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The Economic Sociology of Labour Law

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Drawing on the work of Max Weber, this paper considers the utility of an approach to the study of labour law, which it calls the economic sociology of labour law (ESLL). It identifies the contract for work as the key legal institution in the field, and the primary focus of scholarly analysis. Characterising the act of contracting for work as an example of what Weber called economic social action oriented to the legal order*, it proposes that Weber's notion of the* labour constitution *be used to map the context within which contracting for work takes place. And it argues that, in comparison to traditional socio-legal approaches, ESLL has the significant advantage of allowing for account to be taken of the individual and commercial, as well as the social and legal, elements of contracting for work.*

INTRODUCTION

Over the course of the past decade or so, burgeoning interest in economic sociology as a field of scholarly endeavour has been accompanied by calls for the development of an *economic sociology of law* – or, as we might otherwise call it, a sociology of law and economics.[1] The ambition of those making the calls is, in essence, to apply sociological approaches, concepts

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[1] R. Swedberg, 'The Case for an Economic Sociology of Law' (2003) 32 *Theory and Society* 1; S. Frerichs, 'Re-embedding Neo-liberal Constitutionalism: A Polanyian Case for the Economic Sociology of Law' in C. Joerges and J. Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (2011); D. Ashiagbor, P. Kotiswaran, A. Perry-Kessaris (eds), 'Towards an Economic Sociology of Law' (2013) 40(1) *J. of Law and Society*. R. Swedberg, *Max Weber and the Idea of Economic Sociology* (1998); N. Smelser and R. Swedberg (eds), *The Handbook on Economic Sociology* (2005); N. Bandelj (ed.) *Economic Sociology of Work* (2009).

and methods to the two fields – economics and law – and to instances of their interaction. According to Sabine Frerichs' useful formulation, the economic sociology of law is thus best understood as:

> an academic venture located in the middle of the social sciences… an integrative effort in reconnecting law, economy, and society, both as spheres of reality and as fields of scholarly interest… to assert a genuinely sociological point of view which focuses on the relations between these spheres.[2]

The aim of this article is to consider the utility of an economic sociology of law, or ESL, to the study of labour law – the field of law which regulates relations between workers and employers and their respective representatives (trade unions, works councils, employers' associations). In recent years, there has been talk of a *crisis* in labour law, as concepts and paradigms developed during the Fordist era have become increasingly ill-suited to capturing the realities of post-Fordist working relations. Neo-classical economic thinking about working relationships and labour law has assumed the status of orthodoxy, shaping the policy and legislation of governments of both the centre right and centre left, and even, over time, workers' own perceptions of the world of work. As governments have sought to weaken existing protections and to lower labour standards in the name of flexibility and job-creation, workers have come to self-identify as entrepreneurs of themselves, entering the labour market (rather than finding a job), and making themselves marketable.[3] Each of these developments has posed significant challenges to traditional approaches to the study of labour law, occasioning much soul-searching on the part of scholars in the field.[4]

This article is positioned as a contribution to debates regarding the crisis in labour law, and, especially, to an ever-thickening strand of those debates which looks to methodological innovation as offering a possible way forward.[5] Scholarship in the field of labour law has a strong socio-legal tradition – in large part, because normative arguments establishing the need for special rules to regulate working relationships have tended to rest on illustrations of

[2] S. Frerichs, 'Studying Law, Economy, and Society: A Short History of Socio-Legal Thinking' (2012) *Helsinki Legal Studies Research Paper* No. 19, at 6.
[3] S. Garrett and A. Hochschild, 'The Personalized Market and the Marketized Self' in A Hochschild, *So How's the Family? And Other Essays* (2013)
[4] See eg G. Davidov and B. Langille (eds), *The Idea of Labour Law* (2011)
[5] See eg A. Ludlow and A. Blackham (eds), *New Frontiers in Empirical Labour Law Research* (2015); G. Davidov (ed), Labour Law Research Methodologies (2017) 33(1) *International J. of Comparative Labour Law and Industrial Relations* Special Issue; R. Dukes (ed), Labour Laws and Labour Markets: New Methodologies (2018) *Social & Legal Studies* Special Issue

the fundamental differences between contracts of employment and other types of contract. What is sold in a contract of employment – labour power – is inherently human, and from recognition of this essential fact flows concern with the worker's welfare and dignity: the injunction not to treat her as a commodity like any other, but somehow to shelter her from exposure to raw market forces.[6] A current example of the enduring force of such arguments, and of the consequent necessity to understand the nature of working relationships from a sociological perspective, has arisen in the context of litigation over the legal classification of workers in the so-called gig economy. The question for the courts, as they themselves have formulated it, is this: are Uber drivers or Deliveroo couriers self-employed, as their written contracts suggest, or are they *in reality* employed by the platforms in question, and as such entitled to legally prescribed minimum wages and other employment rights?[7]

In addressing the question of how we best approach the study of labour law today, I begin from the observation that, as the coverage of trade union membership and collective bargaining has contracted, and employment rights have been weakened, the *contract* has asserted (or is asserting) itself as the primary legal institution in the field of working relations. Consequently, it has become necessary to identify or develop an approach that allows us to apprehend the process of contracting for work as a form of private ordering; but as one that is shaped directly and indirectly – likely to a very significant degree – by the complex of applicable legal rules and institutions, and by other aspects of the social and economic context within which it proceeds.[8] The act of contracting for work should be understood to have at its core a (market) exchange of labour power for wages, or some other form of payment, and to be, at the same time, a self-consciously legal act with important social dimensions. It follows that an approach is required which allows us to take account of each of these aspects of contracting behaviour – the economic, the legal and the social – and of the different dimensions of the relevant context.

It is with this challenge in mind that I turn, in the third part of the article, to the work of Max Weber, paying particular attention to his analysis of competing rationalities or work ethics

[6] K. Marx, 'Wage Labour and Capital' (1849) April 5-8 and 11, *Neue Rheinische Zeitung*, reproduced in translation at https://www.marxists.org/archive/marx/works/1847/wage-labour/index.htm; International Labour Organisation, *Declaration of Philadelphia* 1944

[7] See eg *Uber BV v Aslam* [2018] ICR 453; *Addison Lee v Lange and Ors* UKEAT/0037/18; *Autoclenz v Belcher* [2011] ICR 1157

[8] M. Freedland, 'General Introduction' in M. Freedland (ed), *The Contract of Employment* (2016)

under feudalism and capitalism, and to his conception of economic social action and the orientation of (economic social) actors to the law as potentially helpful in understanding the act of contracting for work. I also consider his notion of the *labour constitution* – essentially the social, economic and legal organization of labour in any given place, at any given point in time – as providing an analytical construct that might allow us to 'map' the context, or contexts, within which contracting for work occurs, while at the same time bridging the gap between different levels of analysis: micro, meso and macro. In the final part, I sketch the contours of an ESL that builds upon these elements of Weber's work. I then compare this ESL with the long-standing tradition of critical socio-legal approaches in the field and find them to share several strengths, but to differ, above all, in terms of the focus and scope of the analysis that they encourage. ESL has the significant advantage, I suggest, of allowing for proper account to be taken of those individual and commercial elements of the process of contracting for work that had previously been treated by critical scholars as (largely) suppressed by collective bargaining and labour legislation, without encouraging the adoption of overly reductive conceptions akin to the idealized market transaction of economic theory.

ESL AND LABOUR LAW

1. What is ESL?

The term 'economic sociology of law' is a somewhat clumsy composite of 'economic sociology' and 'sociology of law' – *Wirtschaftssoziologie* and *Rechtssoziologie* – intended to imply, essentially, a sociology of law and economics, or a study of the intersection of the three disciplines. In calling for the development of such an approach today, social scientists – including, prominently, Frerichs and Richard Swedberg – have drawn upon the work of classical and early twentieth century scholars, especially Weber, Emile Durkheim, Karl Marx and Karl Polanyi.[9] There, one finds a sustained attempt to understand the foundations of the

[9] Swedberg (1998) op. cit., n. 1, pp. 3-6; Swedberg (2003) op. cit., n. 1; M. Coutu and T. Kirat, 'John R. Commons and Max Weber: The Foundations of an Economic Sociology of Law' (2011) 38(4) *J. of Law and Society* op. cit., n. 469; M. Coutu, 'Max Weber on the Labour Contract: Between Realism and Formal Legal Thought' (2009) 36(4) *J. of Law and Society* 558; F. Block, 'Relational Work and the Law: Recapturing the Legal Realist Critique of Market Fundamentalism' (2013) 40(1) *J. of Law and Society* 27

relationship between economy and society; and, in the case of Weber and Durkheim, also sustained consideration of the interaction of law and the economy.[10]

Drawing very closely on Weber, Swedberg has defined ESL rather precisely as the empirical study of the role that law and regulations play in the economic sphere – using modes of analysis that highlight not only social relations, social structures and so on, but also individual interests.[11] As such, Swedberg writes, ESL allows for the following kinds of question to be addressed: how do economic forces influence legal phenomena, how does law affect the economy, how does the 'spirit of commerce' come to pervade parts of the law that do not have directly to do with economic activity?[12] The case for developing such an approach, for Swedberg, lies with the manifest deficiencies of both law and economics (à la Posner et al), and the sociology of law, when it comes to investigations of this type.[13] Law and economics literature uses microeconomic models and abstract hypothetical examples to make normative arguments regarding the kinds of law best suited to achieving economic ends – efficiency, growth etc – without reference to empirical data. Scholars working in the sociology of law rarely turn their attentions to economic topics and, where they do, tend to focus on social structure, relations and roles, overlooking the importance of actors' interests.[14]

In an important contribution from 2014, Kerry Rittich characterises ESL more decidedly as a desired response to the 'deep interpenetration' of the social and the economic – the *colonization* of the former by the latter – that has been a central feature of the neoliberal era.[15] As economies have been increasingly liberalized, markets have expanded rapidly into spheres of social life that were previously governed by alternative (non-economic) values and action orientations. Formerly nationalized industries have been privatized, the provision of 'public' services has been contracted out to the private sector, and other social realms have come under growing pressure to subject themselves to the functional imperatives of a market

[10] J. Beckert and W. Streeck, 'Economic Sociology and Political Economy: A Programmatic Perspective' (2008) *MPlfG Working Paper* 08/4 at 12
[11] Swedberg, op. cit. (2003), n. 1, p. 2
[12] id.
[13] id., pp. 1-2
[14] id.
[15] K. Rittich, 'Making natural markets: flexibility as labour market truth' 65(3) *Northern Ireland Legal Q.* 323. See also Beckert and Streeck, op. cit., n. 10 above; W. Streeck, *Re-Forming Capitalism: Institutional Change in the German Political Economy* (2009); W. Streeck, 'How to Study Contemporary Capitalism?' (2012) 53(1) *European J. of Sociology* 1

economy: social programmes and charitable works have been subjected to processes of economic calculation and rationality; social objectives are increasingly realised through market processes.[16] As a result, the well-established practice, in both economics and sociology, of treating the economy as a social domain differentiated from the rest of society, and subject to its own rules, has been rendered anachronistic.[17] If the dividing line between the economy and society has broken down in practice then it requires, too, to be broken down in theory. An approach or set of approaches is needed that will allow researchers to explore the social logic and the social nature of the economy – of economic institutions and economic action – and to revisit the question of the essential relationship between economy and society.[18]

In the course of attempts to make sense of such developments, law and legal change figure primarily, for Rittich, as a means of observing the shifting structures and dynamics of both markets and social relations 'from the inside out'.[19]

> 'Even where reforms do not succeed at transforming social and economic relations as intended, reform logics and agendas provide priceless clues as to how workers, societies and markets are imagined and valuable insights into the pressures that may be brought to bear on them'.[20]

Laws are not only indicative of social and economic practices, however, as Rittich notes: they are constitutive of such.[21] One way to understand law's constitutive role is through recognizing that 'knowledgeability' of social and economic action is always invested with legal notions and concepts, even if these are apprehended by the actors themselves in the guise of practices, routines, or shared understandings that are only dimly reminiscent of the legal rule from which they originally stem.[22] To this we might add that if our aim is to analyse not only the 'shifting structures and dynamics' of markets and social relations but also legal change itself, then we ought to bear in mind that law and legal concepts are themselves products of knowledge acquisition as well as of *political contestation*. This would

[16] Beckert and Streeck op. cit., n. 10, pp. 10-11; Rittich op. cit., n. 15, p. 327
[17] Beckert and Streeck op. cit., n. 10, pp. 10-11.
[18] id.
[19] Rittich op. cit., n. 15, p. 323.
[20] id., p. 324.
[21] id., pp. 327-9; M. Weber ''Objectivity' in Social Science and Social Policy' in M. Weber, *The Methodology of the Social Sciences* (1949) at 64-5, cited Swedberg (2003) op. cit., n. 1, p. 5.
[22] R. Knegt, 'Labour Constitutions and Market Logics: A Socio-Historical Approach' (2018) 27(4) *Social & Legal Studies* 512; M. Weber, *Economy and Society* (1978) 312.

suggest the need for a careful account of the likely conflictual process of the selection and introduction of legal concepts and of the methods of their stabilization.[23]

It has sometimes been argued that economic sociology ought to be combined with or supplemented by political economy.[24] Not only would this ensure consideration of the capacities and possibilities of politics and policy to influence economic action and outcomes, it would also focus our minds squarely on the specifically *capitalist* nature of the economies under investigation.[25] With these points in mind, Jens Beckert and Wolfgang Streeck advocated the elaboration of a 'new economic sociology' and, at the same time, a 'specific sort of historical-institutionalist political economy'.[26] While the former would allow for consideration of how economic social relations are shaped at the micro-level by social macrostructures not reducible to an economic logic, the latter would analyse from a macro perspective the collective interests and collective actions shaping the operation of the economy in concrete historical conditions.[27]

In the economic sociology *of law*, the focus on law's constitutive role in respect of social and economic practices might be taken to raise, already, the question of the capacity of politics and policy to influence the economy.[28] Provided that legal rules and institutions are understood to be the product of political conflicts and agreements regarding their design and their interpretation – thereby avoiding the functionalist trap of assuming laws to result from some kind of self-propelling tendency towards efficiency maximization – then there may be little to separate ESL from what we might otherwise call political economy. In either case, the concern, at the macro level, would be to understand both the role of the state and (state-) law in shaping the economy and society, and the power relations that configure the capacity of different individuals and groups to do the same – either directly, or indirectly through wielding an influence on the state. In addition to Marx and Weber, reference might be had here to Joseph Schumpeter; to his conception of capitalism as involving continuous innovation – 'creative destruction' – on the part of capital seeking new ways to extract value

[23] Knegt id.; K. Klare, 'Critical Theory and Labor Relations Law' in D. Kairys (ed), *The Politics of Law: a Progressive Critique* (1982, 3rd edn.).
[24] Eg Frerichs op. cit., n. 1, p. 6.
[25] E. Tucker, 'Uber and the Making and Unmaking of Taxi Capitalisms' in D. McKee, F. Makela and T. Scassa (eds.), *Law and the "Sharing Economy": Regulating Online Market Platforms* (2019).
[26] Beckert and Streeck op. cit., n. 10, p. 13.
[27] id., p. 14.
[28] Frerichs op. cit., n. 1.

from socially produced wealth.[29] Or we might turn, with Frerichs and others, to Karl Polanyi, and to his analysis of the 'double movement' of market expansion and social protection as explanatory of institutional change over time.[30]

2. Why might ESL be useful to the study of labour law?

Labour law was first recognised as a discrete field, or legal discipline, around a century ago. Then, as in the decades to come, the case for the necessity or desirability of a body of 'labour law' that was distinct from other fields was typically understood to rest upon a demonstration of the inequities that would follow the straightforward application of private law rules to employment relations.[31] At a time when others were arguing for the superiority of a very narrowly conceived 'blackletter' *law as science*, early scholars of labour law employed a socio-legal, or 'critical socio-legal' method precisely so as to emphasise the extra-legal facts of the humanity of labour, the subordination of the worker to the employer, and of labour to capital.[32] With reference thereto, they argued for the application of concepts drawn from the public sphere – democracy, constitution – to the organisation of work and production, deliberately eliding the normative and descriptive aspects of their analysis so as to make the case either for the requisite interpretation of prevailing norms or for law reform.[33] It was with both descriptive and normative intent that the German-Jewish scholar Hugo Sinzheimer defined labour law, in contradistinction to private law, as *social* law: as the body of law which recognised the social existence of the worker, as he put it, elevating him from the status of legal person (which he enjoyed in private law) to human being.[34] By recognising and guaranteeing the role of labour in the regulation, or ordering, of the economy, Sinzheimer argued, labour law sought at once to emancipate the worker from his relation of subordination to the employer, and to ensure that the economy would function in furtherance

[29] J. Schumpeter, *Capitalism, Socialism and Democracy* (1942); W. Streeck, 'Driving Forces: History as Capitalist Development', presented at the conference: *The Dynamics of Capitalism: Inquiries on Marx on the Occasion of his 200th Birthday*, May 2018.
[30] K. Polanyi, *The Great Transformation* ([1944] 2001); Frerichs op. cit., n. 1. See also Block op. cit., n. 9, Streeck (2009) op. cit., n. 15.
[31] A. Bogg, A.C.L. Davies, C. Costello, J. Prassl (eds.), *The Autonomy of Labour Law* (2015).
[32] O. Kahn-Freund, 'Hugo Sinzheimer' in R. Lewis and J. Clark (eds), *Labour Law and Politics in the Weimar Republic* (1981) 98; L. Nogler, 'In Memory of Hugo Sinzheimer (1875-1945): Remarks on the Methodenstreit in Labour Law' (1996) 2 *Cardozo Law Bulletin*.
[33] R. Dukes, *The Labour Constitution: the Enduring Idea of Labour Law* (2014) ch. 8.
[34] H Sinzheimer, 'Demokratisierung des Arbeitsverhältnisses' in H. Sinzheimer, *Arbeitsrecht und Rechtssoziologie: gesammelte Aufsätze und Reden* ([1928] 1976), 124.

of the common interest, as identified by the representatives of capital *and* labour.[35] Having defined labour law, in this way, as social law – categorically different to the private or 'economic' law that it was intended largely to supplant – Sinzheimer and his contemporaries then proceeded to analyse it primarily in isolation from private law, corporate law, and associated fields. In the decades of political consensus that followed the end of the Second World War, labour law was defined again in contradistinction to private law, but now, commonly, as the body of law which addressed the imbalance of power in the employment relation.[36] Arguments regarding the necessary *autonomy* of labour law from other legal disciplines were marshalled in support of particular interpretations of legal norms, and of the creation of specialised labour courts and tribunals, chaired by judges with specialist training, who understood the full social reality of contracting for human labour.[37]

During the 1980s and 90s, dissatisfaction with this established approach to the study of labour law was voiced from several quarters. At a time when labour legislation and public policy were more likely to be inspired by Friedman and Hayek than by Keynes, modes of scholarship that were focused still primarily on trade unions and the principle of free collective bargaining were criticised as offering an increasingly misleading description of the law then in force.[38] The standard normative-and-descriptive statement of labour law – labour law is the body of law which addresses the imbalance of power in the employment relation – was objected to meanwhile for its tendency to encourage certain lines of enquiry and to obscure others. In characterizing labour law, essentially, as a force for good, and in treating 'workers' as an homogenous group or social class, for example, it was argued that the 'imbalance of bargaining power' framing tended to discourage consideration of the possibility that some workers or groups of workers might benefit from particular laws, while others (women, ethnic minorities) were significantly disadvantaged.[39] In advancing the notion that labour law should function to supplant private law rules, it was elsewhere suggested, the standard framing promoted, or did little to challenge, an understanding of private law as a pre-existing, 'natural' order, to which labour law created limited – 'unnatural' – exceptions.[40]

[35] H. Sinzheimer, 'Eine Theorie des Sozialen Rechts' (1936) XVI *Zeitschrift für öffentliches Recht* 3, reproduced in Sinzheimer (1976) op. cit., n. 34.
[36] The classic text is P. Davies and M. Freedland (eds), *Kahn-Freund's Labour and the Law* (1983, 3rd ed) 18.
[37] Lord Wedderburn, 'Labour Law: From Here to Autonomy' (1987) 16 *Industrial Law J.* 1.
[38] Davies and Freedland, 'Editors' Introduction' in Davie s and Freedland op. cit., n. 36.
[39] J. Conaghan, 'The Invisibility of Women in Labor-Law – Gender-Neutrality in Model-Building' (1986) 14 *International J. of the Sociology of Law* 377.
[40] Klare op. cit., n. 23.

Scant attention had been paid, as a consequence, to such foundational matters as the ownership of corporations, the ownership of the product, and, more generally, the significant limitations of the transformative potential of a progressive or social labour law within an otherwise unreconstructed capitalist economy and legal system.[41]

A first and ultimately influential response to the growing dissatisfaction with the old ways of studying labour law was to reframe the field of study so as to place the labour market at its centre. An approach that was more closely aligned to governmental priorities in the field would strengthen scholars' claim, it was suggested, to provide an accurate description and useful analysis of the law.[42] A labour market framing would allow for microlevel analysis of the individual employment relation to be supplemented with macrolevel analysis.[43] It would widen the focus of scholarly investigations beyond the traditionally defined boundaries of 'labour law proper', begging questions regarding the constitution, governance, and possible segmentation of markets by law; the control or manipulation by government of labour supply through immigration controls and social welfare law; and the inclusion and exclusion of different workers or groups of workers from access to employment, for example through the provision of low-cost childcare and 'family-friendly' rights to paid 'care' leave and flexible working.[44] A new normative 'rationalization' of the field could be found with the potential of labour laws and social rights to improve the functioning of labour markets so as to achieve a range of goals including, prominently, the maximization of social inclusion, efficiency, and growth.[45]

The move to refocus the study of labour law on labour markets was a partially fruitful one, which, in some of its most promising and sophisticated formulations, involved the adoption of political economy framings,[46] and even something like a sociology of law and economics, though the terminology of ESL was not used.[47] In some cases, however, the concern with markets was taken to presuppose the adoption of economic methods and modes of analysis,

[41] id.
[42] Davies and Freedland op. cit., n. 38.
[43] P. Davies and M. Freedland, *Labour Law Text and Materials* (1984, 2nd edn) 2, 11.
[44] S. Deakin and F. Wilkinson, *The Law of the Labour Market* (2004); R Mitchell, 'Where Are We Going in Labour Law?' (2011) 24 *Australian J. of Labour Law* 274-301.
[45] Deakin and Wilkinson op. cit., n. 44, ch. 5.
[46] See eg several of the contributions to C. Costello and M. Freedland (eds), *Migrants at Work* (2014); J. Howe, A. Chapman, I. Landau (eds), *The Evolving Project of Labour Law* (2017).
[47] Deakin and Wilkinson 'Labour Markets and Legal Evolution' in Deakin and Wilkinson op. cit., n. 44, esp. pp. 26-36.

and the applications of these to labour *law*.[48] Abstract, ahistorical models typical of law and economics scholarship were used to assess particular laws as desirable or otherwise with reference to their potential to improve flexibility, efficiency and, perhaps, social inclusion. More sophisticated functional approaches of the kind associated with new institutional economics entailed the characterization of laws as 'the equilibrium outcomes of a game' – as the outcomes of a process of strategic interaction between rational economic actors – in a manner which ascribed *no significance whatever* to political and legislative processes, to judicial decision-making, or to interests and motivations other than rational economic ones.[49] As with any other framing of the subject matter, moreover, the 'labour market regulation' – or 'law of the labour market' – approach had the tendency to encourage particular lines of enquiry while shutting down others. Especially where the imperative of 'market efficiency' was approved, or partially approved, by the scholar in question, it was striking the extent to which *non*-economic considerations – dignity for workers, democracy at work – seemed to lose their force.[50] Distributive justice, social solidarity, substantive equality, all were quickly eclipsed as quite secondary to the imperative of efficiency, unless, perhaps, they manifested in the form of an extreme 'core labour rights' or 'human rights' violation.[51] Just as there was normative intent in the original characterization of labour law as social law, then, so the move to reframe the field as 'market regulation', or economic law, could have political implications of a quite different sort, whether these were intended by the scholars in question or not.

The endeavour contained in this article to consider the contours and potential utility of an *economic sociology of labour law* proceeds from a recognition of the importance of labour markets as elements of the field of study. Wary of the normative implications of market-framings, however, it proposes that analysis begin instead with the contract for work as the primary *legal* institution in the world of work and systems of labour law. In recognition of the fragmentation and commercialization of working relations in recent decades, it proposes further that the 'contract for work' be defined widely to include not only contracts of employment, but also contracts between 'employing' parties and workers who are not strictly speaking employees: zero-hours workers, casual workers, gig-economy workers etc. Contracting for work should be understood, moreover, to involve not only one-off offers and

[48] R.M. Fischl, 'Labor Law, the Left and the Lure of the Market' (2011) 94 *Marquette Law Rev.* 947.
[49] Deakin and Wilkinson 8-9, citing M. Aoki, *Toward a Comparative Institutional Analysis* (2001).
[50] Dukes op. cit., n. 33, pp. 110-11.
[51] Rittich op. cit., n. 15, p. 335.

acceptances of terms, but, rather, processes which are on-going as the contractual framing of the work-for-payment bargain changes over time.[52] Crucially, contracting behaviour in the world of work ought to be conceived of as, at once, economic, social *and* legal: as likely economically motivated, but influenced too – and perhaps to a very significant degree – by actors' perceptions of the applicable legal rules, social norms, and shared understandings of what is standard or fair or reasonable practice in the specific context. It follows that an approach is needed which allows analysts to take account of the economic, social and legal aspects of contracting behaviour, and to apprehend labour markets as social and legal as well as economic institutions.

BEGINNING FROM WEBER

In what follows, I review the economic sociology of Max Weber, together with his sociology of law, highlighting those elements that I find particularly suggestive when it comes to the study of labour law today. Included here are both 'economic sociology' in the quite specific sense in which Weber referred to it in *Economy and Society* – as a 'subdiscipline', together with economic theory and economic history, of the broader discipline of political economy ('social economics') – and 'economic sociology' in a looser sense, meaning in that case simply the application of sociological approaches or methods to the study of the economy and economic phenomena.[53] I refer, then, not only to *Economy and Society* but to other of Weber's writings, considering in turn the political economy of capitalism and the role of labour therein; the interaction of economic social action and the law; and the concept of the *labour constitution* as an aid to mapping the context within which contracting for work proceeds. In this and in the following part of the paper, my suggestion is that Weber's work is especially useful when it comes to the analysis of contracting for work at the microlevel. His concept of the labour constitution, meanwhile, provides a means of allowing such analysis of individual contracting behaviour to inform, and to be informed by, studies of the relevant legal institutions, social structures, statuses and stratification, and of the political and economic power relations at play in shaping the development over time of law, social relations, and the economy.

[52] Freedland op. cit., n. 8.
[53] Weber op. cit., n. 22, ch. 2; Swedberg (1998) op. cit., n. 1, pp. 4, 187, 189.

1. Capitalism and Labour

On the political economy of capitalism, and the nature of labour relations in capitalist society, Weber closely followed Marx, according a centrality to wage labour that was reflective of the times in which they both lived.[54] The primary concern was to understand the transition from feudalism to capitalism and, as symbolic of that transition, the emergence of the factory as the key site of production, housing workforces hired directly by owner-employers.[55] In *The Protestant Ethic*, Weber focused his inquiry on the rationality or 'work ethic' characteristic of each mode of production. Why had workers abandoned the practice, typical of pre-capitalist times, of working until they had earned enough money to take care of their traditional needs, thereafter enjoying their leisure? Why had they adopted instead the 'spirit of capitalism', working as hard and for as long as was possible, so as to earn as much as was possible?[56] For Weber, of course, a key explanatory factor here was ascetic Protestantism and its teaching that work was a calling, or vocation.[57] For Marx, it was above all violence that had played the role of 'midwife' in the emergence of capitalism, wielded unsparingly to re-educate the medieval peasantry out of their traditional 'subsistence mentality', and into a capitalist 'profit mentality', thereby transforming them into the modern working-class.[58] In either case, the authors were in agreement that, with the eventual establishment of (modern rational) capitalism, neither violence nor Protestant belief were anymore routinely necessary as a means of encouraging workers to labour as required.[59] 'The Puritan wanted to work in a calling' wrote Weber, 'we are forced to do so'; caught in the iron cage.[60] For Marx:

> The dull compulsion of economic relations completes the subjection of the labourer to the capitalist… In the ordinary run of things, the labourer can be left to the 'natural laws of production' ie to his dependence on capital, a dependence springing from, and guaranteed in perpetuity by the conditions of production themselves.[61]

[54] Streeck op. cit., n. 29.
[55] Tucker op. cit., n. 25; J. B. Freeman, *Behemoth: A History of the Factory and the Making of the Modern World* (2018), pp. 22-35.
[56] M. Weber, *The Protestant Work Ethic and the Spirit of Capitalism* (1930), pp. 43, 41
[57] id.
[58] K. Marx, *Capital* vol 1 ([1867] 1976), ch. 31; Weber op. cit., n. 56, p. 17
[59] Streeck op. cit., n. 29, pp. 15-7
[60] Weber op. cit., n. 56, p. 129
[61] Marx op. cit., n. 58, ch. 28, p. 689

As is explicitly acknowledged here by Marx, the possibility that workers might again embrace a subsistence mentality in respect of their wage labour is something that never fully disappears in capitalist society.[62] Indeed, it is in part because the spirit of capitalism has not always been sufficiently well internalised by workers – so as to turn them into rational profit-maximisers – that labour markets have not always functioned as economic theory might predict.[63] Wherever workers have chosen increased leisure time over higher income, for example, the supply of labour has declined, rather than risen, as its price increased. As a result of the social or even physical dependence of workers on a fixed minimum level of income, conversely, the supply of labour has increased, at times, rather than fallen, as wages declined.[64] The need to minimize the 'subsistentist threat', as Streeck has put it, by ensuring the existence of a disciplined workforce, is one of the forces that has shaped and continues to shape regulation of working relations, from the Poor Law of the nineteenth century, to the welfare cuts of recent decades.[65] One might also consider, in this context, the disciplining effects on workers of mortgages, consumer debt, the reduction and postponement of pension entitlements, and, in certain circumstances, of labour market policies aimed at increasing the supply of labour.[66]

Of course, the insecure, or *precarious*, nature of some contracts for work (casual, zero-hours, self-employed) can serve itself to discipline workers, the spectre of joblessness subduing any inclination they might otherwise have had to resist ill or unfair treatment. Over time, capitalism has proven to be compatible not only with wage labour but with a variety of modes of labour exploitation, or contracts for work, several of which may co-exist at any particular historical conjuncture.[67] In seeking to analyse the novel relations of production prominent or emergent today, a key concern for scholars of labour law is to explore and assess the extent of domination and exploitation inherent in them.[68] To that end, we should consider the manner in which laws effectively limit (or accentuate) workers' market vulnerabilities, and facilitate

[62] Streeck op. cit., n. 29.
[63] W. Streeck, 'The Sociology of Labor Markets and Trade Unions' in Smelser and Swedberg, op. cit., n. 1, p. 262.
[64] Streeck op. cit., n. 77, p. 262; Weber op. cit., n. 56, p. 37.
[65] Streeck op. cit., n. 29, p. 34; N Whiteside, 'Constructing Unemployment: Britain and France in Historical Perspective' (2014) 48(1) *Social Policy and Administration* 67; S.J. Konzelmann, S. Deakin, M. Fovargue-Davies and F. Wilkinson, *Labour, Finance and Inequality* (2018).
[66] G. Lebaron, 'Reconceptualizing Debt Bondage: Debt as a Class-Based Form of Labor Discipline', (2014) 40(5) *Critical Sociology* 763.
[67] J. Banaji, *Theory as History* (2011) cited by Tucker op. cit., n. 25.
[68] Tucker op. cit., n. 25.

(or obstruct) their ability to act collectively to protect their interests. Insofar as space is available for collective action, questions then arise regarding the forms that this might take and the likelihood of its success. More generally, the broader political economy falls to be investigated as setting the conditions within which laws are enacted and enforced, collective action occurs, and capital exercises power.[69]

2. Economic Social Action and the Law

The specific economic sociology of *Economy and Society* is useful to us above all for its central concept of *economic social action*. Weber defined this as action that is driven mainly by material interests, and directed at utility, but also oriented to the behaviour of others.[70] Accordingly, economic sociology was the subfield of political economy that was directed at, 'the interpretive understanding of [economic] social action and thereby … a causal explanation of its own course and consequences'.[71] The primary concern, in other words, was to understand the meaning that the individual attached to her own behaviour.[72] (Was she driven by material or ideal interests, by habits or emotions? Was her action formally or substantively rational or irrational?) Using the notion of *economic social action* as a basic unit, or building block, Weber developed ever more complex definitions of particular institutions, for example, 'the enterprise', 'the firm', 'property' and 'the market'.[73] It followed that a central task for the researcher, in economic sociology as well as general sociology, was to establish the mechanisms through which a number of individual actions might turn into collective actions (institutions) of a new type.[74]

When it came to the significance of *law* to economic social action, an important insight offered by Weber was the observation that, in the modern market economy, economic action was routinely oriented simultaneously to some other actor and, at the same time, to the legal order.[75] (In other types of society, economic action might be oriented to the clan, the political

[69] Id.
[70] Weber op. cit., n. 22, pp. 63-9.
[71] Id., pp. 63-9.
[72] Id., p. 4.
[73] Id., ch. 2. Weber didn't himself use the term institution: Swedberg (1998) op. cit., n. 1, p. 169.
[74] Swedberg (1998) op. cit., n. 1, p.164.
[75] Weber op. cit., n. 22, p. 33.

order, the religious order.[76]) For example, where a party received money in the course of a transaction, she could assume that other actors would accept it in the course of future transactions. Where the legal order was taken into consideration by actors in this way, the principal consequence was that the economic action in question was more likely to take place as intended – promises would more often be kept; property better defended.[77] Viewed from a sociological perspective, Weber suggested, the basic function of law in economic life could therefore be described as follows:

> The empirical validity of a norm as a legal norm affects the interests of an individual in many respects. In particular, it may convey to an individual certain calculable chances of having economic goods available or of acquiring them under certain conditions in the future.[78]

In Weber's analysis of the economy and law, contract enjoyed a special status as the principal means, among other things, by which the 'power of control and disposal' over economic resources was transferred and, as such, 'the principal source of the relation of economic action to the law'.[79] The contract was defined by Weber as 'a voluntary agreement constituting the legal foundation of claims and obligations'.[80] From a sociological point of view, what was remarkable about the contract was that it both allowed for the creation of new legal relationships through voluntary agreement, and increased the certainty that some social action would take place. In an advanced capitalist economy, law thus provided legal actors with a kind of space within which they were allowed to form new economic relationships by transferring economic power and control by means of contracts.[81]

In a manner which might be understood to have particular relevance to consideration of the evolution of *contracts for work*, Weber distinguished between two main kinds of contract: the 'status contract', which addressed a person's total legal situation, and entailed a change from one status to another – to a master's slave, for example, or servant – and the 'purposive contract', which aimed 'solely … at some specific (especially) economic performance or

[76] Swedberg (1998) op. cit., n. 1, p. 87.
[77] Weber op. cit., n. 22, 328.
[78] Id., p. 31.
[79] Id., p. 67.
[80] Id., p. 671.
[81] Id., pp. 668, 683.

result'.[82] Purposive contracts had close links to the market and had become more common and more complex with market expansion. He also distinguished usefully between formal and substantive freedom to contract, highlighting here the notion quite fundamental to labour law that the freedom of a worker to enter into a contract with an employer is often illusory:

> [C]onditions of formal freedom are officially available to all; actually, however they are accessible only to the owners of property and thus in effect support their very autonomy and power positions… In the labour market, it is left to the 'free' discretion of the parties to accept the conditions imposed by those who are economically stronger by virtue of the legal guarantee of their property.[83]

With respect to the relationship between particular types of legal system and economy at the macrolevel, Weber directed his attention to two principal questions: what role had the economy played in the general evolution of the law; and what could different legal systems teach us about the relationship between law and the economy?[84] He was quite insistent that these were highly complex matters: there were no straightforward correlations, and causality didn't work only in one direction.[85] On the influence of the economy on legal change, he wrote that:

> 'Obviously, legal guaranties are directly at the service of economic interests to a very large extent. Even where this does not seem to be, or actually is not, the case, economic interests are among the strongest factors influencing the creation of law. For, any authority guaranteeing a legal order depends, in some way, upon the consensual action of the constitutive groups, and the formation of social groups depends, to a large extent, upon constellations of material interests.'[86]

Just as he stopped short of characterizing law as exclusively the product of economic forces, so he also objected to the proposition that the economy was the product of legislation by the state. There were definite limits to how much the state could influence the economy through legal interventions.[87]

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[82] Id., pp. 672-673. See also O. Kahn-Freund, 'A Note on Status and Contract in British Labour Law' (1967) 30 *Modern Law Review* 635.
[83] Weber op. cit., n. 22, pp. 730-1.
[84] Id,, p.89
[85] Id., p.88
[86] Weber op. cit., n. 22, 334
[87] Id., 334-5

3. The Labour Constitution

Arbeitsverfassung, or 'labour constitution', was a term developed and employed by Weber in his early work on agriculture in the eastern territories of the German Empire: east of the river Elbe.[88] As commonly used by political economists of the time, especially those of the historical school, the term 'labour constitution' meant the historically-given ensemble of conditions – social, economic, political, legal – governing the relations of workers to their employers and to other parties.[89] As such, it had both social and juridical connotations and – similarly to the English word 'constitution' – an inherent ambiguity: it could denote either the 'regime' governing or ordering labour relations, or the state of labour (in the abstract) itself.[90] While Weber employed the term in this generally accepted sense, he also used it to denote more specifically, the 'relations of stratification within the larger socio-economic system' – what we might otherwise refer to as *the social relations of production*.[91] Emphasising, in those instances, the social nature of the labour constitution, Weber sought to make the point that economic variables could not in themselves account for the workers' material situation. The labour constitution should be understood to be an independent variable, itself 'decisive' of the material situation of labour.[92]

The second innovation in Weber's development of the concept 'labour constitution' was precisely his proposal that it be understood, or utilized, as an *ideal type*: that is, as a logically coherent statement of the characteristic properties of a particular regime of labour relations, or 'system of social stratification'.[93] Seeking in his study of agriculture in the east to identify the 'real' consequences for labour of capitalist 'rationalization', he specified and compared two successive labour constitutions, the 'patriarchal' and the 'capitalist'. The former was characterized by the personal domination of numerous strata of dependent labour by a master who was 'not a simple employer, but rather a political autocrat'; by wage forms based on share-rights – use of plots of land, threshing shares, grazing rights – and, consequently, by a

[88] See especially M. Weber, *Verhältnisse der Landarbeiter im ostelbischen Deutschland* (1892); M. Weber 'Entwickelungstendenzen in der Lage der ostelbischen Landarbeiter', (1894) 77 *Preussische Jahrbücher* reprinted in M. Weber, *Gesammelte Aufsätze zur Sozial- und Wirtschaftsgeschichte* (1924) 498.
[89] L. Scaff, 'Weber before Weberian Sociology' (1984) 35(2) *British Journal of Sociology* 190, p. 200; K. Tribe, 'translator's note' to a translation of Weber 'Entwicklungstendenzen' in K. Tribe (ed) *Reading Weber* (1989) 185.
[90] Scaff, id., p. 200
[91] Id., p. 200.
[92] Weber, op. cit. (1894), n. 88, cited Scaff, id., 201.
[93] Scaff, id., p. 201, citing Weber, id.

marked degree of shared interests between masters and servants.[94] The latter emerged as a result of the 'proletarianization' of agrarian labour, and the polarization of what was now class conflict between the owners of the land and their workers. In juxtaposing these heuristic types, Weber did not intend to suggest an ontology or teleology of labour, but rather simply a sociology, or 'developmental history'.[95] The exploitation or 'material situation' of agrarian labour was presented as but one example of the old struggle for the 'emancipation of labour from property', first acted out in antiquity and repeating itself in new circumstances. Crucially, however, there was nothing natural or necessary in Weber's view about the progression from one stage of the struggle to the next – from one form of labour constitution to the next.[96] In response to the question which he himself posed in this body of work – how have societies organized labour-intensive agricultural production, especially in the face of inevitable seasonal fluctuations in labour requirements? – Weber composed not a teleology but a genealogy of labour, as Lawrence Scaff put it; in fact, *a genealogy of labour constitutions*.[97]

In Scaff's opinion, it is thus through Weber's use of the concept 'labour constitution' that the distance between the Weberian approach and the Marxism of the day becomes most apparent.[98] In emphasising the central importance of the labour constitution to the material condition of the workers, Weber rejected a simple economic determinism, perceiving instead a relation of 'reciprocal causality' between 'technical economic conditions and interests' on the one hand, and 'social structure and political formation' on the other.[99] When he explained in the form of a genealogy the development of the labour constitution over time from one type, or stage, to another, he demonstrated his repudiation of the Hegelian notion of history, and his belief that Marx's 'developmental laws' and concepts should be treated as contingent 'tendencies' and 'ideal types', rather than as 'necessary' and 'real' entities.[100] As developed by Weber, then, the notion of the labour constitution allowed for the application of a quite particular kind of structuralism: one which conceived of action as (only) partially a result of

[94] Weber, op. cit. (1894), n. 88
[95] Scaff, op. cit., n. 89, p. 202.
[96] Scaff, id., pp. 201-2, citing M. Weber, 'Agrarverhältnisse im Altertum', *Handwörterbuch der Staatswissenschaften* (1897) 1; Scaff, id., p. 204
[97] Scaff, id., p. 204.
[98] Id., 199
[99] M. Weber, 'Die deutschen Landarbeiter' in *Bericht über die Verhandlungen des 5. Evangelisch-sozialen Kongresses* (1894), 66 cited Scaff, id., p. 202.
[100] Scaff, id., p. 204.

material/economic forces external to the individual, and which rejected the notion of a foundation-upward 'inter-level' causality model, in favour of a network or cyclical model.[101]

TOWARDS AN ECONOMIC SOCIOLOGY OF LABOUR LAW

The challenge identified in the second part of this paper was to identify or elaborate an approach to the study of labour law which (i) began from the contract for work as the key legal institution in the field of working relations; (ii) defined this widely, to include contracts between workers and 'employers' that did not fall within the legal definition of contracts of *employment*, as well as those that did; and (iii) in light of the waning significance and reach of collective bargaining and statutory employment rights, aimed to analyse contracting for work as a form of private ordering that is likely economically motivated but influenced, at the same time, by the applicable laws and other elements of the social and economic context within which it proceeds. On the basis of the foregoing discussion of Weber's economic sociology and sociology of law, the contours of such an approach begin to suggest themselves, constructed around the notions of the *contract for work* and the *labour constitution*.

1. Contracting for Work and the Labour Constitution

In a Weber-inspired economic sociology of labour law, analysis should begin with the contract for work and proceed on the assumption that contracting behaviour is *economic social action that is oriented to the legal order*; driven, in other words, mainly by material interests, and directed at utility, but also oriented to the behaviour of others, and to the law. Contracting for work should be conceived of as a means by which parties can create and give form to new working relationships through voluntary agreement, bearing in mind always that the worker's freedom of contract is typically only formal, and not substantive, by reason of the greater economic power of the employing organisation. Indeed, as systems of collective industrial relations are dismantled or marginalised, it is typically the case that the choice of

[101] Id., pp. 202, 203. Weber spoke later of 'causal chains', deriding the 'theorists of the super-structure' for their belief in an 'ultimate' or 'essential' cause in which a secular theory of history can be grounded: Weber, op. cit. (1924), n. 88, p. 26, cited Scaff, id., p. 203.

form of work contract, and the drafting of specific terms, is in the power of the employing organisation alone. In the hands of professionalised human resource managers, contracting for work is managed in direct response to labour legislation and to the various forms of control, constraint, and risk which the applicable legal rules are understood to constitute. As a result, one very significant general trend is away from the routine use of contracts of employment (potentially 'status contracts', in Weber's terminology) in favour of more casual or commercial contractual forms ('purposive contracts'). In many cases, employment contracts are retained for a 'core' of workers, while the majority are rendered 'peripheral' – casual and dispensable – through the use of contracts of a more purposive nature.[102]

Notwithstanding our initial labelling of contracting for work as a form of 'private ordering', recognition of actors' orientation to the legal order should alert us to the all-important role here of the state, and of society;[103] of the fallacy or even mendacity involved in distinguishing categorically between a putatively private (economic) sphere and putatively public (political) sphere.[104] Even in an era of largely 'deregulated' labour markets, law and social norms influence contracting behaviour in a wide variety of ways, both direct and indirect: conferring, and placing limits on, contractual freedoms; defining remedies in case of breach; shaping actors' understandings of what is 'normal' or 'fair' in a given situation; encouraging the design of avoidance strategies to take an agreement outside of the scope of application of particular rules.[105] More fundamentally, law constructs or reinforces power relations within the economy by assigning rights to property – 'powers of control and disposal' – to some and not to others.[106] Trade unions may fulfil important functions in respect of contracting for work, both strengthening the hand of workers when contracts for work are first negotiated, and acting, thereafter, as 'guardians of the contract' to ensure that its terms are respected.[107]

That laws, social norms and statuses, and collective institutions function in these ways to limit or augment the freedom of action of the parties to a contract for work is well captured

[102] A. Gorz, *Reclaiming Work* (1999); W. Streeck 'Revisiting Status and Contract: Pluralism, Corporatism and Flexibility' in W. Streeck, *Social Institutions and Economic Performance* (1992).
[103] E. Durkheim, *The Division of Labor in Society* ([1893] 1933) 211.
[104] K. Klare, 'The Public/Private Distinction in Labor Law' (1982) 130(6) *University of Pennsylvania Law Review* 1358; E. Fraenkel, 'Die politische Bedeutung des Arbeitsrechts' (1932) in T. Ramm (ed), *Arbeitsrecht und Politik: Quellentexte 1918 – 1933* (1966), 251.
[105] R.H. Mnookin and L. Kornhauser, 'Bargaining in the Shadow of the Law: the Case of Divorce' (1979) 88(5) *Yale Law Journal* 950.
[106] Block op. cit., n. 9.
[107] Streeck op. cit., n. 63, p. 265.

by Weber's notion of the labour constitution. 'In the sociological sense', Weber wrote, the constitution is 'the modus of distribution of power which determines the possibility of regulating social action'.[108] With reference to this definition, and building upon our characterisation of the contract for work as a form of ordering – therefore, of 'regulating social action' – the labour constitution might be understood as *the complex of rules, institutions, social norms, and social statuses etc which together determine the possibility of contracting for work*.

It is with this definition in mind, that I propose the labour constitution as a tool to map the various contexts – or regulated spaces – within which contracting for work proceeds: a particular workplace, company, sector, locality and jurisdiction.[109] For each such space, ideal typical labour constitutions might be constructed and then refined with regard to the prevailing laws, institutions, social norms, shared understandings etc in the space in question. Used in this way, the labour constitution would provide a means of moving beyond the microlevel of analysis to the meso- and macrolevels, without defaulting automatically to 'the labour market' as that which frames the field. It would allow for comparisons to be drawn between different workplaces, sectors, jurisdictions, and across time, in a way that might then aid the construction of hypotheses, or drawing of conclusions, regarding the influence of particular laws and institutions on contracting behaviour. And it would allow us to address questions regarding the interaction of different 'labour constitutions' with one another, and the implications of the uneven development of such constitutions in different countries, regions, or places of work: questions of inequalities and conflicts of interest *between* workers, of the manipulation of such inequalities by transnational corporations and other investors, and of threats of competitive deregulation.

When it comes to the analysis of legal change, Weber's remarks regarding economic power and political influence are highly instructive: 'economic interests are among the strongest factors influencing the creation of law'.[110] With respect to *public policy and legislation*, they suggest an approach such as that developed by Georg Menz, taking inspiration from

[108] Weber op. cit., n. 22, p. 330.
[109] Social geographers attempt something similar when they refer to 'regulatory spaces' or 'workplace regimes': see eg C. Inversi, L.A. Buckley, T. Dundon, 'An Analytical framework for employment regulation: investigating the regulatory space' (2017) 39(3) *Employee Relations* 291; B. Rogaly, 'Intensification of Workplace Regimes in British Agriculture: The Role of Migrant Workers' (2008) 14 *Population, Place Space* 497.
[110] Weber op. cit., n. 22, p. 334.

Pashukanis, which understands the state and public policy to be shaped to a significant degree by the interests of the 'predominant and hegemonic' social classes, and, as such, begs the question of the role of business – and, potentially, of collectivised labour – in 'driving forward' particular policy changes.[111] *Adjudication* might usefully be conceived, with Weber and Duncan Kennedy, as a form of 'legal social action', since the judge will always orientate her reasoning to the law but simultaneously also to others (the community of judges, the wider community).[112] Of course, businesses and trade unions play important roles here, too, bringing cases to court and providing financial and other forms of support to litigants.

In addition to legislation and adjudication, questions abound regarding the internalization and mobilization of legal rules by lay actors.[113] Weber wrote of the reconstruction of juridical rules by ordinary people as 'maxims of action'.[114] It follows that law should be understood not as a simple external constraint on social action but as internal to situated behaviour and social interactions.[115] We should ask ourselves, as Kahn-Freund put it: 'how do [legal] norms change as a result of their contact with reality, … how is the abstract content of the norm made concrete, how does it adapt itself to social reality, how does this reality influence the conceptual grouping of existing norms, and how does the spontaneous social creation of norms influence the corpus of existing norms?'[116] In charting legal change over time, the method to be adopted, following Weber, is genealogy. A genealogy of *labour constitutions* would allow for legal rules and concepts to be understood as they have interacted with one another and with prevailing social norms and economic power relations in particular places, at particular points in time.[117]

An example of what is envisaged here can be found in recent work by Eric Tucker on the Uber model of taxi service provision.[118] Seeking to place Uber in historical perspective, and

[111] G. Menz, 'Employers and Migrant Legality: Liberalization of Service Provision, Transnational Posting, and the Bifurcation of the European Labour Market' in Costello and Freedland, op. cit., n. 46.
[112] D. Kennedy, 'Freedom and Constrain in Adjudication: a Critical Phenomenology' (1986) 36(4) *Journal of Legal Education* 518; M. Neugebauer, 'Atypical Work and Employment Status: A Genealogical Study of the Application of Legal Technique' working paper presented at the LSA, Toronto 2018.
[113] R. Diaz-Bone, C. Didry, R. Salais, 'Conventionalist's Perspectives on the Political Economy of Law' (2015) 40(1) *Historical Social Research* 7.
[114] M. Weber, *Critique of Stammler* ([1905] 1977).
[115] S. Deakin, 'Juridical Ontology: the Evolution of Legal Form' (2015) 40(1) *Historical Social Research* 170.
[116] Kahn-Freund op. cit., n. 32, p. 98.
[117] E. Christodoulidis, 'Critical Theory and the Law' in E. Christodoulidis, R. Dukes and M. Goldoni (eds), *Research Handbook on Critical Legal Theory* (2019).
[118] Tucker op. cit., n. 25. For further examples of approaches to the study of labour law that, without necessarily using the precise language of ESL, share elements of what I propose here, see N. Zatz, 'Prison Labor and the

to do so in a way which takes full account of the specifically capitalist nature of the gig economy in general, and of Uber in particular, Tucker develops a stylized history of what he calls the different 'taxi capitalisms' of twentieth century Toronto. At the beginning of the twentieth century, he narrates, the sector was as yet largely unregulated but entry costs were high; taxi provision came to be dominated by large fleet owners who employed drivers directly. When the price of motor cars fell, competition increased, various types of middlemen appeared, and drivers' incomes fell dramatically. Over the course of the following decades, successive waves of regulation were shaped by the changing interests and power relations of the various actors: drivers, fleet owners, customers, middlemen. While Uber was functionally equivalent to the middlemen of earlier years, it succeeded – at least in the short term – in characterising itself as something other – a 'rideshare' company – so as to avoid the obligations imposed by existing regulations and laws.

In sketching these successive 'taxi capitalisms' – or *labour constitutions* – Tucker's intention is to develop a heuristic that will allow him to identify the consequences for workers of changes to the regulation of the taxi sector, and to the business models adopted by enterprises in that sector, including the preferred form of (contractual) relationship with drivers.[119] Particular attention is paid to the questions of how value was abstracted, or profits made, at specific points in time, and how business models and working relations ('social relations of production') were adapted in the light of new technologies, new rules, and changing levels of competition. A second point of focus lies with the changing opportunities for those creating value – the drivers – to collectivise and to fight for the right to a greater share of the farebox income. The similarities between this exercise and what I have in mind when I propose a genealogy of labour constitutions are striking. It would remain, however, to supplement the sketch of labour constitutions with analysis of the meaning which the contractual relations have for individual drivers and brokers, or drivers and medallion owners. (Does the driver understand himself to be contracting for work? Does he understand himself therefore to be owed a minimum wage and other employment rights? Alternatively, does he regard himself as truly self-employed? Which aspects of his working relationship does he object to and why?

Paradox of Paid Nonmarket Work', in Bandelj op. cit., n. 1; S. Marshall, 'How Does Institutional Change Occur? Two Strategies for Reforming the Scope of Labour Law' (2014) 43(3) *Industrial Law Journal* 286; J. Fudge and K. Strauss, 'Migrants, Unfree Labour, and the Legal Construction of Domestic Servitude' in Costello and Freedland op. cit., n. 46; L.J.B. Hayes, *Stories of Care: A Labour of Law* (2017); J Prassl, *Humans as a Service* (2018).

[119] Compare text to n. 95 above.

What account of prevailing legal rules has been taken by the drafter of the contract for work and to what end? Etc.) The question would then arise whether these understandings had led to the emergence of particular practices or even social norms; whether they had resulted in collective action, or in collective lobbying or strategic litigation in an effort to effect legal change. In order to test hypotheses regarding the effects of specific rules or laws on contracting behaviour, comparison might be made with labour constitutions and contracting for work in other municipalities or jurisdictions.

2. From the Critical Sociology of Labour Law to the Economic Sociology of Labour Law

As sketched out above, a Weber-inspired ESL is similar in significant respects to the critical socio-legal tradition in labour law. Both are concerned to analyse law empirically; to consider 'the social effect of the norm ... the way in which it appears in society and ... its social function'.[120] Both understand the economy and society to be constantly evolving, in different ways in different locations, so that particular economic and social configurations are regarded as context specific rather than inevitable or universal.[121] Both ascribe particular importance to the existence of power relations within the economy, recognising that the worker is typically compelled to sell her labour.[122] Both reject, at least partially, the public/private distinction as it applies to labour law, and both are somewhat sceptical of the capacity of law to affect changes in social and economic behaviour.[123]

The most obvious difference between the two approaches arises in connection with the focus and scope of the ensuing analysis. At the time of the development of the critical socio-legal tradition in labour law, the rules which regulated working relationships were mostly agreed by trade unions and employers' associations in the form of collective agreements.[124] Within systems of collectivized industrial relations, the contract of employment retained its technical-legal significance as that upon which all else hinged – including importantly the applicability to the parties in question of collectively agreed terms and conditions – but, in

[120] Kahn-Freund op. cit., n. 32, p. 98.
[121] See eg O. Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37(1) *Modern Law Review* 1.
[122] Dukes op. cit., n. 33, ch. 2.
[123] R. Dukes, 'Critical Labour Law: Then and Now' in Christodoulidis, Dukes, Goldoni, op. cit., n. 117.
[124] O. Kahn-Freund, 'Legal Framework' in A. Flanders and H. Clegg, *The System of Industrial Relations in Great Britain* (1954) 45.

substance, it was little more than an empty shell; a 'bare' agreement to work in exchange for wages.[125] It followed that scholars focused their analysis primarily on those laws which facilitated and encouraged the emergence and 'smooth functioning' of systems of collective bargaining and collective dispute resolution, characterising these as forms of autonomous rule-making and rule-enforcement.[126] By critical scholars such as Sinzheimer, the very aim of labour law was argued to lie with the decommercialization – the de-marketization – of employment relations. The aspiration, wrote Kahn-Freund, was:

> to show the way from the law of contract to the law of labour, from the treatment of the worker as a 'person', abstractly equal to the employer, to his treatment as a human being, concretely dependent in his existence.[127]

For analytical and normative purposes, it was possible to concentrate on the regulatory function of collective bargaining, and to treat the individual contractual and market aspects (*Preiskampf, Konkurrenzkampf*[128]) of the employment relation as having been largely suppressed: *labour law was social law*. The concern of the critical scholars lay primarily with collective structures and collective (class) interests, rather than with those of the individual.

In the economic sociology of labour law proposed here, in contrast, the focus shifts to the contract for work as the (emergent) primary source of legal norms in the field of working relations and, in the first instance, onto the motivations and actions of the individual as party to the contract. At the same time, the focus widens to include not only 'labour law', narrowly conceived, and collective labour institutions, but also other fields of law, or elements of them, which together 'determine the possibility of contracting for work' as it was put above: immigration law, social security law, family law, private law, corporate governance, financial regulation. In view of the liberalization of labour markets and recommodification of labour in recent decades, labour law (and these other laws) are no longer defined *a priori* as social law. Instead, the formally rational ('market justice') and substantively rational ('social justice') elements of contracting behaviour and the context(s) within which it proceeds are treated as factors to be determined.[129]

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[125] Id.
[126] Dukes op. cit., n. 33; Special Issue on national styles in labour law scholarship (2002) 23 *Comparative Labor Law and Policy Journal*.
[127] Kahn-Freund op. cit., n. 32, 103.
[128] 'struggle over price' and 'struggle between competitors': Weber, op. cit., n. 22, pp. 92, 108
[129] W Streeck, *Buying Time: the Delayed Crisis of Democratic Capitalism* (Verso 2014), 55-63

In Sinzheimer's work, the *labour constitution* figured as the body of law – constitutional and statutory – which fulfilled the function of 'constitutionalizing', or democratizing, the economy.[130] In a manner referred to above, Sinzheimer's analysis of the relevant legislation was both *descriptive* of the law in force and *normative*, arguing for a particular interpretation of that law. The scope of the labour constitution was dictated by the identification of the democratizing function. It consisted, accordingly, of those laws which accorded rights to collectivized labour to participate on a parity basis with capital in the regulation of working relationships, workplaces, companies, and – in aspiration, at least – the economy as a whole.

My definition of the labour constitution as 'the complex of rules, institutions, social norms, and social statuses etc which together determine the possibility of contracting for work' is less obviously determinative, and potentially much broader, than Sinzheimer's. In part, this has to do with my intention to construct ideal typical labour constitutions and to use these, in the first instance, as Weber proposed, for heuristic and expository purposes. According to Weber, the ideal type was intended to 'aid description' and not, itself, to be either descriptive or evaluative of concrete phenomena: the adjective 'ideal', here, was categorically not an expression of approbation.[131] That is not to say, on the other hand, that in Weber's hands the labour constitution was entirely 'value free': selection of the particular characteristics or factors to be accentuated in an ideal type was a preliminary and inevitable step, in Weber's opinion,[132] and should proceed precisely *with* reference to 'value-ideas'.[133] The sole criterion by which the choice of factors should then be judged was the capacity of the resultant ideal type to 'reveal concrete cultural phenomena in their interdependence, their causal conditions and their significance'.[134]

Like Weber's 'patriarchal' and 'capitalist' agricultural labour constitutions east of the river Elbe, the taxi labour constitutions sketched by Tucker well illustrate how reference to 'value-ideas' might result in constructs which, though primarily heuristic and expository in nature, suggest hypotheses or conclusions that are capable of informing normative argument. Tucker's value-ideas, as we have seen, are worker domination and exploitation, and his

[130] Dukes op. cit., n. 33.
[131] The ideal type was ideal 'in the strictly logical sense of the term': Weber op. cit., n. 21, p. 49.
[132] There was an 'insurmountable hiatus between the concept and the real' which rendered consideration of the totality impossible: Coutu and Kirat, 483, citing Weber, op. cit., n. 21.
[133] Coutu and Kirat op. cit., n. 9, 481, citing Weber, id.
[134] Weber, id., p. 50.

labour constitutions allow him to address two sets of questions regarding the role of the applicable law in limiting (accentuating) workers' market vulnerabilities, and in facilitating (obstructing) their efforts at collectivisation and resistance. Depending on the nature of the research questions in any given study, alternative or additional value orientations could, of course, be selected: for example, in the case of the taxi sector, consumer rights, or the wider public interest.[135]

CONCLUSION

Writing in 1986 in defence of the socio-legal tradition in labour law, Lord Wedderburn formulated the aim of scholarship in the field as follows.

> 'Projects for new labour laws must be tested in concrete terms by their effect upon real people, the condition and quality of their lives, their prosperity and their – real, not theoretical – liberty'.[136]

The role of the scholar, in Wedderburn's opinion – and in Sinzheimer's and Kahn-Freund's before him – was to assess the consequences for workers, and for the wider public interest, of particular laws and social arrangements, with a view to influencing the formation of policy, legislation, and legal precedent. Even today, it seems to me that this is broadly reflective of how scholars of labour law understand the task at hand. In different places at different times, legislatures and courts might show themselves more or less willing to pay heed to arguments or evidence that speaks to those consequences. But in any case the arguments ought still to be made and the evidence gathered – because one day they might be heard again; because legislatures and judges are anyway not the only audience for such work.

In view of the interpenetration of the social and the economic that we might understand to be characteristic of neoliberalism, there is growing recognition among scholars that social scientific analysis should not proceed any longer from an assumption that these are separate spheres with distinct logics of action. In respect of the study of labour law, trends towards the greater commercialization and 'precarization' of working relationships imply the need for an approach that will allow for adequate account to be taken of the individual and market, as

[135] See eg Prassl op. cit., n. 118
[136] K.W. Wedderburn, *The Worker and the Law* (1983, 3rd edn.) 860.

well as the social and legal, aspects of those relationships. Drawing on elements of Weber's political economy, economic sociology and sociology of law, I sought to make the case in this article for the usefulness of what I have called the economic sociology of labour law. Having identified the contract for work as the key legal institution in the field, and the primary focus of scholarly analysis, I went on to characterise the act of contracting for work as an example of what Weber called *economic social action* that is oriented to the legal order. With Weber, I gave particular emphasis to the importance of interpreting the meaning which that action has for the actors themselves. I further proposed that Weber's notion of the *labour constitution* be used to map the context within which contracting for work takes place. Defining the labour constitution as 'the complex of rules, institutions, social norms, and social statuses etc which together determine the possibility of contracting for work', I suggested that it be understood to provide a means of allowing microanalysis of contracting behaviour to inform, and to be informed by, studies of the relevant legal institutions, social structures and social statuses, and of the political and economic power relations at play in shaping the development over time of the law, social relations, and the economy.