

## Guest Editorial

### Labour Law for the Post-Industrial Era

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With the 1979 election of Margaret Thatcher in the United Kingdom, the welfare state in Europe came under attack. Looking across the Atlantic to the United States, Thatcher set out to eliminate labour laws and industrial relations practices that she believed restrained British business, putting them at a competitive disadvantage in a global economy. The view of the Thatcher government, that 'restrictive' employment laws made it impossible for free labour markets to operate, was picked up by other European governments confronting high levels of unemployment. Yet, throughout the 1980s, labour law academics decried deregulation and looked with scepticism at any initiative designed to achieve 'flexibility' in the labour market.

The theme of so many academic conferences in the 1980s was the rise of the atypical worker, and the threat this phenomenon posed for traditional labour law. Atypical workers were also seen as cheap labour, undercutting the standards achieved by typical workers, those persons who work full-time, year-round, on an indefinite contract of employment. Atypical workers were seen as the problem, not the law, for labour law academics proceeded on the assumption that the law was right in enshrining the typical worker as the gold standard that must be preserved. In the 1980s, no one questioned whether it was possible over the long-term for labour law to ignore economics. Today, we must ask whether labour law will become an irrelevance in guiding the labour market if change does not occur.

#### 1. OBSOLESCE STATUTORY MODELS

Those in the field of comparative labour law should be especially alert to the need to consider economic forces. Ever since *Industrialism and Industrial Man*,<sup>1</sup> it has been recognised that the labour law responses produced by legislatures in the advanced market economies are typically responses to similar economic forces. Sir Otto Kahn-

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1. Kerr, Clark, J.T. Dunlop, F.H. Harbison, and C.A. Myers, *Industrialism and Industrial Man*, Harmondsworth, Penguin Books, 1973 (2d edition with postscript).

Freund in one of his most famous lectures once observed that although the law governing labour relations is one of the centrally important branches of the law, it is most definitely a secondary force, with economics being the primary force.<sup>2</sup> Today, we must consider whether changes resulting from technology and from the global economy represent a fundamental change in the composition of the labour market, and particularly in how the buyers of labour and suppliers of labour act in that market. If that is the case, then a major paradigm shift has occurred. The thinking that produced labour law in the era of industrialisation must change, for the workers of the post-industrial era need relevant labour law.

In most advanced market economies, the country's basic labour laws were enacted at a time when most of the country's work-force toiled at manufacturing jobs. These laws are now dated. The concepts that applied to an industrial work-force no longer are relevant to a post-industrial world populated with rank and file information workers.

## 2. THE SOCIAL HIERARCHY OF AN INDUSTRIAL LABOUR FORCE

Let me give an example from my own country, the United States. Various labour force statistics indicate the dramatic shift in the American labour force in the sixty years since the passage of America's basic labour laws, the National Labour Relations Act (NLRA) and the Fair Labour Standards Act (FLSA). In the mid-1930s, about one-quarter of the labour force was still employed in agriculture, with slightly over half in manufacturing, mining and construction. Today, the composition of the labour force has changed greatly. Agriculture has shrunk to six per cent of the labour force while manufacturing, construction and mining represent less than twenty-five per cent of the labour force. More persons are employed in the finance, insurance and real estate industries. Sectors each employing about twenty per cent of the labour force are government, health care and education, and services.

The recital of statistics is necessary to comprehend the significance of what the 1930s' legislation was designed to achieve. The legislature passed a statute to support the dominant segment of America's workers. At the time, these were mainly male industrial workers toiling in factories and at other manual jobs. This is not to deny that there were women workers, especially young women, and even children who worked in factories. In the 1930s, there were people doing service jobs, and those working for government. Nonetheless, the legislatures were responding to the main group in the labour force when they passed the NLRA and FLSA. What was done in the United States was done by legislatures in other countries: they responded to the needs of a male industrial work force.

The other typical feature of the basic American labour law is that Congress acted in the middle stages of industrialisation. In 1935, the United States was not an emerging economy. Its industrial revolution, begun in the early 1800s, was long over.

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2. Kahn-Freund, *Labour and the Law*, at 2-3 (1st ed. 1972).

This era was a time of mass industrialisation, when somewhat better living conditions for the working class created aspirations which elected politicians heeded.

In the early to mid-twentieth century, legislatures have reacted to an industrial labour force. More importantly, the legislature saw labour relations in terms of the way in which companies managed their human resources at that time. Academics use different names to describe this human resource management approach. Some call it simply 'Taylorism' while other management theorists focus on the hierarchical corporation, with its pyramid structure. The hierarchical corporation was a structure with many layers, or rungs, with everyone reporting to someone on the next higher rung. The hierarchical structure suited a decidedly authoritarian approach to management.

In the traditional hierarchical company structure, the people at the bottom, the rank and file workers, did what they were told. The management practice of the time saw no value in asking workers for their thoughts on how the job could be done better, and workers did not expect to be consulted. Upon arriving at work, manual workers were often effectively transformed into human robots. It was also a time when the label 'manager' was applied sparingly. In factories, few persons held that title.

It was not until the mid-twentieth century, the later stages of industrialisation, that legislatures in many countries updated their notions of appropriate treatment of workers. In such periods, legislatures enacted provisions that gave employees a means of challenging a dismissal they believed to be unfair, and mandated disclosure of information and consultation with employees.

### 3. CHANGING NATURE OF THE LABOUR FORCE

In contrast to the 1930s, today's labour force is enormously different. The typical worker, one who works full-time year-round, in some countries is as likely to be female as male.<sup>3</sup> More importantly, that person most likely is employed in a service industry as the percentage of the labour force in manufacturing has shrunk drastically, down to as low as twenty per cent of the labour force in the United States. In light of the diversity of occupations within a given service sector and the diversity across the service sectors, it is more difficult to discuss the typical employee in a service industry. There are high level intellectual services, such as those found in law firms, universities, software firms, and biotech research firms. There are many more routine services, to be found in industries such as health care, insurance, and banking. In terms of numbers employed and number of establishments, there are many more low level services copy shops, one-hour film processing, retail stores, and food service. The diversity of employment in services has rendered the traditional blue-collar/white-collar distinction meaningless.

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3. For instance, in the United States, women comprise 40 per cent of the labour force, and 70 per cent of working women work full-time.

#### 4. THE CHANGING SOCIAL HIERARCHY AT WORK

Statistics on the numbers employed in different industries do not capture the immense change that has occurred in the nature of white collar work. In 1970, the computer was found in most larger companies, but the computer was a mainframe, and specialised computer personnel directly utilised its capabilities, not ordinary employees. In 1970, the word 'microprocessor' meant nothing to the ordinary person, but by the end of the 1970s, the microprocessor had made its appearance, first in calculators and digital watches. In the 1980s, the impact of microprocessors began to be felt in industry, especially when microprocessors made the desktop PC and other computerised applications possible.

Job losses occurred as software applications, such as spreadsheets, eliminated the need for legions of mid-level white collar employees who performed the mental work of recording, classifying and routinely analysing information. In the 1990s, companies became aware of the real power of microprocessors: entire layers of 'management' could be de-layered. This was only possible because the managers affected did not manage people; rather, they managed information and information flow. With microprocessors, the front-line collectors of the information, often lower level employees, and the users of the information, usually higher level managers, could bypass the middle manager who collated and analysed data.

Re-engineering the corporation may have decimated the lower and middle management ranks, but it also had the effect of empowering the rank and file. Re-engineering the corporation has meant the end of the rigidly hierarchical corporation, with its many layers. It has meant people must work in teams. Yet, they cannot do this without being empowered to speak out, to participate.

Even before the advent of the flattened corporate hierarchy, the workplace had become less formalistic. Compared to factories, office settings and shops usually induced informal behaviors, with managers calling subordinates by their first names and being called by their first name in reverse. The Total Quality Management (TQM) and re-engineering movements, with their emphasis on team work, have led companies to focus on building team spirit. This has heightened the tendency for companies to downplay any status distinctions in office interaction. Although this trend cannot be found everywhere yet, it is indisputably the wave of the future. This is inevitable as we make the transition into the post-industrial era, an era in which many rank and file jobs will be knowledge worker jobs. The future, even for the rank and file, are knowledge jobs in the service economy.

#### 5. THE GLOBALISATION OF MARKETS

The globalisation of markets is not new, but the impact today on the labour forces of advanced countries is greater than ever before. Globalisation of markets impacts manufacturing most noticeably. The economic development of previously underdeveloped regions of the world has meant that companies have more options than

ever before in deciding whether to keep their production facilities in the home country or shift them to another part of the world.

The impact of technological advances transcends the organisation of work at workplace level. Vast technological progress in telecommunications technology has resulted in it being no more difficult to send data to the company's office on the other side of the world as it is to send data to the office across the street. This is no longer a futuristic vision: for rank and file office workers, it is a routine task to fax and e-mail information around the globe. This has had a major impact on both manufacturing and service industries. In manufacturing industry, it has meant that the office interaction necessary between two companies, e.g., a plant in Germany and its parts supplier in Brazil, is now easily, quickly, and cheaply accomplished. Formerly, only very large companies had the infrastructure to support multinational operations. Today, even medium sized companies can be global players. Technological advances have also had an impact on service industries, industries once thought immune to the export of jobs. Those industries most reliant on the transmission of data, such as the financial industry, became rapidly globalised in the 1980s as the telecommunications technology permitted this to occur. Thus, today, a London-to-New York telecommunications open link between two offices of a company operating in the financial market is the norm. Home offices have shrunk as it has become easy and relatively inexpensive to communicate rapidly with offices situated nearer the customer base.

In countries that have pursued a relatively open market policy, the above developments have meant that workers, both in manufacturing and in service industries reliant on information transmission, face the fact that the work they do can be done by workers in less developed countries, often for much less. Employers, themselves confronting an increasingly competitive business environment, rebel against buying more labour than they need. The result, as we have seen, is a movement towards offering part-time, temporary, and fixed term work.

Labour law and unions can do little about this as both are bound by national borders but capital is not. Workers do not need to hear an express statement from their employer to know that their employer can simply shift their work elsewhere. Countries that do not pursue an open market policy find themselves disfavoured by business, and over time, their growth rate stagnates and unemployment rates increase. In such countries, we are already beginning to see a generational response. Younger workers, many well educated but facing poor employment prospects, support changes in labour law that would make it possible for employers to offer what some term 'precarious' employment.

## 6. FUTURE DIRECTIONS

With pressure to remove employment protections, we must ask why certain 'standards' should be defended. We must ask what purpose they once served and what purpose they now serve. I submit that one area ripe for revision is the regulation of working hours. I would agree that it is appropriate to have a ceiling on the number of hours an employee can work, perhaps on an annualised basis. But in many countries, legislation

on working hours occurs to such an extent that it appears the legislature is attempting to micro-manage the economy.

It must be recalled that statutes extending protection to typical workers do so based on notions derived from factory schedules. The daily working hours of a factory worker was determined in relation to the optimal operation of the machines. From the employer's viewpoint, the company wanted to have machines running for certain periods of the day. So, employers offered work in blocks of time. Everyone on a shift might start at one time and work for a given number of hours, with certain stipulated break times. Because it might be more efficient to shut down the factory entirely, vacation periods were often stipulated. In enacting statutes, legislatures often responded to this pattern of work, a pattern made desirable by the industrial nature of the work. Such standardisation of working hours is simply unnecessary for information workers accomplishing much of their work on a networked desktop computer.

The competitive pressures on employers are becoming so great in a globalised economy that there is a danger of much of labour law being swept away in a desire to remove outdated employment protections. Now is the time for labour law academics to propose substantial revisions to existing labour laws based on a thorough consideration of the needs of a post-industrial labour force.

JANICE R. BELLACE\*

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\* Samuel Blank Professor of Legal Studies and Deputy Dean, The Wharton School, University of Pennsylvania, USA.