Part I
Introduction

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Nature and sources of labour law

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What is labour law?

What are the aims of labour law? Why is it regarded as a distinct and important field of study? One place to start thinking about these questions is the Universal Declaration of Human Rights, adopted by the United Nations in 1948.

Universal Declaration of Human Rights, Article 23

(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
(2) Everyone, without any discrimination, has the right to equal pay for equal work.
(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
(4) Everyone has the right to form and to join trade unions for the protection of his interests.

Article 23 identifies many of the characteristic aims of labour law:

- to secure fair access to labour markets under conditions of equal opportunity;
- to ensure that the conditions under which people work are just, safe, healthy, and respectful of human dignity;
- to require pay to be fair and sufficient for a decent standard of living;
- to protect job security and fair treatment at work;
- to permit workers to form trade unions and other representative organisations to protect their interests at work.

In pursuing these aims (and others), the objects of labour law include the contract of employment between employer and worker, working conditions within organisations, relations between workers, access to employment through the labour market, and more generally measures to steer the economy with a view to promoting full employment with decent jobs. Most studies of labour law have not examined these topics dispassionately, but have rather been concerned critically to assess how far labour law achieves the central aims identified in Article 23.[1] The case for studying this subject rests in part on the crucial economic, social and political significance of paid work in a market economy

[1] H. Collins, 'Labour Law as a Vocation' (1989) 105 *Law Quarterly Review* 468; K. Klare, 'The Horizons of Transformative Labour Law and Employment Law', in J. Conaghan, R. M. Fischl and K. Klare (eds.), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford: Oxford University Press, 2002), p. 3.

and in part on the distinctive characteristics and problems that labour law must address.

Significance of labour law

For most people, employment provides the principal source of income and wealth. The legal institutions that constitute and govern the relations of production between workers and their employers provide one of the cornerstones of market economies. From a social perspective, work not only occupies a large proportion of most people's days, but also provides one of the principal sites where we can construct social relationships and seek meaning for our lives. The consequence of unemployment is often described as 'social exclusion', which means both that the ensuing poverty prevents individuals from enjoying the benefits of society and that the unemployed are likely to experience less productive and meaningful lives.

From a political perspective the employment relation lies at the centre of a fundamental conflict of interest that is intrinsic to capitalist societies. The conflict lies between the owners of capital, who invest in productive activities, and the workers, who supply the necessary labour. Employers seek to maximise the return on their investments, whereas the workers seek the highest price available for their labour, which digs into the employer's profits. As in other contractual relations, however, the parties ultimately share a common interest in the successful achievement of production and profits through the combination of capital and labour. The balance of strength between the competing interests of capital and labour always constitutes a key issue in politics, because it contributes a vital element in the patterns of the distribution of wealth and power to which a society aspires. The law plays a pivotal role in both constituting and restricting the power of both capital and labour. Labour law is assuredly never far from the centre of political debate and controversy.

To examine labour law thoroughly, therefore, it is important to study the legal rules in their economic, social and political context. The details of the legal rules have a profound influence on the efficiency of the economic system, the life-chances of individuals, and the type of social justice achieved in society. For example, the rules that prohibit discrimination in access to employment on grounds such as sex, race and disability are intended to ensure that all people can contribute to the generation of wealth, promote the possibility of equality of opportunity for all citizens, and help to combat patterns of persistent social disadvantage and exclusion for particular groups. Similarly, the legal rules that permit workers to take collective industrial action in order to support their claims for increases in pay and improvements in other terms and conditions have a significant influence on the distribution of wealth and power both within the firm and within society more broadly. The importance of legal rules should not be unduly exaggerated, for broader economic, social and political forces will ultimately shape a society and the experience of its citizens. For example,

levels of unemployment, which depend heavily these days on global economic trends and monetary policies, have a profound influence on levels of wages, the bargaining power of workers, and, more diffusely, perceptions of social justice. Nevertheless, the rules of labour law shape how these global economic and social forces become translated into the experiences of workers.

The appreciation of labour law as a fundamental constitutive element in modern societies implies the need to study a vast range of legal rules and institutions. We might study the rules governing access to labour markets, the regulation of any type of transaction involving work, the rules governing organisations of capital and labour, social welfare systems for handling unemployment, the supply of training and education to workers, and the links between workplace relations and broader political institutions. This large terrain trespasses over many fields that have traditionally been studied independently, such as immigration law, social security law, company law and constitutional law. At the same time, labour law requires consideration of a wide range of conceptually distinct categories of law, such as contract, tort, public law, social security law and company law. The challenge we face in this book is to provide a selective study of the key legal rules and institutions at the heart of the discipline, which forms a coherent whole, and which is also of a manageable size. When making this selection, we need to strike a balance also between, on the one hand, a consideration of those legal rules which have a profound influence in shaping the economic and social system and, on the other hand, an examination of laws which have greater daily significance for lawyers. For example, the rules governing trade union organisation and industrial action configure the bargaining power of many workers in the labour market, but in practice most lawyers are far more likely to encounter the rules relating to claims for missing wages, unfair dismissal and discrimination brought by individual workers. Our approach to the scope of labour law is guided by the goal of examining every aspect of the legal regulation of the employment relation, without paying heed to limits set by legal classifications and concepts. Our emphasis upon particular topics, however, depends upon a pragmatic compromise between the need to analyse the fundamental structures supported by the law whilst providing a full explanation of the rules governing common problems and disputes arising between employers and workers.

The employment relation

At the core of the subject, however, we must consider the principal legal relation through which work is performed in a market economy: the contract of employment. This contract resembles other contractual relations in many respects. It is formed by an agreement between two parties: the employer and the employee. It comprises an exchange: the employee promises to perform work in return for

a promise by the employer to pay wages and other types of remuneration. Like other contracts, it is legally enforceable in the courts and the parties can claim compensation for breach of its terms. Yet the contract of employment is also distinctive in many respects. These distinctive attributes of the employment relation provide the second principal reason for a separate study of the field of labour law.

A contract of employment is typically a long-term contract for an indefinite period. The agreement is unlikely to be static but rather will be subject to modifications such as alterations in working methods and increases in pay. The contract of employment is also likely to be less specific than other types of contracts about the details of the performance required from the worker. The terms are likely to avoid precise specification of the work to be performed, but instead to grant to the employer the right to fix the details of the required performance through subsequent instructions. As a consequence, the contract of employment creates a relation of power in which the employer has the discretion, within limits, to direct labour, and the employee has the duty to obey lawful instructions. Surrounding this relation of power, both parties are likely to develop implicit and mutual expectations of fair treatment, trustworthy conduct and co-operation in good faith. These distinctive features of the contract of employment – its indeterminate duration, its variability, its incompleteness and its construction of a relation of subordination surrounded by implicit mutual expectations of trustworthy behaviour – create the need for special regulation beyond the ordinary rules of the law of contract.

Today, this special regulation is generally found in legislation. These laws modify, supplement or replace the terms of the contract of employment. Legislation also regulates the operation of the labour market both to ensure fair access to jobs and to address problems arising from unemployment. The appropriate aims and details of this legislation are often deeply contested political issues. For instance, should workers be guaranteed a minimum wage (and if so how much should it be) or should such a measure be rejected because it may cause higher levels of unemployment among poorly skilled workers, thereby hurting those whom the law is supposed to help the most? To some extent, proposals for labour legislation pose technical questions about the likely costs and benefits of legislation, which can be measured and predicted, though rarely with great precision. We will refer to many such assessments in the course of this book in order to illustrate the effects of the law and a recurrent theme of how difficult it is in a market economy to ensure that desired outcomes are achieved. As well as special legal regulation of the contract of employment and the labour market, it is also vital to appreciate the significant impact of collective organisations of workers.

The Universal Declaration of Human Rights upholds the right of workers to form trade unions for the purpose of protecting their interests. Trade unions can play many roles in the workplace: conduct collective bargaining with the

employer with a view to securing better terms and conditions for the workforce; represent individual workers who are in dispute with their employer; give voice to the concerns of employees about other aspects of their jobs, such as security of employment, their hours of work and their work/life balance, and health and safety issues in the workplace. Trade unions can also monitor the employer's compliance with labour legislation and either report breaches of the rules to a regulator or inspector or press for compliance themselves. Although the impact of trade unions on workplaces has declined in recent decades in Britain and many other countries, they still retain an important influence in many sectors of the economy, and for many workers they provide more effective protection of their interests than the formal legal mechanisms. For a proper understanding of labour law in practice, it is therefore vital to understand the complementary role played by trade unions in securing the aims of labour law and how the legal framework both supports and controls their activities.

Because work is central to people's lives, both in terms of its provision of material well-being and as a source of meaning and social integration, the idea that employment relations should be regarded merely as an economic transaction has always been contested in labour law. The economist's analysis of labour as a 'factor of production' to be bought or sold like other commodities and machines is challenged by a rival perception that maintains that 'labour is not a commodity'. This slogan insists that, though the market economy drives employers to purchase labour like any other commodity used in production of goods and services, the human beings who provide labour should not be treated like commodities to be bought at the cheapest price possible and discarded when no longer needed. Workers should be accorded the dignity of human beings and should be treated fairly. One important way of expressing this idea is to say that human rights are not discarded at the factory gate or the office reception when the employee comes to work. Labour law must ensure the observance of those fundamental rights by employers.

In particular, the relation of subordination created by the contract of employment grants the employer considerable discretionary power over employees, which creates the risk of the abuse of power, the interference with the values represented by human rights law, and the danger of unfair treatment. The key power of the employer in this respect is the power of dismissal or termination of the contract of employment. The ever-present threat of dismissal functions to coerce employees to comply with the orders of the employer for fear of losing their jobs and all the associated benefits of social integration. Control over the employer's power of termination of contracts of employment is therefore a key issue in labour law: it protects the right to work, protects the dignity of workers, ensures fair treatment, prevents serious abuses of power and, above all, prevents employers from treating their employees like a commodity that can be discarded at will.

This brief description of the subject of labour law explains the outline of this book. After two introductory chapters that explain the sources of labour law and

the issues that confront it in today's world, Part II examines the law governing the contract of employment, Part III considers the principal statutory measures that regulate the employment relationship, Part IV explores the aspect of trade unions and collective labour rights, and Part V analyses the law protecting employees against unjust termination of employment. A proper understanding of these topics requires an appreciation of how they are interrelated and why the laws are often interdependent. There are also many cross-cutting themes, such as the protection of human rights at national and international levels in a variety of contexts from the hiring to the firing of employees.

United Kingdom labour law

Like most branches of legal studies today, the sources of labour law in the United Kingdom (UK) combine the common law created by judicial precedent and parliamentary primary and secondary legislation. Apart from shaping the contract of employment, however, the common law plays a diminishing role. As this field of study is deeply contested between the political parties, on being elected each is likely to enact a political programme involving the dismantling and replacement of many aspects of the legislation. Although the UK lacks a labour code, it does have three substantial consolidation statutes. The Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA 1992) provides the rules regulating trade unions and their members, collective bargaining, and the use of industrial action. The Employment Rights Act 1996 (ERA 1996) contains most of the rights granted to individual employees in connection with their employment, such as family-friendly rights and protection against unfair dismissal. The Equality Act 2010 consolidates all the laws regarding discrimination in employment. Many new pieces of legislation take the form of amendments to these consolidating statutes. Nevertheless, several other statutes such as the National Minimum Wage Act 1998 and statutory instruments such as the Working Time Regulations 1998 play an important role in the regulation of employment relations. A complete collection of all this labour legislation occupies many thousands of pages.

The history of this legislation will be explained, where appropriate, in the course of the book. But it is worth pointing out at the beginning that most legislation is of fairly recent origin. At the beginning of the twentieth century, the framework of rules governing trade unions, collective bargaining and industrial action was established by the Trade Union Act 1871, the Trade Disputes Act 1906 and the Trade Union Act 1913. These statutes served to confirm collective bargaining between trade unions and employers as the principal legitimate mechanism for determining terms and conditions of employment. Until the 1960s, apart from wartime measures, Parliament rarely sought to intervene in the details of contracts of employment directly. Otto Kahn-Freund, who may be described as the founder of studies of labour law in the UK, described this system

of labour law as 'collective *laissez faire*',[2] by which he meant that the principal role of labour law was to establish the mechanisms of collective bargaining, but it was not to regulate such matters as wages and hours directly. While most other industrialised countries introduced mandatory legislation on such matters as maximum hours or minimum wages, the UK followed a distinctive pattern of minimal direct statutory regulation of contracts of employment. For example, unlike other industrialised countries, until 1998 there was no regulation of maximum hours of work or minimum wages that applied to all workers, though particular industrial sectors such as mines were closely regulated. This pattern, sometimes dubbed 'legal abstentionism',[3] has now been reversed.

Since the 1960s, Parliament has increasingly intervened to fix mandatory terms of employment or grant statutory rights to employees. Key moments in these interventions were the law of unfair dismissal in 1971, the Sex Discrimination Act 1975 (and the Equal Pay Act 1970, which came into effect in 1975) and the National Minimum Wage and Working Time Regulations of 1998. There were many reasons for this increase in the volume of legislation that addresses individual employment relations.[4] As in the case of the anti-discrimination laws, to some extent the legislation responded to a wider concern to protect the rights of individuals through the law. The need for legislative minimum standards became more compelling as the power of trade unions and the effectiveness of collective bargaining to secure good working conditions began to wane in the 1980s. A crucial consideration was always a concern that small disputes should not erupt into strikes and other forms of industrial action, because that was harmful to the economic prosperity of everyone. Governments were also concerned to help the labour market to work efficiently, both by creating fair equality of opportunity and by removing rigidities and restrictions on the efficient use of labour. Finally, as we shall see shortly, the European Union pressed for harmonisation of employment laws in many fields.

Nevertheless, it would certainly be incorrect to see in the history of UK labour law a steady rise in employment protection rights during the last fifty years. There was an important resurgence of *laissez faire* political ideas in the 1980s and early 1990s, under which governments stressed the importance of permitting free markets to work without restrictions either from legislation or from powerful trade unions. That neo-liberal perspective persists to this day in many respects, but it has been qualified by the recognition that, first, some minimum standards are required to protect workers against the worst forms of abuse and exploitation, and, secondly, that employment protection laws can actually assist in making the labour market more efficient and business more

[2] O. Kahn-Freund, 'Labour Law', in O. Kahn-Freund, *Selected Writings* (London: Stevens, 1978), p. 1, p. 8.
[3] H. Collins, 'Against Abstentionism in Labour Law', in J. Eekelaar and J. Bell (eds.), *Oxford Essays in Jurisprudence Third Series* (Oxford: Clarendon Press, 1987), p. 79.
[4] P. Davis and M. Freedland, *Labour Legislation and Public Policy* (Oxford: Oxford University Press, 1993).