THE LEGAL FRAMEWORK OF EMPLOYMENT RELATIONS

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Abstract

The aim of this paper is to reassess the place of labour law in the wider area of employment relations research and to argue the case for labour law's importance to social scientists. We give an analytical account of the principal institutional features of labour law as a form of legal regulation, from an interdisciplinary perspective which takes into account both the internal workings of the labour law system and the social and economic context within which it has evolved. We analyze, in the manner of an internal or 'immanent' critique, the categories which are generally used within labour law discourse to describe the social and economic relations of employment; account for their emergence and evolution in historical terms; consider the origins of their diversity across different national systems; and look at future prospects for convergence or divergence.

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1. Introduction

The field of labour law grew up alongside that of industrial relations and has generally been closely aligned with it. Industrial or 'employment relations' research has played a major, perhaps even predominant influence, in shaping labour law scholarship. In the first half of the twentieth century, legal scholars and practising lawyers in Europe and north America looked to industrial sociology to provide them with concepts and data which could be used to challenge the pre-existing legal order, which they saw as restrictive and outdated. This is the approach associated, most notably, with 'legal realism' in the United States and the work of the 'social jurists' in Weimar Germany. Labour law continues to reflect these origins and, as a legal sub-discipline, is uniquely open to the influence of the social sciences. Today labour lawyers are taking on the task of engaging not just with the broad sociological tradition as it relates to employment relations, but with political science, gender theory, social psychology and, above all, economics. Social scientists, in turn, are devoting increased resources to exploring the impact of legal and related regulatory changes on the issues which concern them, which include organizational performance, labour market outcomes in terms of indicators such as unemployment, poverty and inequality, national economic competitiveness, and cross-national diversity.

To speak of alignment or engagement between labour law and the social sciences is not to assume that the process is without difficulties. In the immediate post-war years, 'industrial pluralism' provided a theoretical framework that united the various aspects of what in the Anglophone world became known as 'industrial relations'. Labour law was part of that field, its place acknowledged, for example, by Kahn-Freund's chapter in the first (1954) edition of *The System of Industrial Relations in Britain*, which was entitled 'Legal framework'. This contained the influential observation that 'there is, perhaps, no major country in the world in which the law has played a less significant role in the shaping of [collective labour relations] than in Great Britain' (Kahn-Freund, 1954: 47). Kahn-Freund's belief in the peripheral role of law was not, however, confined to his analysis of the British case; in his 1972 Hamlyn lectures, *Labour and the Law*, in the context of a broad comparative synthesis, he continued to insist that law was a 'secondary force in human affairs, and especially in labour relations' (Kahn-Freund, 1977: 2). This can be read, at one level, as a methodological point: a reminder that there are limits to how far the law can be used in an instrumental way to shape social and economic outcomes. But it was also, implicitly, a reaffirmation of a particular version of the pluralist position, namely the idea that industrial relations systems rested on an autonomous or 'extra-legal' arrangement of social forces.

The law, and the state more generally, could support that arrangement of forces in various ways, as it did when it intervened to maintain or extend collective bargaining ('auxiliary' legislation), or to set wages and terms of employment in areas of the economy where collective agreements were weak or non-existent ('regulatory' legislation), but it could not fundamentally alter it.

That view, as we now know, did not long survive the ending of the policy consensus around support for collective bargaining which occurred in most systems, in varying forms, in the course of the 1980s and 1990s. Yet labour law has 'fragmented' as a field not simply because the state no longer supports collective bargaining as the principal or preferred mechanism for regulating employment to the same degree that it did, but also because many additional interests to those of 'subordinated' or dependent labour are taken into account in the framing of labour legislation (Collins, 1997). The expansion of anti-discrimination legislation and the related orientation of labour law towards human rights discourses offer one illustration (Fredman, 1997); another is provided by attempts to use law as a mechanism for ensuring economic 'competitiveness' (Collins, 2001, 2002, 2003), raising employment levels (Ashiagbor, 2005) and bringing about a 'more flexible labour market' (Davies and Freedland, 2007). Labour law, understood as a set of regulatory techniques, is having to accommodate a greater range of objectives, at the same time that its use as an instrument of social and economic policy is contradicting the 'pluralist' methodological precepts around which many of those techniques were initially developed.

Under these circumstances it is no surprise that labour lawyers regularly talk about the 'crisis' of their discipline and seek to develop new conceptual frameworks for use in legal discourse. One option, increasingly gaining ground, is to widen the scope of the subject so that it in effect becomes 'the law of the labour market', encompassing the variety of mechanisms currently being used, in a legal context, to regulate labour supply and demand. At one level this involves greater attention being paid to the links between labour law and other fields of regulation such as social security law, company law, taxation, and active labour market policy. More fundamentally, those who take this view argue that 'a broader focus on "labour market regulation" has a stronger chance of holding the subject together than the existing framework' (Arup and Mitchell, 2006: 16). This is not just about redrawing boundaries, but moving away from 'a traditional labour law subject [which] is still largely organized around *legal* categories (the contract of employment, the law pertaining to bargaining and conciliation and arbitration, the law on trade unions and industrial action, health and safety law and so on), and applies mainly to *legal* reasoning and to generally *legal* materials', to one in which 'our inquiry will

inevitably be directed to key issues in regulatory scholarship – the constitutive role of regulation, types of regulatory norms, regulatory techniques, regulatory institutions, and their effectiveness, responsiveness and coherence'. This necessitates a greater recognition of 'the importance of interdisciplinary studies in understanding the need for particular legal modifications in labour markets, and understanding the evolution of labour law' (Arup and Mitchell, 2006: 17-18).

In one sense this simply takes us back to the origins of labour law which was, after all, founded in a similar spirit of interdisciplinary openness (Finkin, 2006). However, opening up legal discourse and analysis to outside influence was only part of the process which took place in the first decades of the twentieth century; the refashioning of legal concepts in the light of what were then seen as new social policy goals was also important, and this, paradoxically perhaps, focused attention back on to those very doctrinal structures which formed the core of 'formalist' legal analysis. Kahn-Freund famously enjoined labour lawyers to follow the example of Sinzheimer in going 'through' not 'round' the law, by which he meant that legal studies should not seek to abandon conceptual exposition as one of its core tasks (Kahn-Freund: 1981: 77). It is indeed difficult to see how labour law could survive as a discrete field if this were not one of its central objectives; and it is therefore appropriate that the conceptual reformulation of labour law's basic categories, including the employment contract or relationship, is currently the focus of a considerable body of work (Freedland, 2003; Collins et al. (eds.), 2007). For sociologists, economists and others who are concerned with the social operation or functioning of legal rules and institutions, the internal structure of labour law might seem to be less of a pressing issue. Yet, a unified approach to the subject would recognize that labour law is not simply a cipher for wider social or economic forces, but an autonomous institutional phenomenon, which influences the way in which policy is translated into formal legislation, and the way in which rules operate in practice. To that extent, many of the internal workings of the labour law system – not simply the institutional processes by which disputes are resolved, but the forms of legislation and the conceptual categories which are used by lawyers to frame their own discourse – are, in principle, of importance to social scientists seeking to understand the implications of legal regulation for their own areas of inquiry.

In the context of a collection of papers designed to provide an overview of research in the employment relations field, our aim, as labour lawyers, is to reassess the place of labour law in that wider area of study and to argue the case for labour law's importance to social scientists. We will not attempt to review the vast empirical literature, mostly consisting of work by social scientists,

which examines aspects of the operation of legal rules in practice. This is, indeed a huge field. The study of the way legal rules work in practice has a very long tradition in industrial relations scholarship, which, if we just consider the British context, can be traced right back to the pioneering work of the Webbs and their contemporaries on the poor law (Webb and Webb, 1910; 1927a; 1927b), factory legislation (Hutchins and Harrison, 1911), and the first minimum wage laws (Tawney, 1914; 1915). After a mid-century lull during the period of collective laissez-faire, increasing statutory intervention in the labour market in the 1970s led to seminal analyses of the operation of the Industrial Relations Act 1971 (Weekes et al., 1971) and the unfair dismissal legislation of the 1970s (Dickens et al., 1985), as well as a series of studies carried out under the auspices of the (then) Social Science Research Council's program on 'monitoring labour legislation' (see Hepple and Brown, 1981). In the course of the 1990s and 2000s this type of work, in many cases sponsored by the Department of Employment and the Department of Trade and Industry, became both more quantitative and more explicitly policy-orientated, and it is now normal practice for Parliamentary legislation to be accompanied by regulatory impact assessments of considerable detail and sophistication. A survey of empirical work concerning the operation of labour laws since 1997, carried out in 2005, provided an overview of the findings of a large number of academic papers on subjects ranging from working time regulation, the national minimum wage, trade union recognition, European works councils, non-standard work, and work-life balance legislation. But this study also found that 'there is a relatively limited amount of interdisciplinary/multi-disciplinary research bringing together academic lawyers and those trained in social science'. This was because, on the one hand, 'labour law research and writing has been constrained by traditional methods', while, on the other, industrial relations scholars 'still investigate labour markets and workplace relations focusing on areas where legal regulation is intended, or could be expected, to play a role (for example, employers' labour use strategies; worker representation) without actively exploring or commenting on this aspect' (Dickens and Hall, 2005: 32).

Against this background, our objective is to give an analytical account of the principal institutional features of labour law as a form of legal regulation, from an interdisciplinary perspective which takes into account both the internal workings of the labour law system and the social and economic context within which it has evolved. To that end we will seek to analyze, in the manner of an internal or 'immanent' critique (Supiot, 1994), the categories which are generally used within labour law discourse to describe the social and economic relations of employment; to account for their emergence and evolution in historical terms; to consider the origins of their diversity across different

national systems; and to consider future prospects for convergence or divergence.

We begin by tracing the historical emergence of the contract of employment as the basic building block of labour law in different jurisdictions. We then look at current developments in relation to the individual employment relationship, before turning to a consideration of collective labour relations. This approach is justified by the continuing relevance of some of the core concepts, and by the need to consider just how far they are changing as a consequence of external pressures, and why. We conclude by offering some observations on the prospects for labour law in a period of organizational and institutional transition.

2. Origins of the modern labour market: the evolution of the contract of employment

One way in which labour law maintains its boundaries with other subjects is captured by the proposition that labour law is principally concerned with relationships of so-called 'dependent' or 'subordinated' labour, that is, relations between *employers* and *employees*. The concept of 'subordination' is most explicit in civil law systems but is present in the common law too under different terminology (such as the 'control', 'integration' and 'economic reality' tests used to denote employee status). This concept defines the legitimate scope of managerial prerogative – the employer's right to give orders and to require loyalty of the employee – while also providing protection to employees against certain risks. These include physical risks (the domain of early factory legislation and now of occupational safety and health) and economic risks (such as interruptions to earnings and employment from sickness, unjust dismissal, termination on economic grounds, or old age). The genuinely *self-employed* are excluded from this type of regulation, on the grounds that they enjoy autonomy over the form and pace of work and over arrangements for their own economic security. In this way, labour law is closely aligned with social security law and tax law, which share with it many of the same risk-shifting functions.

The focus on the relationship of employment seems self-evident as the basis for labour law, but it is in fact both a controversial idea and an historically contingent concept. The twin ideas that work relations under capitalism are 'contractual', and that they can be captured using the term 'employment', are more recent than is often supposed. There is evidence that in the first phases of industrialization in Europe and America, labour was not uniformly or even generally 'free' and that contractual concepts played a limited role in defining the parties' mutual obligations. The employment model, as we have since come

to know it, was initially confined to a small segment of the wage- or salary-dependent labour force. The manner of the emergence of the 'contract of employment' to occupy a central place in modern labour law systems is of interest from the point of view of the relationship between law and industrialization, and from the perspective of comparative legal development under capitalism.

2.1 The common law: Britain and America

The institutional roots of a market economy in Britain can be found in the later middle ages and in the early modern period; the stimulus provided to innovations in governance by such events as the Black Death (Palmer, 1993) and the dissolution of the monasteries have been extensively documented (Woodward, 1980). England already had a mature *national* legal system at this stage, the significance of which for its economic development is only now beginning to be understood. However, wage labour in the modern sense of that term did not exist at this point. The terms used by the pivotal Statute of Artificers of 1562 and the poor law legislation of this period, including 'servant' and 'labourer', have to be treated with care; it would be a mistake to see them as simply the functional equivalents of the much later concept of the 'contract of employment' (Deakin and Wilkinson, 2005: ch. 2).

The century after 1750 which is conventionally associated with the period of the 'industrial revolution' in Britain was, in addition to being a time of rapid technological and social change, also a period of legal innovation; hence Toynbee's suggestion, made in the 1860s, that the essence of the industrial revolution was not to be found in the adoption of steam power or the advent of factory labour, but in 'the substitution of competition for the medieval regulations which had previously controlled the production and distribution of wealth' (Toynbee, [1864] 1969: 92). Competition in the labour market was promoted through the repeal of the wage-fixing laws and apprenticeship regulations which had contained in the Statute of Artificers (in 1813 and 1814 respectively). It might be thought that this would have led to the contractualization of labour relations and hence to the recognition in the courts of the concept of the contract of employment as the paradigm legal form of the work relationship. However, this is not what happened. For some occupational groups, a type of employment contract did indeed emerge, to which the courts attached status obligations in the form of implied contractual terms. The common law action for wages due as earned under the contract, and the action for damages for wrongful dismissal, can be identified in cases from the early decades of the nineteenth century (Freedland, 1976). However, these decisions were almost without exception based on the employment of managerial, clerical or

professional workers. Manual workers fell under the distinctive legal regime of the Master and Servant Acts, under which breach of the service contract was a criminal offence, for which thousands of workers were fined or imprisoned each year up to the 1870s (Deakin and Wilkinson, 2005: 61-74).

The master-servant model was not a hold-over from the corporative regime of the Statute of Artificers and old poor law. On the contrary, most of the disciplinary powers used by employers and courts were additions from the mid eighteenth century and early nineteenth century, the result of parliamentary action to bolster the prerogatives of the new employer class. The nature of the paradigm legal form of the labour relationship under early industrial capitalism in England was statutory and hierarchical, rather than common law and contractual. The legal influence of the master-servant regime was just as far reaching as its considerable social and economic impact. The model of a command relation, with an open-ended duty of obedience imposed on the worker, and reserving far-reaching disciplinary powers to the employer, spilled over into the common law, so that long after the repeal of the last of the Master and Servant Acts in 1875, not just the terminology of master and servant but also many of the old assumptions of unmediated control were still being applied by the courts as they developed the common law of employment (Hay and Craven, 2004).

US employment law took a divergent path at this point, but one which also resulted in the emergence of a general model for the employment relationship based on contract. By the early twentieth century almost all states had adopted an 'employment at will' rule, under which the contract of employment could be terminated by either party on a moment's notice, without giving a reason. This conferred almost no job security upon the employee. Where the British and American systems diverged in the final decades of the nineteenth century was over the question of whether *all* employment relationships should be presumed to be at will unless the contrary were stated. The American courts, following *Payne* v. *Western & Atlantic Railroad*[1] and in particular *Martin* v. *New York Life Insurance Co*.[2] which concerned a middle class employee, began to apply just such a general presumption. The extension of the at-will model was primarily a product of a constitutional debate over the legitimacy of social legislation. The question of the construction of the terms of employment contracts took on a general significance, far beyond the immediate question of rights under the wage-work bargain between employer and employee (Njoya, 2007). No such presumption developed in Britain, principally because there was no equivalent to the constitutional dimension to the issue which arose in the United States.

In Britain, the advent of the welfare state and the extension of collective bargaining, neither of which was subject to constitutional constraints, saw

employment law taking a different path (see Deakin and Wilkinson, 2005: 86-100). However, the persistence of the master-servant model, and the enduring influence of the principle of less eligibility in the long transition from the poor law to social security, which was completed only in the 1940s, delayed the advent of the modern 'contract of employment'; if that idea is identified, above all, with a classification of labour relations which incorporates the 'binary divide' between employees and the self-employed, we have to look to the middle of the twentieth century to find it in British labour law. The first statutes to adopt the binary divide in a clear form were concerned with income taxation and social insurance. The National Insurance Act 1946, which incorporated Beveridge's plan for social security, marked the turning point; its clear division between those employed under a 'contract of service', a term which gradually became interchangeable with the term 'contract of employment', and those who were 'self-employed' or independent contractors, was then carried over into early employment protection statutes in the 1960s. The term 'contract of employment' is a recent innovation in British labour law, just as it is in civil law jurisdictions.

2.2 The civil law: French and German models

There is evidence from the civil law systems to support the suggestion that the modern contract of employment is an invention of the late nineteenth and early twentieth centuries, associated with the rise of the integrated enterprise and the beginnings of the welfare or social state. The emerging forms of wage labour were grafted on to the traditional Roman law concept of the *locatio conductio* in the post-revolutionary codes of the early 1800s. The adoption of contractual forms and language was more explicit than in the British case at this time. In adapting the model of the *locatio*, the drafters of the codes were grouping labour relationships with other types of contracts, the effect being to stress that, in common with them, they were based on exchange (Veneziani, 1986: 32). Labour, or in some versions labour power – as, for example, in the German term *Arbeitskraft* – thereby became a commodity which was linked to price (not necessarily the 'wage'), through the contract. The notion of the personal 'subordination' of the worker was absent from the formulae used by the codes (Simitis, 2000). The reality was rather different, since more or less all systems acknowledged the power of the employer to give orders, to issue rules which had binding force (in the form, for example, of the French *livret* or work book), and to retain the worker in employment, without a testimonial, until they considered the work to be complete. However, this body of legislation and practice was formally separated from the general private law of the codes, and administered by police authorities and specialized labour tribunals; as a result, it remained under-developed from a conceptual point of view.

The term contract of employment or, in France, *contrat de travail*, only entered general usage in the 1880s. The main impetus for its adoption was an argument by employers in larger enterprises that the general duty of obedience should be read into all industrial hirings. However, once the term became established, it was used in turn of the century legislation on industrial accidents (Veneziani, 1986: 64), and its adoption was promoted and systematized by commissions of jurists charged with developing a conceptual framework for collective bargaining and worker protection (ibid.: 68). At the core of the concept was a notion of 'subordination' in which the open-ended duty of obedience was traded off in return for the acceptance and absorption by the enterprise of a range of social risks (see Cottereau, 2000, 2002; Petit and Sauze, 2006). In Germany, a similar process of evolution can be traced, through which adaptations of the *locatio* model in the codes of the nineteenth century, culminating in the German Civil Code of 1896 (on which, see Sims, 2002), were in their turn modified to produce the modern employment relationship or *Arbeitsverhältnis* in the legislation of the Weimar period, with the advent of legal recognition for collective bargaining and social legislation.

Both France and Germany, then, experienced the late development of the contract of employment. What emerged, however, were forms which reflected the distinctive legal cultures of the two systems (Mückenberger and Supiot, 2000). In the French-origin systems, the power of the state to regulate conditions of work was instantiated within the legal system through the concept of *ordre public social*, that is, a set of minimum, binding conditions which applied as a matter of general law to the employment relationship. The implicit logic of this idea was that in recognizing the formal contractual equality of the parties to the employment relationship, the state also assumed, by way of symmetry, a responsibility for establishing a form of protection for the individual worker who was thereby placed in a position of 'juridical subordination'. In German-influenced systems, by contrast, a 'communitarian' conception of the enterprise qualified the role of the individual contract. In contrast to the French approach, German law came to recognize the 'personal subordination' of the worker in the form of 'factual adhesion to the enterprise' (*Tatbestand*), a process which conferred 'a status equivalent to membership of a community' (Supiot, 1994: 18).

3. The contract of employment today: conceptual evolution and change

Although the emergence of a coherent model of the contract of employment was a considerable achievement, and a progressive one, for its time, its legacy has been problematic. We will consider two main challenges currently facing the law in its attempt to regulate individual aspects of the employment relationship. First we look at why the heavy reliance on the notion of 'contract' poses difficulties in regulating the termination of employment. We note the special case of the employment relationship in the large, publicly held company. Second, we consider the question of balancing job security with flexibility, profitability and competitiveness, a key issue in determining the scope of employment protection legislation. Economic dismissals remain largely unregulated by law in the UK, on the basis that such regulation would impose rigidity and exacerbate unemployment. We consider the social implications of this approach, contrasting it with some of the approaches in continental Europe and the United States, and suggest that redefining the conceptual basis of the employment relationship may provide a means of ensuring a better balance between job security and economic flexibility.

3.1 Shifts in the contractual foundations of the employment relationship

One of the principal regulatory difficulties currently facing labour law is that of identifying the concepts best suited to defining and describing the employment relationship at a time when organizational form is in flux. As the organization and social context of work change, so does the nature of the employment relationship, and the law constantly faces the challenge of adapting its own conceptual framework in response to these changes. As we have seen, the law generally conceives of the employment relationship as a *contract* between employer and employee. This is coupled with the notion of freedom of contract (based on the assumptions of perfect rationality, foresight, and information on the part of both employer and employee) as well as the assumption that both parties have equal bargaining power. These assumptions are particularly influential in the context of individual aspects of labour law – it is usually only in the context of collective action that these assumptions can be more directly addressed, and mitigated. In terms of the individual employment relationship one of the most pressing concerns is that of job security. In theory freedom of contract allows both parties to agree on terms that grant employment security to the worker, but in practice inequality of bargaining power and the prevalence of 'standard form' contracts mean that most workers are not in a position to enter into an independent negotiation of the terms and conditions of employment. Moreover, many atypical workers and semi-dependent workers are left outside the framework of the 'contract of employment' altogether. They do not fall

within the strict legal definition of 'employee', and so are often not covered by employment protection laws.

As have seen, the conceptual framework of labour law is shaped both by private law concepts, principally that of contract, and by social legislation. In relation to job security, the common law action for 'wrongful dismissal' is an action for breach of contract. 'Wrongful' at common law refers simply to the failure to give reasonable notice of dismissal, and does not include any general notion of unfairness. The traditional rule in common law jurisdictions was that the employer would be within its rights in terminating the contract for any reason or none at all, subject to giving the requisite notice or paying a monetary sum to the employee in lieu of notice. The only exception would be where the terms of the contract specify that there will be no dismissal except for just, or specified, causes.

Yet, the common law is not static. In the US, there have been recent suggestions that the common law might develop to allow breaches of contractual terms other than the notice term to give rise to a wrongful dismissal claim, overcoming or at least qualifying the concept of employment at will (Stone, 2007). In the UK, the implied term of 'mutual trust and confidence', under which the employer has an obligation to deal with the employee in good faith, has been seen as a potential way forward in developing norms preventing dismissal without just cause (Brodie, 1996). Similarly, in the US, most states have developed limited modifications or exceptions to the at-will rule on the basis of an implied covenant of good faith and fair dealing.

At the same time, there are limits to how far the common law can go. In English law, although the implied obligation to maintain mutual trust and confidence has had a considerable impact on the interpretation of the employer's duty in the course of a *continuing* employment relationship, so far this obligation has had little, if any, discernible effect on job security in terms of preventing dismissals. The main reason for this is that the scope of the implied term of mutual trust and confidence is limited, so that it applies during the continuing employment relationship but does not extend to the 'manner of dismissal.' The courts continue to draw a careful distinction between the action for damages for breach of the implied term of mutual trust and confidence as an ordinary action for breach of contract, on the one hand, and the action for wrongful dismissal on the other. Hence, as Freedland writes (2005: 361), 'the view that wrongful dismissal is wrongful, and remediable in damages, only because of its prematurity, its denial of a promised period of notice or fixed term of employment, has been and continues to be the dominant approach of English common law'.

3.2 Unfair dismissal legislation

The notion of 'unfairness' in dismissal had to be introduced by legislative intervention in virtually all systems; it was not a natural offshoot or development of private law norms or concepts. Unfair or unjust dismissal legislation originated in continental European systems in the inter-war period and in the decade immediately after 1945, and has since been adopted in some form by most systems with the exception of the United States. ILO Convention No. 158 defines its core elements which include a requirement that the employer should normally have a valid reason for terminating the employee's employment. Only one US state (Montana) has enacted an unjust dismissal statute, even though a model code is available in the form of the Model Employment Termination Act (1991) which was drafted under the auspices of the National Conference of Commissioners for Uniform State Laws. However, at the federal level there is significant legislation in the area of human-rights dismissals; this includes federal statutes governing discrimination on the grounds of sex, race, age and disability. The levels of compensation payable by employers to victims of discrimination often contain punitive elements, and far outstrip the sums which could be paid in most European jurisdictions.

In Britain, unfair dismissal legislation dates from 1971. Although this legislation was informed by the standards laid down by the ILO, it was also heavily influenced by a perceived need to streamline industrial relations procedures at plant level and to encourage employers to put in place disciplinary procedures for dealing with individual disputes, one effect of which would be to reduce unofficial strikes over dismissals. The subsequent evolution of unfair dismissal law was influenced by the growing debate over flexibility, although deregulatory legislation of the 1980s made only a marginal impact on the main body of unfair dismissal protection, which more or less remained intact. Over time, certain aspects of protection have been strengthened, in particular those relating to the category of inadmissible reasons or 'human rights' dismissals (Deakin and Morris, 2005: ch. 5).

At the outset of the debate over labour flexibility in the early 1980s, most of the civil law systems began from a position of having strong dismissal laws, in contrast to those in the common law world which were less highly developed. As efforts to increase flexibility in the labour market intensified, the civil law systems have, in varying degrees, loosened controls over managerial decision-making, but have done so not through changes of a far-reaching nature to the core of dismissal law, but through limited exemptions in favour of 'atypical' forms of work. A number of legislative initiatives throughout the 1980s and 1990s sought to encourage the growth of part-time and fixed-term employment

by exempting employers from dismissal protection in these cases and by subsidizing hirings under these contracts through other means such as the tax-benefit system. The balance of opinion is that these reforms may have had a positive but minor overall impact on employment levels (OECD, 2004); but they have also led to an increase in the numbers employed in flexible or 'atypical' forms of work, and hence to growing segmentation between a secure 'core' and a less secure 'periphery' of workers. In reaction to this negative development, several recent EU initiatives have sought to strengthen protection against inequality and structural discrimination at work. These include measures aimed at enhancing opportunities for temporary and part-time work at the same time as entrenching a principle of equality of treatment between these forms of work and full-time, long-term employment, and recognition at EU level of a wider principle of non-discrimination in employment.

3.3. Economic dismissals

The dismissal of workers for 'economic' reasons is one of the most controversial areas of legal intervention into the employment relationship. The justification for limiting the protective role of the law in this context is that when employing entities undergo organizational restructuring, the sustainability of the enterprise must take priority over job security. Thus the law generally respects the 'managerial prerogative' to dismiss workers as a cost-cutting measure. This approach is reflected across international law, European law, and UK law. For instance the ILO acknowledges that the 'operational requirements of the undertaking' may justify termination of employment (ILO Recommendation No 119 of 1963, Art 2(1) and Art 12). EU law, in the context of the Acquired Rights Directive, allows dismissal for 'economic, technical or organizational reasons' as a defense to an unfair dismissal claim. At common law, in the words of Lord Hoffmann, 'employment law requires a balancing of the interests of employers and employees, with proper regard not only to the individual dignity and worth of the employees but also to the general economic interest'.[3] Similarly, in the United States economic dismissals are justifiable in the context of collective bargaining law on grounds of 'business necessity'.[4] The current law governing employment security therefore contains ample scope for flexibility, often to the detriment of job security.

It may be questioned why the law governing termination of the employment contract offers workers virtually no protection to the individual worker when the dismissal is for economic reasons. Economic dismissals during corporate restructuring geared towards boosting short-term share value arguably impose significant social costs on workers and their communities with knock-on effects

for other industries and the economy as a whole. Concerns about job security in this context are heightened where there is no suggestion of 'fault' on the part of the workers – blame is laid instead on impersonal market forces, which may intensify the sense of social displacement felt by those affected particularly where the job cuts are not perceived to be inevitable. In response to these concerns, the suggestion that job security should be enhanced is countered on the basis that job security for the employed would allow core workers to become entrenched in their positions, resulting in rigid labour markets in which certain marginalized groups, the peripheral and atypical workers referred to earlier, are perpetually unemployed. A related argument is that employment protection legislation may impede the creation of new jobs, as such legislation potentially 'increases the costs for the employer of adjusting their workforce and can create a barrier to hiring' (OECD 2006: para. 3.3). These perspectives suggest that job security should therefore be understood as simply extending to the availability of jobs in the economy as a whole, and especially widening access to employment opportunities, rather than with job protection for the employed in their specific or current positions. However, while the concern about the entrenchment of secure core workers is legitimate, recent empirical studies published by the OECD 'generally have not found robust evidence for a significant direct effect of [employment protection legislation] on unemployment' (ibid.). The risks of adverse effects on opportunities for the unemployed appear to arise only when job protection is 'too strict', and not simply from the mere existence of job protection. The OECD therefore recommends that the implementation of such legislation should be 'quick, predictable and distort labour turnover as little as possible', and 'should be carefully coordinated with reforms to the unemployment benefits system … so as to reconcile so far as is possible labour market flexibility with security for workers' (ibid.).

The differences in levels of job protection in different jurisdictions partly reflect variations in the overall economic, political and institutional context of each country. This context has in turn given rise to different responses to the issue of how to regulate the employment relationship. Despite the fact that industrialization and the increasing sophistication of production methods have brought about a shift in the organization of work globally, labour relations and labour laws continue to diverge sharply in different jurisdictions and so far there is no reason to expect this trend to change. The UK and United States have among the lowest levels of employment security legislation in the world (Botero et al., 2004). This is largely attributable to the continuing influence of private law concepts, in particular freedom of contract, as already noted. Conversely, in most EU member states employment protection has its origin in industrial traditions which, while they conceptualize employment as being founded upon a

private law contract, *also* define it, as we have seen, as a special relationship regulated by principles of public law or mandatory public regulation (*ordre public social*), which grant workers a form of quasi-constitutional entitlement to remain in their jobs unless there is just cause for their dismissal. For instance in German law dismissal, even with notice, must be 'socially justified' otherwise it is 'illegal'; selection of employees for redundancy 'must take into account so called "social aspects" [so] that those who suffer the most from the effects of the dismissal should be the last ones to be dismissed … social justice for each individual case' (Weiss, 1988: 86-88, discussing the Act on Dismissal Protection of 1951 (s.1)).

Criticisms that the European approach to job security is too rigid have prompted reform proposals by the European Commission. Although the Commission still refers to 'full employment' as one of the goals of its employment agenda, this is now giving way to concepts such as adaptability, responsiveness, and employability. Flexibility on the workers' side is understood as the workers' capacity to anticipate change and move readily from one type of job to another. As European employment policy emphasizes the creation of 'more and better jobs' the focus is on ensuring that workers who lose their jobs will find alternative opportunities within a dynamic and vibrant economy.

Yet there are difficulties inherent in this focus on flexibility. For many highly skilled workers who have invested years of work in a particular firm or trade it may prove impossible to find an alternative of *comparable worth*, an effect often felt for the remainder of the worker's career. Where the worker is compelled to take the next best alternative, empirical studies demonstrate 'substantial and long-lasting effects of job loss on annual earnings and wages' over the long term, from which many workers never recover (Topel, 1900: 181). This has been defined as the real cost of job loss, that is, 'the difference between the utility value of being in the current job and that of the next best alternative' (Green and McIntosh, 1998: 365–6). The question then becomes whether the overall social cost of job loss is necessary in the interests of efficiency or overall wealth benefits to society. In situations where jobs are cut in order to boost short-term gains for the firm's shareholders then it could be said that the corporation is 'effectively transferring to the public sector the costs of maintaining these displaced workers' (Singer, 1993: 496).

3.4. Alternatives to contract: the use of property-based concepts to enhance legal job security

Several commentators have noted that there are inherent difficulties in relying on the concept of 'contract' to define the employment relationship, and that there is a good case to be made for moving beyond contract. In the context of job security in the firm the concept of property may prove more helpful than that of contract, in the following way. Understood as an analogy rather than as a 'category' of property rights as such, the notion of property implies that the employee has a claim of 'ownership' in the form of an expectation of continued employment without fear of arbitrary dispossession (Meyers, 1964). Compensation for wrongful or unfair dismissal would be based not simply on the 'notice period' defined by the contract, but on the real value of the job lost. This approach is particularly helpful in understanding the employment relationship in the large firm. The dominant presumption is that the corporation is owned exclusively by its shareholders (who have rights of property in the firm) and that the workers' interests are fully defined by and limited to the terms of their employment contracts. However, an historical analysis of the employment relationship reveals that property rights have not traditionally been associated *exclusively* with the rights or status of the employer. Notions of respect for private property have long been invoked to support the rights of *employees* (Njoya, 2007).

Recognition of the value of firm specific human capital has come to acquire important implications for law reform. The statement in the European Commission's *Employment in Europe* (2006, at 81 et seq), that 'workers feel better protected by a support system in case of unemployment than by employment protection legislation' presents only part of the picture. It remains the case that job security in the job actually held is paramount: 'a secure job is still an essential aspect, for most individuals, of their long-term economic security' (Deakin and Morris, 2005: 569). In drawing the boundaries of its regulatory scope the law already recognizes that not all dismissals which take place during corporate restructuring are justifiable, and that in certain situations employees may have property-like claims on the firm, i.e. interests which go beyond the terms of their employment contracts. The best example of this in the UK is the Transfer of Undertakings (Protection of Employment) Regulations 2006, which recognize that workers have a claim to remain in their jobs with a particular firm when it is sold. Such a proprietary approach is more compatible with an understanding of employment security as much more than ensuring that workers are 'adaptable' and 'employable' in different jobs. It goes further by understanding employment security as 'a form of regulatory intervention designed to protect workers against arbitrary managerial decision-making', a

protection which recognizes the valuable long-term relationships which arise between employees and the firms for which they work (Deakin and Morris, 2005: 388; Njoya, 2007).

4. Collective labour relations: worker representation and corporate governance

4.1 Worker representation and the coverage of labour standards

Representation of workers through independent trade unions which negotiated pay and conditions of employment on their behalf with an employer or groups of employers became the predominant model around which the collective labour law of the twentieth century developed. It is reflected in the core principles of freedom of association of the ILO and in the practice of many systems. However, systems differ in the nature and extent of state encouragement for collective bargaining provided, the levels at which bargaining takes place, and the mechanisms for determining the representativeness of unions.

There is a case for seeing a division of systems along the lines suggested by the 'variety of capitalism' approach (Hall and Soskice, 2001). In so-called 'liberal market' systems, the predominant form of employee representation is collective bargaining between employers and trade unions. From a legal perspective, collective bargaining operates in manner akin to setting up a contractual mechanism for negotiation. This can be done by the employer voluntarily recognizing a particular union or unions, or through various regulatory mechanisms which, as in the United States since the 1930s, have required the employer to negotiate with a certified bargaining agent which can demonstrate that it has majority support in the relevant bargaining unit. On the face of it, the US system offers strong legal support for a union which can demonstrate in a workplace election that it has majority support in a bargaining unit. The union becomes the certified bargaining agent for that unit, and as a result has a statutory monopoly over bargaining for pay and conditions in respect of the employees in question. However, this arrangement, put in place by the federal National Labour Relations (or Wagner) Act of 1935 and subsequently amended by the Taft-Hartley Act of 1947, is less favourable to unions than it might seem. Enforcing the employer's duty to bargain is often problematic, and employers are permitted to deploy a powerful array of weapons in frustrating unionization drives and in pressing for decertification. Attempts to reform the law so as to allow alternative forms of employee representation to emerge, and to soften the rigidly adversarial quality of the certification process, have failed. The deficiencies of the law are thought to be a contributing factor in the decline of

union density in the United States to its current level of only 7% in the private-sector, compared to 36% in the public sector where institutional support for collective bargaining is stronger (Kolins Givan, 2007).

In Britain, for most of the twentieth century, the 'recognition' of trade unions by employers – agreement to enter into collective bargaining over pay and conditions, among other things – was a matter of consent rather than of statutory imposition. The law imposed no duty to bargain and, conversely, played no role in certifying unions as bargaining agents, hence Kahn-Freund's insistence on seeing its role as 'marginal' in relation to autonomous sources of regulation. The law preserved a wide freedom to strike, and to lock-out, by granting unions and individuals immunities from liability in tort for organizing strike action. The absence of direct legal intervention was seen to be the system's principal strength. However, since the 1970s, the system of collective bargaining has undergone a process of decline, with falling coverage of collective agreements (down to below 40% from over 80% in 1979) and falling union density (now below 30% from a peak of nearly 60% in 1979). It is not entirely clear that the legal reforms of the 1980s, which cut back on the freedom to strike and encouraged decentralization of collective bargaining, were the critical factor in precipitating this decline, but there is some evidence that they were (Freeman and Pelletier, 1990). Since 2001 Britain also has a system of compulsory recognition, based superficially on aspects of the US model, but with some critical differences, in particular the greater role accorded to encouragement for voluntary agreements outside the framework of the legislation (Wood and Godard, 1999).

Whatever the degree of state compulsion used to bring about recognition or certification, there are strict limits to how far collective bargaining can go in relation to the core areas of managerial 'prerogative', so that it stops short of co-decision making or codetermination (for the US, see Weiler, 1990; for Britain, Wedderburn, 1986: ch. 4). Outside those areas where employers concede collective bargaining or have it forced on them by public regulation, there is no legal obligation to deal with employee representatives. In their emphasis on collective bargaining as a form of regulated contractual coordination, these systems may continue to be characterized as *voluntarist.*

Voluntarism at the level of the enterprise tends to go hand in hand with a partial approach to regulation at market level. Thus although both Britain and the United States have national minimum wage laws and some legislation governing basic terms and conditions such as working hours, the tendency has been for statutory regulation to impose only minimal constraints on the employment contract outside those sectors which are governed by collective

bargaining. As collective bargaining has shrunk, since the 1950s in America and the late 1970s in Britain, so the uneven and *partial* character of labour market regulation has been accentuated within these systems (for the United States, see Weiler, 1990; for the UK, see Deakin and Wilkinson, 1991).

'Coordinated market' systems, on the other hand, tend to combine an *integrative* approach to the role of employees in the enterprise with *universalism* in labour market regulation. 'Integration' implies the incorporation of employee voice directly into the decision-making structures of the firm. In many civil law systems, particularly those located in Western Europe, sectoral bargaining ensures that a basic floor is set to terms and conditions of employment, with legal support. In addition, legislation normally mandates some form of collective employee representation at plant or enterprise level. The function of works councils (in Germany, in particular) is not (on the whole) to enter into collective bargaining, but rather to engage in the explicitly cooperative goal of 'codetermination' of the working process. This involves representing employee voice to the employer and monitoring the application of laws and agreements within the workplace, functions which are intended to complement collective bargaining operating at a multi-employer level. In Germany, collective bargaining between trade unions and associations of employers to set basic terms and conditions mostly takes place at industry or sector level; in that sense, codetermination within the enterprise is complementary to trade union autonomy both from management interests and from state interference at industry level. The effects of collective agreements can be extended to non-federated employers by statutory order. In France, where enterprise committees and other representative bodies operate at enterprise level in rather different fashion from the German works council (they have fewer legal powers and also have employer representation), we again find strong multi-employer bargaining at sectoral level. France also has a statutory minimum wage which is linked to wage (and not just price) increases and legislation on working time and other aspects of terms and conditions of employment which is enforced by a well-resourced labour inspectorate.

4.2 Information and consultation of employee representatives

A key element of the continental European model is the obligation of the employer to enter into processes of 'information and consultation' with the workforce representatives. This principle is incorporated in Article 27 of the European Charter of Fundamental Rights and has now been embodied in a series of European Union directives. This has the effect of institutionalizing a role for employee representation when decisions are taken which affect the form and operation of the enterprise, such as large-scale restructurings leading to

dismissals and transfers of businesses between employers. Transnational enterprises are required to enter into regular consultation with employee representatives under the terms of the European Works Councils Directive of 1995, a model which was extended to other companies above a certain size threshold by the Information and Consultation of Employees Directive of 2002 (ICE). The ICE Directive has introduced significant changes to collective labour law in systems such as the UK and Ireland which had traditionally relied on a 'single channel' model of collective representation in which the sole mechanism for consulting workers was the recognized trade union. This left non-unionized workers unable to benefit from rights of information and consultation granted by European law. Moreover, in the absence of any general framework for consultation, even those workers who were unionized would only have such rights in specific situations such as redundancies and transfers of undertakings. For these reasons, in so far as it goes against the pre-existing tradition of collective representation, the possible impact of the ICE Directive in Ireland and the UK is likely to prove more controversial and problematic than in other member states.

One of the difficulties in assessing the role of the ICE Directive within the legal framework of liberal market economies is that strong rights of employee consultation and representation in decision-making in the firm are perceived as incompatible with the notion that a company's directors are solely accountable to their shareholders, not the employees, for the decisions they make. Decision-making is an essential attribute of ownership and control. Within a legal tradition in which ownership and control are assumed to vest exclusively in shareholders (and in managers as the shareholders' agents), the general understanding has been that employee decision-making rights should not be prescribed by legislation. As we saw above, in view of the limits on how far collective bargaining can go in relation to the core areas of managerial prerogative the tradition in both the UK and the US has been to limit the scope of mandatory collective bargaining to wages, hours and terms and conditions of work. In contrast, the emerging European framework of information and consultation extends to core managerial matters. For instance under Article 12 of the Works Councils Directive the matters over which workers have information and consultation rights include the firm's 'structure, economic and financial situation, the probable development of the business and of production and sales … investments and substantial changes concerning organization … [and] transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof.' Critics of this approach argue that while it is good managerial practice to consult employees and listen to their ideas and suggestions, any rights of information and consultation should be limited to an opportunity for employees to express their viewpoint (understood

as rights of 'voice') but should not extend to a right to influence the final decision. As expressed by the US Supreme Court, in introducing a 'duty to bargain' with employee representatives under the NLRA 'Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed'; ultimately, 'management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business'.[5]

This perspective has nevertheless been challenged as overlooking the fact that in the modern knowledge and skills based economy employees who make valuable investments of firm-specific human capital are just as entitled to participate in decision-making as shareholders who invest finance capital (Njoya, 2007). If ownership of the firm is understood as a 'bundle of rights' which includes the right to participate in controlling the firm's operations and strategy, then such ownership may be understood as shared between employees and shareholders. This would imply that employee participation in decision-making goes beyond 'voice' rights, extending to a role in determining outcomes for instance by sitting on the firm's board of directors. Employee membership of corporate boards is not mandated by European Union law, and is also the exception at national level; Germany is the most prominent system to make this a requirement. However, many systems have some combination of two-tier board structures and employee consultation requirements. Rights of information and consultation which fall short of board membership may still be understood within the framework of ownership rights, but only where they are coupled with sanctions which ensure that failure to observe these rights will invalidate the managers' unilateral decision. This is the case in some member states such as Germany and France, where a managerial decision arrived at without prior consultation with employee representatives is generally (subject to specified conditions) voidable or even void (Laulom, 2001). By contrast, in the UK the regulations implementing the ICE Directive impose a maximum financial penalty of £75,000 for non-compliance with the consultation requirement, payable not to the affected employees but to the Secretary of State. In the absence of any direct remedy available to workers for the firm's failure to consult them the regulations fall far short of conferring proprietary rights on employees.

The question may be posed whether participatory rights falling short of property or ownership rights are sufficient to protect employees' firm-specific human capital. One perspective is that 'voice' rights respect the dignity of workers by allowing their views to be heard, and if job security is understood simply as the need to respect the dignity and autonomy of workers whilst dismissing them

(Collins, 1992) then the existing framework of information and consultation under the UK regulations would appear to meet this need. Another argument is that there is nothing to prevent employees bargaining for rights of ownership and control, so that there is no need for prescriptive legislation. This perspective accepts that employees make valuable investments in the firm but reasons that 'all are left to protect themselves through contract' (Easterbrook and Fischel, 1991: 38). In practice, however, such bargaining is inevitably incomplete (Kim, 1997; Stone, 2002).

This is not to suggest that the property-rights model is necessarily more effective at protecting human capital investments than a contractual model. There are potential governance costs associated with participatory decision-making. However, controls over restructuring which impede management and reduce financial returns also provide the basis for long-term cooperation between management and labour in systems reliant on investments in firm-specific human capital. In this context it is significant that in German debates about the benefits and costs of codetermination, there does not appear to be any conclusive view on whether the arms-length contractual model associated with the Anglo-American firm is superior in terms of efficiency: 'there have been no undisputed econometric studies on the (negative or positive) correlation between co-determination and company performance' (Baums, 2003: 185). Germany's 1998 Codetermination Commission considered that empirical evidence pointed to efficiency gains as well as costs (Addison et al., 2004: 394).

4.3 Corporate governance and its interface with labour law

A further aspect of the apparent divergence between 'liberal' and 'coordinated' market systems concerns the interaction of collective labour law with the predominant structures of corporate ownership and control ('corporate governance') in systems. In liberal market systems, dispersed ownership and market liquidity enable outside investors to diversify their holdings, thereby spreading the risk of being subject to managerial opportunism, while at the same time using the capital market to hold management to account, via the mechanism of the hostile takeover bid. In different systems, different institutions have evolved which facilitate these processes. In the United States, a range of mechanisms, including shareholder litigation and an intensively regulatory regime of securities law, serves to protect minority shareholder interests (Coffee, 1999). In Britain and other common law countries such as Australia, the model of the takeover code, originating in the City of London, plays a key role, and shareholder litigation is rare. This reflects, to a large degree, the collective voice exercised by institutional investors in the British context, which is not matched to the same degree, historically, in the US (Black

and Coffee, 1994; Armour and Skeel, 2007). Shareholder litigation and takeover codes therefore appear to be substitutes in providing a mechanism for protecting minority shareholders; the presence of one means that there is less need for the other.

By contrast, in the case of 'insider-orientated' or 'coordinated market' systems, the concentration of ownership allows for direct monitoring and observation of managerial performance, thereby overcoming some of the agency problems which are inherent in the separation of ownership and control in outsider-based régimes (although this need not imply the absence of laws protecting shareholder interests, which are often quite strong in civil law countries: see Siems, 2005). Concentration or 'blockholding' takes different forms, depending on context; in varying degrees, corporate cross-shareholdings, bank-led governance and the residue of family-based control and state control can be observed (see the contributions in Hopt et al., 1997). Again, specific legal institutions have developed to complement the presence of mechanisms of direct control (Rogers and Streeck, 1994). In German-influenced systems, there is a role for employee-nominated directors on a supervisory board as part of a two-tier board structure. Employee representation within company organs is by no means the general rule, however. In France, most companies have not taken up the option, provided in legislation, of having a dual board, and employee voice, while significant, mostly operates outside corporate structures (Goyer and Hancké, 2003). In Japan, a highly integrative approach to the participation of employees in the firm almost entirely takes the form of social norms rather than legal prescription (Learmount, 2002: ch. 7).

In the context of coordinated market economies, this more direct form of employee involvement appears to be complementary to concentrated share ownership. Employee representatives may aid investors in the process of monitoring managers, and may also bring valuable information on organizational processes to bear on the decision making process, notwithstanding possible costs arising from more extended or protracted decision-making processes (Pistor, 1999). Employee representation may also provide a more broadly-based mechanism for building trust between workers and investors and in particular for encouraging mutual investments in firm-specific assets (Rogers and Streeck, 1994). Either way, institutionalized employee involvement in the firm may be said to be complementary to blockholding as a particular form of corporate ownership and control.

There is evidence of enterprises and sectors which go against the trend in all varieties of system; British and American pharmaceutical firms behave very much along the lines predicted for stakeholder-orientated systems (Gospel and

Pendleton, 2003), as do many utilities and service providers in regulated sectors (see Deakin, Hobbs, Konzelmann and Wilkinson, 2002). Conversely, some German and Japanese companies have begun to adopt shareholder value metrics and the business strategies associated with them (Lane, 2003; Learmount, 2002). Thus legal institutions do not rigidly dictate firm-level practices. However, the balance of evidence suggests that a good case can be made for the existence of complementarities across the linked domains of corporate governance and labour law, and for the continuing influence of these linkages at firm level. (Parkinson, 2003: 491).

In Germany and Japan, internal labour markets, constructed around implicit promises of job security and high levels of investment in firm-specific training, have remained in place during the 1990s and early 2000s, when they have become a rarity in the private sector in United States and Britain. There is also evidence that Japanese and German companies have adjusted to the growing role of external investors and to increased capital market pressures in a way which has left intact (so far at least) the social compromises embodied in those systems (Jacoby, 2005; Höpner, 2005). Thus it is far from clear that a tendency to convergence of either form or function is being observed (Amable, 2003). Even during a period when national systems are increasingly exposed to the effects of transnational capital flows, regulatory competition and the growing acceptance, among policy makers and business elites of a 'shareholder value' norm (see Hansmann and Kraakman, 2001), governance mechanisms remain matched to local conditions and reflect particular trajectories of economic development.

5. Conclusions: the prospects for labour law in a time of transition

In this chapter we have sought to explain some of the structures and concepts which distinguish labour law as an autonomous institutional phenomenon; autonomous, that is from the industrial relations system, and from labour market relations more broadly. The idea that labour law possesses this autonomy and so is not a mere appendage or expression of social and economic forces is one which labour law scholars increasingly look to in an attempt to give shape to their discipline (Rogowski and Wilthagen, 1994). This is not to argue that labour law can be studied in isolation from the social sciences. Rather, it represents a return to labour law's methodological roots, and to a tradition which sought co-existence between what we might now describe as an 'internal' (or juridical) perspective on the conceptual language of legal discourse with an 'external' (or social science) understanding of labour law as impacting on, and being impacted by, social and economic relations. The essence of this approach is that it is only by recognizing that positive legal analysis, on the one hand, and

the sociological or economic analysis of law, on the other, are *distinct* techniques, that they can be effectively integrated in the study of labour law; one should not be dissolved into the other (Kahn-Freund, 1981: 97).

From this point of view, labour law can be identified with the emergence of conceptual forms for defining the employment relationship, the business enterprise and structures of worker representation. These forms were at one and the same time the product of certain prior legal categories (those of contract and property in private law, and the rationalization of governmental power in public law), and the result of the influence on the law of the social and economic changes which accompanied the rise of industrial societies. Divergence across labour law systems is in part the legacy of the common law/civil law divide, but it also reflects variations in the timing of industrialization, the forms of worker organization and the nature of industrial enterprise in different countries. Yet, there is also a high degree of functional continuity across labour law systems, not least in the common identification of 'subordinated labour' within an 'employment relationship' as the focal point of labour law regulation.

According to Sinzheimer (1922; cited in Kahn-Freund 1981: 101), 'in times of sudden change, where the old disappears and the new craves recognition, a purely technical insight into the existing legal order is not sufficient'. At the start of the twenty-first century, labour law seems to be going through just such a period, when changes to organizational forms, coupled with the delocalization of production, are undermining familiar conceptual categories. It is not surprising therefore that some scholars identify at the core of labour law a 'failing paradigm' (Hyde, 2006: 45), which has to be corrected by a fundamental re-evaluation of core concepts. In this chapter we have provided concrete examples of the way in which these concepts have constrained the capacity of labour law to address contemporary problems, while also pointing out how even such foundational notions as those of contract and property are being adapted to new conditions. A methodology which seeks to understand how labour law's conceptual core came to be as it is, when allied to the techniques of the social sciences in explaining the law's wider operation and impact, might help us in understanding its likely future development.

Notes

[1] 81 Tenn. 507 (1884).

[2] 148 NY 117 (1895).

[3] *Johnson v Unisys* [2003] 1 A.C. 518 at para. 37.

[4] National Labour Relations Act, 29 U.S.C. §§ 151–169.

[5] Justice Blackmun in *First National Maintenance Corporation v NLRB* 452 U.S. 666, at 676 (1981).

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