NB: This is the author's final draft of a chapter accepted for publication in D Ashiagbor (ed.) *Re-Imagining Labour Law for Development: Informal Work in the Global North and South*. (Hart 2018)

Insiders, Outsiders and Conflicts of Interest

Ruth Dukes*

> If labour law, as Arthurs puts it, 'takes its purpose, form, and content from the larger political economy from which it originates and operates', what shape does or should labour law assume in response to the transformation of the political economy in countries of the global North, with the declining prevalence of the postwar model of full employment within a formal welfare state regime? Correspondingly, what is the proper role to be played by labour law and labour relations institutions in the development process within industrialising countries of the global South?[1]

I Introduction

This chapter considers the use made of the notions of conflicts of interest, and of insiders and outsiders, in academic and policy discourse regarding labour markets and labour law. It takes as its starting point the questions raised by Diamond Ashiagbor concerning the 'conceptual and normative narrative' of labour law.[2] It notes, especially, her forefronting of political economy as the source of labour law's 'purpose, form, and content' – but as something, too, which may, in turn, be shaped by the law. (The potentially transformative character of law is acknowledged by Ashiagbor, as I understand her, when she asks what shape labour law does or *should* assume today in the global North; what the proper role is to be played by labour law and labour relations institutions in the development process in the global South.) The argument that I seek to make, with Ashiagbor, is for the importance of the wider political economy to understanding labour law, and to assessing the capacity of particular laws and

* School of Law, University of Glasgow

[1] D Ashiagbor, *Conference Programme: Re-imagining labour law for development: informal work in the global North and South* (September 2016), citing H Arthurs, 'Labour Law After Labour' in B Langille and G Davidov (eds), *The Idea of Labour Law* (Oxford, OUP, 2011).
[2] ibid.

institutions to contribute to the attainment of particular policy aims: job creation, decent wages and working conditions, economic security for workers and their dependants, the reduction of wealth and income inequalities.

In order to make this argument, the chapter begins by outlining briefly the significance of the notion of conflicts of interest to the foundational narratives of labour law, conceptual and normative. (The focus here, as throughout the chapter, is with labour law in the industrialised world and, especially, the UK.) It then illustrates the degree of emphasis given today by policy makers and commentators to the conflicting interests of different workers or groups of workers, observing that conflict between the social classes, in contrast, tends now to be underemphasised in both policy and scholarly discourse. It notes that the identification of conflicts of interest between workers or groups of workers is closely linked, often, to the claim or belief that flexible – 'free' – markets benefit all, raising employment levels and encouraging economic growth. Labour market segmentation should be addressed, so the argument goes, so as to maximise flexibility and ease market access for all.

In the course of this discussion, I seek to argue that approaches which begin from an identification of labour market insiders and outsiders can suffer from a number of weaknesses, chief among them a tendency to oversimplify complex constellations of interests, motivations, strategies, allegiances and collusions. As such, they can tend to overstate the incidence and the significance of conflicts of interest between the posited groups of workers, insiders and outsiders. Often such approaches adopt the kind of 'pure economic theory' forms of reasoning that are typical of law and economics scholarship, conceiving of markets in the abstract – as functioning according to the same set of rules regardless of place and time – and of market actors as purely economically motivated. In doing so, they can tend to obscure the role of the state, and of law, in giving specific form to labour markets and labour market institutions, and, of course, grossly to underemphasise the importance of any interest or value other than an economically rational one. A political economy framework, in contrast, allows for questions to be asked of labour markets as they are configured within particular localities, drawing scholars' attention directly to the state and to public policy as an expression of struggles between different actors over political

influence.[3] Such a framework allows, importantly, for the impact of particular laws and policies to be considered over a period of real time, and not only in the 'snapshot' view captured by an economic model.[4] For these reasons, it allows the questions to be addressed in a much more nuanced way of who benefits and who is disadvantaged by particular labour laws and labour market institutions; in what respects they are advantaged or disadvantaged; and why that is so.

In the final part of the chapter, I construct a case study of the agricultural sector in Scotland. In the context of a discussion of labour market insiders and outsiders, informed by the wider themes of this volume, the sector is of particular interest. Using the definitions of formality and informality developed by Ashiagbor in the volume's introduction, we might say that the general trend in Scottish agriculture is to greater informality in employment relations. On the face of it, the sector could characterised by the existence of a number of insider and outsider groups: employees whose terms and conditions are regulated by the Scottish Agricultural Wages Board, and casual workers, to whom the relevant rules do not apply; local workers, and temporary migrants from within the EU and elsewhere; workers employed directly by farmers, and those supplied to the farmers by labour market intermediaries or 'gangmasters'; the documented, and the undocumented. Resisting the easy characterisation of these groups as labour market insiders and outsiders, and the implication of 'inter-worker' conflicts of interest which such characterisation might bring with it, I seek instead to understand why it is that workers in the sector are generally low-paid and often ill-treated: what are the motivations and strategies of employing organisations; why are they under such pressure to employ low-wage labour; what is the role of the state in causing or failing to address the causes of such pressures? I also attempt to identify the possible consequences of amending the existing systems of regulation, and the potentially disastrous impact upon the sector of Brexit.

II Conflicts of Interest and Labour Law

[3] G Menz, 'Employers and Migrant Legality: Liberalization of Service Provision, Transnational Posting, and the Bifurcation of the European Labour Market' in C Costello and M Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford, OUP, 2015), at 49-50.
[4] J Robinson, 'Time in Economic Theory' (1980) 33 *Kyklos* 219.

A. From Traditional Narratives to the Third Way

In early accounts of labour law – those which did the work of first presenting it as a distinct and coherent field of study and legal practice – employment relations were understood to be inherently conflictual.[5] Relying more or less directly on a Marxist analysis of capitalism, scholars understood the interests of the social classes – dependent labour, on the one hand, and the owners of capital, on the other – to be distinct and opposed.[6] Labour law was advocated as a means of empowering the weaker party in the relationship, the worker, so that his interests were not routinely subordinated to those of the more powerful employer. The goals of labour law were conceived accordingly to include the emancipation of the worker and democratisation of the economic sphere. Broadly speaking, the interests of the individual worker were understood to be identical with those of dependent labour as a class.[7] Conflicts of interest arising *between* workers were regarded, therefore, as largely illusory and, in any case, to be greatly ameliorated by systems of collective bargaining that ensured standardised wages across sectors and regions.[8]

For the duration of the *trente glorieuses*, these were the essential tenets of the dominant narrative of labour law. It was not until the 1980s that the narrative was challenged quite fundamentally on two fronts, each emphasising in different ways the existence of labour market insiders and outsiders, and conflicts of interest between groups of workers. In the first instance, scholars of neoclassical economics, Austrian libertarianism, and law and economics brought a particular form of economic reasoning to bear on the analysis of employment relations, characterising workers and employers alike as rational wealth-maximizers, and

[5] Part II of this chapter draws heavily on R Dukes, 'Conflict and the Crisis in Labour Law: From Weimar to Austerity' in PF Kjaer and N Olsen (eds), *Critical Theories of Crisis in Europe* (London, New York, Rowman and Littlefield, 2016).
[6] Se eg H Sinzheimer, *Grundzüge des Arbeitsrechts*, 2nd ed, (Jena 1927). On the influence of Marx upon Sinzheimer, see O Kahn-Freund, 'Hugo Sinzheimer' in R Lewis and J Clark (eds), *Labour Law and Politics in the Weimar Republic* (Oxford, Blackwell, 1981).
[7] In the work of Hugo Sinzheimer, for example, the condition of the individual worker was said to be determined by the conditions of the social class of which he was a member, so that any improvement in the former was dependent upon an improvement in the latter: H Sinzheimer, 'Demokratisierung des Arbeitsverhältnisses' (1928) in H Sinzheimer, *Arbeitsrecht und Rechtssoziologie: gesammelte Aufsätze und Reden* (Frankfurt, Cologne, Europäische Verlagsanstalt, 1976) 121.
[8] See eg H Sinzheimer, 'Das Rätesystem', and 'Die Rätebewegung und Gesellschaftsverfassung' both in *idem*, *Arbeitsrecht und Rechtssoziologie: gesammelte Aufsätze und Reden* (Europäische Verlagsanstalt, Frankfurt, Cologne, 1976).

trade unions as rent-seeking monopolies.[9] Employment protection laws and collective bargaining were criticised for their propensity to raise the wages of some (ie 'insiders') above the 'natural' market level, causing lower wages or even unemployment elsewhere (ie to 'outsiders'). Ultimately, it was argued, protective labour laws and trade unions were damaging to the economy and so to the very workers that they were designed to protect. Feminist critiques of labour law, meanwhile, were directed at exposing the extent to which trade unions and established collective bargaining practices had failed, for many decades, to embrace certain categories of worker, including categories that were predominantly or wholly populated by women (and/or immigrant) workers. Focused, by their nature, on the furtherance of members' interests, unions routinely regarded the priorities and interests of 'non-standard' workers as marginal, or even contrary to members' interests. As a result, these workers ran the risk of being denied the protections afforded to others by way of the collective negotiation of employment terms and conditions.[10]

Notwithstanding the force of these challenges to the traditional labour law narrative, it remained the case that class conflict was still highly visible in the 1980s: picture a line of striking miners in the north of England eye to eye with an opposing line of police; a mounted policeman, truncheon raised; a roomful of young, male traders popping champagne corks as computer screens flash green around them. For the most part, scholars of labour law tended to frame their analysis accordingly.[11] It was not until the mid-1990s that the influential 'third way' discourse was developed by the centre left in an effort to transcend 'old' divides between left and right; to offer instead a vision of a win-win society in which rich and poor alike would be better off. In the UK, 'New' Labour devised a set of policies and legislative initiatives in the field of employment and employment relations which were introduced as offering 'fairness at work'.[12] The premise upon which the claim of fairness lay, quite explicitly, was that certain kinds of labour laws and legally enforceable standards could benefit employees and employers alike, improving the situation of the former while helping

[9] The locus classicus is R Posner, 'Some Economics of Labor Law' (1984) 51 *University of Chicago Law Review* 988-1011. See also Lord Wedderburn, 'Freedom of Association and Philosophies of Labour Law' (1989) 18 *Industrial Law Journal* 1-38.
[10] J Conaghan, 'The Invisibility of Women in Labor-Law – Gender-Neutrality in Model-Building' 14 *International Journal of the Sociology of Law* 377-392; J Conaghan, 'Feminism and Labour Law: Contesting the Terrain' in A Morris and T O'Donnell (eds), *Feminist Perspectives on Employment Law* (London 1999).
[11] See eg Wedderburn, 'Freedom of Association'
[12] UK Government (1998), White Paper, *Fairness at Work*, Cm 3968.

at the same time to make British businesses and the British economy more competitive. '[F]airness at work and competitiveness go hand in hand … one must reinforce the other. That is the cardinal principle'.[13] Describing the social policy of the European Union at the time, with reference to Karl Polanyi, Colin Crouch spoke of 'embedded neoliberalism'.[14] Neo-liberal strategies were pursued, but it was recognised that such strategies should be nested or embedded in certain forms of social protection, to gain legitimacy and to ease disruptive transitions. So-called 'flexicurity' programmes aimed, then, to increase the flexibility of action open to employers, especially their ability to dismiss workers, while offering those workers 'security' in the form of improved opportunities for alternative employment and adequate income support during periods of 'transition'.

During the early 2000s, many scholars of labour law, in the UK as elsewhere, were critical of third way policies and legislative initiatives, illustrating how measures which purported to benefit both sides of industry in truth served the interests of employers rather better than those of the workforce.[15] Others, however, glimpsed therein the possibility of a new narrative for the field; one which might constitute a convincing alternative to the 'deregulation' orthodoxy of the 1980s.[16] Without, of course, simply endorsing government policy and legislation uncritically, these scholars felt themselves able to identify within its terms a set of objectives that they could approve as setting an appropriate agenda for scholarly investigations. In their authoritative history of labour legislation and public policy in the years to 2007, for example, Paul Davies and Mark Freedland adopted a framework which assessed laws and policies primarily with reference to New Labour's stated objectives of maximising social inclusion and improving the competitiveness of the economy.[17] These were 'profoundly important social objectives', Davies and Freedland suggested, which scholars would do well to engage with.[18] In the UK and elsewhere, other authors developed a line of analysis which sought to make the case for labour law by demonstrating how it served to address 'labour market failures' or 'externalities', or to improve labour market efficiency.[19]

[13] ibid.
[14] C Crouch, 'Entrenching neo-liberalism: the current agenda of European social policy' in N Countouris and M Freedland (eds), *Resocializing Europe in a Time of Crisis* (Cambridge, CUP, 2013).
[15] Eg T Novitz and P Skidmore, *Fairness at Work* (Oxford, Hart, 2001)
[16] R Dukes, *The Labour Constitution: the Enduring Idea of Labour Law* (Oxford, OUP, 2014) ch 5.
[17] P Davies and M Freedland, *Towards a Flexible Labour Market* (Oxford 2007).
[18] Davies and Freedland, *Towards*, 249.
[19] For discussion see RM Fischl, 'Labor Law, the Left and the Lure of the Market' (2011) 94 *Marquette Law Review* 947.

On that logic, they were able to argue that certain labour rights and standards could be beneficial not only to workers and rights-holders, but to all.

B. Crisis, Austerity, and the Politics of Division

> *Where is the fairness, we ask, for the shift-worker, leaving home in the dark hours of the early morning, who looks up at the closed blinds of their next-door neighbour sleeping off a life on benefits?*
>
> George Osborne, UK Conservative Party Conference, October 2012

For a brief moment in 2008, the financial crisis appeared to reveal the deep-seated nature of the conflict of interests between those who (had) benefited from deregulated or 'lightly' regulated financial markets and those who had not. As a matter of more or less unanimous agreement, it seemed, the ostensibly 'win-win' strategies of the third way would be rethought: more stringent financial regulation would be introduced, bankers' salaries and bonuses reigned in, no longer would we feel quite so 'intensely relaxed about people getting filthy rich'.[20] Before such steps could be taken, however, the crisis was quickly recast as one of swollen public sectors, over-generous welfare systems and rigid labour markets.[21] As billions of dollars and Euros were spent by governments on propping up the banks, unemployment rates rose, welfare payments were reduced, and legal and institutional supports for better-than-minimum terms and conditions of employment were removed.[22]

In what has since become the mainstream analysis of 'failing' labour markets, labour market segmentation has routinely been attributed to the existence of market 'insiders' and 'outsiders'. Insiders are those who enjoy 'unnaturally' and, therefore, 'unfairly' high wages and good working conditions including, importantly, job security; outsiders are those without work or in precarious, low-paid work. Often 'insiders' are defined simply as those in a standard employment relationship (SER), enjoying all the legal protections that are accorded

[20] As Peter Mandelson, a prominent member of Tony Blair's first Government, stated in 1998 (https://www.theguardian.com/politics/2012/jan/26/mandelson-people-getting-filthy-rich).
[21] A Supiot, 'Towards a European Policy on Work' in N Countouris and M Freedland (eds), *Resocializing Europe in a Time of Crisis* (Cambridge, CUP, 2013).
[22] For country by country analysis within the EU see: C Clauwaert and I Schömann, 'The Crisis and National Labour Law Reforms: a Mapping Exercise', *Annex to ETUI Working Paper 2014/4* (Brussels 2014).

to (standard) 'employees', while 'outsiders' are correspondingly those in non-SER.[23] The characterisation of labour markets as dually segmented in this way encourages the conclusion that conflicts of interest arise – primarily and problematically – not between workers and their employers, but between different groups of workers. The logic implied by the diagnosis is that in order to improve the position of the outsiders, the insiders' rights should be weakened or forfeited: it is *because* the insiders' terms and conditions are unfairly high that those of the outsiders remain low.[24]

In the context of the financial crisis of 2008 and the ongoing crisis in the Eurozone, the EU Commission and its Troika associates have consistently identified dual segmentation as a primary cause of failing labour markets, high unemployment levels, and stunted economic growth.[25] Accordingly they have recommended or required national governments to reform employment protection legislation so as 'to reduce over-protection of workers with permanent contracts, and provide protection to those left outside or at the margins of the job market'.[26] With the stated aim of better 'balancing' the legal protection afforded to so-called insiders and outsiders, national governments have amended legislation so as to weaken the rights and lower the standards enjoyed by the former, without in fact strengthening the protections afforded to the latter.[27] Elsewhere, conflicts of interest have been deemed to arise between 'hard-working families' and 'welfare-scroungers', 'strivers' and 'shirkers', and used to legitimise cuts to welfare.[28] In an attempt to explain the imposition of draconian restrictions upon the right to strike, the interests of striking workers have been said to conflict with those of other worker-consumers, whose access to services is purportedly unfairly hindered by reason of the industrial action.[29]

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[23] V De Stefano, 'A Tale of Oversimplification and Deregulation: the Mainstream Approach to Labour Market Segmentation and Recent Responses to the Crisis in European Countries' (2014) 43(3) *Industrial Law Journal* 253.

[24] See eg the Kok Report, *Jobs, Jobs, Jobs. Creating more Employment in Europe* (Report of the Employment Taskforce, November 2003), cited De Stefano, 'Oversimplification' 258.

[25] The term 'Troika' is widely used to refer to the EU Commission, European Central Bank, and International Monetary Fund acting together.

[26] EU Commission, 'Communication from the Commission to the European Parliament, the European Economic and Social Committee and the Committee of Regions, Annual Growth Survey' COM (2011) aa final.

[27] De Stefano, 'Oversimplification' 264-74. For an assessment of such reforms see (2016) 32(4) *European Sociological Review*, special issue

[28] See eg the Conservative Party of the UK, Manifesto 2015, and its bracketing together of welfare cuts and income tax cuts.

[29] UK Government, Department of Business Innovation and Skills, *Trade Union Bill: Consultation on Ballot Thresholds in Important Public Services* (July 2015).

The figment of conflicts of interests between workers also loomed large, of course, in policy debates and print media in the run up to the 2016 Brexit referendum, and the Trump presidential campaign of the same year. Here, it took the form of the putative competition for jobs (and access to public services) arising between 'British', or 'American', and immigrant workers. In both cases, then, the 'villains' of the piece were the outsiders rather than the insiders; in both cases, the language and imagery used was routinely exaggerated and even inflammatory. Take, for example, *Leave.EU*'s notorious 'Breaking Point' poster, with its depiction of a snaking queue of hundreds of dark skinned people, waiting – so we were clearly intended to understand – to gain entry to the country;[30] or the almost daily headlines in The Sun, the Daily Express, and the Daily Mail, referring to the 'hordes' of immigrants squeezing into 'full-up' Britain, at the insistence of the EU.[31] 'MILLIONS of EU migrants grab our jobs: Time for Brexit to FINALLY take control of borders' was fairly typical of the time, with its suggestion of a direct conflict of interest over work, and Brexit as the mechanism that would allow us to stem the immigrant flow.[32] After the event, analysis suggested that these narratives had been influential: immigration was one of the main issues to influence Leave voters' decision-making; moreover, that readers of the Sun, the Express and the Mail were much more likely to vote Leave than Remain.[33]

C. Conflicts of Interest Depicted in Scholarship

In scholarly writing, the language of labour market insiders and outsiders is familiar, first and foremost, from the US and a line of analysis in the law and economics tradition which seeks to illustrate the allegedly damaging effects of trade union representation; particularly, the barriers put in the way of employers who would otherwise 'increase efficiency' by hiring cheaper, non-union labour.[34] In recent years, it has appeared, too, in the work of some left-wing, or centre left, commentators. Perhaps the best-known example is Guy Standing and his

[30] Leave.EU is an organisation that campaigned for Leave during the 2016 Referendum. The poster in question is reproduced here: https://www.theguardian.com/politics/2016/jun/16/nigel-farage-defends-ukip-breaking-point-poster-queue-of-migrants
[31] J Martinson, *The Guardian*, 24 June 2016.
[32] The headline is taken from the Daily Express, 18 February, 2016.
[33] K Swales, *NatCen Report: Understanding the Leave Vote* (NatCen Social Research 2016). At the time of writing, similar analysis of the 2016 US presidential election has yet to be published.
[34] De Stefano, 'Oversimplification' 262-4.

identification of an emerging global class of low-paid workers with little or no job security: the 'precariat'.[35] As the dynamics of globalisation and government policies aimed at 'flexibilisation' have fragmented older class divisions, so Standing argues, several new social classes have emerged, which may be defined with reference, essentially, to the degree of vulnerability suffered by their members. Above the 'precariat', sit then, among other classes, the 'salariat' (comprising those employed in large corporations and government administration on a full-time basis, enjoying job-security, pensions and paid holidays) and the rump of the old working class (also employed under full-time, long-term contracts, enjoying both legal protections and representation by trade unions). Below it, sit the unemployed and the *Lumpen*. Implicit, and at times even explicit, in Standing's analysis is the suggestion that the interests of these different classes of worker conflict. From a social policy/basic income group perspective, for example, he describes current systems of welfare and labour law as 'labourist', effective only in supporting the shrinking and privileged population who are in stable and secure jobs. The centre-left must abandon the interests of 'labour', he argues, and turn its attentions instead to representation of the precariat.

In the field of labour law more specifically, several important works have focused in recent years on the question of inter-worker conflicts: by Valerio de Stefano, for example, already cited above, analysing the centrality of the notion of labour market segmentation to 'mainstream responses' to the financial crisis in the EU; by Guy Mundlak, and by ACL Davies.[36] Both Mundlak and Davies have sought in their writing to make the case for the importance of inter-worker conflicts; Mundlak arguing that they ought to be paid greater attention by policy-makers and scholars alike, Davies building on that argument to consider how the law addresses such conflicts in the UK, and to begin the task of mapping out the law's various responses. In the course of his analysis, Mundlak has made the provocative claim that conflicts of interest between different workers or groups of workers are of the same 'order' as the conflict between labour and capital.[37]

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[35] G Standing, *The Precariat: the New Dangerous Class* (London 2011). For criticism, see J Breman, 'A Bogus Concept?' (2013) 84 *New Left Review* 130.

[36] De Stefano, 'Oversimplification'; G Mundlak, 'The Third Function of Labour Law: Distributing Labour Market Opportunities among Workers' in G Davidov and B Langille, *The Idea of Labour Law* (Oxford 2011); ACL Davies, 'Identifying 'Exploitative Compromises': the Role of Labour Law in Resolving Disputes Between Workers' (2012) 65 *Current Legal Problems* 269-94. See also J Rubery, 'Reregulating for Inclusive Labour Markets' Conditions of Work and Employment Series No. 65 (Geneva: ILO, 2015) and further references contained therein.

[37] Mundlak, 'Third Function' 323

> [T]he question labour scholars and practitioners often ask – who gains from any particular arrangement, employers or workers? – must be complemented by its counterpart – which workers gain and which lose? Sacrificing the interests of some workers for the benefit of 'labour' as a group is but one option, but clearly not the only one, nor necessarily the most redeeming, even if recognizing the gains and losses of some groups risks the size of the aggregate gain, or labour's gain.[38]

III An Outline Critique

The interests of individual workers and groups of workers can, of course, conflict. Competition between workers for jobs is as much a characteristic of market economies as conflict between workers and their employers over terms and conditions,[39] and the greater the inequality of rewards attached to particular jobs – within and between different countries – the more accentuated such competition is likely to be. Conflicts of interest can arise then, for example, between applicants for the same post, or between workers in a particular sector and others (eg young people, migrants) who would willingly do the same jobs for less. It is also manifestly the case that law can serve to intensify or to weaken such conflicts of interest, or to resolve them in favour of particular parties.[40] It can create mandatory minimum terms and conditions of employment, for example, applicable across whole localities or whole sectors. It can extend such minima to casual and migrant workers. It can guarantee a particular level of welfare to the unemployed. It can seek to prohibit discriminatory treatment of workers by employers on the grounds of race, gender or sexuality. In a situation of redundancies, it can stipulate the manner of redundancy selection. Which workers or groups of workers stand to benefit, and which to be disadvantaged, by particular labour laws is or should be a matter of concern to all scholars and policy-makers working in the field.[41]

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[38] Mundlak, 'Third Function' 328

[39] Characterised by Max Weber as 'Konkurrenzkampf' and 'Preiskampf': M Weber, *Economy and Society* (Berkeley 1978) 72, 82, 93. Cf Kahn-Freund's identification of 'universal' conflicts of interest between management and labour in P Davies and M Freedland (eds), *Kahn-Freund's Labour and the Law*, 3rd ed. (London, Stevens, 1983).

[40] Davies, 'Exploitative Compromises'; Mundlak, 'Third Function'

[41] Davies, 'Exploitative Compromises'; Mundlak, 'Third Function'. C Costello and M Freedland, 'Migrants at Work and the Division of Labour Law' in Costello and Freedland (eds), *Migrants at Work* (Oxford, OUP, 2014).

I want to suggest that it is nonetheless the case that approaches to the description or analysis of labour laws and labour markets which begin from an identification of conflicts of interests between workers – including, especially, those which employ the notion of insiders and outsiders as a heuristic device – can suffer from a number of weaknesses. Often, such approaches make use of the kind of microeconomic model which provides only an atemporal, spatially limited 'snapshot' of a single workplace or locality, from which the likely consequences of particular actions or events must be deduced. The use of such models can encourage analysts into making a number of assumptions: for example, that the amount of resources to be distributed between workers in any given situation – (good) jobs, wages, rights, risks – is fixed, so that if one worker secures a job, or a higher wage, or a right to take time off to care for dependants, another will necessarily miss out on those things. The disadvantage suffered by the outsider can accordingly be attributed directly to the advantage enjoyed by the insider.[42] Membership of posited 'insider' and 'outsider' groups of workers is similarly often assumed to be fixed rather than fluid – the unemployed will remain unemployed, while those in full-time, stable employment stay in full-time, stable employment. 'Labour' is assumed to be a homogeneous good, the labour of one person to be always easily replaceable with that of another.

Reintroducing a temporal and spatial dimension to the picture reveals that such assumptions may be unfounded. While it may be possible, in any given context, to establish that resources are fixed – so that a particular employer could not afford to hire extra staff without cutting the wages of existing employees; or so that the employment of an influx of migrant workers would necessarily entail the redundancy of others – this is not something that ought, without investigation, to be assumed. It might just as easily be the case that hiring extra staff would be economically viable for a particular firm because it would allow it to increase its customer base; that the employment of migrant workers would contribute to the growth of the economy and the creation of more jobs. Those who assume that resources are fixed overlook the fact that future resources are not; that action taken today may serve to increase, as well as to decrease, the quantity of resources available at a later date. Categorising workers as either insiders or outsiders, meanwhile, can tend to obscure not only

[42] See for example Mundlak, 'Third Function' 323-4: 'those who pay the price to the benefit of others'; Davies, 'Exploitative Compromises', 270: 'the introduction of the statutory right to request flexible working can be seen as a choice in favour of a particular group of workers – those with caring responsibilities – and against those who might want the benefit of flexible working for other reasons'.

the potentially temporary nature of membership of the posited groups, but also the possibility and the extent of *shared* interests between them. Workers in low-paid, insecure work may aspire to better jobs with better terms and conditions, and for that reason may not regard it as in their interests for systems of worker protection to be dismantled. Lowering the wages of one group of workers may impact negatively on the wages of others, and may additionally serve to legitimate cuts to welfare (on the basis that income tax revenue has fallen, or so as to ensure that 'work pays'). Many 'outsiders' share directly the interests of 'insiders' by reason of being partially financially dependent on an 'insider' family member. Regarding labour as homogeneous and workers as readily interchangeable overlooks the existence of many different segments or groupings in labour markets, arising not only by reason of the differing terms and conditions of workers, but also different skill-sets and levels of education, geographical locations, corporate structures, trade union membership and so on.[43]

A further significant weakness of the insider/outsider heuristic is its tendency to obscure the importance of employer interests and strategies in causing market segmentation. The very language of insiders and outsiders can appear to attribute the causes of inequalities among workers to the insiders (and not to capital or the state), and, as a consequence, to legitimise measures which aim to achieve greater equality by a process of levelling wages and conditions *down.* It is true that the lowering of insiders' terms and conditions is not the only possible policy response to a diagnosis of dual segmentation. As Deakin has identified, a number of alternative strategies exist, including 'mandating equal (or pro rata) protections for workers in atypical work relationships to those in the 'core' ('levelling up')'; widening the scope of labour law protections so as to increase the proportion of workers who enjoy them; and using the law 'to stimulate alternative mechanisms of labour market regulation' such as 'collective bargaining, training policy and fiscal incentives'.[44] In the current context of austerity, however, and in line with the economic orthodoxy regarding the benefits of ever-greater flexibility, it is levelling-down which is almost invariably the preferred option of national governments and supranational institutions. The aim is decidedly to increase the number of jobs, and not to ensure their quality.

[43] W Streeck, 'The Sociology of Labor Markets and Trade Unions' in N J Smelser and R Swedberg (eds), *The Handbook of Economic Sociology* (Princeton 2005).
[44] S Deakin, 'Addressing Labour Market Segmentation: the Role of Labour Law' *Working Paper No. 52*, Governance and Tripartism Department (Geneva 2013)

As was emphasised long ago by Engels, employers have much to gain by orchestrating and intensifying competition between workers.[45] It was, of course, precisely for that reason that workers sought to organise themselves into trade unions and to demand the standardisation of terms and conditions across whole sectors and countries, or regions, refusing to compete with one another on the basis of the price at which they were willing to sell their labour power. Those who advocate labour market 'flexibilisation' as a response to the existence of insiders and outsiders seem to overlook this point; to downplay the fact that some forms of flexibilisation – eg the dismantling of established machinery for the collective representation of workers' interests – may serve to *increase* inequalities between workers, intensifying competition between them for (the better) jobs.[46] This is not true across the board, of course: certain types of labour market segmentation may serve the interests of employing organisations not only by keeping wages low, but also by weakening the capacity of labour for collective action.[47] The reorganisation of big firms in line with a core/periphery pattern, for example, may be undertaken with the specific aim of reducing labour costs, divesting the firm of non-core elements of the production process, and creating a two-tier workforce in the process. Inequalities between remaining 'core' employees and the rest – the employees of smaller contractors, 'zero hours' and other 'casual' workers, self-employed workers – are likely to be significant.

IV Case Study

A. The Agricultural Sector in Scotland

In what follows, the aim is to give further consideration to the nature and implications of conflicts of interest in the field of work and labour market relations, focusing specifically on the agriculture sector in Scotland. In economic terms, the sector is small, accounting for only

[45] '[C]ompetition of the workers among themselves is … the sharpest weapon against the proletariat in the hands of the bourgeoisie.' F Engels, *The Condition of the Working Class in England* (Leipzig: Otto Wigand, 1845.
[46] This is especially likely to be the case where the collective bargaining machinery previously in place was sectoral rather than company specific: De Stefano 271-4; Rubery cites evidence that deregulation can serve to increase the dispersion of employment conditions and rewards: Rubery, 6
[47] Breman, *New Left Review*

around 1 per cent of income and 1 per cent of jobs in Scotland.[48] In terms of its workforce, it is characterised by low pay across the board, and by a singularly high proportion of temporary migrant labour.[49] In 2010, it was estimated that as many as half of all employees in the sector were 'A8' migrants, from the eight Central and Eastern European countries that acceded to the EU on 1 May 2004.[50] This was a much larger proportion of the workforce than in any other sector in Scotland.[51] Between 1998 and 2008, the number of full-time employees in agriculture decreased by around 4000, while the number of casual and temporary workers increased by around 2000.[52] Full-time employees now constitute only around half of the workforce, the other half being part-time, casual and seasonal workers, with migrants providing much of the seasonal labour.[53]

In Scotland, as elsewhere, employment in the agricultural sector possesses certain features which can tend to make the situation of workers particularly precarious.[54] Much of the work is seasonal, leaving workers without a stable, guaranteed income throughout the year. Where they are only in post for short periods of time, workers are less likely to have been given proper health and safety information and training, or to have acquired the same level of expertise in using farm machinery as permanent employees, putting them at an even greater risk than usual of workplace accidents.[55] Often, agricultural work requires to be done in geographically isolated locations, meaning that farm workers are reliant on the accommodation and/or transport provided by their employer, with only very limited opportunities to seek advice, including legal advice, or to join a trade union. By reason of these various vulnerabilities, workers in agriculture may be more likely than others to accept

[48] The reference here to 'jobs' indicates that 'working occupiers' and 'working spouses' are excluded from the calculation, since they are generally treated as unpaid labour. Scottish Government, *Economic Report on Scottish Agriculture*, 2016 Edition (Edinburgh 2016); Scottish Government, *Regional Employment Patterns in Scotland: Statistics from the Annual Population Survey 2015* (Edinburgh 2016)
[49] In April 2013, median full-time gross weekly earnings in agriculture in the UK were found to be £407.50, 21.3% lower than the median for all industries and services, £517.50: D Bovill, Office for National Statistics, *Patterns of Pay: Estimates from the Annual Survey of Hours and Earnings, UK, 1997 to 2013* (London 2014)
[50] Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovakia, Slovenia. A Findlay, A Geddes, D McCollum, 'International Migration and Recession' (2010) International
Migration and Recession' (2010) 126(4) *Scottish Geographical Journal* 299-320, 314. No Government statistics are available as to numbers of migrant workers employed across the sector.
[51] Ibid.
[52] Findlay et al, 'International Migration', 316
[53] Scottish Gov Report 2016:
[54] Davies, 'Migrant Workers', 80-1
[55] Health and Safety Executive, *Fatal injuries in farming, horticulture and fish farming in Scotland from 2003/04 to 2013/14* (HSE 2014)

any terms offered in a bid to get themselves hired, and less likely to be in a position to enforce their legal rights. Migrant workers may not be able to build up the periods of long-term continuous residence necessary to acquire more secure residence status. According to the Equality and Human Rights Commission, there is some evidence in the Scottish agricultural sector of human trafficking and forced labour.[56] The wages of migrant workers employed to plant and harvest soft fruit in Scotland, it has found, may be below the minimum wage.[57]

> [T]hey can lose significant parts of what they earn in commission to the gangmaster, as well as repaying exorbitant charges for being conscripted and brought in. They may also be charged for living accommodation in insanitary, dangerous portakabins in the countryside, crammed to the seams with other workers.[58]

From 1943 until the end of 2013, the hiring of temporary migrant labour in agriculture across the UK was regulated by a series of temporary migrant worker programmes.[59] Most recently, the so-called Seasonal Agricultural Workers Programme accommodated as many as 25,000 workers per annum in the country, employed primarily in horticulture at harvest time.[60] From 2008, the Programme was limited to so-called A2 nationals, from Romania and Bulgaria.[61] It was brought to an end on 1 January 2014 to coincide with the lifting of restrictions on the rights of A2 nationals to work in the UK. Since then, the demand for seasonal workers in agriculture has been filled predominantly by A8 and A2 nationals who, as EU citizens, do not require a visa to work in the UK. This is consistent with Government policy that demand for unskilled and low skilled labour should be satisfied, for the moment, from within the EU.[62]

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[56] Equality and Human Rights Commission Scotland, *Inquiry into Human Trafficking in Scotland Report* (Equality and Human Rights Commission 2011), 8
[57] Ibid.
[58] Ibid.
[59] S Scott, 'Making the case for Temporary Migrant Worker Programmes: Evidence from the UK's rural guestworker ('SAWS') scheme' (2015) 40 *Journal of Rural Studies* 1-11
[60] At its 2004 peak: ibid. For an outline of the relevant rules, see ACL Davies, 'Migrant Workers in Agriculture' in C Costello and M Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford 2014)
[61] The A2 countries are Romania and Bulgaria which joined the EU on1 January, 2007. The access of A2 nationals to the UK labour market was restricted until January 2014.
[62] Scott

Since the beginning of 2014, then, no distinction has been drawn in law between temporary migrant and other kinds of agricultural labour when it comes to the regulation of workers' terms and conditions of employment. In Scotland, two separate and very different regulatory regimes are in force, in addition to the generally applicable norms of employment law: the Scottish Agricultural Wages Board (SAWB) and the Gangmasters Labour Abuse Authority (GLAA, formerly the Gangmasters Licensing Authority).[63] The SAWB is empowered by statute to set wages and other terms and conditions for the sector by way of statutory order.[64] Together with the Agricultural Advisory Panel for Wales, it is the sole survivor of a system of wages councils first set up under the Trade Boards Act 1909, the remainder of which were abolished during the 1980s, and, in the case of the Agricultural Wages Board for England and Wales, in 2013.[65] The original aim of the trade boards legislation was to create a legislative substitute for collective machinery, involving representatives of labour and the employers directly in the setting of wages.[66] In line with that aim, the SAWB comprises 17 members: six nominated by Unite the Union, six nominated by the National Farmers Union Scotland and the Scottish Land and Estates, and five independent members appointed by Scottish Ministers. Its annual Wages Orders apply to all employees in the sector, guaranteeing them an hourly wage that is at least as high as the National Living or Minimum Wage (NLW/NMW) and in many cases higher, depending on the length of service and qualifications of the employee in question.[67] It also sets additional overtime rates, minimum paid holiday entitlements that are more generous than the generally applicable minima established under the Working Time Regulations, and other rules, including a requirement that employees be supplied by their employer with weather protective clothing and boots.[68] Enforcement of the rules contained in the Order is a matter for the Scottish Government Wages Enforcement Team, and the Agricultural Wages Inspector.[69]

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[63] The Agricultural Wages Board for England and Wales was abolished in 2013.
[64] Agricultural Wages (Scotland) Act 1949
[65] The Trade Boards Act 1909 was amended by the Trade Boards Act 1918. The Wages Councils Act 1945 repealed the two earlier Acts in their entirety and replaced them with a new set of provisions. In agriculture, a Wages Bard was first established under the Corn Production Act 1917. The Agricultural Advisory Panel for Wales was established under the Agricultural Sector (Wales) Act 2014.
[66] As discussed by Otto Kahn-Freund in O Kahn-Freund, 'Legal Framework' in A Flanders and HA Clegg (eds), *The System of Industrial Relations in Great Britain* (Oxford 1954), 69
[67] The Order uses the term 'worker' throughout but confines its application to workers 'employed' in agriculture: Agricultural Wages (Scotland) Order (No. 63) 2015 [AWSO], Art 3. An employee with at least 26 weeks continuous service is entitled to a higher hourly minimum, as is an employee with certain agricultural qualifications: AWSO, Arts 5, 6, 8
[68] AWSO, Arts 9, 10, 27
[69] Scottish Agricultural Wages Board, *Annual Report for 1 October 2015 – 30 September 2016*: http://www.gov.scot/Topics/farmingrural/Rural/business/18107/SAWBAnnualReport2016

The GLAA was first established in 2006 with the aim of protecting vulnerable and exploited workers in the agriculture, horticulture, shellfish gathering and associated processing and packaging sectors throughout the UK.[70] Because its method of seeking to achieve this aim involves operating a 'gangmaster' – or labour provider – licensing regime, it has no application to individuals who are employed directly by farm businesses. Under the terms of the relevant legislation, any labour provider must apply for and continue to hold a licence in order to operate lawfully in the relevant sectors. Before granting a licence, the Authority must inspect the applicant; where the business is new and not yet trading, it may return after granting the licence for a second inspection. The matter of whether to award or revoke a licence is judged by the GLAA with reference to eight labour standards, the majority of which seek to protect workers from exploitation and abuse, to ensure that they enjoy safe and decent working conditions, and to ensure a floor of basic rights.[71] Responsibility for monitoring and enforcement lies primarily with the GLAA. Where a gangmaster breaches a term of its licence, the GLAA may revoke the licence, or modify it.[72] It is a criminal offence to operate as a gangmaster without a licence, or to use labour from an unlicensed provider.[73]

In contrast to the Scottish Agricultural Wages legislation, the Gangmasters (Licensing) Act makes no provision for the setting of wages or other terms and conditions higher than those already stipulated as the NLW/NMW or by the Agricultural Wages Order. Instead, its 'added value' lies principally with the additional degree of scrutiny it ensures of labour provision practices in the sector, and of the terms and conditions of employment, and working and living conditions of the relevant workers. A second strength of the regime is its broad scope of application. Both gangmaster and 'worker' are defined very widely in the Act so as to include all workers provided by a gangmaster (whether an individual or agency, situated in the UK or elsewhere) or other intermediary, including those workers who have no contract of employment or 'workers' contract, and/or 'no right to be, or to work' in the UK.[74]

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[70] Gangmasters (Licensing) Act 2004, since amended by the Immigration Act 2016. The types of agriculture and associated industry covered by the Act are stipulated in s. 3. In the 2016 Act, provision has been made for the future extension of the GLAA's remit to cover all sectors of the labour market: s 3(5) GLA, as amended.
[71] Gangmasters (Licensing Conditions) Rules 2009, SI 2009/307, Schedule 1. For explanation, see GLA, *Licensing Standards* (May 2012, reprinted July 2015), available: http://www.gla.gov.uk/media/2745/licensing-standards-aug-2016.pdf
[72] GLA, s 9
[73] GLA, ss 12 and 13
[74] GLA, ss. 3 and 4

The licensing system thus extends a number of employment rights, albeit indirectly, to workers who might not otherwise have had them – including the right to be paid a national minimum.[75] In operation for over a decade now, the Authority has been widely and highly praised for clamping down on rogue employers and preventing abusive practices.[76] Since 2010, significant budget cuts have raised a question mark over its continued capacity to function as effectively as it did in its first years.[77]

B. Agricultural Insiders and Outsiders?

On the face of it, then, the agricultural sector in Scotland comprises a variety of different groups of workers which could be thought of as comprising 'insiders' or 'outsiders': employees whose terms and conditions are regulated by the SAWB, and casual workers, to whom the relevant rules do not apply; local workers, and migrants from within the EU and elsewhere; workers employed directly by farmers, and those supplied to the farmers by labour market intermediaries or gangmasters; the documented, and the undocumented. Categorising the workers in this way might prompt us to consider such questions as the following. In commanding higher wages than the national minimum by reason of the Scottish Agricultural Wages Order, are employees eating up an unnecessarily large portion of employers' budgets? Are they thereby preventing the hire of potentially greater numbers of (cheaper) casual and gangmaster-supplied workers? With their readiness to accept lower wages and harsher terms and conditions, are temporary migrant workers undercutting Scottish workers, and filling vacancies that would otherwise be filled by the locals? If, as a consequence of Brexit, EU workers were no longer able to work here without visas, causing labour shortages in the sector, would Scottish workers step forward to take up the jobs as they became available? Would employers offer higher wages in an effort to persuade them to do so?

[75] See 'Licensing Standard 2': 'A worker must be paid at least the National Minimum Wage (NMW) or, if applicable, in accordance with appropriate Agricultural Wages Order (AWO)… Failure against this standard will lead to the licence being revoked without immediate effect.' I say 'indirectly', because the Act does not actually confer any rights on workers, but instead deems the paying of stipulated wages etc to be a 'licensing condition'.

[76] See eg Frances O'Grady quoted in TUC press release, *TUC raises concerns over changes to the Gangmasters Licensing Authority*, 12 January 2016; A Balch, P Brindley, A Geddes, S Scott, *Gangmasters Licensing Authority: Annual Review 2008* (GLA 2009); M Wilkinson, G Craig, A Gaus, *Forced Labour in the UK and the GLA* (Hull University 2010. For a discussion of current threats to the continued effectiveness of the GLAA, see ACL Davies, 'The Immigration Act 2016' (2016) 45(3) *Industrial Law Journal* 431-42

[77] Davies, 'Migrant Workers'; Davies 'Immigration Act'

The sketch of the sector drawn above principally comprises information regarding working relationships and the relevant regulatory regimes. If we supplement it with consideration of *employer* motivations and practices, it changes dramatically so that quite different questions appear to require answers. A useful example of such an employer- or demand-side-focused analysis is provided by Ben Rogaly in his study of horticulture in the UK.[78] Rogaly takes as his starting point the observation that it is harder, *as a general rule*, to make a profit in agriculture than in many other sectors. As Marx long ago observed, production time and labour time are not identical in agriculture, so that there are necessarily periods of idleness of labour and machinery, with consequent stalling of the turnover of capital.[79] In recent years, Rogaly goes on to explain, these basic difficulties have been compounded by the ever-growing power of supermarkets as the main buyers of horticultural produce, and their ability to appropriate ever-greater value from the producers.[80] In an effort to turn a profit nonetheless, producers have sought to intensify production in a variety of ways. Here, Rogaly adopts the broad definition of 'intensification' proposed by Guthman to include not only 'efforts to speed up, enhance or reduce the risks of biological processes', but also 'some nontechnical innovations in labour control … for example, the use of vulnerability to ensure a timely and compliant labour force come harvesttime'.[81] In British horticulture, he observes three examples of trends in employment practices which may be understood to indicate such intensification: the increased employment of international migrant workers, the increased use of gangmaster labour, and the increased use of piece rates. On the basis of three case studies, he concludes that the drive towards intensification 'has been caused largely by corporate retailers' regulation of workplace regimes in the sector, through their requirements for volume, 'quality' and low margins for the growers'.[82]

[78] B Rogaly, 'Intensification of Workplace Regimes in British Agriculture: The Role of Migrant Workers' (2008) 14 *Population, Place Space* 497-510. Rogaly approves Krissman's arguments regarding the need for more demand-side-focused analyses of migration: Rogaly, 499 citing F Krissman 'Sin coyote ni patron: why the 'migrant network' fails to explain international migration' (2005) 39 *International Migration Review* 4–44.
[79] Rogaly, 'Intensification', 498, citing S Mann, *Agrarian Capitalism in Theory and Practice* (University of North Carolina Press 1990)
[80] Rogaly, 'Intensification', 499, citing Competition Commission, *Supermarkets: a Report on the Supply of Groceries from Multiple Stores in the United Kingdom* (London 2000)
[81] Rogaly, 'Intensification', 498, citing J Guthman, *Agrarian Dreams: The Paradox of Organic Farming in California*. (University of
California Press 2004)
[82] Rogaly, 'Intensification', 506

Of course, the oligopsony power of supermarkets is not only an issue for horticultural producers.[83] In her 2004 exposé of the supermarket sector, the food writer and journalist Joanna Blythman likened the relationship between retailers and producers to that of masters and servants.[84] Producers are beholden to supermarkets for the simple reason that they have no one else, often, to sell to.[85] In their relations with individual producers, supermarkets capitalise on their position of power by wielding the threat of 'delisting' ie ceasing to buy from that producer.[86] At the same time as they present the producer with a list of incredibly detailed product specifications (stipulating precisely the size, shape, colour and general appearance of the items to be supplied), they refuse, as a rule, to make any binding commitment to purchase from that producer, then, or for any period of time to come.[87] Nor will they undertake to provide a minimum period of notice before cancelling an order.[88] In tailoring its produce, as it must, to comply with the supermarket's wishes, meanwhile, the producer becomes even more reliant on that specific buyer, since others will likely have different product specifications. As documented by the Competition Commission in 2000, the variety of ways in which supermarkets routinely abuse their resultant positions of power is quite startling: not only squeezing the price that they will pay for goods, for example, but actually requiring producers to *pay them*, in various ways, in return for stocking or promoting the producers' food and drink.[89]

In the Scottish agricultural sector, as elsewhere, the oligopsony power of the supermarkets is reflected above all in the very low profit margins of the majority of commercial farms, and in the high proportion of such farms reliant on subsidies.[90] As a result of efforts to intensify production, wages have been driven down and working practices amended so that it has become increasingly difficult for employers to recruit local workers.[91]

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[83] J Blythman, *Shopped:The Shocking Power of British Supermarkets* (Harper Perennial 2005); Rogaly, 'Intensification'
[84] Blythman, *Shopped*, 177
[85] In 2011, supermarkets in the UK were estimated to command 76% of the supply of food products to consumers: P Shears, 'Grocery Suppliers Code of Practice: Fairness for Farmers?' (2013) 3 *International Journal of Agricultural Management* 59
[86] Blythman, *Shopped*, ch 18
[87] ibid, ch 27
[88] ibid, ch 22
[89] Competition Commission Report 2000
[90] According to Government figures, in 2014/15 average farm business income, including from subsidies, was only £23,000. Excluding support from grants and subsidies, the average farm made a loss of £17,000 in 2014: Scottish Government, *Economic Report*.
[91] Findlay et al, 'International Migration', 316-7

Migrant workers fulfil a 'complementary' rather than 'substitutional' workforce function, performing work that would not otherwise be done by locals.[92] In the light of these findings, the question that begs to be answered is not so much one of conflicts of interest between different worker groups, but rather that of the potentially disastrous consequences of Brexit for the sector. As was noted above, more than half of all workers in the sector are currently thought to be EU citizens exercising their freedom of movement. Evidence suggests that they could not be replaced with Scottish or British workers, at least, not without a rise in wages of a magnitude that could threaten the viability of many producers, for example, if supermarkets chose to buy imports instead.[93] If the demand for cheap, exploitable labour cannot otherwise be filled, however, the threat arises of increased incidences of undocumented work, trafficking and forced labour.[94]

As to the role of government in all of this, Rogaly has highlighted the interest which the state has in reducing food prices, and retail price inflation more generally.[95] In furtherance of that interest, successive governments have offered all kinds of support to supermarkets since the end of the second world war: from the funding of trips for the directors of Tesco and Sainsbury to study emerging multiple grocery stores in the United States, to the abolition of the retail price mechanism in 1964.[96] In 2001, the Labour Government responded to the 2000 Report of the Competition Commission, which had recognised the frequent abuses by supermarkets of their positions of power, by issuing a Supermarkets Code of Practice.[97] Voluntary rather than binding in nature, and reliant upon individual producers brave enough to bring complaints against the retail giants, however, the Code was widely criticised for its ineffectualness.[98]

In 2010, the Coalition Government introduced a new Grocery Suppliers Code of Practice which, since 2013, has its own Groceries Code Adjudicator.[99] Under the terms of the

[92] ibid, 313
[93] Migration Advisory Committee, *Report on Migrant Seasonal Workers*, (UK Home Office 2013)
[94] With respect to forced labour, the Equality and Human Rights Commission Scotland have identified demand for cheap, exploitable labour as a pull factor to 'destination' countries: Equality and Human Rights Commission Scotland, *Inquiry*.
[95] Rogaly, 'Intensification', 507
[96] ibid, 506-7
[97] For discussion, see Blythman, *Shopped*, ch 24
[98] ibid; Shears, 'Fairness for Farmers', citing Office of Fair Trading, *The Supermarkets Code of Practice: Report on the Review of the Operation of the Code of Practice* (2004).
[99] https://www.gov.uk/government/organisations/groceries-code-adjudicator

relevant legislation, the Adjudicator is authorised to arbitrate disputes between retailers and suppliers, investigate complaints from suppliers, and where there has been a breach of the Code, to publish that information and/or to impose a fine.[100] Importantly, the Adjudicator may rely on evidence from third parties in deciding whether to launch an investigation, and need not therefore wait for a plucky producer willing to raise her head above the parapet. These are positive developments indeed, which have already resulted in the public admonishing of Tesco for breaches of the Code relating to delayed payments.[101] Whether the Adjudicator is sufficiently resourced to make a significant and lasting difference to supermarket behaviour remains, however, to be seen.[102] In this respect, it ought also to be borne in mind that the Code aims at ensuring 'fair and lawful' treatment of producers by retailers, and not at transforming the essential nature of their relationship across the sector.

On the matter of Brexit, and the labour shortages that it will almost certainly bring with it, the Government has not undertaken, at the time of writing, to guarantee the right of EU citizens to continue working in this country; nor to introduce any kind of alternative temporary work visa scheme. In her speech to the annual conference of the National Farmers' Union in February 2017, the Environment Secretary acknowledged the 'vital role' that seasonal migrants from the EU played, especially in horticulture, but was also quick to remind the audience that controlling immigration was a 'key factor' behind the vote to Leave.[103] Labour shortages would best be avoided, then, she seemed to suggest, through encouraging British workers and apprentices into the sector, and through technological innovation.

V Conclusion

In policy discourse, the rhetoric of labour market insiders and outsiders is often deployed in support of measures aimed at weakening labour rights and protections, sometimes as part of a wider-ranging politics of division. As scholars of labour law, we ought always to be attentive

[100] Groceries Code Adjudicator Act 2013
[101] Groceries Code Adjudicator Annual Report 2015-16
[102] In 2015-16, the single investigation into Tesco's breach of the Code lasted almost a year from launch through to publication of the report, taking over 50% of the Adjudicator's time and 25% of the total office resource: ibid.
[103] https://www.gov.uk/government/speeches/environment-secretary-speaks-at-nfu-conference, accessed 23 February 2017

to conflicts of interest between workers, and the ways in which law can accentuate, alleviate, or resolve these. We must be equally attentive, however, to the possibility that such conflicts have been overemphasised by government or other commentators, purported or assumed to exist where they may not. Where conflicts of interest between workers are overstated – as can be the case, in particular, where the notion of insiders and outsiders is used as a heuristic – the danger arises that the motivations and strategies of employing organisations, and the role of the state, might each be obscured. Workers might feel encouraged into the belief that legislative protections and collective institutions are not for them; as a consequence, support for the protective legislation and collective institutions in question might be weakened, and their efficacy undermined.[104]

[104] S Marshall and C Fenwick, *Labour Regulation and Development: Socio-Legal Perspectives* (Elgar 2016)