THE CONTRIBUTION OF LABOUR LAW TO ECONOMIC DEVELOPMENT AND GROWTH

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Abstract

A review of theoretical, historical and quantitative empirical research on the economic effects of labour laws suggests that worker-protective labour regulation generates net positive outcomes for development and growth. Labour law should be seen as a developmental institution which has a symbiotic relationship to the rise of capitalism in the global north and is part of the transition to a market economy being experienced by today's low- and middle-income countries. Claims made for the desuetude of labour law's core mechanisms, including the standard employment relationship, are not borne about by recent evidence. The complex role played by labour regulation in the dynamics of capitalism would repay further investigation.

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1. Introduction

There are perhaps few more controversial ideas today than the claim that labour laws – broadly conceived to include all worker-protective rules affecting the employment relationship, including legally mandated labour standards and social security systems – contribute positively to economic growth. The World Bank, in its 2008 *Doing Business Report*, very well captured the neoliberal spirit of the times in the remark that 'laws created to help workers often hurt them' (World Bank, 2008: 8). In its 2015 *World Employment and Social Outlook*, the ILO cautiously suggested that the 'there is a fairly wide "plateau" on which labour regulations will have neutral effects on employment performance, allowing considerable scope for country preferences and choices' (ILO, 2015a: 110). This is not exactly a ringing endorsement of the economic case for labour regulation. Yet it could be that the debate is starting to turn. In its 2015 *Doing Business Report* the World Bank shifted its position, stating that 'employment regulations are unquestionably necessary', not just to protect workers from 'arbitrary or unfair treatment' but 'to ensure efficient contracting between employers and workers'. Labour laws 'increase job stability and can improve productivity through employer-worker cooperation' and as such 'benefit both workers and firms'. The impact of labour laws on competitiveness and growth may be expected to be significant, and can be 'negative' not just when regulation is 'excessive' but where it is 'insufficient' (World Bank, 2014: 231). The 2016 *Doing Business Report* continues in the same vein, suggesting that 'under-regulation' in the areas of working time and minimum wage protection can have harmful effects on productivity, and exacerbate the effects of macroeconomic shocks (World Bank, 2015: 247).

This seems a good moment to take stock and to consider what we are learning from the large and ever-growing literature on the economic effects of labour laws. This issue has been addressed from a number of perspectives, which include theoretical, historical and empirical (including statistical) approaches. The consensus which is emerging slowly from this body of work is that we should abandon the idea of an inevitable trade-off between equity and efficiency in the formulation and implementation of labour standards. Arthur Okun's 'big trade-off', or the idea that 'in an economy that is based primarily on private enterprise, public efforts to promote equality represent a deliberate interference with the results generated by the market-place, and they are rarely costless' (Okun, 1975), is still widely accepted in the economics mainstream. Perhaps many in the labour law community also believe a version of it. A not atypical view is that it is dangerous to invoke efficiency-based justifications for labour laws since these same arguments 'can be deployed in ways that propose the dismantling of most of the special rules for employment' (Collins, 2013: 138). The persistence of the idea that labour law is antithetical to economic efficiency is perhaps more than anything else a sign of the extent to which the core tenets of neoliberalism have come to be taken for granted on all sides in the debate. Yet this need not be so, as the World Bank's recent volte face indicates.

This article will review the state of the art in this developing field by firstly examining theoretical contributions which stress the distinctiveness of the employment contract as a mode of economic governance, before considering historical evidence on the long-run relationship between labour law and development. It will then consider the growing use of statistical data and techniques to analyse the economic impact of labour laws. The conclusion will assess implications of this work for labour law scholarship and policy.

2. New institutional economics and the employment relationship

Although some labour lawyers have maintained that it should be the function of employment law to promote the competitiveness of private sector businesses (Collins, 2001), few economists would argue that increasing profit-making by firms should, as such, be a goal of public policy. The economic case against labour law has generally turned on a somewhat different argument, to the effect that regulations protecting workers and trade unions lead to coordination failures and hence to a misallocation of society's resources (Epstein, 1983, 1984; Posner, 1984). Thus all things being equal, labour laws, as market-distorting devices, retard economic growth and reduce potential for development. Labour laws may also be disadvantageous to particular groups, such as the low-paid or unemployed, who may find themselves 'priced out of employment' by, for example, protective norms which artificially raise employers' hiring costs. If this argument is correct, many labour law rules are neither fair nor efficient.

The argument from resource allocation assumes that the labour market is in equilibrium prior to the intervention of worker-protective laws. However, various strands of new institutional economics have questioned this view. The new institutional approach has become increasingly influential since the late 1980s of a number of works, in particular Oliver Williamson's *Economic Institutions of Capitalism* (Williamson, 1986), Elinor Ostrom's *Governing the Commons* (Ostrom, 1990) and Douglass North's *Institutions, Institutional Change and Economic Development* (North, 1990). The roots of the new institutional approach, however, to back further to the foundational contributions of Ronald Coase and Herbert Simon.

In 'The Nature of the Firm' Coase (1937) argued that transactions carried out within the firm are distinguished from market exchanges by the presence of a power of direction which vests in the 'entrepreneur-coordinator'. This 'supersession of the price mechanism' is efficient in the sense of reducing the costs associated with repeated contracting between employer and worker. Coase was far from unaware of the legal context of his argument; he cited F.R. Batt's textbook on the English law of master and servant (Batt, 1929) to argue that 'it is the fact of direction which is the essence of the legal concept of "employer and employee", just as it [is] of the economic concept' which Coase was proposing. Coase considered that the legal definition of the employment relationship was evidence of how firms operated 'in the real world'. Another factor shaping the firm, Coase argued, was that 'exchange transactions on a market and the same transactions organised within a firm are often treated differently by Governments or bodies with regulatory powers', and he went on to discuss the effects of fiscal law.

In 'The Problem of Social Cost' Coase (1960) set out a more complete framework for analysing how legal rules could reduce transaction costs. His approach is not, as it is sometimes taken to be, an inevitably libertarian one. In a later clarification he accepted that regulation could be superior, in efficiency terms, to the specification of property rights in certain circumstances (Coase, 1988). It is nevertheless the case that it is hard to find support anywhere in Coase's works for the characteristic institutions of labour law such as collective bargaining or social insurance. In 'The Nature of the Firm' the rules which Coase associates with the employer-employee relationship are only those which confer power on the employer, namely the employee's duty of obedience and the corresponding right of the employer to determine how the contract is to be performed on an hour-by-hour basis.

Herbert Simon's paper 'A Formal Model of the Employment Relation' (Simon, 1951) took a somewhat different but complementary approach, modelling the employment relationship as a non-zero sum game in which cooperative outcomes could be achieved in the presence of certain norms. In Simon's model, it is inherent in the 'authority relation' created by the employment contract that the employer can exercise control over the worker only 'within limits'. Over the long run, the employer would voluntarily accept such limits in order to build 'a relationship of confidence' with the worker. While these constraints might be contracted for expressly or arise through informal understandings, Simon suggested that they could also be put in place by other means which included collective bargaining (Simon, 1951).

In a paper which combined elements of Coase's and Simon's analyses, Oliver Williamson, Michael Wachter and Jeffrey Harris argued that 'collectivising the employment relationship' would attenuate contractual risks arising from bounded rationality and the danger of opportunism. Their conception of the employment contract sees both parties locked in by their mutual investments in ‘asset-specific’ knowledge and skills. The ‘collectivisation’ they had in mind referred in the first instance to bureaucratic, employer-led practices associated with the concept of the ‘internal labour market’, but was also compatible with a role for collective bargaining in generating workplace norms (Williamson, Wachter and Harris, 1975).

The wider theory of transaction cost economics developed by Williamson (1985) drew heavily on Iain Macneil’s concept of the relational contract (Macneil, 1974), but it seems that Williamson’s classificatory scheme referred to contractual practice rather than the juridical classifications which Macneil had in mind. In Williamson’s approach, boundedly rational agents under conditions of uncertainty and asset specificity agree relational contracts (of which employment is one example) through a process of iteration involving trial and error, rather than through the intervention of the law. Similarly, Ostrom’s notion of governance within a ‘commons’ or shared societal resource sees private ordering by self-organising groups as the key to the emergence of workable rules (Ostrom, 1990). Ostrom’s approach distinguishes self-forming normative orders from those which derive from the state, which for this purpose includes the legal system. How far Ostrom’s notion of emergent governance is compatible with a role for law in shaping private ordering is not a theme which is strongly represented in her own work, but it could be argued that it is not inconsistent with it.

New institutional theories can therefore be read as envisaging a role for labour law which is complementary to private ordering, but which does not displace it. This is far from being a fatal objection to protective regulation: many statutory labour law rules have the goal of promoting self-regulation at the level of civil society, as in the case of collective bargaining or workplace-based forms of codetermination: ‘auxiliary’ labour law, in Otto Kahn-Freund’s terms (Kahn-Freund, 1977). Even areas of labour law which are formally mandatory or ‘regulatory’ as Kahn-Freund described them, such as working time and dismissal laws, often refer back to standards based on workplace practice and self-regulation by industry, so that the distinction between external enforcement and reflection of pre-existing norms is blurred.

Behavioural studies which model the responses of the contracting parties to rules of different kinds are becoming more common in the literature, and throw light on the dynamic properties of fairness norms of the kind which labour law rules embed or insert into the employment relationship. A recent paper by Björn Bartling, Ernst Fehr and Klaus Schmidt (2013) addresses a question posed by Herbert Simon in his earlier analysis, namely, which factors determine the choice of the parties for wage-labour over self-employment? They propose and then experimentally test two different versions of a strategic game played between the buyers and sellers of labour services. In the first, the players swap roles between different rounds of play and there is no repeat trading, in the sense that agents have to find new contracting partners in successive rounds. In this version of the game, self-employment predominates as the equilibrium outcome of contracting. In the second game, the players have fixed roles and there is repeat play. In this version of the game employment is the dominant outcome, although this result is contingent on the emergence of fairness norms which constrain the employer to avoid exploitation of the worker in the allocation of tasks and in the payment of the agreed wage. The underlying logic of the model is that fairness norms are endogenous to – that is, internally generated by – particular contractual arrangements. With repeated trading and fixed roles, the players can constrain each other to observe norms of reciprocity, and a form of cooperation can emerge on the basis of trial and error. However, the model is not incompatible with a role for external regulation in triggering or seeding the emergence of fairness norms, in particular where reputational effects are slow to develop, as a result of the costs associated with the dissemination of information in the wider market. As the authors put it:

> 'Viable authority relationships under employment contracts… arise endogenously as the dominant mode of governance only when both principals' fairness preferences and reputation building mechanisms are present… [But] to the extent to which reputational forces alone are insufficient for solving the employers' moral hazard problem, labour unions and labour legislation can play an efficiency enhancing role by constraining the employers' ability to assign the workers inefficient tasks.'

Thus new institutional economics can underpin legal support for fairness norms which are specific to employment as a distinct social and economic relation. This is by no means the end of the debate, and we can expect this body of work to continue to evolve in ways which may bring new insights to bear on the way that labour law rules work in practice and on their desirability from a policy point of view. To many labour lawyers, the course of new institutional theory might seem like a rather lengthy detour to get back to a position which the 'old' institutionalists, above all J.R. Commons (1924), had argued for in the early decades of the twentieth century when the discipline and practice of labour law were in the process of forming. There is more than an element of truth in this suggestion, just as there is a obvious continuity between Marx's account of wage labour and in particular his account of the commodification of labour power (Marx, 1847, 1867), and the concept of the 'authority relation' later described by Coase (1937) and Simon (1951). However, for the purposes of the present-day debate over the economic impact of labour laws, it is far from irrelevant that new institutional economics, as a field, should be suggesting insights on the nature and functioning of the employment relationship which offer qualified support for labour standards, and hence are far removed from the general-equilibrium models which helped to legitimise the neoliberal policy turn of the 1980s.

3. Labour law and capitalist dynamics: the evolution of the contract of employment

Despite being entitled *The Economic Institutions of Capitalism*, Williamson's principal work (Williamson, 1985) has virtually nothing to say about the nature of capitalism as a particular mode of economic governance, instead taking market-based ordering largely for granted. North's historical approach, by contrast, seeks to explain the emergence of markets in more holistic terms, as the outcome of state support for contract and property rights in the global north in the period from the sixteenth century to the onset of the industrial revolution (North, 1990). Focusing mostly on the English case, he associates judicial independence and the constitutional settlement of the seventeenth century as together providing the conditions for the protection of individual property, and hence for the growth of trade in goods and services and for the beginnings of industrial enterprise which occurred at this time. North's approach is rooted in a particular conception of institutions as 'humanly-devised constraints on action', a view which neglects the sense in which legal rules evolve alongside developments in the economy, and also overlooks the part they play in constituting the conditions for exchange as opposed to controlling or regulating economic behaviour. He also has practically nothing to say on the emergence of labour markets.

North's position is consistent with a long-standing view that industrialisation in Britain was associated with the liberalisation of the economy and specifically with the removal of what Adam Smith had referred to as 'obstructions' to 'the free circulation of labour and stock' (Smith, 1999). H.S. Maine's observation in 1861 that the movement of 'progressive societies' had been from 'status to contract' (Maine, 1861) struck a similar note, which is still to be found in the widely assumed association between nineteenth-century laissez-faire and a 'private law society' from which social legislation was largely absent (Böhm, 1966). A characteristic restatement of Maine's dictum is Richard Epstein's claim, contained in one of the more influential critiques of labour law from the early 1980s wave of neoliberal scholarship, that 'during the nineteenth century, the area of labour relations was governed by a set of legal rules that spanned the law of property, contract, tort, and procedure. There was no special set of rules for labour cases as such' (Epstein, 1983: 1357).

It is undoubtedly the case that the century from 1750 saw a reshaping of the rules governing wage labour in England, with the removal of legal support for the guilds and the repeal of statutory wage regulation. At the same time there was a strengthening of disciplinary labour legislation associated with the 'master-servant' model and a criminalisation of breach of the service contract by workers quitting without permission or disobeying employers' orders (Simon, 1956). Thus it is not true to say, for England at least, that the transition to an industrial economy was a simple matter of removing the influence of the state. Liberalisation of some rules, largely those which protected what E.P. Thompson (1968, 1971) termed the 'moral economy' of customary norms associated with wage labour, was accompanied by the enactment of new forms of statutory control of the service relationship, which tilted the balance of power in favour of employers (Steinfeld, 2002; Hay, 2000).

Partly because this disciplinary service model lingered so long in English law, only fading away in the final quarter of the nineteenth century, the assumption of a movement from status to contract during the period of industrialisation in Britain is not borne out for the labour market, whatever its wider relevance may be for other areas of law and for other market settings. In English law the juridical category of the 'contract of employment' which labour lawyers are familiar with today did not emerge fully formed upon the suppression of the guilds. Rather, the modern concept of the contract of employment results from the confluence of several distinct legal categories, including 'servant', 'workman' and 'employee', with the latter term applying initially only to high-status workers whose professional status or managerial position placed them outside the scope of disciplinary labour regulation. The idea of that a single juridical category can contain all the different types of wage-dependent labour is an invention of a later period, and is associated not so much with the rise of industrial forms of production, but with the passage of social insurance legislation which conferred on all employees a status intended to protected them against labour market risks (Deakin and Wilkinson, 2005). In Britain this transition was only realised as late as the 1940s, although in France and Germany it occurred somewhat earlier, in the decades either side of the turn of the twentieth century (Deakin, 2006).

We should give up the idea of a linear movement from status to contract and replace it with the notion that status and contract, or regulation and exchange, are overlapping and complementary forms of market governance. Exchange requires a framework of rules external to the contract itself, through which expectations can be stabilised and the interests of the parties aligned. Some of these rules of the market may be self-forming on the basis of iterations between economic agents, but private ordering takes place within the shadow of a legal system which constitutes the conditions within which the market operates, which it does in part by setting a boundary to the market's influence. The advent of an autonomous legal order or 'rule of law' which North's work associates with the rise of the market in the global north, did not consist solely of the constitutional innovations which made it possible to protect private property against a predatory state. The western legal idea of a public-private divide, itself an innovation of juridical thought, was designed not just to protect the private sphere against Leviathan, but to preserve a public space within which the different branches of government could operate independently from the logic of the market. This a point entirely lost on contemporary neoliberal thought, which seeks to extend the market into all areas of social life including the administration of the legal system. As Alain Supiot (2015) has shown, this is a process which, if it continues, will lead ineluctably to the corruption of the law and of the wider public sphere.

The process of constituting the labour market in early modern England required the active deployment of the legal and fiscal arms of the state. The state's involvement in shaping market relations was, in many contexts, coercive and even punitive, as the trajectory of master-servant laws suggests, but legislation also played a role in mitigating risks associated with the transition to the market. By the late sixteenth century England already had in place a nationwide system of poor relief, administered locally but governed by a single legislative framework, through which taxes were levied on households according to the value of their property in land and related assets. In the eighteenth century the 'poor' were understood juridically as 'those who labour to live, and such as are old and decrepit, unable to work, poor widows, and fatherless children, and tenants driven to poverty' (Dalton, 1747). Anticipating the logic of the twentieth century welfare state, the lawyers and jurists who administered the pre-industrial poor law regarded poverty as a condition engendered 'not by riot, expense and carelessness, but by mischance' (Dalton, 1747; see Deakin and Wilkinson, 2005: ch. 3). Recent historiography has revealed the extent of poor law transfers in England during its transition to a market economy: expenditure on poor relief was seven times the amount spent in France at this time, and doubled as a percentage of GDP in the century to 1800 (Solar, 1995). Although the overall amount of national income spent on relief was low compared to modern-day levels of expenditure on the welfare state, replacement rates for unemployment benefits in some regions were comparable to those operating in Britain in the 1980s (Snell and Millar, 1987). An accumulation of evidence of this kind points to the conclusion that the 'creation and elaboration and the poor law system from the reign of Elizabeth onwards was an important reason for the development of a capitalist system in England, affording the kind of protection for those in need which gave individuals a degree of protection against the hazards of life that in typical peasant cultures was provided by kin' (Wrigley, 1988: 120).

The development of a welfare or 'social' state was nevertheless far from continuous in the early industrialising nations. The demise in England of the 'old poor law' under the pressures of industrialisation in the final decades of the eighteenth century eventually ushered in the disciplinary regime of the workhouse, which was designed to make the receipt of poor relief as demeaning as possible and to avoid the subsidisation of wages. The expectation of the 1834 Poor Law Amendment Act was that once this strict regime was in place, wages would 'naturally' rise to a subsistence level. When this failed to happen, and when real wages instead began to fall during the 'great depression' between 1873 and 1986, the initial response of policy makers was to make the workhouse regime even more punitive. The expensive failure of the 'test workhouse' convinced reformers at the turn of the century that an alternative was needed. Sidney and Beatrice Webb (1909) and William Beveridge (1909) were among those who made the argument for a combination of social insurance and collective bargaining to put in place a floor to terms and conditions of employment. It was these reforms which reversed the trend towards casualised work at extremely low rates of pay which had become the norm in major cities and industrial centres in Britain at the end of the nineteenth century, a pattern which was repeated across the industrialised countries of Europe and north America at this time.

The emergence of the 'standard employment relationship' (SER) as the focal point of labour law regulation in the early decades of the twentieth century was the result, in part, of employer strategies which at that point favoured the vertical integration of production; it was also the consequence of the rise of collective bargaining within industry and of the passage of social legislation in the areas of workmen's compensation and insurance against unemployment (Deakin and Wilkinson, 2005). The SER was a compromise, in which 'subordination' within the workplace was the condition of access to protection against labour market risks (Supiot, 1999: 10).

The historical association of the SER with full-time, 'permanent' or indeterminate work, and a predominantly male-orientated breadwinner wage, has put a question mark over its future given the decline of factory production and the rise of precarious employment across the economies of the global north since the 1970s (Standing, 2011; Stone and Arthurs, 2011). Yet there are features of the SER which imply that, as an institution combining elements of law and social practice, it may have more resilience than some recent analyses have suggested. The employment model provides enterprise with an inherent flexibility to direct the factors of production which is at the root of capitalist dynamics, as Marx (1847, 1867) recognised. Hence the return of a turbulent variant of global capitalism in our time is unlikely to signify the end of employment. The recent rise of precarious and insecure forms of work does not signify a return to pre-capitalist economic relations, nor is new technology creating the conditions for the return of the guild-like structures which, prior to the industrial revolution, blurred the boundaries between capital and labour. On the contrary, these trends signify new forms of subordination and dependence for those who 'labour to live'. It remains the case that 'capital hires labour' (Putterman, 1984) rather than the reverse. Thus there continues to be a need for an institution like the SER which channels the risks associated with wage dependence and qualifies the exercise of economic power by and through the capitalist enterprise. Adapting the SER is a better option than abandoning it (Adams and Deakin, 2014).

4. Labour law and the growth path of low- and middle-income countries

Claims concerning the relationship between labour law and development are particularly contested in the context of low- and middle-income countries. In the 1950s, 'structural adjustment' theory predicted that development, understood in terms of the transition from a subsistence economy to one based on wage-labour and formal market relations, would lead to greater equality based on a compression of incomes and of differentials of wealth. In Arthur Lewis's model, economies in the early stages of industrialisation benefit from access to a pool of low-cost labour, but as agriculture gives way to industry and an urban working class is formed, this cost advantage is eroded, in part because 'capitalist workers organise themselves into trade unions' (Lewis, 1954: 150). One interpretation of Lewis's model is that as the economy nears a 'Lewisian turning point', a policy of upgrading the labour force through education and training, coupled with encouragement for investment by firms in productivity-enhancing technologies, is more viable than one based on continuing reliance on the comparative advantage offered by cheap labour.

Simon Kuznets (1955) similarly predicted that inequality increases as low-income economies start to industrialise, this trend is reversed as market-led economic growth takes hold. The 'inverted U' of the Kuznets curve regards capitalism as self-equilibrating, in the sense of achieving more equal and hence stable social outcomes, in the medium to long term. Factors tending to reduce inequality in industrialised countries, according to Kuznets, included 'legislative interference and "political" decisions… aimed at limiting the cumulation of property directly through inheritance taxes and other explicit capital levies'. Such interventions, reflecting 'the view of society on the long-term utility of wide income inequalities', constituted 'a vital force that would operate in democratic societies' to compress incomes and wealth even in the absence of other countervailing influences (Kuznets, 1955: 9). Kuznets thought that a 'dynamic' market economy would create opportunities for new entrants which would erode away the advantages of elites, but he also discussed the potential for self-organisation among an urban working class which he thought was a by-product of economic growth: 'in democratic societies the growing political power of the urban lower-income groups led to a variety of protective and supporting legislation, much of it aimed to counteract the worst effects of rapid industrialization and urbanization and to support the claims of the broad masses for more adequate shares of the growing income of the country' (Kuznets, 1955: 17).

Thus it is important to bear in mind, when assessing the contemporary relevance of structural adjustment theory, that both Lewis and Kuznets saw a role for democratic politics in achieving conditions of increasing equality; income compression was not an inevitable feature of capitalist dynamics. Other factors account for the failure of many low- and middle-income countries to follow the growth path envisaged by the Kuznets curve. Perhaps the most obvious difference between the experience of developing countries today and those of the global north during the period of early industrialisation is that the latter did not have to contend with other countries whose level of development was already more advanced than theirs. An effect of uneven development is that the terms of trade between countries systematically favour those which have already industrialised. This phenomenon, separately identified by Hans Singer (1950) and Raul Prebisch (1950), can be ascribed to a number of factors including the legacy of colonialism, but one reading of it is that the gains made by the working classes of industrialised countries are reflected in the terms on which goods and services are internationally traded. This was, and remains, a large part of the justification for the ILO's programmes of extending compliance with labour standards to developing countries: the logic of this approach is that levelling up of the conditions under which working class groups can mobilise for a larger share of national income will reduce the tendency for global trade to favour wealthier countries.

Cross-national variations mean that it is not straightforward to assess the current empirical status of the hypothesis inherent in the Kuznets curve. Thirty years of neoliberal reforms coupled with trade liberalisation and the removal of constraints on capital flows have led increases in income inequalities in nearly all countries regardless of their level of development, but there are significant cross-country differences in patterns of inequality. The Gini coefficient, which presents inequality in terms of the degree of dispersion of incomes within countries, is broadly correlated with levels of development, with the Nordic systems and Japan appearing at one (more equal) end of the spectrum and Latin American and Southern Africa at the other (more unequal) end. However, as Gabriel Palma (2011) has shown, the main factor driving cross-country differences in income inequality is the share of high income groups and in particular those in the top ten per cent. Data for the period since the 1980s indicate that across the world there is relatively stable and homogenous middle class, associated with the fifth to ninth deciles by distribution, which receives around half of national income. Differences across countries are accounted for the share taken by the top decile and the implications this has for the bottom 40 per cent. Highly unequal regions, which include parts of Latin America, middle-income Southern Africa and the oil-producing Middle East countries, are those in which there is extreme polarisation between the experience of the very rich and those in the lower income segments. When these regions are excluded from the analysis, there is no statistical evidence to support the rising part of the inverted U: in other words, the evidence is weak that ‘things have to get worse before they can get better’.

Reducing the share of national income taken by the very wealthy can more effectively be addressed through fiscal measures rather than by labour market regulation, but labour laws protecting the right to organise and setting a floor to wages and employment conditions have a role to play in narrowing inequalities within the wider population. In most low- and middle-income countries, an apparent obstacle to the extension of labour standards to combat poverty is the size of the informal sector. Most labour law rules presuppose at least a certain minimum level of stability to the employment relationship if they are to function effectively, and such stability is precisely what is lacking where there is a large informal or unorganised sector. Work in the informal sector tends to be characterised by irregular or incomplete access to wages which adequately living costs and subsistence needs, but this may be compensated for by partial access to the land or to kin-based relations, or participation in own-account work or micro-enterprises in the unorganised economy. Where workers in the informal sector combine receipt of wages with access to these other forms of subsistence, as they generally do, the SER model, which presupposes a more complete form of wage-dependence, is not only irrelevant but to some degree unnecessary. However, it remains the case that the persistence of informal work in low- and middle-income countries is correlated not just with high levels of poverty and economic insecurity, but with low productivity and hence with under-utilisation of economic capacity (ILO, 2015a). It is therefore not surprising that promoting formal employment should be an express policy goal of the ILO and of many national governments.

The ILO’s *World Employment and Social Outlook* report for 2015 reported that only around half of the world’s working population were in regular waged employment. The report purported to ‘[reveal] a shift away from the standard employment model, in which workers earn wages and salaries in a dependent employment relationship vis-à-vis their employers, have stable jobs and work full time’ (ILO, 2015a: 13). If this claim were true, the case for adjusting the SER, as opposed to abandoning it in favour of an (as yet loosely specified) alternative mode of addressing economic insecurity, would indeed be a weak one. However, the data presented in the WESO report do not bear out the claim, which is to be found in its executive summary. The rising share of self-employment reported for developed countries is a consequence of the recession which followed the financial crisis of 2008, and will probably be at least partially reversed in future if previous recessions are any guide. Much of the reported rise in self-employment in industrialised countries is associated less with an increase in genuine own-account work or in business start-ups, but with a growth in forms of casual work which fall outside conventional legal and statistical definitions of employment but do not indicate the absence of wage dependence (Adams and Deakin, 2014). In the developing world, the ILO's data indicate a rising share of formal employment in most countries and regions, and this trend is particularly clear in east Asia where the proportion of the working population in waged or salaried employment has increased from a quarter to over a half in the last twenty-five years (ILO, 2015a: 29).

It is clear from the experience of different middle-income countries that economic growth does not translate automatically into an increase in wage or salaried employment. In India, the proportion of the working population in formal employment has barely increased above the 10 per cent level in the last twenty-five years, although there has recently been a small rise and it cannot be said that in general there is a trend away from the SER in India. In China, by contrast, the growth of GDP experienced since the mid-1980s, averaging around 10 per cent per annum until recently, has translated into a significant increase in waged employment. This shift does not necessarily signify that employment has become more secure (Kuruvilla, Lee and Gallagher, 2013). However, the decline of the protected employment previously associated with the state-owned sector needs to be understood as a consequence of a process of constituting a labour market which operates along capitalist lines. Under the 'iron rice bowl model', workers in the larger state-owned enterprises had de facto security of tenure, but there was state direction of labour and wages played little or no role in resource allocation. China's move to a market-based economic order signifies a shift towards, not way from, the SER, which implies commodification of labour power as well as access to protection against labour market risks.

It is perhaps no accident that as China has been making this transition, there has been an active debate about labour law reform which culminated in the late 2000s in the passage of legislation extending labour standards in the areas of wages, working time and dismissal, the development of labour arbitration and related mechanisms for individual dispute resolution, and the extension of social insurance provision in urban and industrial regions (Cooney, Biddulph and Zhu, 2013; Kuruvilla, Lee and Gallagher, 2013). In India, in the same period, there has been no agreement on reform of strict dismissal laws which, formally at least, operate as a disincentive to employers to expand formal employment. There is only weak evidence that it is these laws which are holding back the growth of the formal economy (Fagernäs, 2011), but they have been the subject of deregulation in several Indian states. These include Gujarat where labour law reform has been part of a series of measures credited with stimulating industrial development, although there are other factors at work in Gujarat's growth model (Deakin and Haldar, 2015). Reform of India's labour laws has been a preoccupation of successive governments but, in contrast to China, the emphasis has been on removing laws deemed to be a constraint on business, rather than on building institutional capacity in the labour market. Reforms to dispute resolution procedures and the extension of social insurance to a wider segment of the wage-dependent population will arguably do more to promote formal employment in emerging markets than simple deregulation.

5. Labour law's contentious data revolution

An improved understanding of the economic effects of labour law reforms is only achievable if data are available on the extent to which such laws protect workers' interests, on the one hand, and curtail employer's powers to set terms and conditions of employment and to hire and fire at will, on the other. Generating such data has, however, proved to be a difficult and contentious process. The OECD was first in the field, with the publication of its indicators on employment protection law (EPL) (the most recent version see OECD, 2013). It was followed in the 2000s by the World Bank, which developed a series of employment indicators as part of its series of *Doing Business Reports* (World Bank, 2008). In each case, the methodology involved the construction of a 'synthetic index' requiring the coding of information on labour laws in particular countries into an ordinal scale. The OECD index measures the 'strictness' of employment protection on a scale from 1 to 6, with a higher score indicating stricter (more worker-protective) laws. The World Bank's Employing Workers Index measures labour laws in three areas (terms and conditions of employment including working time; non-wage labour costs; and dismissal costs) on a scale from 1 to 100, with higher scores indicating 'more rigid' rules.

Part of the controversy around these indices arises from the premise underlying them, which is that worker-protective laws necessarily impose a burden on business. No account of taken of possible benefits to be derived from protective labour laws such as those identified in the new institutional economic literature (see section 2 above). In particular, the OECD and World Bank indices see labour regulation as a pure private cost, with no advantages accruing to employers from enhanced labour-management cooperation or reduced levels of workplace conflict. The problem lies not in the idea of measuring the strength of worker protection as such, but in the identification of protection with negative economic effects. When the indices were used to rank countries according to the extent of 'strictness' or 'rigidity', it might have been assumed that an empirical link between regulation and negative outcomes such as unemployment or loss of productivity had been established. This was not the case; the outcome was just assumed in the way that the data were presented. The empirical evidence, then as now, was mixed (see Adams and Deakin, 2015), but this did not prevent the indices being used to drive policy and legislative change in a number of countries. Partly for these reasons, the World Bank decided from 2009 onwards to report data from its Employing Workers Index separately from the other Doing Business indicators, and not to incorporate scores from its labour law datasets in the composite index purporting to measure the overall quality of the business climate in different countries. However, the data are still reported under the heading of Labour Market Indicators and can be straightforwardly used to produce country rankings even if these no longer appear in the World Bank's own publications (see World Bank, 2014, 2015).

The indices developed by OECD and World Bank, particularly the former, have been very widely used in econometric analysis, but the methods used to construct them have been regarded as highly controversial, above all in the labour law research community. Responses have largely taken two forms: some accounts have been critical of the idea that laws can be effectively coded or translated into numerical form, while others have sought to modify the original methodology in various ways. The ILO has taken this line with the publication in 2015 of a new index of employment protection laws, the EPLex index (ILO, 2015b). There have also been a number of indices developed by independent researchers. A research field known as 'leximetrics', including but not confined to the coding of labour laws, has begun to take shape (Siems and Deakin, 2010).

There is a case for arguing that the application of new statistical methods to the study and analysis of labour laws is in keeping with the historical origins of the field, which are to be found in part in the pioneering empirical studies of collective bargaining carried out by social researchers at a time when collective agreements and workplace norms were not recognised as having legal significance. The development of labour law as a distinct juridical area necessarily implied a movement away from a purely empirical approach, but the field entirely never lost its connection to sociological inquiry and the training of labour lawyers in university law schools and more generally continues to refer to the importance of understanding legal rules in their social and economic context. As the social sciences themselves developed and became more quantitative over time, it was inevitable that, sooner or later, econometric and other statistical techniques would impact on policy-making in the labour law field and would be used to challenge some of the assumptions used in legal reasoning. The assumption most open to challenge was the belief, implicit in the dogmatic structure of labour law, that worker-protective rules effectively redress the balance of power between capital and labour, and thereby improve workers' welfare. The World Bank's assertion (2008) that such laws are in fact harmful to workers' interests, by artificially raising the price of labour and distorting otherwise efficient market allocation, was a direct assault on this foundational belief, and all the more powerful for the endorsement given by one of the institutions entrusted, as part of the post-1945 settlement, with ensuring global economic stability.

As we have seen, the World Bank has now qualified its position on the economic impacts of labour law rules (World Bank, 2014, 2015), and has asserted the necessity for some kind of labour regulation as a response to coordination failures and imperfections which are inherent in the operation of the labour market. This shift is justified in the light of empirical evidence over the past decade which has called into question the assumed negative relationship between worker protection and economic outcomes. Many of the early studies in the field which found evidence of negative effects can now be seen to be based on partial or incomplete data, and to have used statistical techniques which are no longer state of the art. The production of 'leximetric' datasets coding for changes in labour laws over time is part of the process of improving the quality of data while also permitting the identification of time trends which were not available when the first econometric studies in this field were carried out.

Statistical techniques have also advanced to the point where it is possible to distinguish between short-run and long-run effects of labour law reforms. This is important in testing the hypothesis that changes which have the effect of imposing costs on employers in the short run, and which may thereby have the result of initially increasing unemployment, may have long-run positive effects as employers adjust to regulation through improvements in training and labour use which are then reflected in gains in productivity and in rising employment over time (Deakin and Sarkar, 2011; Adams et al., 2015).

In a developing field such as this it is not possible to offer a definitive answer to the question of whether the effects of labour laws are positive or negative, either in general or in particular contexts. However, some findings are beginning to emerge from multiple studies using different time-series data. The first is that employment protection laws, as predicted by theory, often have the effect of encouraging employers to make investments in productivity-enhancing technologies, and that such laws have a positive correlation with innovation at firm level as measured by patenting activity, start-ups in high technology sectors such as software and bio-pharma, and numbers employed in such sectors (Acharya, Baghai-Wadji, and Subramanian, 2012, 2014). A second finding is that laws supporting worker voice within the enterprise and underpinning collective bargaining at both firm and industry level induce employment and productivity gains through their impact on worker motivation and commitment (Deakin, Malmberg and Sarkar, 2014; Deakin, Fenwick and Sarkar, 2014). A third emerging finding is that protective labour laws across the board, but in particular those relating to support for collective employee representation, are correlated with more egalitarian outcomes in wage bargaining and with an increased labour share in national income (Deakin, Malmberg and Sarkar, 2014; Deakin, Fenwick and Sarkar, 2014).

While the data revolution which is currently taking place within labour law remains nothing less than contentious, the first results from empirical studies using time-series data suggest that this will remain a fertile field for researchers for some time to come. If this body of work has the effect of calling into question some of the nostrums which have directed policy debate since the 1980s, it will have served a useful purpose.

6. Conclusion

We are learning more about the ways in which labour laws can contribute to economic development and growth. Labour laws which embed fairness norms in the employment contract help to overcome coordination failures within the firm and can contribute to positive productivity and employment effects across the wider economy. In the industrialised economies of the global north, social legislation played a role in the transition to capitalism by providing mechanisms for diffusing labour market risks. In today's low- and middle-income countries, labour law reform can help build institutional capacity in areas which include social insurance, collective bargaining and dispute resolution, and can contribute to the formalisation of employment which is an important step in reducing economic insecurity. Over the long run, labour law, along with other institutions of the 'social state', has modified the operation of the market in ways which have, far from undermining capitalism, have made it more stable and enduring (Renner, 1929; Polanyi, 1944). Whether capitalism is ultimately sustainable by these or other means, and whether labour law in its current form is assisting or obstructing the evolution of a more just economic order, are open questions in our current state of knowledge, but it would seem that some element of worker-protective labour regulation is a precondition for the operation of a market economy and not simply a side-effect of market-led growth.

If labour regulation is a positive sum game for economies at various stages of development, it does not follow that labour law reform is a straightforward process. Labour law may have an efficiency-enhancing dimension, but it is also concerned with the redistribution of wealth and power. Entrenched interests are generally well placed to resist worker-protective laws, and the conventional wisdom of any given time must also be overcome. In our own time, neoliberal arguments against labour regulation have proved remarkably persistent, to the extent that they have come to frame parts of labour law scholarship. Empirical research can help, however, to sort out good arguments from bad in the debate over the economic effects of labour law. Labour lawyers should be prepared to question conventional wisdom on the supposed negative impact of worker-protective norms and to query claims made over the desuetude of its core institutions, in particular the standard employment relationship. It would seem that labour law is still a work in progress, and central to contemporary capitalist dynamics.

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