

Introduction to Special Issue on Labour Laws and Labour Markets: New Methodologies

Social & Legal Studies
1–7

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DOI: 10.1177/0964663918758514
journals.sagepub.com/home/sls



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Abstract

This short piece of writing introduces a collection of papers by Judy Fudge, Diamond Ashiagbor, Simon Deakin, Shelley Marshall, Jenny Julen Votinius and Robert Knegt. It outlines the aims of the collaborative research project from which the papers resulted, referring to the event at which they were first presented, and it summarises the topic and argument of each paper in order.

Keywords

labour law, labour markets, methodology

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

In the context of financial crisis and ensuing austerity, the research project was born out of a shared concern, empirical and normative, with the continued viability of systems of labour law that are broadly protective of workers' interests. Such systems would aim, typically, to ensure a set of at least minimum terms and conditions – minimum wages, maximum working hours, holidays, sick pay, job security and so on – and, at a societal level, some measure of wage and income equality. For several decades, the continued existence of protective labour laws – together with institutions designed to allow for the

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collective interest representation of workers and collective regulation of working relationships – has been widely understood to be threatened as a result of myriad pressures associated with globalization and deindustrialization (refer to the work of Bercusson and Estlund, 2008). Following the economic crisis of 2008, the threat intensified. Across the globe, and especially in parts of Europe, a body of received knowledge regarding labour law and labour markets was used by national governments and supranational institutions alike to legitimize the lowering of labour standards and the dismantling of collective institutions for the regulation of employment terms and conditions and the resolution of disputes (Bruun et al., 2014). The purported ‘truth’ about labour markets was that legal rights and labour market institutions constitute undesirable ‘rigidities’ and, as such, barriers to increased employment levels and economic growth. But this truth was not always supported by empirical evidence – countries which weaken their labour laws in a bid to encourage growth do not always achieve that aim. A second motivation for the project, then, was the observation that a lack of empirical knowledge and evidence regarding the effects of legislation and other regulatory institutions on working relationships can allow for the emergence of erroneous and potentially harmful understandings of the capacity of law and government to address social and economic problems.

Among scholars of labour law, the reorientation of public policy in the field of employment in line with new economic orthodoxies has occasioned much soul-searching. The dominant discourse in recent decades has been one of crisis in the discipline: old ways of thinking about the subject, of describing and analysing it, have seemed increasingly inadequate, but new ways have yet to be found (Davidov and Langille, 2011). The starting point for this research project was to understand the crisis in the field of labour law as having at its heart a *crisis of methodology*. In the past three or four decades, we have witnessed, across the developed world, both the marked decline of institutions for the collective regulation of employment relations and the demise of industrial relations as a field of scholarship. A crisis in methodology arises, in the first instance, because of the resultant change in the context within which employment contracts and other contracts for work (casual work, zero hours work, etc.) are formed: from a ‘system’ of (collectivized) industrial relations, to highly professionalized practices of human resource management (HRM). It is important to recognize, here, that the trajectory has not been, as might have been expected, from collective bargaining to the type of individual negotiation of contractual terms invoked by the notion of ‘deregulation’ and ‘free’ markets (Brown et al., 2000). The regulatory vacuum that appeared in the absence of trade unions and collective bargaining has been filled instead by HRM practitioners and their legal advisers exercising formalized *unilateral* control over the employment relation, using a variety of techniques – standard form contracts, substitution clauses and declarations of self-employment – to minimize the portion of legal and economic risk and responsibility to be borne by the employing organization (Barmes, 2015).

Far from treating labour law and industrial relations as discrete systems with their own particular logics, meanwhile, governments of both the right and centre-left have tended instead to use labour legislation as one tool among several available to them to assist in the achievement of various macroeconomic objectives: lower inflation, cuts in

welfare spending. Since the 1990s, the need to address unemployment levels has assumed a growing prominence in government agendas. Job creation has been pursued for the most part not through publicly funded demand management but through attempts to ensure the broad economic conditions deemed conducive to private sector growth and employment – chief among these, *labour market flexibility*.

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

Beginning in the 1990s, scholars of labour law began to reorientate their scholarship to include consideration of labour markets, in addition to the more traditional objects of analysis: contracts of employment, collective bargaining and representative institutions, and statutory and common law rules. In explaining their reasons for doing so, they noted especially the increased prominence of economic considerations and rationalities in policy discourse and government decision-making. More prosaically, there was a suggestion that – especially in the absence of sectoral collective bargaining, regulatory in substance and reach – to neglect to consider labour markets was tantamount to neglecting to consider work contracts at all from a macro perspective: neglecting to consider, as Davies and Freedland put it, ‘the larger social and economic consequences of legal controls over the constituting of the employment relationship’ (1984: 11). In some quarters, the turn to the market was accompanied by an expression of dissatisfaction with sociological methods. Collins, for example, suggested that the traditional sociological approach to the study of labour law had caused ‘other external analyses such as those provided by economics and liberal political theory [to be] largely ignored, so that the analysis offered by labour law was deaf to their rival interpretations of practice’ (1997: 297). Others including Simon Deakin and Davies and Freedland argued, rather, that sociological approaches to the study of labour law ought to be *supplemented* with economic methods (Davies and Freedland, 1983: 5; Deakin, 2007: 1170–1171). If the government’s policy objectives in the field were primarily economic, wrote Davies and Freedland, then the description and analysis of them, and any associated legislation, would require engagement with economics – among other things – and in particular, labour market economics (1993: 3).

As I have argued elsewhere, it is difficult to combine economic methods and frames of reference with sociological and/or legal methods without the former becoming dominant; without economic efficiency figuring as the *key* criterion by which rules, policies

and institutions ought to be judged, rather than simply considering one among several. Where scholars of labour law adopt the labour market and the idea of labour market regulation as primary points of reference in their analysis, it is striking how non-economic considerations – such as the question of whether more, or more centralized, collective bargaining might improve working lives, securing more dignity for workers, or more democracy at work – can seem to lose their force (Dukes, 2014: 110–111). The kinds of normative argument that can be constructed, and the kinds of rule, policy and institution for which the case can be made, appear limited, accordingly (Dukes, 2014). Where goals such as worker participation, or decent wages are still spoken of, they come to be understood primarily in terms of economic rationality as ‘objectives to be realised in conjunction with, even directly through market forces’ (Rittich, 2014: 335). Distributive justice, social solidarity, substantive equality and so on are quickly eclipsed, meanwhile, as quite secondary to the imperative of efficiency, unless they manifest in the form of an extreme ‘core labour rights’ or ‘human rights’ violation (Rittich, 2014: 335). In this way, the desire to combine economic with other methods results in a form of interdisciplinarity, which, as Michael Fischl has observed, ‘[harnesses] the social in service of the market, elevating economics to the role of... disciplinarian’ (Fischl, 2018).

Recognizing the importance of labour market analysis to a full and useful understanding of law and policy in the field of work and employment, the central aim of our research project was thus to give consideration to methodologies applicable to the study of labour laws *and* labour markets: methodologies drawn, in particular, from the fields of institutional economics, economic sociology and political economy. The intention was that the research undertaken in the course of the project would contribute to the longer term research goal of identifying and refining a methodology or methodologies that would allow for the analysis of the role of (labour) law in constituting markets and, at the same time, for recognition of the inherently political nature of the question *how* labour markets are constituted, *how* they are combined with or constrained by non-market institutions and modes of action and interaction, and *who* falls to benefit and who to be disadvantaged by particular market configurations and orderings.

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

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

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

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

With a focus on the field of parental rights in working life in Sweden, Jenny Julén Votinius explores the existence and significance of 'Normative Distortions in Labour Law'. Her aim is to reveal how conflicting norms – both social and legal in nature – can tend to hinder or distort the effective application of protective labour law; how, in that

way, the *mediating* potential of labour or social rights, as Ashiagbor put it, can be undermined. With reference to Max Weber, Julén Votinius begins her discussion by identifying three ideal-typical norms prominent in the regulation of parental rights at work: the parenthood norm, which suggests that care obligations are born by both parents; the motherhood norm, which suggests rather that parenting is primarily the duty of the mother; and the primacy of working life norm, which directs that parenting commitments must not encroach upon work. Through an examination of the functioning of these principles in Swedish workplaces, she constructs her main argument: that assessment of the relative strength of conflicting norms is crucial to an accurate assessment of the efficacy of particular (labour) rights.

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

Acknowledgements

The author would like to thank Aude Cefaliello and Catriona Cannon for assistance in organizing the event referred to in the first paragraph of this introduction and to colleagues for their participation, especially Lizzie Barmes, Emilios Christodoulidis, Andrew Cumbers and Claire Mumme.

Declaration of Conflicting Interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

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