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Hugo Sinzheimer and the Constitutional Function of Labour Law

*Ruth Dukes**

A. Introduction

Inherent in any attempt to redefine labour law – as a tool for labour market regulation; as a means of 'regulating for competitiveness'; or, post financial crisis, as some as yet undefined, less market-centric alternative – is a rejection of old ways of thinking about the subject. Often the 'old', or 'traditional', ways are discussed in a shorthand form with reference to the 'inequalities of bargaining power' paradigm, or to state intervention to further employee-protective aims: fair terms and conditions, equality of treatment, some measure of wealth redistribution. Such shorthand referencing carries with it a danger that the old paradigms might be over-simplified or caricatured; that significant links might be undone, the constitutive blurred with the incidental; and that, as a result, the whole might be rejected too hastily.

My aim, in this chapter, is to return to the traditional conception of labour law as presented in the work of the Weimar scholar, Hugo Sinzheimer.[1] Through a close reading of Sinzheimer's prescriptions for the creation of an economic or labour constitution, I attempt to identify those elements which are capable of generalization: those elements which are true of the regulation of work relations in all types of capitalist economy. This exercise is motivated by a belief that while much of Sinzheimer's writing has become outdated, there is a generalizable core that is still valid today. To begin, as he did, with a recognition of the humanity of the worker, to move from that recognition to a concern with securing respect for human dignity and liberty in the context of working relations, cannot be dismissed as anachronistic without abandoning much wider aspirations to constitute free and equal societies. In line with the themes of the workshop, a second aim of the chapter is to consider how the generalizable elements of Sinzheimer's conception of

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[1] I build here on earlier work: R Dukes, 'Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund and the Role of Labour Law' (2008) 35 Journal of Law and Society 341; R Dukes, 'Otto Kahn-Freund and Collective Laissez-Faire: An Edifice Without a Keystone?' (2009) 72 MLR 220; and R Dukes, 'The Origins of the German System of Worker Representation' (2005) 19 Historical Studies in Industrial Relations 31.

labour law might be re-specified for current economic conditions. Though it is not possible within the confines of a short chapter to consider this second question fully, I attempt, at least, to provide an indication of the potential benefits and difficulties involved.

B. Sinzheimer's conception of the economic constitution

Hugo Sinzheimer (1875–1945) was a legal scholar and politician whose work had a direct and highly significant influence on the labour law and constitution of the Weimar Republic. Today, he is widely regarded as the founding father of German labour law.[2] In his academic writings, he developed several of the ideas which came to underpin labour legislation in Germany and beyond. In his role as a parliamentary representative, in 1919 and 1920, he was personally involved in drafting parts of the Weimar Constitution. Having failed in a bid to become the Minister of Labour of the new Republic in 1919, he worked as the Professor of Labour Law and the Sociology of Law at the Universiry of Frankfurt until 1933. As a Jew, he was stripped of his chair in that year and moved to the Netherlands, where he continued to work until 1940 at the Universities of Amsterdam and Leiden. Following the German invasion of Holland, he spent the remainder of the war in hiding, surviving only barely to die of exhaustion some weeks after VJ Day.

Given the lasting influence of Sinzheimer's work on German labour law, both during the Weimar Republic and in the decades since the Second World War, the greater part of his writing remains easily accessible to readers today. In order to understand it fully, of course, one must have reference to the period in which it was written – a time of enormous social, economic, and political upheaval. In particular, Sinzheimer's work on labour law is best read as an integral element of wider efforts to establish a new social democratic state following German defeat in the imperialist First World War, and the November Revolution that followed. It is imbued, even as late as the 1930s, with the sense of a search for a new type of justice; with a belief in the capaciry of the people to construct a better and fairer way of life.

The detail of Sinzheimer's writing, too, must be read with reference to the peculiarities of German industrial relations at the time. In the immediate aftermath of the war, for example, one of the questions which most occupied him was the 'question of the workers' councils'. By reason of the central role played by workers' and soldiers' councils in the revolution, they retained initially a great deal of political strength, such that it was unclear, for some years, whether the councils or the trade unions should assume the role of the principal representatives of workers within the new Republic. It remained unsettled, too, what the role of the workers' representatives should be. While calls were made from the left for the institution of a new form of democracy based on representation through councils,

[2] A biography describes him as such: K Kubo, *Hugo Sinzheimer – Vater des deutschen Arbeitsrechts* (CH Beck, 1985). For further biographical detail in English see O Kahn-Freund, 'Hugo Sinzheimer' in R Lewis and J Clark (eds), *Labour Law and Politics in the Weimar Republic* (Blackwell, 1981).

the belief elsewhere was that any significant political role for the councils and/or the unions should be excluded as inimical to parliamentary democracy. This was a matter on which Sinzheimer himself underwent a change of opinion as the years wore on. Having advocated the assumption of a limited political role by the workers' councils, he came to believe that they should function in the economic sphere only, in a capaciry subsidiary to the trade unions.[3] The latter view was given legislative support in the Works Councils Act of 1920 and came, with time, to form the basis for the German 'dual channel' system of worker representation still in place today.

For the most part, Sinzheimer's beliefs and proposals for the regulation of working relations remained constant over the years, so that it is possible, without too much disregard to detail, to present his work on labour law as a unified whole. The starting point for this work was the recognition of the worker as a human being – *die Arbeit ist also der Mensch selbst* – and the characterization of the working relationship as one of subordination. According to Sinzheimer, the source of the subordination of the worker lay with the employer's ownership of the means of production.[4] In order to live and work, the worker was absolutely reliant on the employer (on 'Properry'), 'since Properry contains the means of living and working'.[5] Having agreed to perform work in exchange for wages, the worker remained under the control of the employer whose 'right of command' was inherent in the ownership of capital.[6] In liberal democracies, this domination of the worker by 'Properry' was obscured by the notion of freedom of contract, which posited free agreements between legal persons, each the bearer of legal rights and legal capaciry. In social democracies, the subordination of the worker was recognized, and steps taken to make the worker truly free by imposing limits on the exercise of the social power inherent in private properry. This was the primary task of labour law: to free the worker and thereby to effect his transformation, in law, from legal person to human being.[7]

That said, it is important to emphasize that for Sinzheimer the role of labour law was not exhausted with fulfilment of the task of securing freedom for workers from abuses of employer power. It was not exhausted by rules directed at securing fair wages and working hours, and at providing social insurance against periods of sickness or unemployment.[8] Labour law was best understood more widely as a tool to be employed in the process of democratizing the economy. This process was central to the achievement of a truly democratic sociery. Without economic democracy, as a supplement to political democracy, the vast majoriry of the people remained unfree, subject to the control of a minoriry wielding economic power. Moreover, economic democracy, like political democracy, had two sides to it. Political democracy aimed not only at guaranteeing individual rights of freedom

[3] HA Winkler, *Von der Revolution zur Stabilisierung: Arbeiter und Arbeiterbewegung in der Weimarer Republik, 1918 bis 1924* (JHW Dietz, 1984) 236.
[4] See in particular 'Die Demokratisierung des Arbeitsverhältnisses' in H Sinzheimer, *Arbeitsrecht und Rechtssoziologie* (Europäische Verlagsanstalt, 1976).
[5] Ibid 117.
[6] Ibid.
[7] Ibid 124–5.
[8] Ibid 118–23.

vis-à-vis political power, but also at seizing political power from private hands and transferring it instead to a 'public community' (*öffentliches Gemeinwesen*), in which all citizens participated in the creation of a political common-will. The same went for economic democracy. On the one hand, it involved the emancipation of individuals *vis-à-vis* the bearers of economic power; and, on the other, it was directed at transferring such power from private persons to a 'community of the economy', in which all economic actors could participate in the creation of an economic common-will. In an economic democracy, workers should be *free from* employer efforts to dictate the social and economic conditions of their existence and, at the same time, *free to* participate in the formation of those conditions.

The means of achieving economic democracy lay with the institution of an economic constitution (or labour constitution) alongside the already existing political constitution. Just as the constitutionalization of state power had brought to citizens political equality and freedom from subordination at the hands of the state, so the constitutionalization of economic power would bring equality in the economic sphere, freeing workers from their subordination to the power of Property. Just as the political constitution allowed for political power to be wielded collectively through a parliament representative of all, so the economic constitution would allow for economic power to be wielded collectively through an economic community representative of all. Specifically, the economic constitution would involve the institution of an order based on the joint action of organizations representative of employers and workers. Through the creation of such an order, employers' and workers' organizations would work together, as equals, to govern the economy, regulating working relations and production. Matters which previously had fallen within the employer's sole prerogative would now be decided in community with labour;[9] and the exercise of labour power would be rendered conditional on the participation of the will of organized labour.[10]

The notion of autonomy and autonomous law was thus central to Sinzheimer's conception of constitutionalization. It was fundamental to the idea of economic democracy that *all* economic actors should be free to participate in regulation of the economy. Just as the state created law by means of legislation, so the 'autonomous class organizations' that existed within the economic sphere should be free to make law by reason of their 'spontaneous law-creating powers'.[11] Critically, however, the intention behind constitutionalization was not to afford the collective economic actors *absolute* freedom of action. Individual liberalism should not simply be replaced with collective liberalism (or as we might otherwise put it, collective *laissez-faire*!).[12] Because the economy was a matter of public concern, the ultimate goal of the constitution had to lie with furtherance of the general public interest. 'Collective liberalism', Sinzheimer noted, was informed by the same belief as

[9] H Sinzheimer, *Grundzüge des Arbeitsrechts*, 2nd edn (Verlag von Gustav Fischer, 1927) 207–13.
[10] H Sinzheimer, 'Die Reform des Schlichtungswesens' in Sinzheimer, above n 4.
[11] Kahn-Freund, above n 2, 80.
[12] 'Reform des Schlichtungswesens', above n 10, 243. The similarities, at a descriptive level, between Sinzheimer's depiction of 'kollektive Liberalismus' and Kahn-Freund's 'collective laissez-faire' are striking. See Dukes, 'Otto Kahn-Freund', above n 1.

individual liberalism, namely, that the public interest would best be served by the unmitigated emancipation of individuals. Where parties were free of every state obligation to reach agreement, the common interest would be furthered, as if automatically. State intervention in free collective bargaining could serve only to damage the community between labour and property.[13] According to Sinzheimer, experience had shown that this was not the case. A wholly free economy did not result in collective regulation by means of collective bargaining, but rather in the reassertion of employers' control through the 'free' negotiation of individual contracts of employment.[14] Where no means of defence were in place to protect the furtherance of the common interest, there was no guarantee that it would in fact be furthered.

It was vital, for this reason, that the state should assume the role of ultimate guarantor of the public interest.[15] The (social democratic) state's interest in the economy was not exhausted with the freeing of the collective economic actors. It had a direct interest in the social and economic conditions of existence of working people and, more widely, in the efficient functioning of the economy. It had an interest, too, in ensuring that economic decisions were not reached with reference solely to economic considerations: economic interests were not the only interests of the people, and the economy as life-sphere should not be isolated such that it functioned without reference to other life-spheres. In Sinzheimer's view, the terms of the economic constitution should allow for state intervention to further the various interests that it had in the economy. The state should be able, for example, to take and implement decisions where the 'economic community' was unable to do so; to intervene where industrial action threatened the public interest; and to protect individuals from harm at the hands of powerful economic actors. A balance had always to be struck, however, between the autonomy of the economic actors (fundamental to democracy), and state intervention in furtherance of the public interest. The state should not assume the task of regulating the economy, and collective actors should not be regarded as instruments of the state. Therein lay the path to totalitarianism.

C. The constitutional function of labour law

It is undoubtedly the case that the globalization of capital and the liberalization of markets have wrought significant changes on work and working relationships since the time when Sinzheimer lived and wrote. In the context of efforts to make sense of these changes and to consider the question of what labour law is, or ought to be, under conditions of globalization, I wish to argue that elements of his writing retain

[13] Ibid.
[14] 'Zur Frage der Reform des Schlichtungswesens' in Sinzheimer, above n 4.
[15] The role of the state is discussed at length in 'Zur Frage der Reform', above n 14; 'Reform des Schlichtungswesens', above n 10; H Sinzheimer, 'Eine Theorie des Sozialen Rechts' (1936) XVI Zeitschrift für öffentliches Recht 31.

their relevance and their utility. Specifically, I wish to argue for the continued usefulness of the idea of the constitutional function of labour law, echoing Sinzheimer's prescriptions for an economic constitution. As a first step, it might be helpful to clarify what Sinzheimer meant by the term 'constitution'; what I understand by it when used in application to labour relations. What is immediately clear is that Sinzheimer invoked the concept with reference to the role played by law in the regulation of labour relations, and not to signify that labour rights ought to be protected as fundamental within the Weimar Constitution.[16] Similarly, I refer to the 'constitutional function' rather than the 'constitutionalization' of labour law or labour rights, since my concern is not, or not exclusively, with the entrenchment of labour rights as fundamental rights.[17] Might this allow the objection to be raised, however, that by using the term 'constitution' other than in reference to the inclusion of labour rights within a bill of rights or similar text, we stretch its meaning to the point where it is merely metaphorical; synonymous with the legal recognition of worker rights?[18]

In order to explore this a little further, we might begin by considering a general definition of the term 'constitution', and the potential of that definition to fit with labour relations and labour law. Writing about the use of the concept 'constitution' in the context of globalization, 'beyond the nation state', Neil Walker provides a useful definition constructed around the characteristic functions of constitutions.[19] According to Walker, constitutions typically create or recognize a particular 'body politic', and provide an encompassing framework for and measure of the limits of that 'body politic'. They typically provide for the creation of norms and for the resolution of conflicts between norms, for example, by establishing a hierarchy among them. And they typically enjoy an entrenched status, a precedence over other system norms.

Sinzheimer's proposals for the democratization of the economy through the institution of an economic or labour constitution seem to me to fit rather well with this general definition. What was intended was that law ('state law', as he referred to it) should be used to institute, or recognize, a system of bi-partite regulation of the economy.[20] Law should be used to create or to recognize a system of workers' councils and bi-partite industrial councils, and to confirm the continued existence of the trade unions and employers' associations.[21] It should be used to endow these bodies with the capacity to legislate and to perform other administrative acts in regulation of the economy. And it should create the legal

[16] Though labour rights were in fact guaranteed within the terms of that constitution.

[17] Cf J Fudge, 'The New Discourse of Labour Rights: From Social to Fundamental Rights?' (2007) 29 Comparative Labour Law and Policy Journal 29; and J Fudge, 'Constitutionalizing Labour Rights in Europe' in T Campbell and K Ewing (eds), *Rescuing Human Rights*, forthcoming.

[18] H Arthurs, 'The Constitutionalization of Employment Relations: Multiple Models, Pernicious Problems' (2010) 19 Social & Legal Studies 403–22.

[19] N Walker, 'Beyond the Holistic Constitution', *School of Law Working Paper Series*, 2009/16 (SSRN, 2009).

[20] See, eg, H Sinzheimer, 'Das Rätesystem' and 'Rätebewegung und Gesellschaftsverfassung', both in Sinzheimer, above n 4.

[21] Art 165 Weimar Constitution.

framework within which regulation should proceed, assigning particular duties or spheres of influence to particular bodies, for example, and placing legal limits on the exercise of their powers. Whether issued in the form of legislation or provisions of the Constitution, the state law that fulfilled these functions should have the status of 'fundamental norms' – *Grundnormen*. The aim of the economic constitution was to allow for self-determination within the economic sphere *by virtue of state fundamental norms*.[22]

A similar analysis can be applied to the current German law regulating works councils, which bears the name 'works constitution law'. The Works Constitution Act can be understood to have a foundational quality, constituting actors ('works councils', 'electoral boards', 'economic committees', etc). It can be understood to provide an encompassing framework for those actors, endowing them with norm-creating and other powers, and establishing a hierarchy of norms, so that for example norms created collectively have precedence over individual contracts of employment, and collective agreements have precedence over works agreements. And the Act can even be understood to be entrenched, insofar as it takes precedence over autonomously created norms, and appears to enjoy a measure of permanency. (The Act has been in force, and amended only twice, substantially, since 1952.[23] While it would of course be possible, as a matter of law, to abolish or fundamentally amend it, politically this would be rather more difficult.)

It would seem, then, that in the context of German labour law the term 'constitution' is used not only metaphorically, but in a rather more literal sense. The question remains, however, whether the concept can meaningfully be applied to the role of labour law beyond Germany. What would it mean to apply it to a jurisdiction such as the UK, for example, where labour relations have never been governed by an encompassing legal framework similar to the Works Constitution Act;[24] where it was never attempted, in statute, to entrench certain norms, or to prioritize some above others? What did Sidney and Beatrice Webb have in mind when they described the legal recognition of collective bargaining and the gradual elaboration of a labour code as the concession of an industrial constitution to the working class?[25] What might it mean to talk about the constitutional function of labour law in application to the transnational sphere, beyond the nation state?

In my understanding, the Webbs meant something rather similar to Sinzheimer when they used the term constitution. Like him, they wished to refer to the role that law should play in emancipating workers and giving them control over their working lives. Just as the political constitution had served to limit the power of the king over his subjects, constituting the people as citizens rather than subjects, so the industrial constitution would serve to limit the power of employers over workers, constituting them as something other than commodities – as 'human beings', as

[22] Sinzheimer, 'Das Rätesystem', above n 20, 327.

[23] Since 1789, the median duration of constitutions is a mere 17 years, and their average life span less than half that: Arthurs, above n 18.

[24] Except, perhaps, the short-lived and catastrophically unsuccessful Industrial Relations Act of 1971.

[25] S and B Webb, *Industrial Democracy vol II* (Longman, 1897) 840–2.

Sinzhemer would have had it, or, perhaps, as 'labour citizens'.[26] Used in this somewhat looser sense, the idea of the constitutional function of labour law can meaningfully be applied in a variety of contexts. Returning to the example of the UK: while it is true that there was never any all-encompassing legal framework in this country, there has been, for around a century, a set of laws which recognize the legality of trade unions, create freedom for the unions to bargain collectively and to take industrial action, and dictate that the normative terms of a collective agreement will usually be implied into the contracts of employment of union members. This would seem sufficient, at least, to fulfil the central constitutional function of constituting labour as something other than a commodity; of allowing workers, through the trade unions, to participate in the creation and enforcement of the norms which govern their working lives.

Might this, then, be one key sense in which the term 'constitution' could be useful in thinking about the aims of labour and the means to be used to achieve those aims? Referring to the labour constitution, or to the constitutional function of labour law, reminds us of the work that labour law ought to be doing – in nation states or at the supranational or international level – to fulfil the function of constituting labour as something other than a commodity. That harm is done to working people when their labour is treated as a commodity is an idea familiar from a wide range of authors, from Karl Marx to Karl Polanyi.[27] And the imperative of action to prevent the commodification of labour has, of course, been enshrined in Article 1 of the International Labour Organization's (ILO) Declaration of Philadelphia since 1944.

In addition to the goal of the emancipation of labour, the idea of the constitutional function of labour law implies a particular means of achieving that goal, namely the exercise of democratic control over the economic sphere. Time and again, Sinzheimer highlighted the dangers involved in allowing regulation of the economy to proceed entirely freely, guided only by economic considerations. As Emilios Christodoulidis has noted:

> The economic constitution was conceived [by Sinzheimer] along the lines of a genuinely constitutional dialogue and in the context of a political economy... It is this marked emphasis on the irreducibly political nature of the economic constitution that underlies and drives its interpretation and realisation.[28]

Without democratic control, the economy collapses into its market form. All that remains 'entrenched' in terms of fundamental norms are the rules of market logic.[29] Labour is understood as a commodity, low wages and poor working conditions are

[26] E Fraenkel, 'Zehn Jahre Betriebsrätegesetz' in T Ramm (ed), *Arbeitsrecht und Politik* (Luchterhand Verlag, 1966) 111; H Arthurs, *The New Economy and the Demise of Industrial Citizenship* (IRC Press, 1996) and J Gordon, 'Transnational Labor Citizenship' (2007) 80 Southern California Law Review 503.

[27] K Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, 2nd edn (Beacon Press, 2002).

[28] E Christodoulidis, 'A Default Constitutionalism? A Disquieting Note on Europe's Many Constitutions' in K Tuori and S Sankari (eds), *The Many Constitutions of Europe* (Ashgate, 2010).

[29] Ibid.

understood as rational cost-cutting measures, and, on an international stage, as offering a country comparative advantage. The consequences of market performance are categorically separated from political deliberation or negotiation, and the political and social spheres are thereafter 'burdened with an impossible compensatory task, the means for the performance of which are no longer at their disposal'.[30] The idea of the constitutional function of labour law reminds us of this, emphasizing that there is nothing natural or inevitable about economies organized as free markets, and directing us to resist the logic of the market where that logic causes harm.

In parenthesis, it might be emphasized that there is no suggestion in Sinzheimer's work that the furtherance of justice must involve a pay-off in terms of decreased economic efficiency.[31] In the context of the economic destitution of Germany following the First World War, and the colossal suffering that resulted, the utmost importance was placed on the goals of *increasing* production and *improving* economic efficiency. The very aim behind the economic constitution was that all economic actors – workers and owners – should work together in furtherance of the common interest, defined by Sinzheimer, in terms of economic aims, as: the increase of productivity, the minimization of the costs of production, and the direction of production to meet the needs of the masses. Following the war and the revolution, he wrote, we can no longer afford the luxury of a liberal economy.[32] Though the economic constitution would certainly have involved the limitation of free market outcomes, and the subversion of market logic in terms of the characterization of labour as a commodity, it was not understood to involve a reduction of productive or economic efficiency. Limitation of the market in furtherance of the goal of justice was not equated, in other words, with the limitation of economic efficiency.

D. The constitutional function of labour law today

Building on Sinzheimer's work, I have argued that thinking about labour law in terms of its constitutional function allows for important lines of analysis. It provides us with a way of conceiving of the subject that is not focussed narrowly on the imbalance of power in individual employment relations. It highlights, instead, the importance of considering the contribution of labour law to the constitutional task of establishing a particular economic and social order; and it calls to mind the fact that the regulation of working relationships cannot usefully be considered in isolation from the broader constitutional context. Against those who argue for a labour law adapted to meet the needs of the market, the idea of the constitutional function of labour law allows us to maintain a critical edge; to resist the logic of the market where that logic causes harm, and to focus instead on conceptions

[30] Ibid.

[31] Cf the characterization of the 'old' or 'traditional' way of thinking about labour law in B Langille, 'What is International Labour Law For?' (2009) 3 Law & Ethics of Human Rights 47; and G Davidov, 'The Changing Idea of Labour Law' (2007) 146 International Labour Review 311.

[32] H Sinzheimer, 'Über die Formen und Bedeutung der Betriebsräte' (1919) in Sinzheimer, above n 4, 322; and 'Rätebewegung und Gesellschaftsverfassung' (1920) in Sinzheimer, above n 4, 357.

of the role and aims of labour law which take the humanity of the worker as the first reference point.

In attempting to apply the idea of the constitutional function of labour law to today's economic and constitutional orders, however, we encounter a number of difficulties. Christodoulidis' depiction of a free market economy insulated from political control, and a political and social sphere impotent to mitigate potentially harsh and unjust market outcomes, directs us to the first of these. His comments were made with reference to the European Union (EU), where in recent years the Court of Justice (ECJ) has held that European rules guaranteeing market freedoms must take precedence over national rules protecting fundamental labour rights, such as freedom of association.[33] As a matter of constitutional law, the reasoning of the ECJ can be traced to the original decision of the drafters of the Treaties of Rome to assign the task of creating a single market to the supranational institutions of the new Economic Community, and to leave responsibility for the guarantee and maintenance of social standards to the national institutions of the Member States. By reason of this division of labour, a Court decision reached some years later, that Community law must have precedence over Member State law, had the effect of instituting a constitutional prioritization of economic, market-creating aims above other (for example, social) aims.[34] Similar patterns of split-level competences and the constitutional prioritization of free market rules can be found in other jurisdictions.[35]

It follows from the nature of such constitutional frameworks that efforts to promote and to guarantee labour and other social rights are significantly handicapped. Again with reference to the EU, Fritz Scharpf has described the existence of a 'competency gap' between a Union without legislative competence to regulate social matters, and Member States prohibited from doing so in the myriad of ways judged to breach the 'fundamental freedoms' of the single market.[36] In fact the problem is more wide-ranging even than that. First and foremost, globalization has meant the globalization of capital and of markets. While centres of economic power and decision making have become increasingly supranational, representative and democratic structures have remained tied to particular localities. Where legislative competence to enact labour protective and other 'social law' measures exists only at the national level this is to some extent inevitable, since trade unions and other organizations will seek to lobby and influence decision making within national institutions. At the same time, however, economic policy decisions of huge importance will be taken above the national level (where labour's influence remains weak), potentially limiting the capacity of the national legislatures to act. What are the consequences of this for the idea of a global economic constitution? Unless and until effective mechanisms for the exercise of countervailing power can be instituted at the supranational level, what might supranational constitutionalization mean? Simply the

[33] Case C–341/05 *Laval v Svenska Byggnadsarbetareförbundet* [2007] ECR I–11767; Case C–438/05 *International Transport Workers Union v Viking* [2007] ECR I–10779; Case C–346/06 *Rüffert v Land Niedersachsen* [2008] ECR I–01989; and Case C–319/06 *Commission v Luxembourg* [2008] ECR I–04323.

[34] F Scharpf, 'Negative Integration and Positive Integration in the Political Economy of European Welfare States' in G Marks and others (eds), *Governance in the European Union* (Sage, 1996).

[35] See, eg, Harry Arthurs' discussion of the federal constitution of Canada: Arthurs, above n 18.

[36] Scharpf, above n 34, 15.

judicial protection of individual rights against more powerful economic opponents?[37] What of Sinzheimer's two-sided definition of democracy, as securing for individuals *freedom from* abusive treatment, and *freedom to* participate in the formation of the social and economic conditions of their existence?

A second related difficulty encountered in applying the idea of the constitutional function of labour law to current conditions lies with the question of who or what might do the work of constitutionalizing. It is true that, as used by Sinzheimer, the idea of constitutionalization acknowledges the existence of multiple state and non-state sources of normativity in labour law.[38] As was mentioned above, the term 'state law' was used to distinguish norms created by the legislature from norms created autonomously by social actors such as trade unions and employers' organizations: both were equally 'law'. But it is also the case that in Sinzheimer's prescriptions for the institution of an economic constitution, the role of the state was absolutely central. As the guarantor of the furtherance of the public interest, it fell to the state not only to facilitate the exercise of regulatory power by employers, trade unions, and works councils, but also to set the correct limits to the exercise of that power through the institution of the constitutional framework. In a globalized context, who or what could perform this role at the transnational level? Could constitutionalization be understood with Gunther Teubner as a spontaneous, stateless process?[39] If so, what could it mean, in the context of work, other than a reinforcement of already existing market relations and market powers? Could the ILO form the core of a market-correcting international labour law? Could international labour standards serve as a globally respected set of rules, 'entrenched' increasingly through recognition by a constellation of human rights adjudicators, trade unions, non-governmental organizations (NGOs), consumer groups, transnational companies (TNCs)?[40] Or are the barriers to such a global labour constitution insurmountable: the apparent universality of the flexibility leitmotiv; the diversification of working relations and fragmentation of the working classes; the asymmetry between global capital, on the one hand, and weakened trade unions and other democratic, representative institutions still tied to the national level, on the other?

E. Conclusion

The prospects for a global labour constitution akin to the national labour constitutions of the 20th century appear bleak. The idea of the constitutional function of labour law continues nonetheless to provide a useful basis for the critical analysis of

[37] F Rödl, 'Re-Thinking Employment Relations in Constitutional Terms' (2010) 19 Social & Legal Studies 241–6.

[38] Arthurs, above n 18.

[39] See, eg, G Teubner, 'Constitutionalising Polycontexturality', Social & Legal Studies, forthcoming; and G Teubner, 'Societal Constitutionalism: Alternatives to State-centred Constitutional theory?' in C Joerges, I-J Sand, and G Teubner (eds), *Transnational Governance and Constitutionalism* (Hart Publishing, 2004) 3–28.

[40] B Hepple, *Labour Laws and Global Trade* (Hart Publishing, 2005).

labour law at the national and transnational levels. It acts to unsettle the notion of the market order as pre-ordained, and to remind us of the aspirations of labour law – 'labour is not a commodity' – as a benchmark for the shortcomings of current constitutional and economic arrangements. In drawing our attention, as labour lawyers, to the nature of these arrangements it invites us to re-think the constitutional function in terms of international institutions – the ILO, TNCs, NGOs, etc. At the same time, it directs us to think carefully before dismissing the potential of national institutions and the normative work that they might still do. Most importantly, perhaps, the idea of the constitutional function of labour law provides us with a means of holding on to long traditions of thought and action which understand labour law as a tool for the furtherance of economic and social justice.

The Idea of Labour Law

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