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ORIGINAL ARTICLE

Labour law after neoliberalism?

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Abstract

Over the course of the past 40 years, neoliberalism has all but destroyed the institutions that once civilized labour markets. In the wake of that destruction, labour law reform is being driven in some jurisdictions by a new kind of right-wing populist politics. What does this hold in store for work relations? Our investigation of contemporary labour law begins with a brief look backwards to the pre- and post-war decades and to the ostensible depoliticization of the law under neoliberalism. We then consider the possible emergence of a distinctly right-wing populist approach to labour law in countries including the United States, the United Kingdom, and Poland, drawing comparisons with the German experience after neocorporatism. Finally, we take a normative turn and consider what steps ought to be taken by a government intent on addressing class inequalities and restoring the kind of rights that post-war democracies once conferred on workers understood to be industrial citizens.

1 | INTRODUCTION

Everything that has a beginning also has an end. In the field of labour law and work relations, as elsewhere, the first signs have appeared that the dominance of neoliberal thought and practice in policy- and lawmaking may be waning. In countries including the United Kingdom (UK), the emergence of a new kind of right-wing populist approach to labour law reform is indicated, one

that is quite different to the neoliberal approach or approaches of the past four decades. Right-wing populist leaders loudly declare their support for workers' rights and interests and, in some cases, even follow up on the rhetoric with worker-friendly innovations in labour law and social welfare.[1] Emphasizing conflicts of interest between immigrants and nationals, they promise to curb immigration as a fast-track route to improving the working and living conditions of working people.[2] In line with wider efforts to centralize power and stifle opposition, they take steps to further disarm already weakened trade unions, removing the last vestiges of their economic and political power. In countries with a corporatist tradition, such as Germany, meanwhile, right-wing populism has so far failed to take hold. There, neoliberal reform, to the extent that it happened, had to be imposed on – if not negotiated with – more or less resilient intermediary institutions that survived exposure to global competition by facilitating coalition building between capital and labour. For now, at least, these institutions stand in the way of a right-wing populist response to the crisis of the neoliberal revival of capitalism. Here, too, however, the principle applies that nothing lasts forever, even if change proceeds more slowly, less visibly, or in a different direction.

Right-wing populism may be conceived, we suggest, as involving the return of the strong state as a visible agent of industrial governance, following its neoliberal withdrawal into the role of a technocratic guarantor of an allegedly non-political free play of market forces. Under neoliberalism, the invisible hand of the state liberated the visible hand of capital and the global firm so that they could perform their miracles on behalf of the common good. Under right-wing populism, the hand of the state reappears to force the market to work in favour of the nation's loyal citizens to the exclusion of other, less deserving groups.

Proceeding from this perspective, our investigation of contemporary labour law begins with a brief, and necessarily somewhat schematic, look backwards: first, to the pre- and post-war decades and, second, to the ostensible depoliticization of the law under neoliberalism.[3] We then consider the possible emergence of a distinctly right-wing populist approach to labour law and work relations, drawing on empirical examples including the UK under Boris Johnson, the United States (US) under Donald Trump, and Poland under Jaroslaw Kaczyński. To shed further light on the specifics of Anglo-American and post-communist right-wing populism, we draw comparisons with the German experience after neocorporatism. In the final part of the article, we take a normative turn and consider what steps ought to be taken by a government intent on addressing class inequalities and restoring the kind of rights that post-war democracies once conferred on workers understood to be industrial citizens. Overcoming the destructive impact of neoliberalism and its latter-day offspring, right-wing populism, will demand, we argue, an extraordinary effort at political mobilization and institution building. In addition to great legal acumen by legislators, courts, and legal scholars, it will require a broad social countermovement against a new level and new forms of commodification of labour inherited from the latest, neoliberal wave of capitalist development.

[1] See the various contributions to the Special Issue (2021) 42 *Comparative Labor Law & Policy J.*

[2] Id.

[3] For helpful, more general discussions of law and neoliberalism, see D. S. Grewal and J. Purdy, 'Introduction: Law and Neoliberalism' (2014) 77 *Law and Contemporary Problems* 1; C. Tomlins, 'The Presence and Absence of Legal Mind: A Comment on Duncan Kennedy's "Three Globalizations of Law and Legal Thought, 1850–2000"' (2015) 78 *Law and Contemporary Problems* 1.

It may be useful, given the extensive and rather divergent literature on the meaning of right-wing populism,[4] to first clarify the sense in which we use the term. Unlike its predecessor neoliberalism, right-wing populism – as we understand it – is not an ideational system or ideology. Rather, it lacks intellectual ambition and is essentially a pragmatic, improvised response to the discontents of neoliberal capitalism caused by the exposure of national societies and politics to the unlimited global markets of the New World Order of the 1990s. In the face of various countermovements against the competitive restructuring of economy and society under international market pressures, right-wing populism seeks a more active role for the nation-state as a way of rendering neoliberal capitalism acceptable. It is in this sense a statist, or etatistic, mode of government that, unlike neoliberalism, does not deny or obscure the controlling role of the state in political economy. What it shares with neoliberalism is its denial of the need for and indeed the legitimacy of intermediary institutions, especially in the regulation of class relations: trade unions and collective bargaining. In this respect, it is fully in line, too, with the eighteenth-century tradition of classical liberalism, which informed the American and French Revolutions: a deep suspicion of intermediary powers disrupting the direct relationship between the state and the individual citizen, and of collective organizations below the state dividing its citizens into classes or 'factions'.[5] In order to make capitalism both safe and governable, right-wing populism instead offers a strong state as a patron protector for the nation as a whole – for all citizens alike, irrespective of class. Like inter-war fascism, which tolerated intermediary institutions only insofar as they had been transformed ('gleichgeschaltet', as the Nazis put it) into extended arms of the state, right-wing populism invokes national unity to obscure or neutralize capitalist class divisions. Very likely, it requires a supersized leader with demagogic talent; a figure with whom the nation can be identified, capable of producing powerful rhetoric and credible, if empty, promises.

As an ideal typical definition, the foregoing may not apply in every detail to every government or political party that is generally regarded as right-wing populist. Like post-war liberal democracy and, more recently, neoliberalism, populism takes different forms in different locations. Nor, given the gradual emergence of populism over time, is a stark dividing line to be found, necessarily, between governments that were squarely neoliberal and others that are decidedly populist.[6] Elements of populism and authoritarianism can be identified in governments of the last decades of the twentieth century, just as older ways of thinking and doing things survive today.[7] Indeed, given the persistence of some rationales and modes of action and decision making, what we might rather expect to see is a marked difference, shaped by the politics and economics of the recent and not-so-recent past, between the right-wing populisms of previously Soviet and Eastern European countries and those of Western states, including the US and the UK. If right-wing populism is rightly understood as a version of post-neoliberalism, we should not expect to find it in countries that were never fully neoliberal, such as Germany.

[4] For an overview, see M. Tushnet, 'Varieties of Populism' (2019) 20 *German Law J*. 382; B. Bugaric, 'Populist Constitutionalism: Between Democracy and Authoritarianism' in *Anti-Constitutional Populism*, eds M. Krygier et al. (2022) 27.

[5] Its most obvious expression was the loi Le Chapelier, passed by the French Constituante in 1791, which outlawed 'corporations' of all sorts, including in particular 'professional associations'.

[6] See for example A. Cozzolino, 'Trumpism as Nationalist Neoliberalism: A Critical Enquiry into Donald Trump's Political Economy' (2018) 4 *Interdisciplinary Political Studies* 47.

[7] As long ago as 1979, for example, Stuart Hall characterized nascent Thatcherism as 'authoritarian populist', at the same time as he emphasized its 'anti-statism': S. Hall, 'The Great Moving Right Show' (1979) January *Marxism Today* 14. For discussion, see B. Jessop et al., 'Authoritarian Populism, Two Nations, and Thatcherism' (1984) 147 *New Left Rev*.

TABLE 1 The politics of labour law and industrial relations

	Corporatism	Neoliberalism	Right-wing populism
Period	1970s	1990s	2010s
Mode of governance	Two-tiered Industrial self-government	State-sponsored marketism	Opportunistic statism
Trade unions and collective bargaining	Constitutionalized	Disempowered	Repressed/politically controlled
Social policy	Accommodating collective bargaining Political exchange	Market expanding Market accommodating	Politics accommodating
Driving force	Trade unions	State-created markets	National politics

To be quite clear, then, our concern in this article lies with the politics of labour law and industrial relations at a time when the neoliberal political economy is suffering a crisis of legitimacy, as a result of broken promises of growth and prosperity for all. Rather than investigating holistic historical configurations of economy and society and their different manifestations in different countries, we focus more narrowly on the political management of work and industrial relations and the particular response to the crisis of neoliberal capital–labour relations that we call right-wing populist. In exploring this phenomenon, we do not claim to be dealing with a new social-political formation that is about to displace neoliberalism. Nor do we treat corporatism, neoliberalism, and right-wing populism as rigidly defined social orders that are the same everywhere and at all times, following one after the other in a predetermined historical trajectory. On the contrary, we conceive of all three as varying in time and space, with fluid borders where they may merge into or combine with one another. So that we may nonetheless investigate recent developments in policy and legislation in countries with governments that are widely recognized to be right-wing populist, we begin with ideal typical definitions of the three that emphasize broad differences with respect to their historical location, their mode of governance, and in particular the role of trade unions and collective bargaining and of state social policy, and the driving force in their evolution. These are roughly summarized in Table 1.

2 | THE POLITICS OF LABOUR LAW

As part of post-war capital–labour relations, labour law undertook to incorporate worker collectivism within a legal order that regulated the sale of labour in exchange for wages: contracts of employment or contracts for work.[8] Worker collectivism was organized in trade unions capable of disrupting production by denying employers access to labour. Within a liberal political economy, this power could only be recognized, *nolens volens*, as a fact of life. Underlying this was a pragmatic, essentially political insight: that where workers considered their terms and conditions of employment grossly unjust, they could only at a high cost *if at all* be prevented by the state from

[8] B. Hepple and B. Veneziani (eds), *The Transformation of Labour Law in Europe: A Comparative Study of 15 Countries 1945–2004* (2009); C. Tomlins, *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880–1960* (1985); P. Sheldon and L. Thornthwaite, 'The State, Labour and the Writing of Australian Labour History' (2011) 100 *Labour History* 83.

disrupting labour markets and production. Following long national histories of industrial civil war, labour law learned to turn the *power* of workers to strike into a *right* to strike.[9] Nonetheless, worker collectivism and the strike remained 'alien elements', 'impurities', 'regrettable imperfections' in the liberal constitution of the capitalist political economy, and in the common or civil law. As such, attempts to impose limits on them always made sense – the common sense, that is, of a liberal order.

The same applied to collective bargaining: the right of trade unions, differently instituted in different jurisdictions, to regulate the content of individual contracts for work collectively and in negotiation with employers.[10] It also held for codetermination, or worker participation at the workplace: the legal rights of worker representatives at the point of production to have a say in the organization of the labour process.[11] Like the right to strike, without which collective bargaining and codetermination are no more than paper tigers, the two were never completely reconciled with private property and (individual) freedom of contract, or with liberal markets and the hierarchies of the state and of the capitalist mode of production. There was always a possibility of conflict; always a possibility that the well-developed doctrines of free trade and freedom of contract would be deployed against the doctrinally impure, political, opportunistically conceded regime of industrial relations – a regime whose legal institutionalization was, after all, a concession to the extortionist power of organized labour, with its capacity for organized coercion.

That there might be an imperfect fit, or cross-institutional frictions, between the state and capitalist markets and hierarchies, on the one hand, and free collective bargaining and industrial democracy as an independent, additional system of social regulation, on the other, was also recognized by socialists, including early theorists of labour law, such as Hugo Sinzheimer.[12] To them, however, the conflict between labour law and the laws of the capitalist state and its market was an inevitable and indeed welcome manifestation of the human quality of labour – of labour's status as an 'imperfect commodity' or 'fictitious commodity'.[13] From a socialist perspective, lack of fit between democratic labour law and market-liberal capitalism reflects the inherent limits to the commodification of labour. It is because of these limits that the institutions governing contracting for work cannot be in harmony with the encompassing institutions of capitalism; they express a logic not subsumable under the logic of markets and of a state dependent on successful capitalist capital accumulation, or, in the terms of early Marx, on 'plus making' for its own sake.[14] By their very nature, work – or industrial – relations became a political base for social opposition to the commodifying logic of capitalist rationalization, ultimately transforming democratic capitalism, or capitalist democracy, into a *Doppelherrschaft*, a system of dual rule. Rather than providing for a reconciliation of class interests, industrial relations served as an engine for legal-social-political progress, inserting into capitalism non-capitalist principles of social organization – as a social

[9] A. Jacobs, 'Collective Labour Relations' in eds Hepple and Veneziani, id., p. 201; B. Waas (ed.), *The Right to Strike: A Comparative Overview* (2014).

[10] Jacobs, id.

[11] U. Mückenberger, 'Workers' Representation on Plant and Enterprise Level' in eds Hepple and Veneziani, id., p. 233; J. Rogers and W. Streeck (eds), *Works Councils: Consultation, Representation, and Cooperation in Industrial Relations* (1995).

[12] O. Kahn-Freund, 'Hugo Sinzheimer' in *Labour Law and Politics in the Weimar Republic*, eds R. Lewis and J. Clark (1981) 73; R. Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (2014) ch. 2.

[13] K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (2001 [1944]).

[14] K. Marx, *Capital Vol. 1* (1887) 172. Friedrich Engels translated Marx's sarcastic term 'Plusmacherei' as 'profit making': K. Marx, *Das Kapital, Erster Band, Viertes Kapitel* (1867) 189.

reality with which capitalism had to learn to live, more resilient in some countries than in others, until it finally gave way to something better.

In the inter-war years, hopes as well as fears had been widespread that the separate institutionalization of work relations might develop into a bridgehead inside the capitalist political economy for some sort of socialist transformation. During the golden age of democratic capitalism in the 1950s and 1960s, trade unions, collective bargaining, and worker participation were accepted as unavoidable, if not outright desirable. Together, they made up an oppositional institutional space protected within national labour constitutions by a state unable or unwilling to exclude the natural anti-capitalism of social life from political organization and influence. Politically awarded public status legally empowered a social countermovement in the labour market at odds with commodification, protecting it against liberal reaction, regardless of its ultimate incompatibility with the foundational principles of a liberal-capitalist political economy. At its height, industrial relations based on rights of industrial citizenship became a 'second tier of government', below the government of the state and above the free play of market forces, more or less well coordinated with both.[15]

In this context, it is important to remember that political efforts at civilizing work relations – by which we mean turning them into a matter of industrial citizenship – were most likely to be successful, or halfway successful, in less-than-fully liberalized market economies. Historically, the fundamental incompatibility of self-regulating markets for goods, services, and capital with limits to commodification in labour markets and hierarchies revealed itself in the fact that capitalist societies that supported collectivized work relations were always also societies with significant political, in a generic sense *socialist*, intervention in their economies.[16] As Karl Polanyi among others pointed out, there is a pressure in political economy, emanating from the interdependence of markets, for homogeneity of market regimes across sectors.[17] Liberal markets for some goods force liberalization of markets for others, or, vice versa, intervention in some markets, if it is to be sustainable over time, demands intervention in other markets too.

For a while, fears of creeping socialism associated with the incorporation of worker collectivism in the governance of capitalist states and markets were laid to rest by functionalist-economistic justifications for labour-inclusive governance.[18] That allowing labour voice invited frictions was not denied, but these could be minimized or obviated, it was argued, by smart fixes such as incomes policy at the macroeconomic level.[19] In some instances, such as information and consultation at the workplace, frictions were even declared to be useful as they were supposed to improve decision making, even where worker representatives insisted on some sort of power sharing, in the sense of a right to co-decision-making. Similarly, at the political level, it was claimed that participatory, labour-inclusive industrial self-government improved information for public policy on work and labour markets. In sociology, institutionalized social conflict was celebrated as a sophisticated mode of social integration, and in political theories of democracy, class conflict was downgraded to being only one dimension among others in a pluralism of collective interests. Pluralist political

[15] S. Rokkan, 'Norway: Numerical Democracy and Corporate Pluralism' in *Political Oppositions in Western Democracies*, ed. R. A. Dahl (1966) 70.

[16] Nominally 'free' markets are of course also regulated and governed by law. Polanyi uses the adjective 'self-regulating' in preference to 'free' to denote markets where legal intervention is broadly limited to state guarantees of property and contractual rights: Polanyi, op. cit., n. 13.

[17] Id.

[18] R. Dukes and W. Streeck, *Democracy at Work: Contract, Status and Post-Industrial Justice* (2023).

[19] R. Dore, *The Return to Incomes Policy* (1994).

theory accepted that industrial conflict was omnipresent but considered it manageable with the help of well-designed institutions providing for a balanced distribution of power and influence, socially equitable and economically efficient at the same time. The inclusion of organized class interests in political and economic governance would, it was claimed, enhance economic productivity and thereby add to the legitimacy of both state democracy and market liberalism. The highest form of pluralism, then, was democratic or liberal corporatism, with established organizations of capital and labour functioning as intermediaries between state and market, providing for indirect and all-the-more effective political-economic governance in exchange for both privileged semi-public status and substantial political concessions, such as full employment, worker participation in management, and an ever-growing welfare state.

It is only now, with hindsight, that it becomes apparent how much the pluralist-corporatist configuration of states, markets, and industrial relations depended on a particular balance of class power, contingent on post-war political conditions and the social structures of high industrialism. It was *not*, in other words, a product of enlightened social engineering to keep capitalism great. Functionalism was a technocratic myth, a euphemistic idealization of what was only ever a second-best outcome for capital in its conflict with labour, a compromise to be abandoned as soon as a shift in the relative power of the two classes allowed it. The opportunity to do so arose in the 1980s as the reasons for capital to play along with the functionalist script withered away – in large part because of new technological and political possibilities to restructure production, increasingly by relocating it to low-wage countries or by inviting low-wage workers to replace high-wage workers in hitherto high-wage countries. The neoliberal programme that took control with the onset of globalization, and even more so with the hyperglobalization that followed the sudden death of communism,[20] re-privatized contracting for work step by step by eliminating collective intermediaries endowed with public status.[21] In their absence, direct state rule began to restore direct market and employer rule, leaving it to employers and 'market forces' exerting authority over re-individualized workers to put into practice their own ideas of efficiency and justice and of how to accommodate the two.

Wherever labour law and work relations were shaped by neoliberal reforms, the contract emerged as both the key legal institution in the field and, at the same time, a dominant ideology. Neoliberal discourse on work and work relations typically emphasized the benefits of free markets and cross-border free trade, characterizing trade unions, collective bargaining, and statutory employment rights alike as potentially deleterious to the interests of workers as well as businesses, especially insofar as they undermined 'competitiveness' by creating 'rigidities' or increasing the price of labour above its 'market value'.[22] In place of employment security, workers were offered the chance to compete as entrepreneurs, marketing themselves, investing in their own careers, and wielding, individually, such a measure of market power – this was the promise – that employment rights and trade unions would become quite unnecessary. It is true that in countries such as the US and the UK there was a growth, from the 1970s, in legislative intervention that was in part protective of workers' rights – a proliferation of employment law-on-the-books, albeit in the form, for the most part, of rather minimal minimum standards.[23] At the same time, however, increased corporate power and weak, underfunded enforcement mechanisms facilitated breach of those

[20] D. Rodrik, *The Globalisation Paradox: Why Global Markets, States, and Democracy Can't Coexist* (2011).

[21] T. Mueller et al. (eds), *Collective Bargaining in Europe: Towards an Endgame* (2019).

[22] K. Rittich, 'Making Markets Natural: Flexibility as Labour Market Truth' (2014) 65 *Northern Ireland Legal Q*. 323.

[23] P. Davies and M. Freedland, *Labour Legislation and Public Policy* (1993).

rights on a scale that manifestly undermined the rule of law – at least for as long as the rule of law was understood, contra Friedrich Hayek, to require compliance with legislation and not only with the common law.[24] Where there had been collective bargaining, therefore, there was now increasingly individual negotiation of contractual terms – all too often meaning take-it-or-leave-it offers of terms by all-powerful employers. Where there had been something like industrial democracy promoting industrial justice, there was now market justice, promising individual freedom and just desserts while it delivered, for growing sections of the workforce, precarity and inequality.

In the rhetoric and strategic rationale of neoliberalism, the re-privatization of industrial relations and labour law was to turn policy- and lawmaking into essentially technical exercises, best left to experts, promising that free markets and liberated contracting would benefit all provided only that they were allowed to function 'optimally'. The fact that there was exactly as much politics in neoliberalism as there was in social democracy or state-administered capitalism, albeit of a different kind, was thereby wilfully obscured. However, just as markets were once contained, borders controlled, and regulations imposed by political and legal intervention, so markets were now set free, borders opened, and regulations lifted *by political and legal intervention*. The same applied to contractual relations concerning human labour and the status of those engaging in them. Once markets are liberated, they must be secured against attempts to re-institute protections and redistribution by those depending for their economic life and social status on public intervention. Markets do not exist by nature; they are political constructions that need to be politically defended against those disadvantaged by them. For that, strong states are needed. That states under neoliberalism do not disappear but on the contrary remain powerful guardians of the national economy, now in a newly liberated condition, creates a need for the state to be defended against takeover by social classes interested in an active interventionist state.

3 | RIGHT-WING POPULIST LABOUR LAW?

As a haphazard, opportunistic statist response to the socially if not capitalistically unsustainable uncertainties and insecurities imposed on workers and their families under neoliberalism, right-wing populism has emerged as a significant political force in many countries around the globe. Prominent examples include the US under Trump, the UK under Johnson, and Poland under Kaczyński. In Poland, the Law and Justice party was propelled to power by a backlash against the neoliberal devastation inflicted on the country by the Donald Tusk government.[25] The resulting Polish brand of populism thrives on a paternalistic relationship between individual workers and their families, as Margaret Thatcher famously put it,[26] and a nascent one-party state that promises to take care of them.[27] It encompasses a nationalism that might best be understood as a reaction to the mandatory internationalism of both the communist and the neoliberal decades,[28] and it rejects

[24] F. A. Hayek, 'Freedom and the Rule of Law' in *The Rule of Law and the Separation of Powers*, ed. R. Bellamy (2005) 153.

[25] A. Rogalewski, 'Right-Wing Populism in Poland: A Challenge for Trade Unions' (2020) 27 *International Union Rights* 8.

[26] D. Keay, 'Interview with Margaret Thatcher' *Woman's Own*, 23 September 1987, at <https://www.margaretthatcher.org/document/106689>.

[27] Rogalewski, op. cit., n. 25; P. Grzebyk, 'Neo-Nationalism in Poland and Its Impact on Labor Law and Social Policy' (2021) 42 *Comparative Labor Law & Policy J*. 115.

[28] Csilla Lehoczky and Balázs Majtenyi use the term 'mandatory nationalism' in their discussion of right-wing populism and labour law in Hungary: C. K. Lehoczky and B. Majtenyi, 'Social Rights, Social Policy, and Labor Law in the Hungarian Populist-Nationalist System' (2021) 42 *Comparative Labor Law & Policy J*. 13.

the language of class conflict and class solidarity as elements of the 'Soviet-imposed' ideology of the past.[29] In the US, the success of the Tea Party movement strengthened the hand of populist elements within the Republican Party and paved the way for the election of Trump.[30] Across the Atlantic, the United Kingdom Independence Party (UKIP) and the campaign for Brexit played a similar role, with votes for UKIP and later for Leave widely interpreted as a call from the electorate for political protection by a strong nation-state, to which the Conservative Party reacted by shifting tack so as to capture that political ground.[31] Like the Tea Party, the campaign for Brexit included two broad groupings or wings, the first focused on the evils of globalization, including immigration, and the second extolling the benefits of free markets, reduced taxation, and a more limited role for government.[32] While the populist wings won out with the election of Trump and Johnson, the neoliberal wings were not entirely sidelined and continued to wield a significant influence within the respective governments, bolstered by major party donors from the worlds of business and finance.[33]

While there are obvious differences between the populisms of the US, the UK, and Poland, they appear to share a particular vision of work relations and labour law that is reflected first and foremost in the tendency of party leaders to make loud, rhetorical commitments to improving the lot of workers. In his electoral speeches during the run-up to the 2017 presidential election, for example, Trump repeatedly presented himself as the only candidate who truly cared about US workers, declaring 'It's going to be a victory for the wage-earner, for the factory worker' and 'I will be your champion in the White House'.[34] Ascribing blame for workers' suffering to globalization as a structural force, Trump obscured the significance of welfare reforms, anti-union laws, and the decline of collective bargaining. Promising to restore (white, male) workers to their 'rightful' place in the national society – above undocumented immigrants, refugees, Muslims, and welfare claimants – he positioned himself as an outsider and champion of the workers *against* national elites.[35] In the UK, the Conservatives attempted under Theresa May to rebrand themselves as the 'Workers' Party',[36] adopting a populist discourse focused on 'just-managing families' deserving 'strong and stable' leadership:[37] 'Rather than pursue an agenda based on a supposed centre ground defined and established by elites in Westminster, we will govern in the interests of the

[29] Lehoczky and Majtenyi make this point in connection with Hungary: id.

[30] D. J. Cumming et al., 'Human Resource Management Practices in the Context of Rising Right-Wing Populism' (2020) 30 *Human Resource Management J.* 525.

[31] K. Tournier-Sol, 'From UKIP to Brexit: The Right-Wing Populist Surge in the UK' in *The Faces of Contemporary Populism in Western Europe and the US*, eds K. Tournier-Sol and M. Gayte (2021) 1. Compare Hall's observation that the decline of the National Front in the late 1970s was caused or accompanied by the adoption by the Conservative Party of similar lines of thinking, 'swiftly reworked into a more respectable discourse on race': Hall, op. cit., n. 7, p. 20.

[32] Tournier-Sol, id.; M. Douzou, 'The Tea Party Movement in Pennsylvania: A New Brand of Populism?' in eds Tournier-Sol and Gayte, id., p. 203; I. Jack, 'Now to Stride into the Sunlight' *London Rev. of Books*, 15 June 2017, at <https://www.lrb.co.uk/the-paper/v39/n12/ian-jack/now-to-stride-into-the-sunlight>.

[33] Cozzolino, op. cit., n. 6.

[34] M. Lamont et al., 'Trump's Electoral Speeches and His Appeal to the American White Working Class' (2017) 68 *Brit. J. of Sociology* 153, at 164.

[35] Id., p. 166.

[36] See for example Grant Shapps, speaking as Conservative Party chairman: N. Watt, 'The Workers' Party? That's Us, Say Conservatives in Bid to Rebrand' *Guardian*, 25 February 2014, at <https://www.theguardian.com/politics/2014/feb/25/conservatives-workers-party-rebrand>.

[37] Tournier-Sol, op. cit., n. 31.

mainstream of the British public.'[38] In the 2019 election, the Conservative Party held on to power on the back of Johnson's promise to 'level up' those parts of the country that 'feel left behind'.[39] Brexit, it was claimed, would restore the freedom of the UK to make its own laws, control its own borders, and take back its own money, meaning cease paying contributions to the European Union (EU) budget.[40] In Poland, the Law and Justice party promised a new kind of 'economic nationalism' that would benefit ordinary citizens, including the long-term unemployed, and previously neglected regions.[41] Polish elites in power were portrayed as corrupt, selfish, and closely associated with the remnants of the communist regime.[42]

As to *how* workers' interests are to be furthered by these 'Great Leaders' and their governments, particular prominence has been given in all three countries to plans to halt the inflow of immigrants and thereby to restrict the labour supply. Tightened border controls are promised to ensure not only that jobs will be reserved for the indigenous population, but also that wages and other terms and conditions will rise. 'Clinton', said Trump during the 2017 election campaign, 'is proposing to print instant permits for millions of illegal immigrants, taking jobs directly from low-income Americans. I will secure our border, protect our workers, and improve jobs and wages in your community.'[43] 'We're not going back to the same old broken model with low wages, low growth, low skills, and low productivity, all of it enabled and assisted by uncontrolled immigration', stated Johnson in October 2021.[44] Note that neither leader admitted that legal and institutional reforms would be needed to ensure that a lower labour supply actually results in real wage increases and better working conditions, and these are not promised. Without such reforms, any gains made in terms of improved wages have been swiftly eaten up by sharp rises in the costs of living.[45]

At the same time as immigration is cast as a cause of unemployment and the degradation of workers' standards of living, it is also characterized, more or less explicitly, as a threat to national unity.[46] In Poland, as in Hungary, the notion of immigration as an external threat to the otherwise culturally and ethnically homogeneous 'nation' is particularly prominent in government discourse.[47] In the US and the UK too, purported conflicts of interest between citizen-workers and immigrants, or some kinds of immigrants, are emphasized at the same time as class conflicts are

[38] Conservative Party, *Forward Together: Our Plan for a Stronger Britain and a Prosperous Future – The Conservative and Unionist Party Manifesto 2017* (2017) 7.

[39] Conservative Party, *Get Brexit Done: Unleash Britain's Potential – The Conservative and Unionist Party Manifesto 2019* (2019) 2.

[40] Id.

[41] Grzebyk, op. cit., n. 27, pp. 119–122.

[42] Id., p. 125.

[43] Lamont et al., op. cit., n. 34, p. 169.

[44] Bloomberg UK, 'Johnson Says UK Moving toward High Wage, High Skill Economy' *Bloomberg UK*, 6 October 2021, at <https://www.bloomberg.com/news/videos/2021-10-06/johnson-u-k-moving-toward-high-wage-high-skill-economy>.

[45] A. Doniger, 'How Inflation Is Changing the 2022 Annual Employee Pay Rise Equation' *CNBC*, 12 December 2021, at <https://www.cnbc.com/2021/12/12/why-workers-should-expect-a-raise-and-that-it-wont-match-inflation.html>; TUC, 'UK Set for "Worst Real Wage Squeeze" in the G7' *TUC*, 15 July 2022, at <https://www.tuc.org.uk/news/uk-set-worst-real-wage-squeeze-g7>.

[46] R. Shabi, 'How Immigration Became Britain's Most Toxic Political Issue' *Guardian*, 15 November 2019, at <https://www.theguardian.com/politics/2019/nov/15/how-immigration-became-britains-most-toxic-political-issue>.

[47] Grzebyk, op. cit., n. 27, pp. 122–125; Lehoczky and Majtenyi, op. cit., n. 28.

obscured or denied.[48] What is categorically not on the agenda, for any right-wing populist government, is a labour constitution that allows workers a collective, independent voice on their wages and working conditions. Where there is a 'great national leader' with a heart for the 'little people', pluralist institutions of industrial relations are unnecessary and undesirable, if only because they undermine national unity and unified government. Statist, anti-union labourism is rampant and has resulted, everywhere, in continued or reinvigorated attacks on already weakened trade unions and collective institutions.[49] In the UK, for example, the right to strike was significantly limited in 2016,[50] with further restrictions threatened in 2022.[51] The right to picket peacefully has been curtailed by the creation of new police powers to prevent and put a stop to demonstrations.[52] On each occasion, trade unions have been characterized by government as enemies of the people – the people being commuters and other service users but also workers themselves, coerced into action, it is claimed, by a radically left-wing union leadership.[53] State democracy giving rise to national unity is to make industrial democracy redundant, so the reasoning seems to go, as nationalized markets are allowed to do their beneficial work without institutional interference, other than some necessary fencing-in courtesy of the strong state.

What of individual worker rights – to a minimum wage, for example, or maximum working hours? In Poland, the government has made significant political capital out of improvements to wages and social welfare.[54] The minimum wage was increased and a new hourly minimum introduced for self-employed workers; the retirement age was lowered and a new child benefit created to be paid per child per month.[55] In the UK and the US, by contrast, rhetorical commitments have not resulted in anything new in terms of employment rights and social security. Indeed, under Trump, wage and working-time protections were further weakened and the enforcement of existing employment rights made yet more difficult.[56] At the same time as he promised to champion workers' interests, Trump faithfully acted on a top-ten corporate-interest wish list published by the Chamber of Commerce in early 2017.[57] In the UK, meanwhile, there have been no reforms of any significance, despite specific undertakings included in the Conservative Party election manifestos in 2017 and 2019.[58]

[48] Lamont et al., op. cit., n. 34; Bloomberg UK, op. cit., n. 44.

[49] K. Andrias, 'Peril and Possibility: Strikes, Rights, and Legal Change in the Age of Trump' (2019) 40 *Berkeley J. of Employment & Labor Law* 135; C. McNicholas et al., *Unprecedented: The Trump NLRB's Attack on Workers' Rights* (2019); Special Issue of *Comparative Labor Law & Policy J.*, op. cit., n. 1.

[50] A. Bogg, 'Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State' (2016) 45 *Industrial Law J.* 299.

[51] K. D. Ewing and Lord Hendy, *Workers' Rights in Times of Crisis* (2022).

[52] D. Mead, 'The Police, Crime, Sentencing and Courts Bill: A Look at the Public Order Provisions' *UK Labour Law Blog*, 21 January 2022, at <https://uklabourlawblog.com/2022/01/21/the-police-crime-sentencing-and-courts-bill-a-look-at-the-public-order-provisions-by-david-mead%ef%bf%bc/>.

[53] R. Dukes and N. Kountouris, 'Pre-Strike Ballots, Picketing and Protest: Banning Industrial Action by the Back Door?' (2016) 45 *Industrial Law J.* 337.

[54] Grzebyk, op. cit., n. 27.

[55] Id.

[56] Andrias, op. cit., n. 49.

[57] McNicholas et al., op. cit., n. 49.

[58] Conservative Party, op. cit., n. 38; Conservative Party, op. cit., n. 39.

For trade unions, right-wing populism poses an existential threat.[59] In claiming for itself the role of champion of workers' interests, the state both usurps unions' primary function and courts the support of their membership. In the UK, trade unions have had to face the fact that in a 2019 general election contest between a Labour Party with a radical manifesto, detailing significant new rights for workers and state support for collective bargaining,[60] on the one hand, and the 'Get Brexit Done' Conservatives,[61] on the other, many British workers chose the latter.[62] In that sense, there was at this point some truth to the Conservatives' claim to be the 'Workers' Party'. In a country such as Poland, where the government has actually delivered on promises to improve the working and living conditions of the poorest sections of society, the unions find themselves in a difficult position indeed – critical, still, of racist, misogynist, and anti-Islamic proclamations and policies but hesitant to malign too loudly a government that has won the gratitude of many working people.[63] The union Solidarity has even given its wholehearted support to the Law and Justice party, with no caveats whatsoever.[64] The recent history of the country points to an explanation for this: both the extent of the devastation caused by neoliberalism and the failure of the left, for several years, to offer any real alternative.[65] As long ago as the early 1990s, Solidarity declared itself a right-wing, 'traditional Catholic' union movement, and today it has a membership that is especially readily swayed by the government's characterization of blue-collar workers as 'real Poles', deserving of higher status than both lesser Poles and immigrants.[66]

Right-wing populist labourism is easier to build and sustain in a conservative Catholic society with a state-centred authoritarian political tradition. Where dominant trade unions are nationalist and socially traditionalist in their orientation, making them comfortable with authoritarian paternalism and clientelism, there is no need for union breaking. Moreover, Polish right-wing populism does not – or not yet – face a need to renege on its promises to the working class by adopting neoliberal strategies in order to increase national productivity and competitiveness. Like Hungary, another Eastern European EU member state under right-wing populist government, Poland benefits from extensive financial transfers from the EU, providing its government with considerable leeway for a redistributive-paternalistic politics – much to the dismay of its liberal opposition and the liberal-minded EU parliament. By insisting on the European Commission cutting or withholding entirely EU transfers unless Poland complies with the 'rule-of-law' provisions of the EU treaties, they hope to make right-wing populist policies, with their considerable popular and electoral appeal, ultimately unsustainable.[67]

In the political science literature on right-wing populism, there is disagreement between those who assert that it is a variant or mutant of neoliberalism and those who believe that the former

[59] K. D. Ewing, 'Right-Wing Populism, Illiberal Democracy, Trade Unions and Workers' Rights' in *The Cambridge Handbook of Labor and Democracy*, eds A. B. Cornell and M. Barenberg (2022) 66.

[60] Labour Party, *It's Time for Real Change: For the Many Not the Few – The Labour Party Manifesto 2019* (2019).

[61] Conservative Party, op. cit., n. 39.

[62] Ewing, op. cit., n. 59, p. 76, citing A. Woodcock, 'Tories Won More Working Class Votes than Labour amid Stark Generation Gap at General Election, Poll Suggests' *Independent*, 17 December 2019, at <https://www.independent.co.uk/news.uk/politics/election-results-working-class-age-tories-labour-boris-johnson-yougov-a9249936.html>.

[63] Rogalewski, op. cit., n. 25.

[64] D. Ost, 'Why (Which) Workers Often Oppose (Which) Democracy?' in eds Cornell and Barenberg, op. cit., n. 59, p. 263.

[65] Rogalewski, op. cit., n. 25.

[66] Ost, op. cit., n. 64, pp. 275–276.

[67] W. Streeck, 'Ultra Vires' *New Left Rev. Sidecar*, 7 January 2022, at <https://newleftreview.org/sidecar/posts/ultra-vires>.

implies a rejection of the latter.[68] In the field of labour law and work relations, it is quite possible to draw a clear, conceptual distinction between right-wing populist and neoliberal approaches, as we have done in the introduction and first parts of this article. As ideal types, the approaches share a hostility to autonomous trade unions and collective bargaining but differ on the question of the desirability of authoritative state intervention to secure improvements in wages and other terms and conditions, and to keep immigration levels low. Empirical examples are more difficult to analyse, in large part because of the survival within right-wing populist governments of influential neoliberal elements, but also because of the inherently opportunistic nature of populism and the willingness of leaders to change tack whenever necessary to retain popular and electoral support. While different in some respects to the neoliberalism of previous decades, the approaches of the Trump, Johnson, and Kaczyński governments to work relations and labour law build on an established heritage of neoliberal institutions and practices that they presuppose rather than renounce.

4 | GERMANY AFTER NEOCORPORATISM

Taking a long view, and having in mind the US, the UK, and Poland as comparators, one might all too readily conclude that the German post-war 'system' of industrial relations and labour law has held up well over the years. To be sure, unions have declined in Germany, and quite dramatically so,[69] but they have never been excluded from centrist political society, and there has never been a right-wing populist government – or even opposition – intent on undermining their legitimacy or orchestrating an outright attack.[70] Especially in export-oriented manufacturing and the core of the public sector, unions have remained important not only in collective bargaining but also within the works council system. Works councils are statutory institutions for the representation of workers at the workplace, formally distinct from but typically closely connected with trade unions.[71] In a regime unknown in Anglo-American countries, worker representatives have a role in both what is called the works constitution and the enterprise constitution, the latter regulating corporate governance. Under each constitution, the representatives have legal rights to information, consultation, and co-decision making, or co-determination.[72] Like the law on collective bargaining and the right to strike, works constitution and enterprise constitution law has remained broadly unchanged since the 1970s, when reforms were implemented with the aim of increasing, rather than weakening, the effectiveness of collective institutions.[73]

Rather than destroying trade unions, for cost containment in the public sector or the enhancement of productivity and profitability in the private sector, German governments and employers have typically been keen to build alliances with them, especially in the core sectors of

[68] See for example G. Scheiring, 'The National-Populist Mutation of Neoliberalism in Dependent Economies: The Case of Viktor Orbán's Hungary' (2022) 20 *Socio-Economic Rev*. 1597.

[69] Among all workers, trade union density declined during the neoliberal age from 31.2 percent in 1990 to 16.5 percent in 2018: Dukes and Streeck, op. cit., n. 18, p. 76.

[70] Alternative für Deutschland (AfD) fits with our definition of a right-wing populist party but has never been part of the federal government or opposition. A significant share of its voters are manual workers, often unionized, but industrial relations and labour law do not feature in its party programme.

[71] Mückenberger, op. cit., n. 11; Rogers and Streeck (eds), op. cit., n. 11.

[72] W. Müller-Jentsch, 'Germany: From Collective Voice to Co-Management' in eds Rogers and Streeck, id., p. 53.

[73] Dukes, op. cit., n. 12, ch. 4.

manufacturing. The aim has been to boost the international economic competitiveness of a country heavily dependent on exports, a strong currency, and low public debt. For as long as they lasted, high export earnings were used to underwrite social peace within Germany, with wage moderation facilitating relatively stable employment. There are parallels here with Poland, where social peace was and still is similarly subsidized from outside of the country, in the Polish case by the EU and its structural funds. Accordingly, unions and employers' organizations – in Poland in a spirit of social conservatism, and in Germany in line with social preferences for stable employment – have responded to globalization by allowing for a more prominent role for the enterprise as a site of collective bargaining.[74] At the enterprise level, fear of unemployment holding down wage demands makes itself felt more directly than at the national or sectoral level.[75] While wage bargaining tends to be conflictual, concerned as it is with distribution, protecting employment in a competitive environment tends to require cooperation, not only in the form of wage moderation but also of joint exertions to raise productivity and product quality to remain internationally competitive.

Joint efforts to preserve existing jobs in a competitive global environment are supported, in Germany, by a particular kind of state intervention, which also aims to preserve 'social partnership'. The German institution of 'short-time work' is widely admired for its provision, under certain conditions, of partial wage replacement paid for by unemployment insurance for workers who retain their jobs despite a fall in demand for the goods or services that they produce.[76] This cuts down employers' wage bills while by and large protecting workers' income, keeping workforces together for the duration, so that firms are ready to restart operations in full as soon as the economy picks up again. To the same effect, the government provided *Überbrückungsgeld* ('bridging allowance') to employees and some self-employed workers during the COVID-19 pandemic,[77] and is beginning to do so again in order to mitigate the losses caused by economic sanctions against Russia. The aim is to keep workers' heads above water in their respective sectors until the crisis is over and 'business as usual' resumes.

All that said, there are still significant differences in a country such as Germany between the neocorporatist political economy of the 1970s and 1980s, on the one hand, and the period before the current crises, on the other. In short, cooperation between employers, trade unions, and the state, which was initially achieved amid continuing and always intense distributional disagreement, became gradually less conflictual, as conflict was exported to competition in global markets. The extent to which things have changed in the meantime, and the ongoing transition to a post-neocorporatist configuration of political and economic forces, is perhaps best illustrated by the efforts of the Olaf Scholz government to revive what at the high point of trade union power was called *Konzertierte Aktion* ('concerted action'): a tripartite effort, initiated and presided over by the government, to fight inflation, then caused by powerful unions negotiating wage increases out of step with productivity increases. The original purpose was to convince the unions to accept non-inflationary political concessions – from higher pensions in the future, to organizing rights at the

[74] W. Streeck, *Re-Forming Capitalism: Institutional Change in the German Political Economy* (2009) 38–45.

[75] On wage moderation in the German public sector as a result of fiscal austerity, see D. di Carlo, 'Does Pattern Bargaining Explain Wage Restraint in the German Public Sector?' (2018) MPIfG Discussion Paper 18/3.

[76] European Foundation for the Improvement of Living and Working Conditions, 'Germany: Working Time Flexibility' *Eurofound*, 8 February 2022, at <https://www.eurofound.europa.eu/observatories/emcc/erm/legislation/germany-working-time-flexibility>.

[77] T. Pusch and H. Seifert, 'Short-Time Work in Germany: Employment Bridge in the Coronavirus Crisis' (2021) 11 *Sinappsi* 36.

workplace in the present – in return for not forcing inflationary wage settlements on employers that would ultimately compel the government to renege on the political full-employment guarantee that underlay the social contract of the post-war era ('political exchange').[78] Today, by contrast, *Konzertierte Aktion* – to the extent that it ever gets off the ground – will not involve the purchase of economic concessions with political concessions from unions that are too powerful for capitalist economic growth. Instead, it will be aimed at keeping cooperative unions from defending their members' purchasing power by fighting for wage increases to compensate for a kind of inflation caused not by wage pressure but by a combination of an undersupply of goods and an oversupply of money. To reward continued wage restraint in the face of rising inflation, the government is considering handouts such as one-time tax cuts or flat-rate rent subsidies for workers, students, and pensioners funded by public debt until, perhaps, inflation subsides.

To defend their political status and pre-empt populist accusations of damaging German international competitiveness, trade unions in the contemporary neocorporatist regime must continually demonstrate that they are economically reliable. To date, anti-union rhetoric remains rare in Germany, and the intermediary institutions that support unions' political capacity are uncontested. Problems are arising, however, in domestic service sectors, where stable employment was never as strong as in industry, partly as a result of sectoral union and works council weakness.[79] Here, there are indications that continued union cooperation with employers will not be as readily accepted by workers as it was in the past, regardless of whether they are unionized. In the airline industry and in health care, for example, strikes for higher pay and better working conditions have become more frequent in recent years, especially among the lower paid – which may be one reason why the government is trying to reboot *Konzertierte Aktion*. Rising worker militancy in the service sector may be related not only to the absence of competitive pressure from abroad but also to growing public deficits that force public employers to be even less accommodating of worker demands than they were in the past.[80]

With the transition to a more service-based economy, it is possible that stable employment may be less highly valued by some workers than it used to be, and anyway likely less achievable. Changing qualification structures and ways of life may play a role here, with generational change and increasing immigration coming on top of a much more fragmented industrial organization. Indeed, for technical, economic, political, and geostrategic reasons, the 'German model' of a manufacturing-centred, export-oriented national economy, dependent on a safe supply of cheap energy, skilled and dedicated workers, long global production chains, and open worldwide markets, among other things, may soon prove unsustainable in a de-globalizing economy. Stable employment in the industrial core, defended by economically cooperative unions, may be on its way out as a paradigm for the German economy as a whole, especially insofar as it stands in the way of restructuring towards a domestic demand-oriented service economy. In that context, rewards for neocorporatist cooperation by trade unions may be less frequently available as it becomes less useful not only to governments and employers but also to workers. Thus, conflict, in new forms, may come to replace cooperation in a post-neocorporatist political economy. What the German alternative to post-neoliberal right-wing populism might look like in that case, nobody can predict.

[78] On the logic of 'political exchange' in its heyday, see C. Crouch and A. Pizzorno (eds), *The Resurgence of Class Conflict in Western Europe since 1968: Two Volumes* (1978), in particular the introductory chapter: A. Pizzorno, 'Political Exchange and Collective Identity in Industrial Conflict', p. 277.

[79] See for example I. Raehlmann, *Streik im Wandel* (2017); C. Hipp and A. Knorr, *Recht und Ökonomie* (2020).

[80] Di Carlo, op. cit., n. 75.

5 | REBUILDING CIVILIZED LABOUR RELATIONS[81]

As a matter of increasing urgency, the question needs to be addressed whether there are not better ways to repair the damage wrought by neoliberalism and competitive globalization, and to restore the humanistic core of labour law: its foundational programme of de-commodifying that imperfect commodity, labour. For tactical reasons, or out of modernist optimism, that mission was first obscured by post-war functionalism, and then discredited by neoliberalism. Can it be revived in post-neoliberal democratic capitalism, in a political readjustment of the relationship between capitalist movement and labour countermovement? Can the unilateral and discretionary handouts of right-wing populist governments, such as they are, be replaced with reliable institutions under a renewed and revised pluralist labour constitution, returning public status and legal power to industrial co-government in a form that fits the changed economy and society of today? Can such institutions be rebuilt after the losses inflicted in recent decades? In post-neocorporatist political economies, can trade unions re-learn older methods of worker representation forgotten under social partnership, and can they institute these in new and growing service sectors?

With its promises of a better deal for workers, and of protective state action to achieve that aim, right-wing populism is itself indicative of a widespread popular rejection of the neoliberal idea of market justice. After 40 years of neoliberalism, it may be true that flexibility and choice in work relations are valued by some workers in some circumstances, especially younger ones; however, there is also ample evidence that workers continue to expect decent wages and predictable working conditions as a matter of right, and that a strong sense of injustice is provoked when employment rights are breached or cannot be enforced.[82] Market justice has not superseded older notions of industrial justice and industrial citizenship, and frictions between the lifeworld of workers and the treatment of their labour power as a commodity inevitably persist. They are bound to give rise to conflicts wherever governments are unwilling or unable to deliver on promises of protective intervention, or where their arm is too short, as it normally is, to enforce such promises at the myriad individual workplaces that make up a modern capitalist economy.

Notwithstanding the costs of overt conflict, functionalist justifications of institutionalized limits to the commodification of labour suggest a harmony of interests that is nothing but a capitalist utopia. In countries without a corporatist legacy, employers and governments began to do away with post-war concessions to workers and unions the second that the employers felt strong enough, and the governments pressured enough, to do so. In this, they were not only unimpeded by considerations of economic efficiency but, quite to the contrary, driven by them. As the balance of class power began to tip, technological and organizational innovations were deployed to introduce new forms of work organization and labour management devoid of worker rights to participation, even if these might have been equally efficient and profitable. Restoring civility to work relations in the aftermath of the neoliberal revolution must therefore be a normative-political rather than a technocratic project, one that revives the original civilizational intention of labour law and whose realization therefore depends above all on a rebalancing of political-economic power relations in favour of labour in both post-neoliberal and post-corporatist political economies. For labour law, this raises the essentially empirical question of whether and in what

[81] This section of the article draws on the final chapter of Dukes and Streeck, op. cit., n. 18.

[82] E. Kirk, 'The "Problem" with the Employment Tribunal System: Reform, Rhetoric and Realities for the Clients of Citizens' Advice Bureaux' (2017) 32 *Work, Employment and Society* 975; E. Rose and N. Busby, 'Power Relations in Employment Disputes' (2017) 44 *J. of Law and Society* 674.

way law can be of help in resetting that balance.[83] How much leeway, or scope for initiative, can labour law reform have without some sort of support from socialist state intervention, in a generic sense, in markets other than those for labour? To what extent can labour law civilize work relations in a free-market economy, in other words, and can a non-liberal labour constitution be sustained without being protected by, or changing the balance of power towards, a less-than-fully-liberal economic constitution?

In post-neoliberal as in post-neocorporatist capitalism, revitalized labour law will have to take account of new ways of organizing production and configuring work relations in much more fragmented economies, with new occupational communities evolving against a background of new life courses and family structures.[84] All of this needs to be reflected in legal concepts and constructs. For this, labour law will have to work on two levels and in two modes. One is the workplace and the labour market, where institutions need to be built for the independent expression of worker interests, adjusted to contemporary circumstances. The other is the legal and political context of work relations, including a proper legal definition of what is new in labour markets and workplaces, but also, and beyond labour law in a narrow sense, the entirety of the means of creative protection countervailing creative destruction – the latter being, according to Joseph Schumpeter, the central feature of capitalism.[85] Issues here include the regulation of the labour supply through a labour market policy that encompasses a sustainable immigration policy, socially compatible capital and property rights, the politics of regional development and interregional equity, social policy surrounding and interacting with collective bargaining, and trade and monetary policy. These arise and must be addressed in the context of the politics and the regulation of globalization, financial and otherwise, which in the emerging war economy of our time will be, to an important extent, a politics of de-globalization.

For a government intent on addressing class inequalities and restoring the kind of rights that post-war democracies once conferred on workers as industrial citizens, there is no shortage of expert legal scholarship and law reform proposals on which to draw. Particularly impressive and worthy of mention are the Clean Slate Project run by a team at Harvard Law School and the ongoing work of the Institute of Employment Rights (IER) in the UK.[86] Emphasizing, as we have elsewhere,[87] the importance of worker involvement in rule making and in the organization of the labour process, both the Harvard and the IER teams position a renewed and extended right to freedom of association at the heart of their proposals, understood as a foundational democratic right and re-imagined to fit with the realities of work relations today. Now, as in the past, freedom of association must be understood to include strong and effective rights to strike and to bargain collectively. Given the extensive 'fissuring' of workplaces and the many intermediary forms that exist today between employment and subcontracting,[88] an updated version of

[83] For a thoughtful discussion of these matters, see A. Bogg and M. Freedland, 'Labour Law in the Age of Populism: Towards Sustainable Democratic Engagement' in *Collective Bargaining and Collective Action*, ed. J. Lopez Lopez (2020) 15.

[84] Dukes and Streeck, op. cit., n. 18, ch. 4; B. Rogers, *Data and Democracy at Work* (2023).

[85] J. Schumpeter, *Theory of Economic Development: An Inquiry into Profits, Capital, Credit, Interest, and the Business Cycle* (1934).

[86] S. Block and B. Sachs, *Clean Slate for Worker Power: Building a Just Economy and Democracy* (2018), at <https://lwp.law.harvard.edu/files/lwp/files/full_report_clean_slate_for_worker_power.pdf>; K. D. Ewing et al., *A Manifesto for Labour Law: Towards a Comprehensive Revision of Workers' Rights* (2016).

[87] R. Dukes and W. Streeck, 'Labour Constitutions and Occupational Communities: Social Norms and Legal Norms at Work' (2020) 47 *J. of Law and Society* 612.

[88] D. Weil, *The Fissured Workplace* (2014).

freedom of association must bridge the divide between dependent and formally independent labour and allow for the collective representation even of small – especially one-person – firms to the extent that they exist to 'sell labour services'.[89] Rights to freedom of association must be redrawn to ensure that workers are empowered to take collective action against any 'employer' or other organization that wields power over them as workers: the parent company as well as the subsidiary, or the 'end user' in a labour supply chain as well as the small local agency or gang master. Importantly, where employers, for whatever reason, organize work in such a way as to make it difficult for workers to interact with one another informally during working hours, employers must be obliged to provide facilities for them to come together to search for and discuss common interests. Unions should also have the freedom to forge alliances, in the course of disputes, with other interested parties: consumer groups, local communities, or environmental campaigners.[90] While these proposals were conceived for post-neoliberal regimes, some of them may also be taken on board by trade unions in post-neocorporatist systems trying to recover their previous power and once again become independent representatives of all workers in their countries.

To repeat: what labour law can achieve with respect to protecting human labour from full commodification is to an important but a priori unknown extent conditional on the economic constitution – the political economy – of the surrounding society. 'Free' or self-regulating markets for goods and services, capital, and finance put pressure on markets for labour to be freed up too.[91] Containing the commercialization of labour as a fictitious commodity ultimately requires containing the commercialization of real commodities too. Unregulated markets for goods and services, and even more so for capital, make it difficult to subject contracting for work to normative demands for equity and fairness. Without elements of economic democracy – such as some form of democratization of ownership in banking, democratic regulation of the investment strategies of pension funds, or a financial transaction tax to be used to create investment funds under popular control, to name only a few (all of which are precisely the opposite of what contemporary right-wing populism would be willing to offer) – even the most sophisticated and well-intentioned regime of waged labour may have to surrender to 'the juggernaut of capital', as Richard Hyman so memorably put it.[92]

In addressing the all-important question of whether it is possible for a democratic labour constitution to survive and develop within a capitalist economic constitution, we must, however, avoid positing an all-or-nothing relationship between democracy at work, on the one hand, and economic democracy, on the other.[93] It is far from pointless to strive for civilized work relations unless and until there are democratic economic relations in place. The impending renewal of labour law must expand as far as possible the breathing space that exists for it inside capitalism. Just as the creativity of the law is advanced by successful radical politics, and legal intelligence is sharpened by political lessons learned in the class conflicts of the day, so political and economic pressure exerted by workers and their trade unions may enhance the creativity of management in delivering goods not only to shareholders but also to workers. The same holds for the creativity of politics in arranging for compromise between capital and labour, at the upper bounds of

[89] Id.; N. Countouris and V. de Stefano, *New Trade Union Strategies for New Forms of Employment* (2019).

[90] M. Anner et al., 'Fissured Employment and Network Bargaining: Emerging Employment Relations Dynamics in a Contingent World of Work' (2021) 74 *Industrial and Labor Relations Rev.* 689.

[91] Polanyi, op. cit., n. 13.

[92] R. Hyman, 'The Very Idea of Democracy at Work' (2015) 22 *Transfer: European Rev. of Labour and Research* 11.

[93] Id.

what can be extracted from capitalism in its present incarnation, provisional and open to revision as the bargaining power of labour increases, opening up possibilities for organizational growth and development. Socialist progress, in the way in which we define it here, need not necessarily precede but may also follow progress in work relations, one enforcing the other if the political conditions are right.

6 | CONCLUSION

Could the objection fairly be levelled at the foregoing discussion that it is too soon to comment on labour law *after* neoliberalism? In the UK and the US, the enduring influence of neoliberal thinking within right-wing populist politics certainly complicates the question of whether a truly novel right-wing populist approach to labour law and work relations is emerging or has emerged. Focusing solely on the records of the Trump administration and the Johnson government on labour law and social welfare reform, one might be tempted to conclude that the rhetoric of championing workers' interests, and so on, amounted to little more than empty promises – albeit empty promises that seem to have succeeded, for a time, in obscuring the fact of neoliberal 'business as usual'. With its statutory wage and benefit increases, Poland is something of an outlier in this respect; even the Hungarian government under Viktor Orbán has used labour law and social welfare reform primarily to penalize rather than to improve the lot of the low paid and unemployed.[94] Strict border controls to limit the labour supply are more obviously at odds with neoliberal notions of free markets and open borders, but then neoliberal governments also place limits on immigration, sometimes even using the same kind of reasoning as Trump and Johnson: 'US/British jobs for US/British workers.' The difference is arguably a matter of degree rather than of kind.

In time, the somewhat uncomfortable marriage between right-wing populist and neoliberal elements within governing parties may prove unsustainable. Unless they are willing, as the Law and Justice party has been, to intervene in labour and other markets with the aim of ensuring more secure employment and higher wages, the emptiness of the worker-friendly rhetoric will soon become obvious. Here we encounter a fundamental contradiction at the heart of right-wing populist discourse: that it claims to champion workers' interests while at the same time making every effort to silence the voices of worker representatives, in the economic and the political spheres. If independent trade unions and collective bargaining are not permitted, protected, or, where necessary, reintroduced, government promises to improve wages and working conditions are almost certain to remain empty. Without a counterweight in the wage relations system, governments are helplessly exposed to the lobbying efforts of capital. The exceptionality of Poland in this respect rests in large part, as we have explained, on the availability of EU structural funds. Even there, however, some commentators believe that it is only a matter of time before the government shows its 'true face' and begins more openly and more regularly siding with big business over workers.[95]

While the German political economy was never fully neoliberal, with many of its neocorporatist institutions from the 1960s and 1970s surviving the neoliberal revolution in one form or other, it was and is as firmly embedded in global markets, including financial markets, as any other. On the face of it, Germany might still be taken for a country where the post-war economic regime has held up comparatively well under the pressures of globalization, with central pillars of that regime – such as trade unions, collective bargaining, and workplace and enterprise worker

[94] Lehoczky and Majtenyi, op. cit., n. 28.

[95] Rogalewski, op. cit., n. 25.

representation – still very much in place. A closer look reveals some of the same processes of liberalization and decentralization that we observe in the US and the UK, except that in Germany they have advanced less dramatically than elsewhere, taking the form of slow shrinkage and gradual functional change. Nevertheless, there are indications that the sustainability of what has been called the 'German model' may now be about to meet its limits, with the industrial sectors where the model is still strong very likely declining and its capacity to respond to novel conflicts in the new service sectors developing only sluggishly, if at all. Add to this the current tendencies towards de-globalization in the world economy, which particularly affect a country such as Germany whose export-oriented and still highly industrialized economy depends on stable worldwide supply chains and open product markets – conditions that have not only kept Germany prosperous but also enabled it to sustain social peace within only marginally restructured neocorporatist institutions.

In another sense, as we have argued, engagement with the question of labour law after neoliberalism is a matter of real urgency. Historically, trade unions were not only instrumental in creating more equal societies, by improving the wages and conditions of workers; they also played a key role in the construction and maintenance of our democracies.[96] Today, trade unions are greatly weakened and democracy is under threat. The defence and survival of the latter may depend on the revival of the former as an economic and political force.

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[96] Cornell and Barenberg (eds), op. cit., n. 59.