Employment Law in Context

Text and Materials

David Cabrelli

University of Edinburgh

David Cabrelli is Senior Lecturer in Commercial Law at the University of Edinburgh and a solicitor (non-practising) in Scotland. David's research interests lie in the field of labour law, particularly the common law, and statutory regulation, of the contract of employment. He has published papers in a number of leading academic journals in the field of labour law, and his research has been cited by the UK Supreme Court, The Hong Kong High Court, and the Supreme Court of Australia.

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

Impression: 1

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2013957850

ISBN 978–0–19–964488–9

Printed in Great Britain by
Ashford Colour Press Ltd, Gosport, Hampshire

CHAPTER ONE

INTRODUCTION TO EMPLOYMENT LAW

1.1 GENERAL INTRODUCTION

In this chapter we provide an overview of the fundamental goals of this book. Readers are introduced to the running case study feature which is used throughout the text to explain concepts and rules of employment law.[1] The chapter then moves on to explore general academic and policy debates in employment/labour law and places those issues in their context. This will entail an exposition of the general contextual background to labour law and an examination of the distinctiveness of the subject. The justifications for intervention in the employment relationship and labour relations are also addressed. The impact which progressive changes in economic and industrial relations systems and structures have had on labour laws and institutions will be examined. Finally, we will consider the important 'legal origins' theory which postulates that labour laws grounded in the **common law** tradition are more flexible and efficient than those found in Civilian jurisdictions.

1.1.1 The approach of this book

This textbook is primarily intended to give an account of the current laws relating to the regulation of the workplace, employment, and **industrial relations**. It seeks to comprehensively cover the subject of **individual employment law** and **collective labour law**[2] in the UK in an accessible, engaging, and highly contextual format. The principal focus is on drawing a clear dividing line between:

(1) an initial explanation of the issues and problems which confront policy-makers,[3] judges and legislators entrusted with the task of crafting, reforming, applying, and interpreting labour laws; and

[1] The expressions 'employment law' and 'labour law' will be used interchangeably in this book.

[2] The expression 'collective labour law' is primarily intended as a reference to the labour laws regulating the constitution, status, listing, independence, and recognition of trade unions, the relationship between trade union members and their trade union, the protection of trade union members in employment, the regulation of collective bargaining, and the law of industrial action, on which see Chapters A–C on the Online Resource Centre.

[3] For a general discussion of the policy issues in the UK Parliament, see Hansard, 12 September 2013 at columns 1246–1270, available at http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130912/debtext/130912-0003.htm (last visited 11 December 2013).

(2) an account of the substance of the applicable UK labour laws designed to deal with those issues.

The treatment of (1) will involve an evaluation of the social, historical, and political context within which these policy considerations operate, together with an analysis of the economics of labour law intervention. The text also furnishes an academic treatment of the subject by bringing key scholarly debates to the attention of students. The contextual approach is pursued by drawing on extracts from case reports, articles in legal, economic, industrial relations, and human resources management journals, as well as reports and Codes of Practice of institutions central to the disciplines of labour law and industrial relations, e.g. the Advisory, Conciliation and Arbitration Service ('**ACAS**'), the Equality and Human Rights Commission ('EHRC'), and the Central Arbitration Committee. Excerpts are also taken from key academic articles and reports which are central to employment/labour law scholarship and thinking in its current state. Relevant statistics[4] are cited from time to time in order to fortify points made throughout the text. Further, extracts are taken from newspapers and internet sites which provide reports on stories that contextualize the subject-matter and give examples of the consequences of employment law and policies in practice.

Therefore, the five objectives of this text are as follows:

(1) to present the subject in a manner which etches a clear boundary line between the contextual and the substantive;

(2) to explore the issues which confront policy-makers, judges, and legislators in the field of labour law, employment, and the labour market;

(3) to introduce undergraduate and postgraduate students to some of the central contributions made to labour law scholarship;

(4) to offer suggestions as to how labour law might develop in the future; and

(5) to articulate the written material in an engaging format which attracts and maintains the attention of students, inviting them to think critically about the subject.

A preliminary flavour of the matters that comprise the subject of labour law is provided in an influential text by Lord Wedderburn:

Lord Wedderburn, *The Worker and the Law: Text and Materials*, 3rd edition (London, Penguin Books, 1986) 13

It may be useful at this stage to indicate the main areas that fall within the province of labour law…They are:

(1) The employment relationship between [employee] and employer. We shall examine the concept of 'the employee'…; the nature of the individual contract of employment; and the problems of job security connected with its termination.

(2) The area of collective bargaining between trade unions and employers; legal encouragement of, support for, or obstacles to, collective organization and negotiation; and the legal effect of the collective agreement;

(3) Parliamentary provision by statute of a 'floor of rights' for individual employees, and the interpretations of it, from…rights in respect of job security (especially unfair dismissal and redundancy) and matters such as equal pay, [anti-]discrimination [provisions] and [the] protection of wages.

[4] For example, sourced from the website of the Office for National Statistics, available at http://www.statistics.gov.uk/hub/index.html (last visited 1 November 2013).

(4) Strikes, lock-outs and industrial action generally; the interplay of Parliament's statutes and the judges' decisions, and the role of the State in industrial conflict.

(5) The status of trade unions, the right of union members, and the role of the trade union movement.[5]

The relationship between the **employee,** the employer, and the **trade union** as regards (1), (2), (3), and (5) is depicted in Figure 1.1:

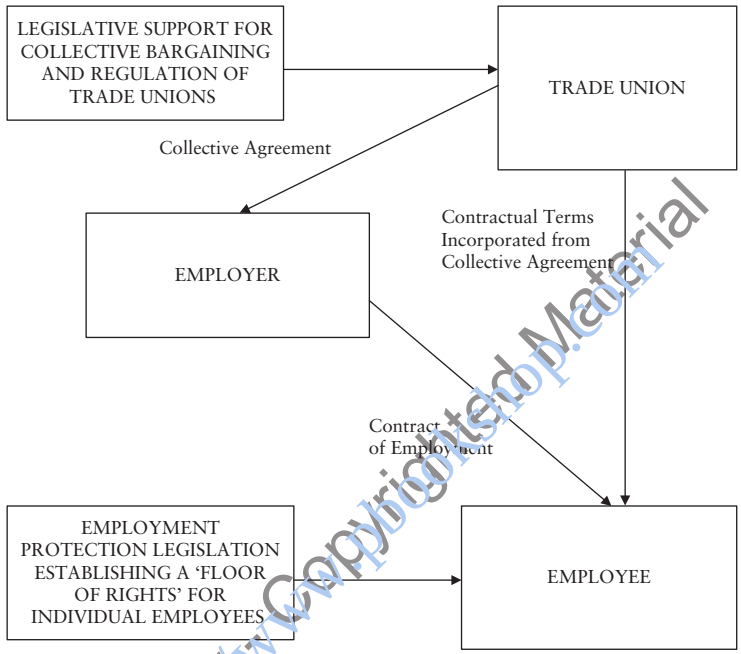

Figure 1.1 *Relationship between employee, employer, and trade unions*

This book is divided into eight parts and covers each of the five principal areas outlined in the extract at various points. In this first part, we set out the structure of the book and the sources and institutions of labour law. Part II goes on to examine the employment relationship and the constitution, classification and identification of the employment contract and other personal work contracts. In Part III, we focus on the content, performance, structure, variation, and suspension of the common law employment contract. In Part IV, we take our first foray into the province of individual statutory employment rights. This involves consideration of the statutory regulation of the wage/work bargain and working time. Statutory measures that are intended to strike a balance between work and family life are also explored in Part IV. In Part V, our attention turns to a comprehensive and detailed analysis of employment equality law, including the statutory rules against discriminatory conduct in the workplace. Meanwhile, Part VI explores the common law and statutory controls on the employer's power of dismissal. Part VII concentrates on the measures designed to regulate **collective redundancies**, **reorganizations**, and **business transfers**, promote workplace representational participation and **consultation** and protect employees on the insolvency of their employers. Finally, Part VIII can be found on the Online Resource Centre and evaluates the area of collective labour law, including the law of trade unions and industrial action.

[5] Writer's annotations appear in square brackets throughout this chapter.

1.1.2 The running case study feature

One of the primary aims of this text is to communicate the subject of employment law in an accessible, engaging, relevant, and contextual manner. The text seeks to achieve this ambition through the use of a running case study feature which is centred on the business of an employer called 'Danny's Demolishers Ltd.' ('DD'). This running case study is encountered throughout the book via the medium of hypothetical scenarios. It is designed to illustrate key concepts, as well as to explain how certain rules of employment law operate in practice. As a subject, labour law lends itself to exploration and explanation from the perspective of the life-cycle of a company's business from incorporation through to expansion, growth and finally, liquidation. This is the trajectory which the employer, DD will follow.

We now turn to provide some basic information about DD. DD is a company incorporated in England and Wales by Danny Dandie and his brother Robin, with its registered office in Macclesfield, Cheshire. As the unimaginative title suggests, DD is a business engaged in the demolition and construction trade. From humble beginnings, consisting solely of Danny and Robin, the company grows into a regional powerhouse in Cheshire and the Northwest of England. After a period of time, DD moves into the Northeast of England and eventually becomes a national player. A long period of consolidation follows, whereupon, in the final chapter, the company takes the fateful decision to expand into Italy by acquiring a large Milanese demolition company called ZAB SpA. This international acquisition turns out to be a disaster. Unfortunately, DD enters into liquidation and is ultimately wound up in the final chapter.

As the various hypothetical scenarios in this book will demonstrate, DD undertakes the following activities throughout its life-cycle which are relevant to our understanding of employment law:

- hires employees, self-employed contractors, casual workers, immigrant workers, barristers, and agency workers;[6]
- enters into, and subsequently varies, contractual terms and conditions with its employees and **workers**, and provides them with access to its confidential information and intellectual property;[7]
- modifies the hours of work of its employees and provides accommodation, tips, and bonuses to some of its workers in lieu of pay;[8]
- allegedly treats some of its workers differently, depending on whether they are female or male, British or foreign nationals, disabled or able-bodied;[9]
- allegedly discriminates against its part-time and fixed-term staff;[10]
- dismisses individual members of staff, makes others redundant, and explores possible alternatives to redundancies where possible;[11]
- disposes parts of its business in Essex and Yorkshire to third party purchasers, outsources some of its support functions to third party contractors, and makes large numbers of its employees redundant;[12] and
- expands its field of business operations by acquiring an Italian demolition/construction company and ultimately enters into liquidation.[13]

[6] See Chapters 3 and 4. [7] See Chapters 5, 6, and 7.
[8] See Chapters 8 and 9. [9] See Chapters 10, 11, 12, and 14.
[10] See Chapter 13. The regulation of part-time work and fixed-term employment is addressed in Chapter 13 in the context of Part V of the book on the topic of equality law, rather than Chapter 4. The grounds for this decision are that (a) it was thought necessary first to introduce readers to the idea of comparators and comparison exercises, which are considered in Chapter 10, and (b) the majority of part-timers and fixed-termers are female and many of the cases on part-time and fixed-term work relate to sex discrimination.
[11] See Chapters 14, 15, 16, 17, and 18. [12] See Chapters 19 and 20.
[13] See Chapter 21.

It is recognized that the adoption of a running case study feature is not a traditional way of approaching legal study, teaching, and learning. Therefore, the hypothetical scenarios have been designed in a 'light-touch' manner so as not to distract you from an engagement with the legal issues and extracts explored in the text. The case study will work best if you put yourself in the place of the characters in the hypotheticals and ask yourself how you would respond to the issues raised. Sometimes you will find that your solution will differ from the legal position. This should prompt you to consider the justifications for the regulatory approach adopted by the law and whether the law is fit for purpose or requires a measure of re-assessment and reform.

1.2 INTRODUCTION TO KEY ISSUES AND THEMES IN EMPLOYMENT LAW

In this section, we pose some elementary questions about the subject of labour law. The first issue we address is whether labour law has a valid claim to be treated as a self-contained discipline and what distinguishes it from other branches of the law. We also explore the role of this area of law and the arguments in favour of the introduction and preservation of such laws. We will then move on to address a central area of controversy, which is whether such laws stifle or stimulate economic growth.

1.2.1 What is labour law, what are its distinguishing features and the justifications for its introduction and preservation as an independent discipline?

Approximately 30 million[14] out of 65 million people living in the UK are in employment. Most of those workers rely on their job as their main source of income. Employment takes up a significant part of the average worker's average day and week. A great deal of satisfaction is derived from work and an individual's occupation is also the principal means of marking out their social status. Work also provides a measure of predictability, routine, and structure to an individual's life. These facts have not escaped the judiciary:

■ ***Johnson v Unisys Ltd*** **[2003] 1 AC 518, 539B–C and 549C**

Lord Hoffmann:
…over the last 30 years or so…[i]t has been recognised that a person's employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self-esteem…

Lord Millett:
…It is generally recognised today that 'work is one of the defining features of people's lives'…[15]

In light of the central importance of employment to the lives of countless individuals, a fundamental preliminary question we must ask ourselves is whether there is in fact such a thing as employment 'law'. Taking into account the fact that the two principal sources of employment law are the common law and legislation, one would be forgiven for thinking that there is nothing special about the subject that sets it apart from other areas of law. However, there is powerful force in the argument that the role and objectives

[14] See Office for National Statistics, Labour Market Statistics, October 2013, available at http://www.ons.gov.uk/ons/dcp171778_327398.pdf (last visited 1 November 2013) at page 5.

[15] See also D. Brodie, 'Legal Coherence and the Employment Revolution' (2001) 117 *Law Quarterly Review* 604, 604–605.

of employment law are so distinct that its treatment as an autonomous field of study is wholly warranted.[16] For example, the judiciary have noted that the employment relationship differs from a commercial relationship and that the employment contract and law cannot be equated to commercial contracts and law:

Johnson v Unisys Ltd. [2003] 1 AC 518, 532F–549C

Lord Steyn:
It is no longer right to equate a contract of employment with commercial contracts. One possible way of describing a contract of employment in modern terms is as a relational contract…

Lord Hoffmann:
At common law the contract of employment was regarded by the courts as a contract like any other. The parties were free to negotiate whatever terms they liked and no terms would be implied unless they satisfied the strict test of necessity applied to a commercial contract. Freedom of contract meant that the stronger party, usually the employer, was free to impose his terms upon the weaker. But over the last 30 years or so, the nature of the contract of employment has been transformed…[and t]he law has changed to recognise this social reality…

Lord Millett:
…the common law does not stand still. It is in a state of continuous judicial development in order to reflect the changing perceptions of the community. Contracts of employment are no longer regarded as purely commercial contracts entered into between free and equal agents…

Autoclenz Ltd. v Belcher [2011] ICR 1157, 1168E–G

Lord Clarke:
…The critical difference between this type of case and the ordinary commercial dispute is identified by Aikens LJ in para 92 as follows:

'I respectfully agree with the view, emphasised by both Smith and Sedley LJJ, that the circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed. I accept that, frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which the other party has to accept.'

Further, since employment law is comprised of elements of contract, tort, constitutional, criminal, and commercial law, any claim in favour of its autonomy and independence as a field of enquiry must invoke its conceptual and normative coherence and distinctive intellectual tradition. In the following extract, Langille searches for labour law's 'constituting narrative':

B. Langille, 'Labour Law's Back Pages' in G. Davidov and B. Langille (eds), *Boundaries and Frontiers of Labour Law* (Oxford, Hart Publishing, 2006) 14–17

One way of approaching…labour law as a separate legal subject matter is to think along the following lines. If one examines the typical North American law school curriculum it is not hard to see that it reveals a basic structure based upon some very basic legal distinctions which can be

[16] See G. Davidov, 'Articulating the Idea of Labour Law: Why and How' (2012) 3 *European Labour Law Journal* 130.

easily mapped. We start with the familiar if controversial division between public law (state-citizen relationships) and private law (citizen-citizen relationships). Thus criminal law and constitutional law fall on the public side, and tort, contract and property on the private law side. And within private law we have other familiar distinctions–the law of property (what people own) and the law of obligations (what people owe each other). And within the law of obligations we have the distinction between obligations voluntarily assumed (contract) and those involuntarily imposed (tort). And so on. But there is another truth revealed in the stricture of the standard curriculum. This is that law school courses are considered to be suitable for singling out as separate subject matters because they have a coherence and severability from the rest of the law. This coherence is often in virtue of the rationality given to their subject matter not simply by the logic of the conceptual map just outlined, and upon which they can be located, but in virtue of the conceptual coherence, or basic grammar, of individual legal concepts themselves. So, the coherence of tort law, for example, is provided with the inner logic or rationality of the legal concept of tort itself. This is what makes tort law tort law, provides its internal organisational structure, and its distinctiveness from the rest of the law–something separate from contract, or unjust enrichment, or tax law for that matter. And the fundamental normative (that is, moral) underpinnings appropriate to tort (say, corrective justice) give it a claim to our resources, intellectual and otherwise. But it will be quickly observed that while this can be said of some of the law's categories it is not true of all. Many other topics in the law school curriculum–say family law and labour law, but also trade law and environmental law–do not have whatever coherence they have in virtue of a defining legal concept. Their claim to coherence must be and is based upon another mode of thinking, one which is at once also intuitively obvious but also more complex, difficult, and controversial. Rather than start with the law or a legal concept (as with tort or contract–or trusts, by way of another example) these other sorts of subject matters start with reality, ie by looking out of the window and seeing what goes on in the real world. Subjects like labour law take a dimension of human life such as work, or the family, or trade between nations, and then draw together all of the law which applies to that aspect of life. But while this may be a useful and necessary intellectual game to play it is also a dangerous one, for how is one to know whether one has carved up reality 'at the joint' as it were. How do we know we have a coherent and appropriate subject? We obtain it by simply looking at life without a guiding legal framework to tell us where to carve? On this approach one could (and some actually have) come up with [useless] categories such as 'swimming pool law'…The thinking is–here is a part of reality, swimming pools, and we should draw together all of the law which applies to them…and write a text, or offer a course, to satisfy our need to address all of these issues comprehensively. But there is the rub–what would it mean to address these issues 'comprehensively', that is beyond merely listing, comprehensively, other legal categories which may bear upon this aspect of reality? This is a good and difficult question…Comprehensiveness is not enough…When will it be the case that we have hit upon a useful category? What informs our judgement of 'usefulness'? It must be something more than comprehensiveness–it must be some notion of 'coherence'. But, as we have noted, coherence here cannot mean what it means in the case of tort or contract law…It must be a different idea of coherence, and I believe that our notion of coherence has two dimensions. First, it must be the case that there is something compelling, or deeply interesting, about this particular part of reality, something which makes it normatively salient and not simply another grain of sand on a very large empirical breach. It must be, in a word, important. Secondly, it must also be the case that when we carve reality at this point and address all the law applicable, the whole is greater than the sum of the parts. That is, it must be the case that in studying all of the various aspects of the law which bear upon, inform, structure this part of our lives, we see them as part of a larger structure. That is we see in each aspect of the law something which would be missed if we did not see them as connected to the other parts of a larger whole. In short, there must be a benefit to be obtained from an overview of all of the law which bears upon our chosen category in the form of insight which would be lost if we did not carve reality here and if we did not attempt to provide a surview or account of it as a whole. This is not to say that there is only one way to carve reality. Rather it is

to say, by way of an example, that while the contract of employment may usefully be seen as part of contract law, it is also usefully seen as a key part of labour law because something is gained when it is seen as a building block of this cross-cutting category, that is, when it is seen in the light of the other legal elements of the package of law regulating, say for now, work. To put it another way, there is a package here which needs to be seen and understood as a package. There is a positive way of putting this. In order to say that we have found an appropriate subject matter of the sort in which coherence is generated in this way, it must be true that we are able to construct a compelling story (or narrative), both conceptually and normatively, of all the law appropriate to this subject matter as a subject matter, that is, of what it is (and is not), why it is important, and therefore why we should worry about it. If such a constituting narrative is available and compelling then we have a viable subject matter–and not something to be relegated to the garbage can along with swimming pool law. Such a narrative provides the organising conceptual structure and framework for the field…as well as an account of its normative importance. When such narratives are successful, as labour law's has been, they are not so much what people have in mind when they think about the question 'what is labour law?' as the background condition that makes that question possible. It tells us that there is such a subject which one can worry about. So, such frameworks are often implicit and unarticulated, but are understood and deployed by every well-educated labour lawyer–in the most mundane of activities (answering questions such as 'should I read this case?', 'is it of relevance to my field?') to the construction of the most complicated legal arguments…Yet, while able to deploy these arguments and operate intelligently within the field of labour law, many labour lawyers may not be able to spell out the narrative with which they are so intimately familiar. This is because what the narrative makes available is basic–it is what competent labour lawyers do not have to worry about.

As for the basic question posed by Langille in this extract: 'what is labour law', the answer is inextricably bound up with the various rationales in favour of regulatory interference into the central institution which is the target of regulation by employment law: the **contract of employment**. A number of justifications have been, and are, cited in favour of legal intervention in the field of employment. The traditional approach was to stress the role of labour laws in correcting *the imbalance in bargaining power inherent within the employment relationship*. As such, the mission of labour law was to override the **freedom of contract doctrine** to some extent by protecting **employees** and **workers** on the ground that they suffer from an inequality of power in the contractual bargaining process:

■ **S. and B. Webb, *Industrial Democracy* (London, Longmans, Green, 1920), 217**

Whenever the economic conditions of the parties are unequal, legal freedom of contract merely enables the superior in strategic strength to dictate the terms.

■ **M. Weber, *Economy and Society: An Outline of Interpretive Sociology* edited by G. Roth and C. Wittich (New York, Bedminster Press, 1968), 729**

[the right of a prospective employee to decide the basis and terms of his contract does not] represent the slightest freedom in the determination of his own conditions of work and it does not guarantee him any influence in the process.

The common law is underpinned by a belief in the equality of legal persons, i.e. that all are equal before the law. However, in the context of labour relations, adopting a form of

myopia to the inevitable divergences in the power of management and labour is not necessarily a desirable approach. Although freedom of contract is a sacred doctrine which lies at the foundation of the liberal philosophy underpinning the common law, there has been a realization on the part of Parliament that liberty and neutrality can only be meaningfully preserved if steps are taken to redress the bargaining inequalities inherent within the employment contract. Whilst the common law by and large clings to the idea of freedom of contract, legislation over the past 50 years has intruded into the employment relationship by nudging the power balance in a pro-employee direction:

■ **P. Davies and M. Freedland (eds), *Kahn-Freund's Labour and the Law* (London, Stevens, 1983) 14–18**

> The principal purpose of labour law, then, is to regulate, to support and to restrain the power of management and the power of organised labour…The individual employee or worker…has normally no social power, because it is only in the most exceptional cases that, as an individual, he has any bargaining power at all…Typically, the worker as an individual has to accept the conditions which the employer offers…[As such,] the relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that indispensable fiction of the legal mind known as the 'contract of employment'. The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship. Most of what we call [employment protection] legislation…is an attempt to infuse law into this relation of command and subordination…There can be no employment relationship without the power to command and a duty to obey, that is without this element of subordination in which lawyers rightly see the hallmark of the 'contract of employment'. However, the power to command and the duty to obey can be regulated. An element of co-ordination can be infused into the employment relationship. Co-ordination and subordination are matters of degree, but however strong the element of co-ordination, a residuum of command power will and must remain. Thus, the 'when' and the 'where' of the work must on principle be decided by management, but the law may restrict the managerial power as to the time of work by prohibiting work at night…and as to the place by seeking to prevent overcrowding and other insalubrious conditions. More than that: the law may create a mechanism for the enforcement of such rules and it may protect the worker who relies on its operation. By doing so the law limits the range of the worker's duty of obedience and enlarges the range of his freedom. This, without any doubt, was the original and for many decades the primary function of labour law.[17]

Kahn-Freund makes the point that labour legislation has interfered in the employment relationship, e.g. to regulate terms and conditions of employment, furnish rules on the hiring and dismissal of employees, and regulate the basic work–wage bargain, i.e. the exchange of the worker's services in return for remuneration. However, the law has also been traditionally concerned with the provision of indirect 'auxiliary support'[18] for the one-time endemic social practice of **collective bargaining**. Prior to the 1980s, the prevailing industrial relations philosophy was **'collective laissez-faire'**,[19] also known as

[17] For an economic account of why labour laws are necessary in order to address inequalities of bargaining power, see B. E. Kaufman, 'Labor Law and Employment Regulation: Neoclassical and Institutional Perspectives' in K. Dau-Schmidt, S. D. Harris, and O. Lobel (eds), *Labor and Employment Law and Economics* (Cheltenham, UK, Edward Elgar, 2009) 1, 30–36.

[18] See A. Bogg, *The Democratic Aspects of Trade Union Recognition* (Oxford, Hart Publishing, 2009) 3.

[19] See O. Kahn-Freund, 'Legal Framework' in A. Flanders and H. Clegg, *The System of Industrial Relations in Great Britain* (Oxford, Basil Blackwell, 1954) 42, 53. The most powerful exposition of

'voluntarism'. This philosophy emphasized the desirability of collective bargaining[20] between an employer or employer's association[21] and an independent trade union recognized by the employer. The principal feature of that system was that trade unions (on behalf of their worker members) and employers or employers' associations would negotiate and conclude **collective agreements** which would include various provisions dealing directly with the protection and rights of employees, e.g. pay, working conditions, holidays, dismissal procedures, procedures applicable in the event of economic reorganizations, such as redundancies, redeployments, and variations in job requirements, etc. It was the collective social power which the forces of labour could muster by banding together in trade unions, backed up by the credible threat of industrial action through strikes, which routinely brought employers to the negotiating table and served to offset the inevitable weaknesses in the bargaining positions of individual employees. This approach was characterized by 'voluntarism', i.e. the absence of any state or legal compulsion on employers or trade unions to engage in collective bargaining, and the only statutory intervention in the field of employment was designed to support the collective laissez-faire industrial relations system.[22] These legal 'props' were adopted to reinforce this widespread social practice of collective bargaining.

However, in the contemporary context, the concern with the correction of inequalities in bargaining power via the prophylactic of labour laws or the social practice of collective bargaining has lost much of its force. Economists have attacked the notion that legal intervention is required to offset the unequal exchange of resources between the employee and the employer:

■ **H. Spector, 'Philosophical Foundations of Labour Law' (2006) 33 *Florida State University Law Review* 1119, 1133**

It might be thought that inequality of bargaining power can also prevent workers from obtaining fair contract terms, such as health and safety conditions or protection against wrongful discharge. The point would be that such terms could not be agreed on voluntarily by employers and employees because employers have greater bargaining power than employees. Unequal bargaining power could also warrant regulation of the employment contract. But, as Duncan Kennedy argues, 'even a monopolist has an interest in providing contract terms if buyers will pay him their cost, plus as much in profit as he can make for alternate uses of his capital'. Monopolists do not affect contract terms but adjust quantity and price. Accordingly, asymmetrical bargaining power does not prevent the free negotiation of any term or condition that the employee is prepared to pay for. Ian Ayres and Stewart Schwab extend this thesis to the labor monopsonist: '[I]n a well functioning employment market, employers will provide all benefits and protections that employees are willing to pay for.' Therefore, the argument of unequal bargaining power cannot justify nonprice compulsory terms in employment contracts. While monopsony-related considerations can justify wage regulations, they are irrelevant for justifying regulation of employment contract terms.

the virtues of collective bargaining is found in O. Kahn-Freund, 'Labour Law' in *Law and Opinion in England in the 20th Century* (London, Stevens, 1959).

[20] Collective bargaining can be divided into enterprise level collective bargaining which takes place between a trade union and an employer generally, plant level collective bargaining conducted between a trade union and an employer which is applicable at a particular site or sites only, or sectoral collective bargaining conducted between a trade union and employers or employers' associations which would govern the workplace conditions of all employees falling within a particular industry sector (e.g. the aviation industry) throughout the UK.

[21] Such as the Confederation of British Industry ('CBI').

[22] See A. Flanders, 'The Tradition of Voluntarism' (1974) 12 *British Journal of Industrial Relations* 352.

Another powerful critique of the 'inequality of bargaining power' justification for labour law centres on its lack of normative precision. For example, consumers suffer from unequal bargaining power in the contracting process, but by no means can we say that consumer law is best viewed as a subset of labour law. Therefore, we find that the premise of the correction of imbalances in bargaining strength between the worker and the employer has given way to:

(1) *the regulation of labour market failures and the achievement of efficient labour markets*; and

(2) the *realization of social justice through the repulsion of the 'economic logic of the commodification of labour'*,[23]

as the principal justifications in favour of employment protection laws. Justification (1) links labour law closely to the functioning of the labour market and anchors it firmly within a market-driven ideology, whereas justification (2) clings more faithfully to the traditional social objectives of labour law, i.e. the redistribution of wealth, resources, and power away from the employer (i.e. management and shareholders) to the employee as a form of social equality.[24] Consider the following extract:

H. Collins, 'Theories of Rights as Justifications' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (Oxford, OUP, 2011) 137

An investigation of the idea of labour law calls for a theory. Such a theory must address the moral, political, and legal force of labour law. Ideally, the theory should justify the existence and weight of such typical rules and principles of labour law as minimum wages, safety regulations, maximum hours of work, the outlawing of discrimination against particular groups, and the recognition of a trade union for the purposes of collective bargaining. Given the general commitment in liberal societies to respect for freedom of the individual and a free market, labour law requires a theory of why such mandatory constraints should exist. There is no shortage of theories of this kind. Historically, it is possible to detect two predominant strands of justification. One strand appeals to efficiency or welfare considerations, in order to justify rules that address market failures caused by transaction costs and asymmetric information, problems arising in the governance of contracts of employment such as coercion and opportunism, and more generally the desirability of promoting productive efficiency and competitiveness through a well-coordinated and flexible division of labour. From this perspective, labour law addresses the idiosyncratic problems that arise in relation to contracts of employment through a mixture of special contract law and market regulation. The other predominant strand of justification for labour law appeals to considerations of a fair distribution of wealth, power, and other goods in a society. On this view, the principal aim of labour law is to steer towards a particular conception of social justice, such as a more egalitarian society, and the norms of labour law are required primarily for the instrumental purpose of securing that goal. This second strand of justification tends to support the practice of collective bargaining and the imposition of basic labour standards such as a minimum wage, because these interventions in the labour market are calculated to improve the position of poorer and weaker members of the society. In diverse combinations and variations, most labour lawyers have either explicitly or implicitly traditionally relied on these two kinds of competing and to some extent antagonistic justifications–efficiency and social justice–to explain the normative foundations of labour law.[25]

[23] See H. Collins, *Employment Law*, 2nd edition (Oxford, OUP, 2010) 5.

[24] See S. R. Bagenstos, 'Employment Law and Social Equality' (2013) 112 *Michigan Law Review* 225.

[25] See also H. Collins, 'Justifications and Techniques of Legal Regulation of the Employment Relation', in H. Collins, P. Davies, and R. Rideout (eds), *Legal Regulation of the Employment Relation* (London,

This change in emphasis in the currency of the competing justifications for employment laws has coincided with vast changes in the UK labour market over the past 30 to 40 years. This period witnessed a sea-change in the organization of work,[26] the industrial relations landscape, and the industrial base of the UK economy, in particular:

(1) the change in the UK from a manufacturing-based economy to a service-based economy; together with

(2) the transformative effects of globalization;

(3) the adjustments to the labour market wrought by the increasing pace of technological change and the development of new flexible modes of production;[27] and

(4) the rapid process of **deunionization**,[28] i.e. the decline in trade union membership from 13.2 million members in 1979 to just under 7.2 million members in 2012/13.[29]

A major consequence of this reduction in trade union membership has been the demise of the voluntarist industrial relations system of 'collective laissez-faire' described earlier, accompanied by a rapid diminution in the percentage of workers in the UK that are covered by collective agreements:[30] a process that is referred to as **decollectivization**. The European Union and successive UK Governments have adjusted to these processes of deunionization and decollectivization by increasing the number and variety of statutory employment rights afforded to workers and employees in an individual capacity: phenomena often referred to as 'juridification' and 'individualization'. The knock-on effect of this transformation in the economic and industrial relations landscape has been the emergence of new modes of conceptual thinking:

■ **J. Fudge, 'Labour as a 'Fictive Commodity'' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (Oxford, OUP, 2011), 124**

From a labour lawyer's perspective, the most important shift in the discipline has been away from collective bargaining towards individualization, whether in the form of the contract of

Kluwer, 2000) 4 and 26; B. Hepple, 'Factors Influencing the Making of Labour Law' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (Oxford, OUP, 2011) 32–34; B. Hepple, *Labour Laws and Global Trade*, (Oxford, Hart Publishing, 2005) 262; and S. Deakin and F. Wilkinson, 'Labour Law and Economic Theory: A Reappraisal' in H. Collins, P. Davies, and R. Rideout (eds), *Legal Regulation of the Employment Relation* (London, Kluwer, 2000) 42–47.

[26] See M. Weiss, 'Re-Inventing Labour Law?' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (Oxford, OUP, 2011) 45–46.

[27] For example, outsourcing, franchising, teleworking, sub-contracting, etc., on which, see H. Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10 *Oxford Journal of Legal Studies* 353.

[28] On the decline in trade union membership in the UK and internationally, see A. Charlwood, 'The New Generation of Trade Union Leaders and Prospects for Union Revitalisation' (2004) 42 *British Journal of Industrial Relations* 379; D. Blanchflower, 'International Patterns of Union Membership' (2007) 45 *British Journal of Industrial Relations* 1; and J. T. Addison, A. Bryson, P. Teixeira, and A. Pahnke, 'Slip Sliding Away: Further Union Decline in Germany and Britain' (2011) 58 *Scottish Journal of Political Economy* 490.

[29] See the 2012/13 annual report of the Certification Officer at page 24, available at http://www.certoffice.org/CertificationOfficer/files/28/28ce62b6-fdcc-407d-bd31-891995998af2.pdf (last visited 1 November 2013) and N. Brownlie, 'Trade Union Membership 2011' (London, Department for Business, Innovation and Skills, 2012) at page 9, available at http://www.bis.gov.uk/assets/BISCore/employment-matters/docs/T/12-p77-trade-union-membership-2011.pdf (last visited 1 November 2013).

[30] See pages 19–20 and 36 of 'First Findings from the 2004 Workplace Employment Relations Survey 2004', available at http://www.berr.gov.uk/files/file11423.pdf (last visited 1 November 2013) and William Brown, 'The Contraction of Collective Bargaining in Britain' (1993) 31(2) *British Journal of Industrial Relations* 189.

employment, human rights and anti-discrimination law, or employment standards... In official accounts of labour law, redistribution and protection have given way to competition and flexibility. Forms of work outside of the standard employment relationship have proliferated and the scope of collective bargaining has contracted in most developed economies. These empirical changes have resulted in a conceptual and normative crisis in labour law, and a concomitant loss of prestige. Labour law's crisis both reflects and is part of a broader conceptual and normative shift within society and the academy. In economics, the neo-classical vision of Friedrich Von Hayek and Milton Friedman eclipsed the institutional approach of John Maynard Keynes and John Kenneth Galbraith, and social democracy was dislodged by neo-liberalism and the third way in politics. In the academy, work and class gave way to identity and social movements in sociology, and in political science and political theory recognition and identity trumped redistribution as the prevailing normative discourse. The predominant normative concern shifted away from redistribution from capital to labour to promoting horizontal equity within the workforce. At the same time, vertical inequality increased to levels not seen since before the Second World War in the dominant developed countries.

Labour laws grounded in one, some, or all, of the justifications for interference in the employment relationship, i.e.

(a) *the correction of imbalances in bargaining power inherent within the employment relationship*;

(b) *the regulation of labour market failures and the achievement of efficient labour markets*; and

(c) the *realization of social justice through the repression of the 'economic logic of the commodification of labour'*,

operate in a manner which interferes in the bureaucratic power of the employer—referred to as the '**managerial prerogative**'[31]—in two ways:

First, labour laws secure a measure of *procedural* and *substantive* justice in favour of employees, i.e. they confer a series of *procedural* and *substantive* rights:

■ **B. Langille, 'Labour Law's Back Pages' in G. Davidov and B. Langille (eds), *Boundaries and Frontiers of Labour Law* (Oxford, Hart Publishing, 2006) 20**

[Labour] law protects those in need of protection in the market place. The first mode of intervention is procedural. If the problem is that we are not securing justice for employees through this contractual bargaining relationship, because of inequality of bargaining power on the part of employees, then we must simply adopt the procedural device of turning up the bargaining power on the side of the employee. Our primary mechanism for achieving this is through the device of collective bargaining. Here we permit workers to secure whatever additional substantive rights and benefits they can in the contracting process by making available to them whatever increases in bargaining power will accrue through collective representation by [trade] unions…The accepted wisdom is that collective bargaining is entirely procedural in the sense that the substance of the bargain to be is still left open to the parties to determine through the exercise of their now restructured bargaining power relationship. The employer's freedom *to* contract with whom it wishes is taken away, and it is compelled to bargain with the collective representative. But the employer's freedom *of* contract is maintained…But labour law consists in more than simply procedural

[31] H. Collins, 'Market Power, Bureaucratic Power, and the Contract of Employment' (1986) 15 *Industrial Law Journal* 1. See Chapter 5, section 5.1.1.

> intervention through collective bargaining. There is a second response to our problem of securing justice in employment relationships. This second response is substantive in nature. The logic here is as follows. If our problem is that we will not secure justice in employment relationships because these relationships are analysed in contractual terms, and employees suffer from inequality of bargaining power in the negotiation of such contracts, then we should simply rewrite the resulting bargain. This we do via human rights codes, employment [protection] legislation, occupational health and safety regulation, and so on.

Whilst labour laws offer such procedural and substantive protection, the tendency is for legal rules to take the latter form, rather than the former.

Secondly, labour laws consist of commands directed to adjudicators to examine the decisions and actions of employers, which, absent the same, would otherwise be subject to the employer's untrammelled managerial prerogative. These commands enjoin courts and tribunals to evaluate managerial behaviour according to precisely drawn *rules* or more open-textured *standards of review*, e.g. notions of 'reasonableness', 'rationality', or 'proportionality'. These *rules* and *standards of review* signal the law's expectations about acceptable managerial conduct in a particular context, e.g. recruitment and selection, suspension, variation of contractual terms, dismissal, redundancy, general treatment of employees, etc., and will be articulated at a particular intensity which will vary according to the context. As such, these rules and standards of review represent the evaluative criteria against which the actions of employers are judged.[32]

The earlier discussion about the goals of labour law and the rationales for its existence, leads us on neatly to consider a deeply contested issue. It is often questioned whether labour laws have a benign effect on economic efficiency and the property rights of employers, or whether they produce adverse economic consequences. The politically influential **neoliberal philosophy**[33] characterizes employment protection laws as a burden on business, impeding the efficient operation of the marketplace and generating negative effects on economic growth. This is reflected at a grass roots level, where we encounter a consistent tendency amongst businesses in the UK to perceive labour law regulation as burdensome.[34] These assumptions about employment law also lie behind the Government's current 'Employment Law Red Tape Challenge'.[35] This is an initiative intended to consult business about the necessity and appropriateness of existing labour regulations and ways in which they could be simplified, better implemented, and enforced. However, there is an alternative narrative which classes employment laws as positive factors contributing to an increase in productive output. The various arguments are summarized in the following extract:

[32] See D. Cabrelli, 'Rules and Standards in the Workplace: A Perspective from the Field of Labour Law' (2011) 31 *Legal Studies* 21 and D. Cabrelli, 'The Hierarchy of Differing Behavioural Standards of Review in Labour Law' (2011) 40 *Industrial Law Journal* 146.

[33] See F. A. Hayek, *The Constitution of Liberty* (London and New York, Routledge Classics, 2006) and R. Plant, *The Neo-liberal State* (Oxford, OUP, 2010).

[34] See E. Jordan, A. P. Thomas, J. W. Kitching, and R. A. Blackburn (March, 2013), *Employer Perceptions and the Impact of Employment Regulation*, report for Department for Business, Innovation and Skills, Employment Relations Research Series 123 at page 37, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/128792/13-638-employer-perceptions-and-the-impact-of-employment-regulation.pdf (last visited 1 November 2013); F. Peck, G. Mulvey, K. Jackson, and J. Jackson (May, 2012) *Business Perceptions of Regulatory Burden*, report for Department for Business, Innovation and Skills at pages 57–59, available at http://www.bis.gov.uk/assets/biscore/better-regulation/docs/b/12-913-business-perceptions-of-regulatory-burden.pdf (last visited 1 November 2013); and J. Purcell, 'Management and Employment Rights' in L. Dickens (ed.), *Making Employment Rights Effective* (Oxford, Hart Publishing, 2012), 159–160.

[35] See http://www.redtapechallenge.cabinetoffice.gov.uk/themehome/employment-related-law/ (last visited 1 November 2013).

S. Deakin, 'The Contribution of Labour Law to Economic and Human Development' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (Oxford, OUP, 2011) 156–161

For the past two decades the debate over law and development has been dominated by the view, generally referred to as the 'Washington consensus', that countries should adapt their institutions to a global template based on constitutional guarantees for private property, a minimalist state, and the liberalization of trade and capital flows. In the context of labour law, the Washington consensus proceeded on the basis that 'laws created to protect workers often hurt them'. This approach was used in numerous countries to resist calls for the extension of labour laws and to initiate programmes of deregulation…Within contemporary social and economic theory three distinct positions on the role of labour law with relation to labour markets can be identified, which may be characterized respectively as *neoclassical*, *new-institutional*, and *systemic*…The neoclassical view sees labour law regulation as an external intervention in, or interference with, the market. As such, it is liable to distort the operation of supply and demand. The result will be to reduce economic growth in various ways. This is the standard neoclassical view of, for example, minimum wage regulation…The basic claim of the neoclassical approach is that autonomous decision-making by individual agents (workers and employers) can lead to an outcome which is in the interests of society as a whole. Regulation is seen as the expression of sectional, collective interests. Labour laws enacted with a redistributive end in mind can be seen as involving a trade-off between equity and efficiency. Thus countries which maintain extensive labour law regulations are effectively making a choice which implies lower growth and reduced development, in favour of certain social goals such as a more egalitarian income distribution. The view that labour regulation has a *market-limiting* function is not confined to neoclassical economics. Non-economic justifications for labour law which view protective legislation as 'decommodifying' labour relations take a similar position but, more or less explicitly, view the trade-off between efficiency and equity which this involves in a different, more positive light…Neoclassical models…are based on the assumption that, in general, markets tend to self-adjust. Thus, in the absence of labour law regulation, the labour market is in equilibrium. This position is challenged by new-institutionalist perspectives which view unregulated labour markets as affected by imperfections of various kinds, including transaction costs, information asymmetries and externalities. The presence of imperfections can give rise to an efficiency-based case for intervention…[and the new institutionalist economic approach emphasises] the 'market-correcting' role of labour law; that is, its use as a mechanism for correcting the effects of market failures…The basic claim of new institutionalist approaches is that autonomous decision-making by economic agents may lead to societally beneficial outcomes, but only under certain conditions, and that regulation may be needed to bring these outcomes about or to adjust for their absence. To the extent that markets are not perfectly competitive, relevant information concerning prices and quality is not costlessly available, and the factors of production are not completely mobile, there is scope for intervention on efficiency grounds. The suggestion that labour law regulations act upon markets which are already at the equilibrium point is seen as implausible. To this extent, new institutionalist perspectives offer a refutation of neoclassical arguments for deregulation…New institutionalist approaches use abstract economic-theoretical insights to generate a potential case for the efficiency-enhancing effects of labour law rules in a relatively narrow range of contexts.

These differing accounts of the relative efficiency of labour laws are a rich source of debate amongst economists.[36] For example, economists adhering to the neoclassical

[36] See S. Deakin, 'The Law and Economics of Employment Protection Legislation' in C. Estlund and M. Wachter (eds), *Research Handbook on the Economics of Labor and Employment Law* (Cheltenham, UK, Edward Elgar, 2012) 330.

account favour deregulatory agendas and emphasize the sclerotic effect of labour laws on a country's economic development. They also reject the argument that labour regulation is necessary in order to remedy labour market failures. Meanwhile, new institutionalist economists ('NEIs')[37] advocate the line that labour laws must be introduced and maintained to offset the inevitable failures in the capitalist market system, i.e. to correct market failures. Their approach points to the adverse effects of unregulated capitalism on third parties such as the forces of labour—referred to as 'externalities' in the economic literature—and the inequalities between employer and employee in the level and sophistication of knowledge and information—known as 'information asymmetries' by economists.[38] The more advantageous position enjoyed by employers in the contracting process as a result of their greater bargaining power, operates to convince NEIs of the merits of labour regulation to achieve a more equitable balance between the interests of capital and labour.

This highly topical debate between neoclassical and NEI economists about the consequences of labour laws also links in with another influential theory. This is a theory which postulates that the legal origins of a jurisdiction's legal system are also determinative of the regulatory style and rigidity of its labour laws. This account is referred to as the 'legal origins' hypothesis. It predicts that legal systems grounded in the common law tradition will tend to support labour markets and will have lower levels of employment protection, with higher labour force participation and lower unemployment. This can be contrasted with Civilian systems which the legal origins hypothesis asserts are characterized by higher labour market rigidities, with a tendency to control and restrain labour markets. As such, the theory claims that the economic performance and labour markets of common law jurisdictions such as the UK and US are more efficient than those with Civilian foundations. Evidence for the 'legal origins' theory was demonstrated in the labour regulation index produced by Botero et al, which coded the labour laws of 85 developed and developing countries:

■ **J. C. Botero, S. Djankov, R. La Porta, F. Lopez-De-Silanes, and A. Shleifer, 'The Regulation of Labor' (2004) 119 *The Quarterly Journal of Economics* 1339, 1378–1380**

There are three broad theories of government regulation of labor. Efficiency theories hold that regulations adjust to efficiently address the problems of market failure. Political theories contend that regulations are used by political leaders to benefit themselves and their allies. Legal theories hold that the patterns of regulation are shaped by each country's legal tradition, which is to a significant extent determined by transplantation of a few legal systems. We examined the regulation of labor markets in 85 countries through the lens of these theories. As we indicated, the efficiency theory is difficult to reject, but we do not find much support for conventional versions. In particular, we find that heavier regulation of labor has adverse consequences for labor force participation and unemployment, especially of the young. There is some support for the view that countries with a longer

[37] See R. Richter, 'The New Institutionalist Economics: Its Start, Its Meaning, its Prospects' (2005) 6 *European Business Organization Law Review* 161.

[38] For exhaustive accounts of the market failures which are addressed by labour laws, see A. Hyde, 'What is Labour Law?' in G. Davidov and B. Langille (eds), *Boundaries and Frontiers of Labour Law* (Oxford, Hart Publishing, 2006) 54–58; B. E. Kaufman, 'Labor Law and Employment Regulation: Neoclassical and Institutional Perspectives' in K. Dau-Schmidt, S. D. Harris, and O. Lobel (eds), *Labor and Employment Law and Economics* (Cheltenham, UK, Edward Elgar, 2009) 1, 14–17; S. Deakin and F. Wilkinson, 'Labour Law and Economic Theory: A Reappraisal' in H. Collins, P. Davies, and R. Rideout, *Legal Regulation of the Employment Relation* (London, Kluwer Law International, 2000) 29; and H. Collins, 'Justifications and Techniques of Legal Regulation of the Employment Relation', in H. Collins, P. Davies, and R. Rideout (eds), *Legal Regulation of the Employment Relation* (London, Kluwer, 2000) 1.

> history of leftist governments have more extensive regulation of labor, consistent with the political theory. There is, finally, strong evidence that the origin of a country's laws is an important determinant of its regulatory approach, in labor as well as in other markets. Moreover, legal origin does not appear to be a proxy for social democracy—its explanatory power is both independent and significantly larger. This evidence is broadly consistent with the legal theory, according to which patterns of regulation across countries are shaped largely by transplanted legal structures…[Therefore,] the main factor explaining labor laws in our data is legal origin…The bottom line of this research is the centrality of institutional transplantation: countries have regulatory styles that are pervasive across activities and shaped by the origin of their laws.[39]

The index compiled by Botero et al is perhaps the least influential of those constructed. The Organisation for Economic Co-operation and Development has also produced an index which assesses the strictness of employment protection legislation in each of its 30 Member countries.[40] Meanwhile, the World Bank's *Doing Business* report,[41] which codes countries for the rigidity of their employment laws, is by far the most widely recognized. Each of these indices share in common two implicit assumptions about the effects of labour laws. First, that employment protection legislation is necessarily a burden on business insofar as it impedes the flexibility of labour markets and enables the labour force to extract anti-competitive rents. Secondly, that the legal origins of a country determine the efficiency of its labour laws. These assumptions are being challenged by some law and economics scholars, who have questioned the methodological approaches adopted by Botero et al.[42] This debate is significant for the UK since the international statistics demonstrate that UK labour laws are some of the most flexible in the world.[43] Of course, this chimes with the 'legal origins' theory, but acts as a counter-narrative to that promoted by Government and British industry, namely that UK employment laws are too rigid, technical, and detailed and exert negative effects on the ability of British firms to compete internationally.

Reflection points

1. See the articles by H. Collins, 'The Productive Disintegration of Labour Laws' (1997) 26 *Industrial Law Journal* 295, and A. Aviles, 'The 'Externalisation' of Labour Law' (2009) 148 *International Labour Review* 47, which chart the fragmentation of labour laws. In light of the discussion in this chapter, do you believe that there are convincing reasons to distinguish labour law from private law and public law and to treat it is an independent field of enquiry? Give reasons for your answer.
2. In light of prevailing attitudes amongst employers that employment regulation is burdensome and a barrier to business, are you convinced by the justifications in favour of the introduction and maintenance of labour laws? If not, why not? If so, why?

[39] See also S. Deakin, P. Lele, and M. Siems, 'The Evolution of Labour Law: Calibrating and Comparing Regulatory Regimes (2007) 146 *International Labour Review* 133 and J. Armour, S. Deakin, P. Lele, and M. Siems, 'How Do Legal Rules Evolve? Evidence from a Cross-Country Comparison of Shareholder, Creditor and Worker Protection, (2009) 57 *American Journal of Comparative Law* 579.

[40] See http://www.oecd.org/employment/emp/oecdindicatorsofemploymentprotection.htm (last visited 1 November 2013).

[41] See http://www.doingbusiness.org/data/exploretopics/employing-workers (last visited 1 November 2013).

[42] See S. Deakin, 'Legal Origin, Juridical Form and Industrialization In Historical Perspective: The Case of the Employment Contract and the Joint-Stock Company' (2009) 7 *The Socio-Economic Review* 35.

[43] See http://www.oecd.org/employment/emp/oecdindicatorsofemploymentprotection.htm (last visited 1 November 2013).

3. See P. Skedinger, *Employment Protection Legislation: Evolution, Effects, Winners and Losers* (Cheltenham, UK, Edward Elgar, 2010). Do you subscribe to the view that labour laws are inefficient and serve to suppress economic growth? Give reasons for your answer.

Additional reading on the objectives of labour law, its distinguishing features, and the justifications for its introduction and preservation

1. A. Flanders, 'The Tradition of Voluntarism' (1974) 12 *British Journal of Industrial Relations* 352.
2. P. Davies and M. Freedland (eds), *Kahn-Freund's Labour and the Law* (London, Stevens, 1983), chapter 1.
3. H. Collins, 'The Productive Disintegration of Labour Laws' (1997) 26 *Industrial Law Journal* 295.
4. H. Collins, 'Justifications and Techniques of Legal Regulation of the Employment Relation', in H. Collins, P. Davies, and R. Rideout (eds), *Legal Regulation of the Employment Relation* (London, Kluwer, 2000) 1.
5. S. Deakin and F. Wilkinson, 'Labour Law and Economic Theory: A Reappraisal' in H. Collins, P. Davies, and R. Rideout (eds), *Legal Regulation of the Employment Relation* (London, Kluwer, 2000) 29.
6. D. Brodie, 'Legal Coherence and the Employment Revolution' (2001) 117 *Law Quarterly Review* 604.
7. J. Addison and P. Teixeira, 'The Economics of Employment Protection' (2003) 24 *Journal of Labor Research* 85.
8. J. C. Botero, S. Djankov, R. La Porta, F. Lopez-De-Silanes, and A. Shleifer, 'The Regulation of Labor' (2004) 119 *The Quarterly Journal of Economics* 1339.
9. B. Hepple, *Labour Laws and Global Trade*, (Oxford, Hart Publishing, 2005) 262.
10. B. Langille, 'Labour Law's Back Pages' in G. Davidov and B. Langille (eds), *Boundaries and Frontiers of Labour Law* (Oxford, Hart Publishing, 2006) 13.
11. A. Hyde, 'What is Labour Law?' in G. Davidov and B. Langille (eds), *Boundaries and Frontiers of Labour Law* (Oxford, Hart Publishing, 2006) 37.
12. H. Spector, 'Philosophical Foundations of Labour Law' (2006) 33 *Florida State University Law Review* 1119.
13. S. Deakin, P. Lele and M. Siems, 'The Evolution of Labour Law: Calibrating and Comparing Regulatory Regimes' (2007) 146 *International Labour Review* 133.
14. J. Armour, S. Deakin, P. Lele, and M. Siems, 'How Do Legal Rules Evolve? Evidence from a Cross-Country Comparison of Shareholder, Creditor and Worker Protection' (2009) 57 *American Journal of Comparative Law* 579.
15. A. Aviles, 'The 'Externalisation' of Labour Law' (2009) 148 *International Labour Review* 47.
16. S. Deakin, 'Legal Origin, Juridical Form and Industrialization in Historical Perspective: The Case of the Employment Contract and the Joint-Stock Company' (2009) 7 *The Socio-Economic Review* 35.
17. B. E. Kaufman, 'Labor law and employment regulation: neoclassical and institutional perspectives' in K. Dau-Schmidt, S. D. Harris, and O. Lobel (eds), *Labor and Employment Law and Economics* (Cheltenham, UK, Edward Elgar, 2009) 1.

18. S. Deakin, 'The law and economics of employment protection legislation' in C. Estlund and M. Wachter, (eds), *Research Handbook on the Economics of Labor and Employment Law* (Cheltenham, UK, Edward Elgar, 2009) 330.
19. H. Collins, *Employment Law*, 2nd edition (Oxford, OUP, 2010) chapter 1.
20. P. Skedinger, *Employment Protection Legislation: Evolution, Effects, Winners and Losers* (Cheltenham, UK, Edward Elgar, 2010).
21. B. Veneziani, 'The Evolution of the Contract of Employment' in B. Hepple (ed.), *The Making of Labour Law in Europe* (Oxford, Hart Publishing, 2010) 31.
22. B. Hepple, 'Factors Influencing the Making of Labour Law' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (Oxford, OUP, 2011) 30.
23. M. Weiss, 'Re-Inventing Labour Law?' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (Oxford, OUP, 2011) 43.
24. H. Collins, 'Theories of Rights as Justifications' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (Oxford, OUP, 2011) 137.
25. S. Deakin, 'The Contribution of Labour Law to Economic and Human Development' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (Oxford, OUP, 2011) 156.
26. D. Cabrelli, 'Rules and Standards in the Workplace: A Perspective from the Field of Labour Law' (2011) 31 *Legal Studies* 21.
27. D. Cabrelli, 'The Hierarchy of Differing Behavioural Standards of Review in Labour Law' (2011) 40 *Industrial Law Journal* 146.
28. S. R. Bagenstos, 'Employment Law and Social Equality' (2013) 112 *Michigan Law Review* 225.