



Novitz, T. (2020). The Perils of Collective Begging: the case for reforming collective labour law globally and locally too. *New Zealand Journal of Employment Relations*, 44(2), 3-19.
<http://nzjournal.org/NZJER44%282%29.pdf>

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The perils of collective begging:

The case for reforming collective labour law globally and locally too

Tonia Novitz*

Abstract

This article explores the consequences of “collective begging”, that is the failure to provide meaningful legal protection and support for collective bargaining. The first part identifies the perils we are now facing, including increasing precarious work, growing economic inequality and diminished democratic engagement. The second part considers our journey here, namely how we took our (collective) eye off the ball and enabled “begging” rather than “bargaining”. Finally, the third part considers potential legal solutions, including expanding the coverage of those at work legally entitled to trade union representation, facilitating sectoral bargaining and enlarging the scope for lawful industrial action.

There is a saying that, in the absence of effective collective bargaining including recourse to strike action, workers’ organisations engage merely in “collective begging”. The origins of this term have been traced back, by Eric Tucker, to 1921.¹ It is now evident that there are certain dangers that arise if we are resigned to “collective begging”. These are not mere projections for the “future of work” but are readily identifiable now in the global economy and labour markets across the world.

The first part of this article seeks to identify the perils we are now facing, which can be characterised by the normalisation of increasing precarious work, growing economic inequality and diminished democratic engagement. The second part considers our journey here, namely how we took our (collective) eye off the ball and enabled “begging” rather than “bargaining”. This analysis deserves more than the short analysis that can be offered in this article, but my

* University of Bristol School of Law and Centre for Law at Work, tonia.novitz@bristol.ac.uk. This article is an adaptation of a keynote address delivered at the New Zealand Labour Law Society conference hosted at Victoria University of Wellington in November 2019. I am grateful to the organisers and participants for comments; all errors are my own.

¹ Eric Tucker “Can Worker Voice Strike Back? Law and the Decline and Uncertain Future of Strikes” in Alan Bogg and Tonia Novitz (eds) *Voices at Work: Continuity and Change in the Common Law World* (Oxford University Press, Oxford, 2014) 458.

focus will be on tensions between social and economic forces at both national and international levels and how they have manifested in labour law regulation.

Finally, the third part considers potential solutions, identifying a set of prescriptions advocated across the globe, on which labour lawyers broadly agree. These include enlarging the coverage of those legally entitled to trade union representation at work and enhancing access to that representation. Enhancing bargaining rather than “begging” can be fostered by greater solidarity, such that there is a powerful argument for facilitating sectoral bargaining within any given state and indeed for enabling industrial action to be taken in solidarity across enterprises and even national borders. Local strength of feeling also matters and is indeed vital to giving collective worker voice meaning. We need the space within national and international labour laws, as well as institutional provision by extant trade unions, to enable emergent voices to be heard on the matters that concern them. This may also entail not just preserving legal protection of a right to strike, but enhancing its scope and the compass of its legitimate objectives.

The consensus emerging on the need for such reforms should not be so surprising. There are profound shared global links between industrial labour law systems. Countries are not independent in the ways that they once were but linked through a network of trade, investment, subcontracting supply/value (or “poverty”) chains and corporate interlinkages (whether through subsidiaries or franchising).² Workplaces, by way of contrast, are artificially separated or “fissured”, despite the contractual and corporate links between the employers at each site.³ Their implementation will, of course, have to be sensitive to the dynamics of each domestic industrial relations system, which is embedded into the political culture of any given country.⁴ In this sense, the local will always need to be respected in the crafting of change. Additionally, while we might sensibly look to international institutions like the International Labour

² Charlotte Villiers “Collective Responsibility and the Limits of Disclosure in Regulating Global Supply Chains” (2018) 23 Deakin LR 143, citing Benjamin Selwyn “Global Value Chains or Global Poverty Chains? A New Research Agenda” (June 2016) Working Paper No 10, Centre for Global Political Economy, University of Sussex <www.sussex.ac.uk> at 2. See also Benjamin Selwyn “Social Upgrading and Labour in Global Production Networks: A Critique and an Alternative Conception” (2013) 17 Competition and Change 75.

³ David Weil *The Fissured Workplace: Why work became so bad for so many and what can be done to improve it* (Harvard University Press, Cambridge (Mass), 2014).

⁴ Otto Kahn-Freund “On Uses and Misuses of Comparative Law” (1974) 37 MLR 1, 26; although note the identification of greater possibilities for transnational transplantation of collective labour representation by Manfred Weiss “The Future of Comparative Labor Law as an Academic Discipline and as a Practical Tool” (2003) 25 Comp Lab L & Poly J 169 at 170 and 179–80; and Katherine Stone “A New Labor Law for a New World of Work: The Case for a Comparative-Transnational Approach” (2007) 28 Comp Lab L & Poly J 565 at 566 and 581, who also advocates comparison as a basis for “a cross-national agenda for progressive social action”.

Organization (ILO) for guidance, it remains possible for any country to be proactive in the promotion of the reforms proposed here, so as to evade the current perils of “collective begging”.

I What Perils are we Facing?

In recent years, policy-makers have spent so much time thinking about and speculating on the more distant “future of work” (and the associated dangers of human replacement by artificial intelligence and robotics),⁵ it is almost as if we have forgotten the perils facing us at the present time. We can and should focus on what is happening now in 2020, following the decline of collective bargaining. It is argued here that key trends include: the normalisation of precarity at work, increased inequalities in income and diminished democratic engagement. In the absence of some corrective, these trends will only continue.

A Precarious work

As Judy Fudge and Deirdre McCann have observed, precarious work takes a myriad of forms and is multidimensional. They have analysed this emergent phenomenon in relation to the International Labour Organization’s conception of “unacceptable forms of work”.⁶ However, the interest here is rather in how precarity has become regarded as *acceptable* and has been normalised.⁷

Arguably, what is indicative of precarious work (drawing on a variety of literature)⁸ is either the absence of - or uncertainty relating to:

- (1) ongoing employment;
- (2) income levels;
- (3) entitlement to work;

⁵ International Labour Organization (ILO) Global Commission on the Future of Work *Work for a Brighter Future* (22 January 2019) <www.ilo.org>; and see *Report of the Director General: ILO Future of Work Centenary Initiative* ILC 104th session (ILO, Geneva, 2015) <www.ilo.org>.

⁶ Deirdre McCann and Judy Fudge “Unacceptable Forms of Work: A Multidimensional Model” (2017) 156 *Intl Lab Rev* 147.

⁷ David Mangan “Deepening Precarity in the United Kingdom” in Jeff Kenner, Isabella Florczak and Marta Otto (eds) *Precarious Work. The Challenge for Labour Law in Europe* (Edward Elgar, Cheltenham, 2019).

⁸ Nicola Kountouris “The Legal Determinants of Precariousness in Personal Work Relations: A European perspective” (2012) 34(1) *Comp Lab L & Poly J* 21.

- (4) scope for dignity at work (including being subjected to discriminatory conduct); and
- (4) coverage by established individual and collective statutory employment and labour law protections which would secure such social goods as, for example, health and safety protections and collective bargaining.

These various aspects of precarity are widely recognised as having become increasingly prevalent as trade union representation has declined.⁹

These marks of precarity are present in standard forms of employment in the contemporary labour market, as well as newer modes of hire. So-called “ordinary jobs”, which have always been and are still characterised in terms of a “standard employment relationship”,¹⁰ have themselves changed. They are now often shorter term, low-waged, performance-managed, and made subject to surveillance and unreasonable targets.¹¹

Then there are jobs in what has been termed a “grey area” or “grey zone”.¹² Are they “employees” or “workers”, or is this even really work and not some one’s own business? It can be observed readily that what has been termed “non-standard work” has increased. Many forms of work come within this categorisation and they are all very different. They can be fixed-term contracts, supply through a temporary work agency, zero hours or, more frequently, set minimum but uncertain hours.¹³ Security of employment is often an issue here less *de facto* and more *de jure*. Such a situation is now frequent in what were professionalised sectors, such as United Kingdom universities, where it is estimated that approximately half the academic teaching staff are on casualised contracts (fixed-term and often hourly paid).¹⁴

⁹ See, for example, the correlation discussed by Maarten Keune “Trade Unions, Precarious Work and Dualisation in Europe” in Werner Eichhorst and Paul Marx (eds) *Non-Standard Employment in Post-Industrial Labour Markets: An Occupational Perspective* (Edward Elgar, Cheltenham, 2015).

¹⁰ As, for example, described in ILO *R198 Employment Relationship Recommendation 2006*.

¹¹ Arne L Kalleberg and Peter V Marsden “Transformation of the Employment Relationship” in *Emerging Trends in the Social and Behavioral Sciences: An interdisciplinary, searchable, and linkable resource* (Wiley, Hoboken (NJ), 2015); and Eurofound *Future of Manufacturing – New Tasks in Old Jobs: Drivers of change and implications for job quality* (Publications Office of the European Union, 2018).

¹² See Matthew Taylor *Good Work; The Taylor Review of Modern Working Practices* (Gov.uk, 2017); and OECD *Policy Responses to New Forms of Work* (OECD Publishing, 2019).

¹³ See, in the UK, the practices of the chain, Sports Direct, discussed in UK Business, Innovation and Skills Committee *Employment Practices at Sports Direct* (19 July 2016).

¹⁴ See survey evidence outlined in University and College Union *Counting the Costs of Casualisation in higher education* (June 2017) <www.ucu.org.uk>.

So-called “gig work” is also rife, entailing quasi-entrepreneurial hire of labour, which entails the worker logging in to an “app” to provide human services on demand.¹⁵ Often the price of those services is set in advance by the app provider, payment is made via the app, and the performance of services regulated by feedback transformed into an algorithm which determines ratings and also (whether directly or indirectly) further availability of work.¹⁶ This mode of accessing paid work (with its accompanying high control-low cost model) has become common in transport, food delivery, cleaning services and care work, not only in the United States, Canada, the United Kingdom, Europe, Australia and New Zealand, but also in Africa and Asia.¹⁷ It is often (although not invariably) characterised by cross-border contractual chains and franchises,¹⁸ with international arbitration as remedial recourse, rather than access to domestic tribunals and courts.¹⁹ Also increasing exponentially is online crowd-work, entailing competition for short-term contracts.²⁰ There are concerns that this type of work has indirectly discriminatory effects on women,²¹ and can also be linked to age discrimination.²² Notably, trade unions in all places and of various sizes and stages of establishment have made efforts to represent workers in the gig economy,²³ but some courts have been resistant to enabling them to do so, leaving those who do this work without access to legally recognised collective bargaining.²⁴

¹⁵ Jeremias Prassl *Humans as a Service: The promise and Perils of Work in the Gig Economy* (Oxford University Press, Oxford, 2018).

¹⁶ Valerio De Stefano “The Rise of the ‘Just-in-Time Workforce’: On-Demand Work, Crowd Work and Labour Protection in the ‘Gig-Economy’” (2016) 37 *Comp Lab L & Poly J* 471.

¹⁷ Mark Graham, Isis Hjorth, and Vili Lehdonvirta “Digital Labour and Development: Impacts of global digital labour platforms and the gig economy on worker livelihoods” (2017) 23(2) *Transfer: European Review of Labour and Research* 135.

¹⁸ For the Uber model, see Elizabeth and Mark Abell “Uber – A Fare Deal for Franchisees” (2016) 14 *Int JFL* 45; and, for arguments regarding franchise regulation, Martin Malin “Protecting Platform Workers in the Gig Economy: Look to the FTC” (2018) 51 *Ind Law Rev* 377.

¹⁹ See Miriam A Cherry *Regulatory Options for Conflicts of Law and Jurisdictional Issues in the On-demand Economy* (8 July 2019) ILO Conditions of Work and Employment Series Working Paper No 106 <www.ilo.org> at 1 – 4 and 24–25; and Charlotte Garden, “Disrupting Work Law: Arbitration in the Gig Economy” (2017) *U Chi Legal F* 205.

²⁰ See Debra Howcroft and Birgitta Bergvall-Kåreborn “A Typology of Crowdwork Platforms” (2019) 33(1) *Work, Employment and Society* 21.

²¹ Miriam Kullmann “Platform Work, Algorithmic Decision-making, and EU Gender Equality Law” (2018) 34(1) *IJCLIR* 1.

²² Miriam A Cherry, “Age Discrimination in the on-Demand Economy and Crowdwork” (2019) 40 *Berkeley J Emp & Lab L* 29.

²³ Valerio De Stefano “Non-standard Work and Limits on Freedom of Association: A human rights-based approach” (2016) 46(2) *ILJ* 185.

²⁴ See the *Independent Workers' Union of Great Britain (IWGB) v RooFoods Ltd (t/a Deliveroo)* CAC decision [2018] IRLR 84 and the unsuccessful judicial review: *R (on the application of IWGB) v CAC* [2018] EWHC 3342 (Admin), [2019] IRLR 249. Discussed in Michael Ford and Tonia Novitz “**Error! Main Document Only.** There is Power in a Union? Revisiting Trade Union Functions in 2019” in Alan Bogg, Jacob Rowbottom and Alison Young (eds) *The Constitution of Social Democracy* (Hart Publishing, Oxford, 2020).

Gig work is just one limb of a wider technological obsession in “future of work” debates. Linked to this development is the potential technological threat to the existence of work as we know it, although threats of redundancy are possibly overstated.²⁵ Arguably, the issue that is not being addressed is where the wealth generated by technology goes? To what extent does it benefit the society in which it is developed or the workers who design and use it? Without access to collective bargaining, the redistribution of profits from technological advancement seems unlikely.

Migrant work can also be precarious work. There is substantial evidence that long term migrants suffer systemic discrimination in terms of both access to jobs and treatment when in work.²⁶ Temporary migrant workers (often hired by temporary work agencies) form part of exploitative global labour chains. The terms of their hire may be subject to debt bondage,²⁷ or other significant sanctions for leaving.²⁸ They can be housed in isolated conditions, paid systematically less than local host state workers, and work without standard health and safety protections. At worst, control of temporary migrant workers is militarised – for which, see the use of guns against Bangladeshi strawberry pickers in Greece²⁹ – but also often control can be achieved simply through reminders of the insecurity of their immigration status.³⁰ There is genuine difficulty involved in organising migrant workers, whether by unions in the home or host states, although there have been some useful and positive experiments.³¹ Without legal facilitation of collective bargaining, competition to access jobs emerges. The migrant is blamed

²⁵ ILO *Inception Report for the Global Commission on the Future of Work* (2017) at 25 <www.ilo.org>.

Different projections in that report varied from a risk to over 56 per cent of jobs (in ASEAN coming from an ILO study) to two-thirds of all jobs in developing countries. Estimates are more conservative from Pricewaterhouse Coopers regarding jobs in the UK and Germany (30 per cent and 35 per cent of jobs respectively to go) with, at the opposite extreme, Roland Berger’s view that the loss in industrial jobs will be more than compensated by a rise in jobs in services.

²⁶ Steve Jefferys “The Context to Challenging Discrimination against Ethnic Minorities and Migrant Workers at Work” (2015) 21(1) *Transfer: European Review of Labour and Research* 9.

²⁷ Jennifer Gordon “Regulating the Human Supply Chain” (2017) 102 *Iowa L Rev* 445; Rutvica Andrijasevic and Devi Sacchetto ““Disappearing workers””: Foxconn in Europe and the changing role of temporary work agencies” (2017) 31(1) *Work, Employment and Society* 54.

²⁸ Rutvica Andrijasevic and Tonia Novitz “Supply Chains and Unfree Labor: Regulatory failure in the case of Samsung Electronics in Slovakia” (2020) *Journal of Human Trafficking*, forthcoming.

²⁹ Application No. 21884/15 *Chowdury v Greece* ECLI:CE:ECHR:2017:0330JUD002188415.

³⁰ Judy Fudge “Illegal Working, Migrants and Labour Exploitation in the UK” (2018) 38(3) *OJLS* 557; and Bridget Anderson, “Migration, Immigration Controls and the Fashioning of Precarious Workers” (2010) 24(2) *Work, Employment and Society* 300.

³¹ Magdalena Bernaciek “Polish Trade Unions and Social Dumping Debates: Between a rock and a hard place”. (2016) 22(4) *Transfer* 505–519; and Rebecca Zahn *New Labour Laws in Old Member States: Trade Union Responses to European Enlargement* (Cambridge University Press, Cambridge, 2017).

and not the employer. The slogans of “British jobs for British workers” and “America First” are palpable reminders of the dangers here.³²

Indeed, the overarching effect of the trend towards precarity outlined above is vulnerability of workers and potential competition between them, as opposed to solidarity which might secure improved terms and conditions. Moreover, as access to work becomes ever more uncertain, terms and conditions including the income of those at work can decline.

B Increasing economic inequality

Another facet of precarity and vulnerability in the modern labour market is determination of remuneration by reference to minimum standards (a statutory national minimum or, in the United Kingdom, ironically called a “living wage”),³³ rather than collectively bargained pay that ensures a share of profits. This has led to a significant increase in the disparity of income levels between the wealthy and the poor, but also between capital, managers and those dependent on working for a living.³⁴ In the United Kingdom, for example, work can no longer be relied on to provide a living wage. A Joseph Rowntree Report published in 2013 found, for the first time, that a majority of families in poverty are also families in work.³⁵ In other words, being employed does not prevent destitution or severe economic hardship. Since the financial crisis, the social consequences of low wages include a doubling in the number of workers who need housing benefit and growing reliance on foodbanks.³⁶

There is a strong empirical link drawn here to the decline in trade union density, discussed by economists at the International Monetary Fund (IMF), Florence Buitron and Carolina Osario.³⁷ The motivation for interest from the IMF would seem to be, not only the protection of workers as human beings, but that growing inequalities of income also affect consumer potential and,

³² Tonia Novitz “Freedom of Association: Its emergence and the case for prevention of its decline” in Janice Bellace and Beryl ter Haar (eds) *Research Handbook on Labour, Business and Human Rights Law* (Research Handbooks in Human Rights, Edward Elgar, Cheltenham, 2019) 231–252.

³³ See in the UK, “National Minimum Wage Rates” GOV.UK <www.gov.uk>.

³⁴ Thomas Piketty *Capital in the Twenty-First Century* (Harvard University Press, Cambridge (Mass), 2014).

³⁵ T MacInnes and others *Monitoring Poverty and Social Exclusion* (Joseph Rowntree Foundation and New Policy Institute, York, 2013) at 26. Confirmed again at 55 per cent in 2016, see <www.jrf.org.uk>.

³⁶ National Housing Federation *Home Truths: The Housing Market in England 2013/2014* (National Housing Federation, London, 2014).

³⁷ Florence Jaumotte and Carolina Buitron *Inequality and Labor Market Institutions* (IMF Staff Discussion Note 15/14, 1 July 2015) IMF <www.imf.org>.

ironically, undermine capitalism as a whole. This is also arguably part of the fear inherent in World Bank and OECD Reports on *The Changing World of Work* and *New Forms of Work* (respectively). They are seeking to rebuild the idea of productive work which does not only enable profitability but also some disposable income on the part of the worker.³⁸

C *The quality of democratic engagement*

Finally, precarious work and inequalities of income arguably do not only have implications for the consumer base in global capitalism, but also for the quality of democratic engagement.³⁹ Precarity limits the scope to find energy for political activity and campaigning, which are becoming again a preserve of the elite. As capital gains in wealth, employers become ever more influential in political life.

Powerful vested interests can hijack political advertising, not just through conventional media (as was the case with the Rupert Murdoch press in the 1980s and 1990s which had to be wooed by political leaders), but through less tangible forms of communication (for example, the Google and Facebook scandals).⁴⁰ This may also be linked to the attempt to blame other even more vulnerable workers for the conditions experienced in the workplace, rather than the employers prepared to exploit them.⁴¹

Workers' collective political organisation is under pressure in part due to lack of resources. As Keith Ewing predicted back in 1988, “[i]f the unions continue to decline in an unfriendly economic and legal environment, the income base of the Labour Party will also continue to decline”.⁴² Union dues have had to remain minimal in low income occupations and it can be difficult to unionise newer forms of work. There are also substantial controls in the United

³⁸ World Bank *World Development Report 2019: The Changing Nature of Work* [*World Development Report 2019*] (24 April 2019) World Bank Group <openknowledge.worldbank.org>; and OECD, above n 12.

³⁹ Buitron and Osario, above n 37, observe at 27 that: “Inequality could also hurt society by allowing top earners to manipulate the economic and political system.”

⁴⁰ Daniel Kreiss and Shannon C McGregor “Technology Firms Shape Political Communication: The work of Microsoft, Facebook, Twitter, and Google with campaigns during the 2016 US presidential cycle” (2018) 35(2) *Political Communication* 155–177; and Carole Cadwalladr and Emma Graham-Harrison “Revealed: 50 million Facebook profiles harvested for Cambridge Analytica in major data breach” *The Guardian* (online ed, London, 17 March 2018).

⁴¹ See Fudge, above n 30 above.

⁴² Keith Ewing “The Death of Labour Law?” (1988) 8 *OJLS* 293, at 299.

Kingdom of unions' use of political funds.⁴³ In the United Kingdom, where elections are privately funded, there is less counterweight than there was to donations from the wealthy. The impacts are self-reinforcing. Precarity and diminishing worker income leads to a lack of democratic engagement, which diminishes active worker representation in government, and then has flow on effects for the regulation of collective bargaining.⁴⁴

II The Journey to Collective Begging

The obvious question is: how did we get here? One commonly identified culprit (and a convenient one) is “technology”.⁴⁵ However, it seems curious that mere technology, without human intervention, can bring about such widespread extensive outcomes. Employers have long sought to blame technology for how they seek to effect change in the workplace (from the Luddites onwards).⁴⁶ While new technologies have potentially enhanced employer profit, workers and their organisations have responded by bargaining over what the impact of technology should be on them and how profits should be distributed.

My suggestion is that it may be more sensible to attribute the current state of affairs, the perils we face in the world of work, to a prevalent belief in two myths. The first is the myth of efficacy of market operations, namely that the labour market can and will self-regulate. This fiction ignores the ways in which markets are created, structured and changed by various legal restraints. The second is the fiction of individual choice in the labour market. In other words, anyone at work chooses his or her fate, in a consensual contractual relationship with an “employer”. These myths can be linked to the motivations for introduction of the Employment Contracts Act 1991 and the deregulatory Thatcherite policies in the United Kingdom of the 1980s and 1990s.⁴⁷ They have been prompts for the removal or marginalisation of legal protection of collective bargaining.

⁴³ See the discussion in Michael Ford and Tonia Novitz “Legislating for Control: The Trade Union Act 2016” (2016) 45(3) ILJ 277, at 283 and 289–290.

⁴⁴ As discussed in an updated analysis in Keith Ewing “The Unfinished Paper – A Tribute to Gordon Anderson” (2019) 50(2) VUWLR 173 at 174–5 and 184.

⁴⁵ For example, *World Bank Development Report 2019*, above n 38, at 19: “technology is disrupting the demand for skills ... technology has the potential to improve living standards ... technology may prevent Africa and South Asia from industrializing in a manner that moves workers to the formal sector”.

⁴⁶ See EP Thompson “Time, Work-Discipline, and Industrial Capitalism” (1967) 38 *Past and Present* 56.

⁴⁷ For analysis of the currency of these beliefs and the need for a riposte in the terms of economic theory and practice, see Simon Deakin “Thirty Years On: Labour Market Deregulation and its Aftermath in New Zealand and the UK” (2019) 50(2) VUWLR 193.

Polanyi's book, *The Great Transformation: The Political and Economic Origins of Our Time*, sought to understand the relationship between market and social forces.⁴⁸ Polanyi identified "fictitious commodities": land, labour and money, which were not "produced for sale" like other commodities. Labour, for example, is a human activity which cannot neatly be detached from the rest of life or be "stored".⁴⁹ That feature made, in Polanyi's eyes, labour an inappropriate subject for exposure to fluctuating market value.⁵⁰

To allow the market mechanism to be sole director of the fate of human beings and their natural environment, indeed, even of the amount and use of purchasing power, would result in the demolition of society.

Arguably, that demolition is now taking place through the normalisation of precarious work, alongside increased income inequalities and a decline in democratisation.

While others (like Frederick Hayek and Roger Douglas) argued that the market could self-correct so as to avoid this threat,⁵¹ Polanyi considered that assumption flawed.⁵² Instead, markets need regulation through a political process, or re-embedding in our complex society. Labour markets require special care; indeed, we might best understand collective bargaining as an effective and reflexive form of labour market regulation (adaptable to social and economic conditions),⁵³ which has the advantage of instantiating deeply held values in our constitution of democracy, freedom and dignity.⁵⁴

Every period of market building which lacked social embedding would, according to Polanyi's analysis, induce a countermovement which would offer new systems of protection compatible

⁴⁸ Karl Polanyi *The Great Transformation: The Political and Economic Origins of our Time* (2nd ed, Beacon Press, Boston (Mass), 2001).

⁴⁹ At 75.

⁵⁰ At 76.

⁵¹ See Friedrich A Von Hayek "Economics and Knowledge" (1937) 4(13) *Economica* 33; and Frederick A Hayek *The Road to Serfdom* (Dymocks, Sydney, 1944), discussed in Damien Cahill "Polanyi, Hayek and Embedded Neoliberalism" (2018) 15(7) *Globalizations* 977, 985–991. See also Deakin, above n 47; and Roger Douglas and Louise Callan *Toward Prosperity* (David Bateman, Auckland, 1987).

⁵² Polanyi, above n 48, at 3.

⁵³ Compare Ralf Rogowski *Reflexive Labour Law in the World Society* (Edward Elgar, Cheltenham, 2013); and Judy Fudge "Regulating for decent work in a global economy" (2018) 43(2) *NZJER*10.

⁵⁴ See Ewing, above n 44, at 178; and Ruth Dukes *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford University Press, Oxford, 2014) at 207.

with the changes.⁵⁵ To prevent the disruption of countermovement (which could take, for example, the form of what Polanyi identified as fascist, but today could be more kindly described as populist protest),⁵⁶ it would be necessary to take pre-emptive measures to embed the market in social realities, so that people were protected. John Ruggie considered this was instantiated on the world stage as a form of “embedded liberalism”, a compromise consisting of “a combination of global currency regulations and domestic commitments to welfare capitalism”.⁵⁷ More recently, it has been suggested that this compromise has (following a variety of reforms to international institutions) instead embedded “neo-liberalism”, whereby transnational global markets have been able to prevail over domestic assertion of social values.⁵⁸ It has even been suggested that the conditions for global markets have been entrenched by global constitutional structures, being a kind of “Geneva consensus” that enables (or even “encases”) exploitative trade and supply chain operations in products and services.⁵⁹ There are sustainability consequences in terms of environmental degradation and the failure of economic systems (boom/bust capitalism, short-term investments, corruption), but also consequences under the “social pillar” of sustainability. I have argued elsewhere,⁶⁰ that it may be possible to map Polanyi’s three fictitious commodities (land, labour, money) onto the environmental, social and economic pillars recognised by the UN in the Sustainable Development Goals and Agenda 2030.⁶¹

Arguably, a process of global marketisation, with all its profound consequences, has been compounded by the limitations of international, regional and domestic labour standards as they are currently legally framed. While it would, in my view, be wrong to tar the ILO with the

⁵⁵ Judy Fudge “The New Discourse of Labor Rights: From Social to Fundamental Rights” (2007) 29 *Comp Lab L & Poly J* 29 at 32–33.

⁵⁶ Polanyi, above n 48, at 245; Alan Bogg and Mark Freedland “Labour Law in the Age of Populism: Towards Sustainable Democratic Engagement” in Julia López López (ed) *Collective Bargaining and Collective Action: Labour Agency and Governance in the 21st Century?* (Hart, Oxford, 2018).

⁵⁷ John Ruggie “International Regimes, Transactions and Change: Embedded liberalism in the post-war economic order” (1982) 36(2) *Intl Org* 385.

⁵⁸ Compare Joo-Cheong Tham and Keith Ewing “Labour Provisions in Trade Agreements: Neoliberal regulation at work?” *IOLR* (forthcoming); Bastiaan Van Apeldoorn “Transnationalization and the Restructuring of Europe’s Socioeconomic Order” (1998) 28(1) *International Journal of Political Economy* 12; Philip G Cerny “Embedding Neoliberalism: The evolution of a hegemonic paradigm” (2008) 2(1) *The Journal of International Trade and Diplomacy* 1; and also Damien Cahill *The End of Laissez-Faire? On the Durability of Embedded Neoliberalism* (Edward Elgar, Cheltenham, 2014).

⁵⁹ Quinn Slobodian *Globalists: The end of empire and the birth of neo-liberalism* (Harvard, Cambridge (Mass), 2018).

⁶⁰ See Tonia Novitz “Past and Future Work at the International Labour Organization: Labour as a Fictitious Commodity, Countermovement and Sustainability” *IOLR* (forthcoming) on which this part of the article is partially based.

⁶¹ *Transforming our world: the 2030 Agenda for Sustainable Development* GA/Res/70/1 (2015).

“Geneva Consensus” brush,⁶² there seems to be a significant problem across the world with the scope and content of collective labour laws. They do not seem to cover all those who actually work, reducing the scope for effective organisation and social solidarity. They do not enable those who wish to be represented by a trade union to do so, such that the notion of contractual “choice” becomes questionable. The ability to enhance strength by bargaining at a national sectoral level or across national borders is limited by labour laws. As we shall see, the right to strike has also come under threat, which is a prerequisite for trade unions to be effective in protecting the wider interests of those who are not only conventional employees but engaged in various forms of work. The scope of any right to strike also needs to reflect workers’ growing concerns with transnational as well as national dimensions of the hire of labour, alongside broader social and environmental issues, which it does not do at present. Altogether, there are a number of crucial lacunae to be addressed.

III Potential Solutions

Having identified how we arrived at a position of precarity, inequality and democratic deficit, it seems imperative that labour lawyers start to consider how to ensure that “collective begging” is replaced by meaningful “collective bargaining”. There seems to be growing consensus internationally on the few solutions selected here as imperative,⁶³ with the proviso that this analysis is predominantly informed by a Commonwealth, common law perspective, and must remain open to further scrutiny and proposals from other countries and legal systems.⁶⁴ Certainly, one agenda for change is as follows.

⁶² Indeed, Slobodian, above n 59, makes no such suggestion at 266 and 281 juxtaposing ILO values with those of the international economic institutions; although a different view is taken by Guy Standing “The ILO: An Agency for Globalization” (2008) 39(3) *Development and Change* 355.

⁶³ See, for example, the proposals made by Gordon Anderson “A Proposal for Four Key Reforms in New Zealand’s Labour Law” (6 November 2017) Social Science Research Network <www.ssrn.com>, discussed by Richard Mitchell “Forty Years of Labour Law Scholarship in New Zealand: A Reflection on the Contribution of Gordon Anderson” 50(2) *VUWLR* 159, at 168–9, and those of Kate Andreas and Brishen Rogers *Rebuilding Worker Voice in Today’s Economy* (Roosevelt Institute, Washington, 2018). See also Alan Bogg and Tonia Novitz (eds) *Voices at Work: Continuity and Change in the Common Law World* (Oxford University Press, Oxford, 2014).

⁶⁴ Ronaldo Munck “The Precariat: A view from the South” (2013) 34(5) *TWQ* 747; see also Branko Milanovic *Global Inequality: A New Approach for the Age of Globalization* (Harvard University Press, Cambridge (Mass), 2016).

A *Removing “threshold exclusions” from access to collective bargaining*

Threshold exclusions from collective bargaining are rife in almost every country, although their focus varies. The most common is the threshold question of who is an “employee” or a “worker”, and even what is “work”? As observed above, this has been a way in which one of the United Kingdom gig employers, Roofoods (trading as “Deliveroo”), has successfully prevented an application for trade union recognition in the United Kingdom.⁶⁵ Another manifestation of the exercise of a “threshold” is the exclusion specifically of certain occupations from forms of employment law and collective labour law protections. An obvious example is the New Zealand “hobbit laws” which deem those engaged in the film sector not to be “employees” and only independent contractors.⁶⁶ It is also notable that recent proposals for reform would still exclude their access to industrial action.⁶⁷

Often those who are excluded are among the most vulnerable in the labour market. This is one of Mark Freedland’s paradoxes of precarity:⁶⁸ the more vulnerable you are the less likely you are to be included, and then able to claim collective bargaining rights which would ameliorate that situation. Examples include “domestic workers”, who are explicitly excluded from seeking representation under the United States National Labour Relations Act.⁶⁹ The questionable nature of this exclusion was arguably highlighted by ILO Convention No 189, but its coverage was compromised by a tough negotiating stance taken by certain member states (especially those in Europe),⁷⁰ and more commitment is required to achieve its genuine implementation.⁷¹

⁶⁵ See *Roofoods*, above n 24.

⁶⁶ See Employment Relations (Film Production Work) Amendment Act 2010, discussed in Bernard Walker and Rupert Tipples “The Hobbit Affair: A New Frontier for Unions?” (2013) 34 *Adel L Rev* 65. See also Pam Nuttall “... Where the Shadows Lie’: Confusion, misunderstanding, and misinformation about workplace status” (2011) 36(3) *NZJER* 73; and Margaret Wilson “Constitutional Implications of ‘The Hobbit’ Legislation” (2011) 36(3) *NZJER* 91.

⁶⁷ See Derek Cheng “Hobbit Law Stays: Minimum standards coming for film industry, but striking will be illegal” *The New Zealand Herald* (online ed, Auckland, 13 June 2019).

⁶⁸ Mark Freedland “The Contract of Employment and the Paradoxes of Precarity” (13 June 2016) Social Science Research Network <www.ssrn.com>.

⁶⁹ See 29 USC § 152(3); and James Lin “A Greedy Institution: Domestic Workers and a Legacy of Legislative Exclusion” (2013) 36(3) *Fordham Intl LJ* 706.

⁷⁰ Tonia Novitz and Phil Syrpis “The Place of Domestic Work in Europe: An analysis of current policy on the light of the Council Decision authorising Member States to ratify ILO Convention No. 189” (2015) 6(2) *ELLJ* 104.

⁷¹ Adelle Blackett *Everyday Transgressions: Domestic workers’ transnational challenges to international labor law* (ILR/Cornell University Press, Ithaca, 2019).

What is more promising is the wider coverage of the 2019 ILO Convention No 190 on Violence and Harassment, which applies under art 1 not only to “workers” but “other persons in the world of work” and requires each Member to “respect, promote and realize” (inter alia) “freedom of association and the effective recognition of the right to collective bargaining”. This is the more sensible approach, since for freedom of association, collective bargaining and the right to strike, threshold constraints arguably make no sense at all. These are internationally recognised human rights under art 22 of the 1966 International Covenant on Civil and Political Rights and art 8 of the International Covenant on Economic, Social and Cultural Rights. To deprive people of their legal autonomy to act collectively with others for the protection of their interests is a violation of their fundamental civil liberties, political and socio-economic entitlements. So much has been recognised already by ILO supervisory bodies,⁷² and we need to see this now translated into (or initiated) in the national context.

B Addressing the representation gap

The representation gap is another manifestation of legal constraints on a worker’s choice to act collectively. This is the “longstanding gap” between those who wish to be represented by a trade union and those who can be,⁷³ which has widened considerably in recent years. Sometimes this can be linked to stringent legal requirements as to who counts as a worker. These may be the threshold exclusions to which I have just referred, such as access to “worker” status in the United Kingdom for trade union recognition purposes,⁷⁴ or legislative exclusion in the New Zealand “hobbit laws”.

In the United Kingdom and a number of other countries, the representation gap can also be attributed to the ways in which an employer’s right to property can obstruct trade union access to the workplace (you can only have such access if formally “recognised” in the United

⁷² See *Definitive Report - Report No 363, March 2012: Case 2888 (Poland) - Complaint date: 28-JUL-11* (2012) ILO <www.ilo.org>; and Committee of Experts on the Application of Conventions and Recommendations [CEACR] *Observation (CEACR) - adopted 2015, published 105th ILC session (2016)*, an observation on Poland 2015 regarding preparation of a draft Act which had not, as at that date, been adopted <www.ilo.org>. For discussion of this human rights approach, see De Stefano, above n 23.

⁷³ Brian Towers *The Representation Gap: Change and Reform in the British and American Workplace* (Oxford University Press, Oxford, 1997); and Edmund Heery “The Representation Gap and the Future of Worker Representation” (2009) 40(4) *Industrial Relations Journal* 324.

⁷⁴ See *Roofoods*, above n 24.

Kingdom or in the process of fighting a recognition ballot, in which case it is still limited).⁷⁵ Employers can even (in a United States context) require workers to attend employer organised anti-union meetings, but prevent comparable union meetings on the basis of their property rights and managerial prerogative.⁷⁶ This difficulty regarding access does not arise in the same way in other jurisdictions, but even then mobilising trade union representation and support when an employer seems hostile to union membership can be obstructed, as much culturally as legally.

The case for a union membership default, rather than the other way around, has been made prominently by Mark Harcourt and Gregor Gall.⁷⁷ It is important in this context to note that negative freedom of association (the individual choice not to belong to a trade union) cannot neatly be equated with the right to belong. One is a bare personal preference, while the other has significant implications for not only one's own welfare but the welfare of others. In this sense, if we look behind a right as interests sufficient to hold others to a duty (a view notable espoused by Joseph Raz),⁷⁸ then there is a strong case for enabling the default choice of representation rather than its opposite.⁷⁹

Questions then arise as to which union becomes the default for any putative member. Here there has to be some caution, especially in contexts where large representative unions can operate with a degree of complacency, not sufficiently representing the most vulnerable. In the United Kingdom, there has been tension between larger and smaller unions – the Independent Workers Union of Great Britain (IWGB) being more effective at protecting the vulnerable gig workers than the larger unions like Unison and the GMB, although they both have sought to offer protection.⁸⁰ Another even more troubling example of a clash between the larger, more established, National Union of Mineworkers and a minority union, representing the more vulnerable rock drill operators, occurred in the context of the Marikana massacre in South

⁷⁵ Keith Ewing and John Hendy “New Perspectives on Collective Labour Law: Trade union recognition and collective bargaining” (2017) 46(1) ILJ 23.

⁷⁶ *Lechmere, Inc v NLRB* 502 US 527 (1992); discussed by Andreas and Rogers, above n 63.

⁷⁷ Mark Harcourt and others “A Union Default: A Policy to Raise Union Membership, Promote the Freedom to Associate, Protect the Freedom not to Associate and Progress Union Representation” (2018) 48 ILJ 66.

⁷⁸ Joseph Raz “On the Nature of Rights” (1984) 93.370 *Mind* 194; and “Liberating Duties” (1989) L & Phil 3.

⁷⁹ Tonia Novitz “Are Social Rights Necessarily Collective Rights? A critical analysis of the collective complaints protocol to the European Social Charter” (2002) EHRLR 50–66; and Tonia Novitz “*Gustafsson v Sweden: Negative Freedom of Association*” (1997) 26 ILJ 79–87.

⁸⁰ Ford and Novitz, above n 25.

Africa.⁸¹ Ideally, trade unions can operate in tandem, for example, joint trade union recognition which gives bargaining power. However, the obligation to belong to *a* union may not be most sensibly translated as the obligation to belong to *the* union, if we want to keep bottom up worker voice alive. Michael Ford and I have, in a United Kingdom context, seen this as a trade-off of efficacy based on the greater power of larger trade unions and the strength of commitment and self-determination in newer, more spontaneous trade union activity.⁸² This remains a tension that is unresolved in an ILO context, arguably deserving attention.⁸³ Both are vital to avoid collective begging and, therefore, any operationalisation of a default will have to respond and seek to reconcile both objectives.

C Bargaining beyond the workplace nationally and transnationally

The shift from sectoral to enterprise-level bargaining is widely recognised to have led to a decline in effective collective bargaining and, with this, a reduction in worker share of income.⁸⁴ The reasons are perhaps self-evident. There can be a lack of knowledge and know-how at the level of the individual workplace, whereas sectoral bargaining enables support from a larger number of workers who may also have experience with negotiation and dispute. Andreas and Rogers have considered that the problems posed by bargaining in a progressively “fissured” workplace have become ever more acute as each bargaining unit becomes smaller and more vulnerable to employer control.⁸⁵ The solidarity and stronger bargaining power inherent in sectoral bargaining secures far superior minimum pay and terms and conditions in any given sector, which then can be improved upon by employers at the enterprise level which can afford to pay more to attract labour. Moreover, sectoral bargaining may also have beneficial

⁸¹ See Temebka Ngcukaitobi “Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana” (2013) 34 ILJ 836; and Gavin Hartford “The Mining Industry Strike Wave: What are the Causes and What are the Solutions” (10 October 2012) GroundUp <groundup.org.za>. See also Bob Hepple, Rochelle Le Roux and Silvana Sciarra (eds), *Laws against Strikes: The South African experience in an international and comparative perspective* (Juta Jenwyn, Cape Town, 2016).

⁸² Ford and Novitz, above n 25.

⁸³ ILO preference for “free” as opposed to powerful unions is, for example, criticised by Teri L Caraway “Freedom of association: Battering ram or Trojan horse?” (2006) 13(2) RIPE 210. For a more recent analysis, which advocates attention to bottom-up worker collective resistance, see Clair Mummé “Rights, Freedoms, Law, Labour, and Industrial Voluntarism: Some Comments” (2 November 2019) Legal Form <legalform.blog>.

⁸⁴ Andrea Garnero, Stephan Kampelmann and François Rycx “Minimum Wage Systems and Earnings Inequalities: Does institutional diversity matter?” (2015) 21(2) EJIR 115 found that higher collective bargaining (including sectoral bargaining) coverage was robustly correlated with lower income inequality. See also Lydia Hayes *8 Good Reasons Why Adult Social Care Needs Sectoral Collective Bargaining* (Institute of Employment Rights, Liverpool, 2017).

⁸⁵ Andreas and Rogers, above n 63, at 20.

effects on employer conduct, encouraging them to become more competitive, not by wage undercutting, but “through enhanced productivity and investment in skills or innovation”.⁸⁶

These factors seem to have led to the New Zealand settlement for care and support workers in 2017,⁸⁷ and indeed to proposals for re-introduction of sectoral bargaining in the United Kingdom in the Labour Party election manifestos of 2017 and 2019.⁸⁸ While there is no immediate prospect that these policies will now be implemented in the United Kingdom, it will be interesting to see how the current Coalition Government in New Zealand responds to the consultation process regarding sectoral fair pay agreements which closed on 27 November 2019.⁸⁹

More than this, as global capital operates transnationally, effective collective bargaining may need to occur for workers across national borders, whether sectorially, or with respect to a particular multinational enterprise (MNE). In response to the limitations of unilaterally adopted corporate codes of conduct, Global Union Federations (GUFs), which represent certain industrial and service sectors, have started to bargain directly with MNEs, leading to the adoption from 1994 onwards of International Framework Agreements (IFAs), now often termed Global Framework Agreements (GFAs).⁹⁰

These agreements were, early on, described as “a key trade union tool for addressing the growth of corporate power”.⁹¹ It has been estimated that, of the 113 IFAs concluded by 2012, coverage extended to at least 65,000 MNEs with more than 850,000 subsidiaries.⁹² The defining features of IFAs have been said to be their global reach (through MNE subsidiaries and sometimes also supply chains), the role of a GUF in negotiation and as a signatory, and reference to ILO core

⁸⁶ Lydia Hayes and Tonia Novitz *Trade Unions and Economic Inequality* (CLASS/IER, London, 2014) at 18.

⁸⁷ *Care and Support Workers (Pay Equity) Settlement Agreement* (1 July 2017); and for media comment: Isaac Davidson and Claire Trevett “Government announces historic pay equity deal for care workers” *The New Zealand Herald* (online ed, Auckland, 18 April 2017).

⁸⁸ Labour Party election manifesto for 2017 *For the Many, Not the Few* (Labour Party, London, 2017) and for 2019 *It’s Time for Real Change* (Labour Party, London, 2019) <labour.org.uk>.

⁸⁹ See Ministry of Business, Innovation and Employment “Fair Pay Agreements” (16 January 2020) MBIE <mbie.gov.nz>.

⁹⁰ The current database for all transnational company agreements (compiled by the ILO and European Commission) is available at: <<https://ec.europa.eu/social/main.jsp?catId=978&langId=en>>.

⁹¹ This was a UK Trade Union Congress statement, cited by Keith Ewing “International Regulation of the Global Economy – The role of trade unions” in Brian Bercusson and Cynthia Estlund (eds) *Regulating Labour in the Wake of Globalisation: New challenges, new institutions* (Oxford, Hart, 2008) at 205.

⁹² Hans-Wolfgang Platzer and Stefan Rüb *International Framework Agreements: An instrument for enforcing social human rights?* (2014) Friedrich Ebert Stiftung <library.fes.de> at 3–4.

labour standards and other instruments, including protection of freedom of association and the right to strike.⁹³

While usually not understood to be legally enforceable, IFAs (or GFAs) standardly include procedures for their implementation in each workplace and sometimes through works councils operating at a transnational level. In this sense, it has been argued that they operate in a manner akin to the extra-legal collective bargaining as it used to occur in post-World War II Britain (identified by Otto Kahn-Freund as “collective laissez-faire”, having practical regulatory impact, the efficacy of which is still dependent on legal props recognising trade union freedoms).⁹⁴

Reingard Zimmer has recently identified in her research the potential for these agreements to entail collaboration not only between GUFs and MNEs, but also between governments, national-level trade unions and employers and even interested civil society NGOs. She further identifies experiments with enforceable agreements, citing the Indonesian Freedom of Association Protocol and the Bangladesh Accord.⁹⁵ We have yet to see such wide-ranging signatories or enforcement clauses in agreements with genuinely global reach, but such regulatory experiments do suggest that this could be possible and it is likely that the outcomes of such transnational collective bargaining could be more efficacious as a result.

D Providing meaningful protection of the right to strike

The right to strike is the most powerful and effective way of redressing the almost invariable imbalance of bargaining power between employer and employee, which otherwise makes a fiction of freedom of choice in the context of work.⁹⁶ The scope of legitimate industrial action

⁹³ For a collation of these identifying characteristics, see Nikolaus Hammer “International Framework Agreements: Global industrial relations between rights and bargaining” (2005) 11(4) *Transfer* 511; Owen E Herrnsstadt “Are International Framework Agreements a path to corporate social responsibility?” (2007) 10 *U Pa J Bus & Emp L* 187; and Lone Riisgaard “International Framework Agreements: A New Model for Securing Workers Rights?” (2005) 44(4) *Indus Rel* 707.

⁹⁴ Tonia Novitz “Exploring Multi-level Collective Bargaining: Transnational legal frameworks that promote worker agency” in Julia López López (ed) *Collective Bargaining and Collective Action: Labour Agency and Governance in the 21st Century?* (Hart Publishing, Oxford, 2019), at 140–142.

⁹⁵ Reingard Zimmer “International Framework Agreements: New Developments through better Implementation on the basis of an analysis of the Bangladesh Accord and the Indonesian Freedom of Association Protocol” *IOLR* (forthcoming).

⁹⁶ For a classic explanation of these dynamics, see Otto Kahn-Freund and Bob Hepple *Laws Against Strikes: International Comparisons In Social Policy* (Fabian Society, London, 1972); and for my own analysis, Tonia

has been progressively restricted in many domestic jurisdictions.⁹⁷ At the international level, the connection between a right to strike and collective bargaining, established by the ILO Committee of Experts by virtue of ILO Convention No 87, was powerfully opposed in 2012 by the ILO employers' group, which staged a dramatic walkout from the Conference Committee on the Application of Standards. Indeed, it was an excellent demonstration of the potent effect of a withdrawal of labour.⁹⁸ Since then, an apparent accommodation has been reached and ILO Director-General Guy Ryder has reported that the 2012 dispute over the source and content of the right to strike has been resolved.⁹⁹ Nevertheless, other sources within the ILO have expressed concern that employer representatives are still mounting a challenge through, for example, the new Standards Review Mechanism.¹⁰⁰

This dispute over the very existence of a right to strike seems peculiar when one considers the explicit protection of this right under Art 8 of the International Covenant on Economic, Social and Cultural Rights 1966, which also states that it is understood to be compliant with ILO Convention No 87. It is also odd, given that the CFA (a tripartite supervisory entity which makes its decisions unanimously) has also found that the right to strike is “an intrinsic corollary to the right to organise protected by Convention No 87”,¹⁰¹ a view to which the employers' group must be understood to have been committed previously.

The employers' argument has little obvious legal merit, but instead follows from the (considerable) political pressure that the employers' group can bring to bear under the tripartite structure of the ILO in a post-Cold War era.¹⁰² What is probably most worrying is that this unmeritorious claim hovering in the background places the workers' group and government

Novitz *International and European Protection of the Right to Strike* (Oxford University Press, Oxford, 2003), at ch 1–4. For the most recent treatment of this topic, see Jeffrey Vogt and others *The Right to Strike in International Law* (Hart, Oxford, 2020).

⁹⁷ See, for an overview, Bernd Waas (ed) *The Right to Strike: A Comparative View* (Kluwer Law International, Alphen aan den Rijn, 2014).

⁹⁸ See Report of the CCAS, ILC Record of Proceedings (2012) 19/Part I/13–19; also Claire La Hovary “Employers' Group 2012 Challenge to the Right to Strike” (2013) 42(4) ILJ 338; Janice Bellace “The ILO and the Right to Strike” (2014) Intl Lab Rev 29.

⁹⁹ See *Report of the Director General: ILO Future of Work Centenary Initiative*, above n 5, at [78].

¹⁰⁰ Claire La Hovary “The ILO's Employers' Group and the Right to Strike” (2016) 22(3) Transfer 401, at 404; and Paul van der Heijden “The ILO Stumbling towards Its Centenary Anniversary” (2018) 15(1) IOLR 203, at 219.

¹⁰¹ ILO Governing Body Committee on Freedom of Association *Compilation of Decisions on Freedom of Association [CFA Compilation]* (ILO, 2018) at [754].

¹⁰² See Janice Bellace “The ILO and Tripartism: The Challenge of Balancing the Three-legged Stool” in George P Politakis, Tomi Kohiyama and Thomas Lieby (eds) *ILO100 Law for Social Justice* (ILO, 2019) at 300 and 305–309; and Claire La Hovary “A Challenging Ménage à Trois? Tripartism in the International Labour Organization” (2015) 12 IOLR 204.

representatives on the defensive, such that they are not making the obvious case for further enhancement of the scope of a right to strike under modern conditions. Instead, the ILO could be considering how to adjust international labour standards to take account of contemporary concerns, whether these be concerned with climate change or global supply chains.

For example, the “golden formula” in s 244 of the United Kingdom Trade Union and Labour Relations (Consolidation) Act 1992 does not allow for engagement in any industrial action, other than for certain specific listed purposes in a dispute with one’s immediate employer. Secondary action taken in sympathy with workers of a related employer, or in relation to concerns regarding one’s employer’s treatment of other workers in a supply chain, whether at home or abroad are also not permitted. Given the fissured nature of the contemporary workplace, this causes particular difficulties in practice.¹⁰³ Moreover, this legal framework places a significant constraint on sectoral and transnational collective bargaining, as unions are left without recourse to their most obvious source of bargaining power.

Moreover, under United Kingdom legislation, lawful industrial action cannot be ideologically motivated, such that opposition to privatisation was not regarded as sufficiently correlated to workers’ immediate interests as specified in the statutory provision, even though in fact this process did have an impact on the availability of jobs to the workers’ affected.¹⁰⁴ This means that only environmental issues affecting workers immediately in the workplace could, on health and safety grounds, be a legitimate basis for industrial action; there is no scope to challenge employers’ environmental conduct due to its flow-on effects for the local community, or in broader climate change terms. This issue has been brought to life by the climate change strikes taken by schoolchildren, which workers all over the world were called to join in September 2019.¹⁰⁵ In the United Kingdom, the legal regime meant that unions could not officially call their workers out on these grounds and attending a protest would mean the risk of dismissal unless consent was given by the employer. At the University of Bristol, workers were told they could attend for half an hour.¹⁰⁶ This was hardly effective industrial action. It is an example of

¹⁰³ For an outline of the problem see Alan Bogg and KD Ewing “The Implications of the RMT Case” (2014) 43 ILJ 238.

¹⁰⁴ *Mercury Communications v Scott-Garner* [1984] ICR 37.

¹⁰⁵ Ruwan Subasinghe and Jeffrey Vogt “Unions must join the Global Climate Strike to avert a climate catastrophe” (5 September 2019) Equal Times <www.equaltimes.org>.

¹⁰⁶ As reported in the student newspaper: Maggie Sawant “Extinction Rebellion have said they value the University’s leadership in the sector and welcome their ‘positive intent’” (19 September 2019) Epigram <epigram.org.uk>.

the ways in which, on issues that have contemporary relevance, workers are being deprived of voice.

The ILO could act on these issues by revisiting its standards on freedom of association and collective bargaining, as well as supervisory jurisprudence on secondary action. At present, the CFA regards as lawful secondary or sympathy strike, but only when the primary action taken is lawful.¹⁰⁷ However, it seems deeply problematic for the legality of strike action to be defeated by what may be the technical peculiarities of any given national legal system (such as the technical notice and balloting requirements in the United Kingdom) and not determined by the legitimacy or otherwise of its aims.¹⁰⁸ Moreover, while the ILO has stressed in its “Just Transitions” of Guidelines 2015, the importance of social dialogue, including active participation by workers and their organisations in shaping environmental policies,¹⁰⁹ it would be helpful to have confirmation that this includes effective collective bargaining supported by access to industrial action.

IV Conclusion

In the words of the preamble to the Treaty of Versailles 1919 signed 100 years ago, “peace can be established only if it is based on social justice”. This is the basis on which international labour law has encouraged states to promote collective bargaining and elaborated on the legitimate scope of a right to strike. Further, the first ILO Constitution also stated that “the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries”. This is why what happens in individual countries, like New Zealand, is significant for the rest of the world. If New Zealand in its film industry creates “workers” who are unable to strike, this sets an example which threatens the entitlements of labour everywhere.

While, as labour lawyers, we are embedded in the structures of our own domestic systems, so much of the dynamics of labour relations and systems of work is global. In order *not* to be merely engaged in “collective begging” – in order to access power and effect change – there

¹⁰⁷ *CFA Compilation*, above n 101, at [770].

¹⁰⁸ De Stefano, above n 23, at 203; and Paul Germanotta and Tonia Novitz “Globalisation and the right to strike: the case for European level protection of secondary action” (2002) 18 *IJCCLIR* 67.

¹⁰⁹ *ILO Guidelines for a Just Transition Towards Environmentally Sustainable Economies and Societies* (ILO, 2015) at [17] and [18].

needs to be scope for communication and coordination between those representing workers. I have argued here that trends towards precarious work, a decline in income equality and impoverishment of the democratic process extend beyond national boundaries. Indeed, what have emerged as the contemporary perils of working life are often generated by transnational commercial activities and have been regarded as being maintained through the operations of international institutions. Enabling connections between workers that challenge these national and transnational dynamics is the role of law, which needs to facilitate simultaneously global and domestic collective voice.

By definition, the voice of those “at work”/ “doing work” is *local* – whether it is in New Zealand or elsewhere. Workers’ concerns have to be voiced from the bottom up. There needs to be space for nascent associations, spontaneous protest and courageous opposition. It is interesting that, in the threats to the world at work posed in the gig economy, that is precisely what is happening by new forms of unions who represent the notionally self-employed.¹¹⁰ Arguably, that deference to local worker voice is what the ILO seeks to achieve by enabling each individual state to craft its own labour laws and solutions to its domestic concerns, with reference to overarching values and principles. The ILO also does this by supporting the principle of free and voluntary negotiation, while placing an onus on states to facilitate the collective bargaining process and protect a right to strike.¹¹¹

That said, the ILO also has more work to do, which is arguably now beginning. Collective labour laws need to be inclusive of everyone at work, so that local action can take place and shape agendas and norms. This means that there is a strong case for the precedent of inclusiveness regarding “persons in the world of work”, set by ILO Convention No 190, to be more broadly applied. It also entails ensuring genuine access to membership of workers’ organisations spontaneously generated by the needs and demands of contemporary work. Simultaneously, legal provisions need to enable overarching protective union structures which can achieve meaningful sectoral bargaining, setting minimum standards on which enterprise bargaining (sensitive to specific local needs) can build. There is a clear argument for legal facilitation of cross-border bargaining to address the reality of transnational employers, which means that more attention needs to be paid to legal protection of secondary or solidarity action.

¹¹⁰ An example in the UK setting is the Independent Workers Union of Great Britain (IWGB) <iwgb.org.uk>.

¹¹¹ *CFA Compilation*, above n 101, at [1313] onwards.

Indeed, more generally, effective worker voice entails access to a right to strike to make that voice heard on all the issues of contemporary concern and relevance to the conditions in which we now work. That said, no country, neither New Zealand nor the United Kingdom, needs to wait for the ILO to take action on these issues. There is scope for any domestic labour law system to resist the trends identified here and put an end to “collective begging” and its effects. Indeed, that need is now urgent.