

## The Politics of Method in the Field of Labour Law

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### Introduction

In English language scholarship in the field of labour law it has become increasingly common to talk of labour markets. Indeed instead of *labour law* – the law of work – some have even begun to conceive of the field of study as comprising ‘labour market regulation’, assessing the desirability of particular laws with reference to their likely labour market impact, among other things. This stands in sharp contrast to traditional approaches to the subject that were constructed around recognition of the imbalance of power in the employment relation and the consequent desirability of worker collectivisation and collective bargaining as a means of empowering labour and ensuring fairer terms and conditions of employment.

At the beginning of the twentieth century, pioneering scholars used socio-legal methods to argue against the straightforward application of private law in the field of employment relations. In practice, they suggested, formal freedom of contract meant nothing other than the dictation of terms by the more powerful employer. Collective agreements were not, or not only, contracts between trade unions and employers organisations, but rather sources of generally applicable norms. The recent emergence of alternative scholarly approaches can be explained in part with reference to developments on the ground: the weakening of trade unions, the contraction of the coverage of collective agreements, the proliferation of statutory rules, and the reframing of policy discourses in line with changing government priorities. Labour law scholars may be motivated by an ambition to participate in policy debates and to exert an influence on policy- and law-making, and they may choose their vocabulary and frame their research objectives accordingly. Alternatively or additionally, the adoption of the language of labour markets might be bound up with the increasingly interdisciplinary nature of labour law research and with the prominence of markets and other economic tropes across the social sciences: the ‘disciplinary imperialism of modern economics’, as Beckert and

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Streeck put it, pointing to the colonization by rational choice theory of fields including political science and, to a lesser extent, sociology.<sup>1</sup>

While there is certainly a case to be made for tailoring research projects, including the choice of methods, to the intended audience (who do we wish to inform and persuade?), there is also a risk involved in accepting the terms and parameters of a debate that have been chosen by somebody else. In the field of labour law, I argue, market framings and associated economic methods can serve to limit quite significantly the kinds of normative argument that can be made, obscuring the importance of certain values traditionally understood to underpin labour law and policy: human dignity, substantive equality, democracy at work. This point is illustrated in part 2 of what follows by means of a discussion of the 2017 ruling of the UK Supreme Court, *R (UNISON) v the Lord Chancellor*, and associated scholarly commentary.<sup>2</sup> In the third and final part of the chapter, I argue that in the current era of fragmented labour law regimes and ‘fissured’ workplaces, labour law scholarship should reembrace its socio-legal tradition in a manner that allows for adequate attention to be accorded to the increasingly individualised and commercialised nature of working relations.<sup>3</sup> An *economic sociology of labour law* holds the promise of allowing for analysis of labour laws and their impact on workers, employing organisations and wider society, in a manner that neither ‘oversociologises’ the field of enquiry,<sup>4</sup> nor reduces it to a collection of abstract market transactions.<sup>5</sup>

## 1. From Socio-Legal to Market Focused Framings

Labour law was first recognised as a discrete field, or legal discipline, around a century ago.<sup>6</sup> From the very outset, the political nature of the question of method was understood, finding expression in Germany in a mini-*Methodenstreit* between the socialist scholar Hugo

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<sup>1</sup> J. Beckert and W. Streeck, ‘Economic Sociology and Political Economy: A Programmatic Perspective’ (2008) *MPLfG Working Paper* 08/4 at 11

<sup>2</sup> [2017] UKSC 51, ['UNISON']

<sup>3</sup> The term ‘fissured’ is taken from D Weil, *The Fissured Workplace* (Harvard 2017)

<sup>4</sup> M Harvey, ‘Productive Systems, Markets and Competition as ‘Instituted Economic Processes’’ in B Burchell, S Deakin, J Michie, J Rubery (eds), *Systems of Production: Markets, Organisations and Performance* (2002)

<sup>5</sup> F Block, *Capitalism: the Future of an Illusion* (UC Press 2018)

<sup>6</sup> Part 1 draws heavily on the first part of R Dukes, ‘The Economic Sociology of Labour Law’ (2019) 46(3) *Journal of Law and Society* 396-422.

Sinzheimer and a number of his more conservative colleagues. At a time when others were arguing for the superiority of a very narrowly conceived ‘blackletter’ *law as science*, Sinzheimer insisted upon the appropriateness of 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.<sup>7</sup> With reference thereto, he 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 his analysis so as to make the case either for the requisite interpretation of prevailing norms, or for law reform.<sup>8</sup> It was with both descriptive and normative intent that 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.<sup>9</sup> 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 of the common interest, as identified by the representatives of capital *and* labour.<sup>10</sup> 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 like-minded contemporaries then proceeded to analyse it primarily in isolation from private law, corporate law, and associated fields.

In the 1920s, Sinzheimer found his work branded by other leading scholars ‘a step backwards [from legal science] to a kind of sociological feuilleton’; ‘those wishing to discover something will find themselves virtually empty-handed’.<sup>11</sup> Two camps emerged in Germany around the two leading labour law journals: one socio-legal and openly political in character, the other championing a doctrinal or ‘black-letter’ approach and claiming politically-neutrality and scientific objectivity.<sup>12</sup> In decades to come, however, it was Sinzheimer’s

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<sup>7</sup> 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*.

<sup>8</sup> R. Dukes, *The Labour Constitution: the Enduring Idea of Labour Law* (2014) ch. 8.

<sup>9</sup> H. Sinzheimer, ‘Demokratisierung des Arbeitsverhältnisses’ in H. Sinzheimer, *Arbeitsrecht und Rechtssoziologie: gesammelte Aufsätze und Reden* ([1928] 1976), 124.

<sup>10</sup> H. Sinzheimer, ‘Eine Theorie des Sozialen Rechts’ (1936) XVI *Zeitschrift für öffentliches Recht* 3, reproduced in Sinzheimer (1976) op. cit., n. 34.

<sup>11</sup> Nogler citing W. Kaskel (1992) *Recht und Wirtschaft* pp.70- 71

<sup>12</sup> Nogler

scholarship that was to be of lasting importance in the UK and elsewhere.<sup>13</sup> Following the teachings of Sinzheimer's one time student Otto Kahn-Freund, labour law was again defined, in the post war era, in contradistinction to private law, but now, commonly, as the body of law which addressed the imbalance of power in the employment relation.<sup>14</sup> 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.<sup>15</sup> As to methods, socio-legal approaches remained dominant: analysis of the 'law in context', directed at assessing whether particular legal provisions had achieved the policy aims which had motivated their adoption; whether, alternatively, they had had any unintended consequences.<sup>16</sup>

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.<sup>17</sup> 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.<sup>18</sup> 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

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<sup>13</sup> Special Issue on national styles in labour law scholarship (2002) 23 *Comparative Labor Law and Policy Journal*.

<sup>14</sup> The classic text is P. Davies and M. Freedland (eds), *Kahn-Freund's Labour and the Law* (1983, 3<sup>rd</sup> ed) 18.

<sup>15</sup> Lord Wedderburn, 'Labour Law: From Here to Autonomy' (1987) 16 *Industrial Law J.* 1.

<sup>16</sup> B Simpson, 'The Changing Face of British Collective Labour Law' (2001) 21(4) *Oxford Journal of Legal Studies* 705-17.

<sup>17</sup> Davies and Freedland, 'Editors' Introduction' in P. Davies and M. Freedland (eds), *Kahn-Freund's Labour and the Law* (1983, 3<sup>rd</sup> ed) 6.

<sup>18</sup> J. Conaghan, 'The Invisibility of Women in Labor-Law – Gender-Neutrality in Model-Building' (1986) 14 *International J. of the Sociology of Law* 377.

pre-existing, ‘natural’ order, to which labour law created limited – ‘unnatural’ – exceptions.<sup>19</sup> 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.<sup>20</sup>

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.<sup>21</sup> A labour market framing would allow for microlevel analysis of the individual employment relation to be supplemented with macrolevel analysis.<sup>22</sup> 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.<sup>23</sup> 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 economic growth.<sup>24</sup>

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,<sup>25</sup> or something like a sociology of law and economics.<sup>26</sup> In

<sup>19</sup> K. Klare, ‘Critical Theory and Labor Relations Law’ in *The Politics of Law: a Progressive Critique*, ed. D. Kairys (1982, 3rd edn.).

<sup>20</sup> *id.*

<sup>21</sup> P. Davies and M. Freedland, ‘Editors’ Introduction’ in *Kahn-Freund’s Labour and the Law* (1983, 3rd edn.)

<sup>22</sup> P. Davies and M. Freedland, *Labour Law Text and Materials* (1984, 2<sup>nd</sup> edn) 2, 11.

<sup>23</sup> 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.

<sup>24</sup> Deakin and Wilkinson *op. cit.*, n. 16, ch. 5.

<sup>25</sup> 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).

<sup>26</sup> Deakin and Wilkinson ‘Labour Markets and Legal Evolution’ in Deakin and Wilkinson *op. cit.*, n. 16, esp. pp. 26-36.

some cases, however, the concern with markets was taken to presuppose the adoption of economic methods and modes of analysis, and the applications of these to labour law.<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup> 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.

## 2. Labour Law and Method in the UK Supreme Court

In 2017, it fell to the Supreme Court of the UK to rule on the lawfulness of a system of fees introduced four years previously and payable by all those taking a claim to the employment tribunal or employment appeals tribunal (‘ET’ and ‘EAT’). Employment tribunals, or industrial tribunals as they were originally known, had first been created in the UK in the

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<sup>27</sup> R.M. Fischl, ‘Labor Law, the Left and the Lure of the Market’ (2011) 94 *Marquette Law Rev.* 947.

<sup>28</sup> Deakin and Wilkinson 8-9, citing M. Aoki, *Toward a Comparative Institutional Analysis* (2001).

<sup>29</sup> R. Dukes, *The Labour Constitution: the Enduring Idea of Labour Law* (Oxford), pp. 110-11.

<sup>30</sup> K. Rittich, ‘Making Natural Markets: Flexibility as Labour Market Truth’ (2014) 65 *Northern Ireland Legal Quarterly* 323, p. 335.

1970s in furtherance of the aim of providing quick, easy and inexpensive access to justice.<sup>31</sup> As the relative importance of collective, trade union based procedures and government inspectorates as means of enforcing labour law had decreased over the course of the ensuing decades, so the importance of the tribunals had grown. Between 1972 and 2012/13, the number of cases brought before the tribunals increased more than ten-fold from 13,555 to 191,541.<sup>32</sup> Concerned by the associated rise in costs, and in the belief that a significant number of those bringing claims were ‘vexatious’ in intent, the Government introduced fees in 2013 of between £390 and £1200 per claim, varying in accordance with the nature of the claim.<sup>33</sup> In doing so, it had three stated objectives: first, to transfer some of the cost burden from general taxpayers to those that used the system; secondly, to incentivise earlier settlements of disputes; thirdly, to dis-incentivise unreasonable behaviour, such as the pursuit of weak or vexatious claims.<sup>34</sup> In furtherance of the ancillary aim of ensuring access to justice for those who could not afford to pay fees, a so-called remissions scheme was also introduced. This was perhaps best described as restricted in scope, applying only to those with very little by way of savings, earning less than a full-time minimum wage.<sup>35</sup>

By the beginning of this century, it was quite commonplace for government, policy makers and civil servants to use a labour market framing when discussing labour law. Indeed reference was scarcely made anymore in such circles to ‘labour law’ or ‘employment law’, these categories having been displaced by the notion of labour market regulation, labour market reform or, exceptionally, employment rights. By the Conservative-Liberal Democrat Coalition Government, which came to power in 2010 under David Cameron, employment laws were characterised first and foremost as ‘red tape’, which limited the flexibility of labour markets quite unnecessarily.

We often hear from businesses that employment related regulation holds them back from growing their firms and employing more people. Whether it is the filling out of endless forms when you hire your first member of staff, the complexities of letting somebody go, or simply manage staff on a day-to-day basis, we want to review these

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<sup>31</sup> Royal Commission on Trade Union’s and Employers’ Associations 1965-68 Cmnd 3623 (1968) Chapter X.

<sup>32</sup> S. Corby, ‘British Employment Tribunals: from the Side-Lines to Centre Stage’ (2015) 56 *Labor History* 161, 161.

<sup>33</sup> The Employment Tribunals and the Employment Appeals Tribunal Fees Order 2013 [‘the Fees Order’].

<sup>34</sup> Department of Business, Innovation and Skills, *Resolving Workplace Disputes: A Consultation* (2011)

<sup>35</sup> UNISON, para 24

regulations with the aim of giving business more confidence in employing people and creating more jobs.<sup>36</sup>

In consulting in 2011 on its proposals to introduce employment tribunal fees as part of a more extensive programme of employment law reform, the Government extended the market framing of the matter at hand far beyond employment relations themselves – the sale of labour in exchange for wages – to encompass the act of bringing a claim before the tribunal.<sup>37</sup> It characterized the claimant as a service-user, or consumer, in other words: the purchaser of ‘tribunal services’. A cost-benefit analysis was conducted accordingly in a manner that admitted only one kind of benefit; namely, a financial one to the individual service-user.<sup>38</sup> The manner of calculation thus rendered invisible and irrelevant any possible benefits to the individual claimant that were not financial in nature – including a sense of vindication or ‘justice done’ – and any wider benefit to third parties or society as a whole of the tribunal system. In the Government’s own terms:

‘[We assume] that there are no positive externalities from consumption. In other words, ET and EAT use does not lead to gains to society that exceed the sum of the gains to consumers and producers of these services.’<sup>39</sup>

The courts were asked to consider the lawfulness of the fees order twice, in 2013 and again in 2014: in essence, to judge whether the order breached the principle of access to justice and specific provisions of equality law. On both occasions the claim of unlawfulness was dismissed. In the Court of Appeal in 2015, it was ruled that it had not been demonstrated that the fee order constituted an interference with the right of effective access to a tribunal because it had not been shown that the fees were unaffordable. Evidence had been lead to the effect that the number of claims brought to the ET and EAT had fallen very dramatically following the introduction of fees, far further than the Government had predicted; however, there was no safe basis, Underhill LJ reasoned, for ‘an inference that the decline *cannot* consist *entirely* of cases where potential claimants could realistically have afforded to bring proceedings but have made a choice not to’.<sup>40</sup>

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<sup>36</sup> Ed Davey as Minister for Employment Relations in 2011: <https://www.gov.uk/government/news/tackling-employment-law-red-tape--2>

<sup>37</sup> Consultation 2011

<sup>38</sup> Ministry of Justice, *Impact Assessment* (2012), 26

<sup>39</sup> Consultation 2011, p. 38

<sup>40</sup> R (UNISON) [2015] EWCA Civ 935, para 68, emphasis in the original.

In an article published in April 2017, Abi Adams and Jeremias Prassl took issue with the Court of Appeal's application of an 'affordability test' to judge the matter of interference with the right of effective judicial protection.<sup>41</sup> According to judicial precedent, they argued, the relevant threshold here was not affordability (or unaffordability) but rather the propensity of the fees to deter meritorious claimants from bringing claims.<sup>42</sup> Suspecting, perhaps, that the Supreme Court might follow the Court of Appeal in accepting elements of the Government's framing of the matter, Adams and Prassl went on to apply rational choice theory to the question of deterrence, reasoning that a rational claimant would only sue when the benefits she expected from bringing a claim exceeded her expected cost of doing so (in other words, when the expected value of the claim was positive).<sup>43</sup> This could be calculated arithmetically:

*Expected value of claim =*

*probability win x payoff when win + probability lose x payoff when lose.*<sup>44</sup>

On the basis of existing evidence – the rate of fees payable under the fees order, the value of awards made to claimants, and the frequency with which awards resulted in pay-outs by employers – Adams and Prassl were thus able to conclude that the fees order *did* violate the very essence of rights to access the courts and tribunals. '[T]he majority of meritorious claimants can expect to be faced with a net financial loss, even following success in their substantive arguments'.<sup>45</sup> Even on the basis of a service-provision characterisation of employment tribunal hearings, in other words, the Government's reasoning was faulty. Further scrutiny of the fees and their impact to date revealed additionally that the order was disproportionate as a means of pursuing the Government's (legitimate) aims. Relevant to the question of proportionality was the Government's failure to acknowledge the 'positive externalities' of employment litigation: the benefit to society of a credible means of enforcing employment law.<sup>46</sup>

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<sup>41</sup> A. Adams and J. Prassl, 'Vexatious Claims: Challenging the Case for Employment Tribunal Fees' (2017) 80(3) *Modern Law Review* 412. See also A Adams-Prassl and J Adams-Prassl, 'Systemic Unfairness, Access to Justice and Futility: A Framework' 2020 40(3) *Oxford Journal of Legal Studies* 561–590.

<sup>42</sup> Adams and Prassl 2017, 427

<sup>43</sup> Note that Adams and Prassl emphasise that that their rational claimant analysis is 'deliberately conservative' (429), and that 'actual litigants are much more easily deterred than the "risk-neutral" rational claimants on whom our initial analysis was premised' (430).

<sup>44</sup> Adams and Prassl 2017, 428

<sup>45</sup> Adams and Prassl 2017, 413

<sup>46</sup> Adams and Prassl 2017, 434-5

In the Supreme Court in July 2017, the lead judgement was delivered by Lord Reed, with the unanimous agreement of his colleagues. Perhaps with a view to the enduring authoritativeness of the Court's ruling post-Brexit, Lord Reed based his decision primarily on English common law rather than EU law, framing the matter at hand with reference to the fundamental principle of the rule of law. At the heart of that principle, His Lordship recalled, was the idea that society was governed by law.<sup>47</sup> In order for the courts to perform their role of ensuring that laws were applied and enforced, people must have 'unimpeded access' to them. Where access was impeded, laws were liable to become 'a dead letter', democracy 'a meaningless charade'.<sup>48</sup> To characterise ET claimants as consumers and to focus solely on the costs and benefits accruing to claimants as individuals was to misunderstand these points.<sup>49</sup> 'The idea that bringing a claim before a court or a tribunal is a purely private activity, and the related idea that such claims provide no broader social benefit, are demonstrably untenable'.<sup>50</sup>

Like the lower courts before him, Lord Reed found the Government's objectives in introducing the fees order to be legitimate. Nonetheless, he ruled, respect for the rule of law dictated that the Government could 'intrude' on the right of access to justice only to the degree that it was 'reasonably necessary' to meet those objectives.<sup>51</sup> Moreover, the question whether the fees impeded access to justice to an unreasonable degree had to be decided 'according to the likely impact of the fees on behaviour *in the real world*'.<sup>52</sup> It was necessary, for example, to bear in mind that the use made by workers of ETs was governed 'more by circumstances than by choice': someone who believed herself to have been unfairly dismissed or unlawfully underpaid might be under a 'practical compulsion' to seek financial redress.<sup>53</sup> When considering the deterrent quality of fees to a worker considering legal action, the question to be asked was whether payment of fees would necessitate the sacrifice of 'ordinary and reasonable expenditure required to maintain what would generally be regarded as an acceptable standard of living'; moreover, this should be judged over a period of time and not according to a snapshot view of a worker's income and expenditure in a single month.<sup>54</sup> It had also to be borne in mind that many claims brought in ETs did not seek *any*

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<sup>47</sup> UNISON para 68

<sup>48</sup> UNISON para 68

<sup>49</sup> UNISON para 66

<sup>50</sup> UNISON para 67

<sup>51</sup> UNISON paras 88-9

<sup>52</sup> UNISON paras 92, 85, my emphasis

<sup>53</sup> UNISON para 92

<sup>54</sup> UNISON paras 93, 55

financial reward; many others were for very modest amounts; and, in any case, only around half of claimants who succeeded in obtaining an award ever received payment of that award in full.<sup>55</sup>

The Supreme Court decision contrasts starkly with the approach of the Government. Having adopted a market framing of the tribunal system, characterising claimants as consumers, the Government argued that the Order was lawful because all potential claimants could afford to bring a claim if they so chose. While Adams and Prassl took issue with the focus on the question of affordability, and acknowledged the public benefits of tribunal claims as relevant to the question of proportionality, they also treated the claimant, in essence, as a consumer of tribunal services: as a rational economic actor who would choose to bring a claim only if the financial benefits that she expected exceeded her expected costs. Concluding on that basis that the Fees Order was unlawful, they nonetheless, by their own admission, left the door open for the subsequent introduction of an alternative scheme, with reduced fee levels and ‘greater scrutiny of the timing of fee payments’.<sup>56</sup> Lord Reed went rather further. For him what was at stake was nothing less than the integrity of our democratic constitution.

Claimants must be recognised to perform a public service when bringing a matter to the ET and their ability to do so prized accordingly. ‘Fundamentally’, he concluded, it was because of the failure to consider the public benefits of tribunal claims that the system of fees was ‘from the outset destined to infringe constitutional rights’.<sup>57</sup> In line with his rule of law framing, Lord Reed insisted that the matter of the propensity of the fees to deter claimants be judged circumspectly, taking into account the social realities of claimants’ situations, rather than reducing the matter to a calculation of likely financial costs and rewards.

### **3. Recovering the Socio-Legal Tradition in Labour Law**

In recent years, a dominant discourse in labour law has developed around the notion that the field is in *crisis*.<sup>58</sup> Sometimes what is meant is that labour law as a body of statutory and judge made rules, constitutional principle, and so on, is in crisis; other times what is meant is

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<sup>55</sup> UNISON para 96

<sup>56</sup> Adams and Prassl, 441

<sup>57</sup> UNISON para 102

<sup>58</sup> See eg G Davidov and B Langille, *The Idea of Labour Law* (Oxford 2011)

that labour law as a scholarly discipline is in crisis. In either case, the crisis is understood to stem from a lack of fit between working relations that have changed quite fundamentally over the decades, and systems of labour law that remain stuck in the era of Fordism. While the notion of a crisis in labour law is certainly a useful shorthand way of referencing a particular set of debates, it may be criticised for implying a greater degree of stability and political consensus in the field than ever truly existed: for implying that there was a period of significant length, before the current crisis, when questions of policy and legislation, of judicial decision-making, were anything other than highly contentious. In the 1950s, Otto Kahn-Freund wrote about British labour law as if it were a long established and enduring system. Even at the time of writing, however, this involved the branding as exceptional, and consequent discounting, of the relatively lengthy periods of time during the first half of the twentieth century when working relations were governed by wartime legislation. Against the narrative of crisis in the discipline, it may be argued that working relations are always in flux, that the law always struggles to keep up with change, and that deep-seated conflicts of interest always render the *manner* of keeping up politically controversial. To the extent that this argument is accepted, the case for the importance of socio-legal approaches is already made: in times of change, wrote Sinzheimer, ‘where the old disappears and the new craves recognition, a purely technical insight into the existing legal order is not sufficient’.<sup>59</sup>

Recognising the nature and degree of change in the world of work since the postwar decades and the consequent inadequacy of traditional framings and concepts, I have recently advocated the adoption of an approach to the study of labour law that I call an economic sociology of labour law (ESLL).<sup>60</sup> Beginning from the observation that – with the weakening of employment rights and contraction of collective bargaining – the *contract* has asserted itself as the primary legal institution in the field, ESLL draws on the sociology of law, economic sociology, and political economy, to seek to understand the economic, social and legal aspects of contracting behaviour, and of the different dimensions of the specific contexts within which contracting takes place. Aiming to avoid the normativity that can be imported to the field of enquiry by a labour market framing, it uses instead Max Weber’s notion of the *labour constitution* as a heuristic to map and compare different contexts: the particular workplace, company, sector, jurisdiction, region within which contracting for work

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<sup>59</sup> O Kahn-Freund, ‘Hugo Sinzheimer’ in Lewis and Clark, *Labour Law and Politics in the Weimar Republic* (Oxford: Blackwell 1981)

<sup>60</sup> Dukes, ‘Economic Sociology’

proceeds. ‘Labour constitution’ is defined here as the historically-given ensemble of rules, institutions, social statuses, economic and technological conditions, which together shape decision-making in respect of the question who gets what work under which terms and conditions.<sup>61</sup>

As I envision it, ESLL is similar in significant respects to traditional socio-legal approaches to 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’.<sup>62</sup> 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.<sup>63</sup> Both ascribe particular importance to the existence of power relations within the economy, recognising that the worker is typically compelled to sell her labour. 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.

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.<sup>64</sup> 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 substance, it was little more than an empty shell; a ‘bare’ agreement to work in exchange for wages.<sup>65</sup> 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. By critical scholars such as Sinzheimer, the very aim of

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<sup>61</sup> Dukes, ‘Economic Sociology’. For discussion of various uses of the term ‘labour constitution’ in the literature see M. Coutu, ‘Economic Crises, Crisis of Labour Law? Lessons from Weimar’ (2020) 47(2) *Journal of Law and Society* 221-239.

<sup>62</sup> Kahn-Freund in Lewis and Clark, p. 98.

<sup>63</sup> See eg O. Kahn-Freund, ‘On Uses and Misuses of Comparative Law’ (1974) 37(1) *Modern Law Review* 1.

<sup>64</sup> O. Kahn-Freund, ‘Legal Framework’ in A. Flanders and H. Clegg, *The System of Industrial Relations in Great Britain* (1954) 45.

<sup>65</sup> Id.

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.<sup>66</sup>

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*<sup>67</sup>) 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 ESLL, 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.<sup>68</sup>

It is perhaps worth emphasising that it is not my ambition in developing and adopting an ESLL to produce analysis that is value free. Notwithstanding its debt to the work of Weber,<sup>69</sup> the proposed ESLL is informed, rather, by a guiding belief that facts have consequences for

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<sup>66</sup> Kahn-Freund in Lewis and Clark, 103.

<sup>67</sup> ‘struggle over price’ and ‘struggle between competitors’: Weber, E&S, pp. 92, 108

<sup>68</sup> W Streeck, *Buying Time: the Delayed Crisis of Democratic Capitalism* (Verso 2014), 55-63

<sup>69</sup> Of course, Weber’s social theory is itself far from ‘value-free’. First, it is driven by the value of truthfulness, allowing for the well-known methodological and philosophical problems of ‘realism’. Second, a truthful representation of the social world deals prominently with the values that motivate the objects of observation, human beings and their actions. Social reality is impregnated with values, and interpretative sociology aims to extract them from under the surface of routine social life and interpret them in their historical and institutional and economic and political context.

NB: This is a working draft to be published in a collection of essays on the politics of method in legal scholarship.

values.<sup>70</sup> The ‘factual order is often instinct with value’, as Philip Selznick put it; ‘it establishes conditions out of which, with some probability, and in the ordinary course of human experience, opportunities and expectations arise’.<sup>71</sup> Moreover, any investigation of fact presupposes values, for example, relevance, coherence, simplicity, as well as the value of the exercise at hand.<sup>72</sup> Values are always at play, in other words, in our choice of which facts to investigate and how to investigate them. Insofar as ESLL has a particular political thrust, this lies in its framing of what counts as relevant, of which questions should be asked and of how they should be addressed. It is constructed, as we have seen, around an insistence on the importance of the social and legal, as well as the economic, aspects of employment relations and a corresponding rejection of modes of analysis and explanation that treat such relations as simply sales of labour in exchange for wages, workers and employers as vendors and purchasers who make ‘rational choices’. ESLL recognises actors’ own perceptions of their employment relations and employment law to be an important source of normativity at work, in addition to the normativity of formal law including human rights and international labour standards.<sup>73</sup> Empirical observation reveals that people are motivated by values as well as interests; that they believe in a need for justice and that concepts of justice are socially and historically context-dependent. Formal law can shape these concepts but equally so can social life, political organization, and location in the structure of economic life. ESLL seeks to take account of the search for justice at work as a constitutive feature of human life and as highly relevant to questions of the interpretation and application of the law, as well as of law’s legitimacy.

#### 4. Conclusion

The comparison drawn above between Lord Reed’s ruling in the UNISON case, the Government’s presentation of the matter and Adams’ and Prassl’s scholarly analysis well demonstrates how a market framing and associated abstract economic reasoning can be unhelpfully reductive, excluding important elements of the matter of hand as either not

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<sup>70</sup> P Selznick, ‘Rejoinder to Donald T Black’ *American Journal of Sociology* 78 (1973), 1266.

<sup>71</sup> Ibid.

<sup>72</sup> M Krygier, *Philip Selznick: Ideals in the World* (Stanford University Press 2012). 201, citing H Putnam, *Pragmatism: An Open Question* (Oxford: Blackwell, 1985), 16-17.

<sup>73</sup> R Dukes and W Streeck, ‘Labour Constitutions and Occupational Communities: Legal Norms and Social Norms at Work’ (2020) 47(4) *Journal of Law and Society*, forthcoming; R Dukes and E Kirk, ‘Law, Economy and Legal Consciousness at Work’ (2021) *Northern Ireland Legal Quarterly*, forthcoming

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relevant or of secondary relevance only. After decades of deindustrialization and globalization, changing practices, procedures and perceptions have rendered traditional approaches to the study of labour law ill-suited to the task at hand, and traditional lines of argumentation increasingly redundant or unlikely to be heard. Building on the work of current scholars of labour law, and on critical approaches in political economy and economic sociology, a renewed and reimagined critical labour law today must grapple more comprehensively with questions concerning the social, legal and economic construction of working relations in a manner that allows for a continued focus on principles of enduring importance: worker dignity, substantive equality and democracy.