of the contract for work and the labour constitution nevertheless bore the risk of reinforcing conceptual gaps between agency and structure, especially if the relation between the two notions was conceived in terms of unidirectional influence only, the latter shaping the former. While the proposed ESLL framing

---

<sup>170</sup> *Ibid.*

<sup>171</sup> Dukes, as n. 11.

<sup>172</sup> *Ibid.*

sought to relate economic sociological analyses of contracting behaviour to broader questions of political economy, moreover, the precise means of doing so was not worked out in any detail.

In this paper, we have argued for the significant contribution that legal consciousness research can make to the study of labour law today. As developed and utilised by LCR scholars, the concept of legal consciousness can help us to understand the ways in which laypeople interact with labour law, legal norms and discourses, including but extending beyond the more obviously legal means by which they respond to a sense of injustice. Over and above that, it can help us to understand how actors' quotidian interactions with law, broadly understood, can serve to enact and re-enact, to construct and deconstruct, to shape and reshape legal rules. It encourages us to question how competing rationales and ideologies, including economic and market-focused rationales and ideologies, can become bound up with interpretations of the law, informing and shaping legal behaviour. Analysis that focuses on the legal consciousness of HR managers can aid consideration of the impact of HRM, broadly understood, on workers' legal consciousness, and it can allow for connections to be traced between the impact of law in particular organisational settings and the wider political economy: the evolving nature of capitalism and capitalist rationales. The task remains to document how HR professionals themselves understand structures of legality, their (re)production in every day organisational life, how they experience the contradictions of regulation, market, and morality, and under what circumstances particular configurations 'win-out.' A legal consciousness lens reveals that the value of such subjective accounts lies, above all, in what they can tell us about less accessible structures of legal-economic hegemony and their reproduction and enactment at work.