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Recovering the Impact of Normative Regimes on Labour Relations Practices: A Socio-Historical View of Institutional Requirements

ROBERT KNEGT*

I. Introduction

When Hugo Sinzheimer coined the term ‘labour law’ (*Arbeitsrecht*) in 1911, the term represented two developments partly realised by him: first, that academic lawyers had become aware that state law could be relevant to labour relations; secondly, that part of the labour movement was giving up its suspicion of state law as repressive law, and discovering its potency to contribute to freedom, equality, and security for workers.¹ Sinzheimer gave a strong impetus to a wide institutional re-embedding of labour relations that was only halted when the hegemony of neoliberal economic perspectives afflicted government policies in the 1980s. The consecutive institutional downshift generated strife among labour law scholars for restoring or reinventing the goals of labour law.² Strategies diverge: some authors tend to submit to the hegemony of economics and try to convince economists that labour law rules do not disturb, but actually contribute to the efficiency of labour markets.³ Others stress the autonomy of labour law’s goals and criteria: it is rather markets that ought to bow to the superior political principle of democracy or the legal principles of justice and equality.⁴

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¹ H Sinzheimer, *Grundzüge des Arbeitsrechts* (Jena, Fischer, 1927).

² See, for instance, the different contributions in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford, Oxford University Press, 2011).

³ S Deakin and F Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (Oxford, Oxford University Press, 2005).

⁴ M Weiss, ‘Re-Inventing Labour Law?’ in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford, Oxford University Press, 2011).

Since the 1980s, the political embrace of neoliberal doctrine has tended to obscure sight of the importance of institutional conditions for well-functioning labour relations. I argue that a broader historical perspective on developments in the regulation of labour relations can assist us in recovering a clearer view of these conditions, and may assist us in considering the possible futures of labour law.

This argument requires, first, a lessening of the strict limits to which 'labour law' has been subjected. Its history is then, secondly, reconstructed as one of successive transformations of normative models, which are not just ideological refractions of, but are actively co-constituting labour relations. A succinct outline of labour relations regimes in Western Europe, over a period of roughly eight centuries, substantiates the importance of institutionally embedding the strange market on which the commodity of 'labour' is said to be traded, and suggests the need to find (new) ways of doing so if we are to prevent its future collapse.

II. Seven Common but Deplorable Limits of Labour Law

With a view to a broader historical perspective, I need to dissociate myself from what I will list – for the sake of brevity – as seven common, but deplorable limits that are regularly placed on the scope of labour law. Whatever the reasons have been for setting up fences, they tend to obstruct our view of the actual continuity of the norm-imbued domain.

First, labour law is often depicted as if it originated with the Industrial Revolution.⁵ Wage labour and its regulation, however, have existed in considerable volume for much longer. In Europe, wage labour has been reported as far back as the seventh century. It existed on a large scale in monasteries at the start of the last millennium. In the fourteenth century, more than half of all labour was, at least in Britain and the Netherlands, wage labour.⁶

Second, labour law is widely identified with *state* law, or rules formally based upon the latter at supranational level. This is in keeping with conceptions of law that have gained dominance since the nineteenth century. However, if we do not impose such a narrow definition of 'law' upon reality, we rediscover a not inconsiderable amount of law regarding labour relations at 'lower' levels, in different forms; for instance, local conventions, or rules of associations, or enterprises that were explicitly perceived as 'law' by those associated with them. In a prolonged struggle during the nineteenth century, nation states gradually succeeded in usurping most of it. Labour law may acknowledge their claim to victory, yet without submitting to the conqueror's narrow perspective.

⁵ eg, B Hepple (ed), *The Making of Labour Law in Europe: A Comparative Study of Nine Countries Up to 1945* (London, Mansell, 1986) 12.

⁶ C Dyer, *An Age of Transition?: Economy and Society in England in the Later Middle Ages* (Oxford, Clarendon Press, 2005) 211–13.

Third, labour law is argued as concerning the *protection of workers*.⁷ But, for instance, it also authorises employers to direct the activities of ‘their’ employees and protects employers from some of their whims. Labour law is about normatively structuring labour relations by generally attributing powers, rights, and responsibilities in a certain way. The protection of workers is only part of it. In substantially different labour market conditions, even the protection of employers might become urgent – as has occurred in specific situations in the past.⁸

Fourth, this protection is argued as applying in principle to *employees* only, because of their specific subordinate position. This argument corresponds with the currently dominant, strict division between employment and entrepreneurship. However, the strictness of this division is just a recent aberration. In the past, governments have devised regulations protecting self-employed workers; for instance, formally independent textile workers who were economically dependent on merchants running a ‘putting-out’ system.⁹

Fifth, the types of protection are deemed to be characteristic of labour relations under *industrialised* relations. However, terms of dismissal, continued payment of wages in case of illness, and several other conditions have been documented elements of labour relations at least from the fourteenth century.¹⁰ Terms of dismissal have also been conferred upon legally independent textile craftsmen working under the conditions of a ‘putting out’ system.¹¹

Sixth, labour relations are thought to have always been based on *contract*. Whilst incumbent duties will generally be based upon a certain type of formal confirmation of entering a relationship, this need not be the current conception of contract as a ‘concordance of wills’ – an eighteenth-century innovation. Previously, commitment was typically entered by a *unilateral* act, the self-description of which was ‘hiring oneself out’.

Seventh, labour law tends to be conceived as a normative framework *imposed* ‘from the outside’ upon a ‘naturally’ functioning market. However, conceived less narrowly, law is an integral element of practical interactions. And, until the eighteenth century, the ‘market’ did not have the naturalised character that orthodox economics assigns it nowadays. The market was conceived as a public place of justice;¹² as a device that would, by its technical design, realise justice

⁷ Hepple, *The Making of Labour Law* (n 5) 11.

⁸ K Schulz, *Handwerksgesellen und Lohnarbeiter: Untersuchungen zur oberrheinischen und oberdeutschen Stadtgeschichte des 14. Bis 17. Jahrhundert* (Sigmaringen, Thorbecke, 1985) 74–76.

⁹ K Schermer, ‘Handwerker und Verleger: Das Verlagssystem der frühen Neuzeit als rechtshistorisches Problem’ in K Schermer and D Willoweit (eds), *Vom Gewerbe zum Unternehmen: Studien zum Recht der gewerblichen Wirtschaft im 18. und 19. Jahrhundert* (Darmstadt, Wissenschaftliche Buchgesellschaft, 1982).

¹⁰ W Ebel, *Gewerbliches Arbeitsvertragsrecht im Deutschen Mittelalter* (Weimar, H Böhlhaus, 1934); W Klatt, *Treuepflichten im Arbeitsverhältnis* (Pfaffenweiler, Centaurus Verlag, 1990) 36–39.

¹¹ J Brand, *Untersuchungen zur Entstehung der Arbeitsgerichtsbarkeit in Deutschland* (Pfaffenweiler, Centaurus Verlag, 1990) 240–41; Schermer, ‘Handwerker und Verleger’ (n 9) 53.

¹² M Foucault, *The Birth of Biopolitics: Lectures at the Collège de France 1978–1979* (M Senellart ed, G Burchell tr, New York, Palgrave Macmillan, 2008).

between trading parties. Only liberalism has turned it into a quasi-natural mechanism, and thereby isolated it from a discourse of justice.

III. Repertoires of Evaluation and Legal Models of Labour Relations

By steering these critical notes in a positive direction, towards an approach that recognises (labour) law as a constitutive element of day-to-day human practices, I build upon the work of Luc Boltanski and Laurent Thévenot.¹³ They have urged social science to take the imperative to justify human action seriously. In the face of uncertainty, people ordinarily 'seek to carry out their actions in such a way that these can withstand the test of justification ... to establish associations among things that count, to identify beings independently of circumstances, and to reach agreement on forms of generality'.¹⁴ Coordination of human beings at work requires *investments of form* that endow human beings, and objects, with capabilities and thus ensure an adjustment of diverse resources. Boltanski and Thévenot identify six different orders of worth, with each based upon mutually incommensurable ways of establishing equivalences amongst beings, in order to coordinate human action: *Inspired* (passion, creativity); *Domestic* (trust, authority); *Civic* (equality, solidarity, rights); *Opinion* (recognition, repute); *Market* (exchange, desire); and *industrial* (functionality, productivity, expertise). Below, I use the first letter in parentheses to refer to each mode, with the exception that (U) stands for 'industrial'.

Organisations partake of different orders at the same time, and can be analysed as composite arrangements of compromise between them – the business firm, for instance, as 'a compromising device between several modes of coordination, which engage different repertoires of evaluation'.¹⁵ In this view, labour law is the equipment of a central compromise between civic and industrial orders around the constitutive concept of the 'worker'.¹⁶

Boltanski and Thévenot stress the incessant *dynamics* of coordination, thus disentangling their composite 'repertoires of evaluation'. Whilst their research orientation leads them to treat compromising devices as derivative phenomena, such phenomena may be valued for their capacity to construct a relative *stability* that allows them to be mobilised in the coordination of (labour) relations as *composite modes of evaluation*. The stability of these compositions is being pursued by material arrangements that support the regularity of practices

¹³ L Boltanski and L Thévenot, *On Justification: Economies of Worth* (C Porter tr, Princeton, Princeton University Press, 2006).

¹⁴ *ibid* 32, 37.

¹⁵ L Thévenot, 'Organized Complexity: Conventions of Coordination and the Composition of Economic Arrangements' (2001) 4 *European Journal of Social Theory* 405.

¹⁶ Boltanski and Thévenot, *On Justification* (n 13) 325.

(rituals, written rules), and by investments of form that culminate in the design of *normative models of labour relations*. My analysis focuses on the role that these normative models have played, and are playing, in the structuring of labour relations.

As to which normative models are being used, this depends primarily upon three conditions. First, on the prior *availability* of *normative models* of relations: what is already in the 'toolkit', and how may it be used to normatively shape practices? Secondly, on the availability of certain *technical devices* and arrangements that facilitate the implementation of models (oath, meeting places, writing). Thirdly, on the capacity of an available model to be adjusted to *fit* current requirements. This fit has to be judged both in terms of the model's internal consistency and legitimacy (do participants in the unit sufficiently recognise it as a valid framework for what they are doing collectively?), and of its performative power within the configuration of interdependent actors of which the unit is a part.

Distinguishing between types of configurations of actors, types of technical arrangements, and types of normative structuring allows me to argue for the role of normative models in different historical *regimes of labour relations*.

IV. Regimes of Labour Relations: An Outline

The outline below is selective in several respects. It aims, not of course at completely rewriting the history of labour relations, but at highlighting the role of differential normative models in their development. It comprises 'regimes' that have been relatively stable and widespread in Western Europe, and that might still somehow be relevant to our thinking about the future of labour law. My sources, though, are to a large extent on developments in Germany, as these have been documented and analysed more thoroughly than elsewhere. The point is to highlight a number of relevant types of regimes as combinations of configurations of actors, types of technical arrangements and relevant knowledge, and types of normative structuring.

A. Craft Guild Regime

Economic developments during the High Middle Ages allowed cities to be revived or newly founded, and to develop into craft centres. Craftsmen, working in workplaces connected to their homes (D)¹⁷ which were often spatially collected in a quarter of the town, were basically equal competitors in one trade. Their configuration in the political space of the city, yet to be defined, urged them to organise

¹⁷ The letters between parentheses refer to Boltanski and Thévenot's (n 13) six orders of worth, introduced in the text above.

themselves collectively (C). In their search for a normative mould, the religious model of a *sworn brotherhood* offered itself; the mutual oath (*coniuratio*) being the basis to claim and organise the rule-making capacity and jurisdiction of the guild.¹⁸ In the Middle Ages, the oath was one of the few devices permitting the constitution of binding relations of parity between non-kin people of equal status.¹⁹ Guild members used to bind themselves by oath to comply with the rules – even those not yet issued – and to accept, in advance, sanctions in case of infringement. The brotherhood model has clear legal implications of equality and of common decision-making. Competition (M) allows for different earnings, but brotherhood (C) forbids excessively large differences in potentials (rules on the maximum number of journeymen employed). In accordance with a conception of markets as places where *justice* would be realised, guild rules aimed at guaranteeing a just division of the amount of work, and a reasonable level of subsistence to all members.

The expertise of the trade (U), transferred from masters to apprentices, constituted a secret kept from outsiders (D); the ‘mystery’ of the trade – a term that might be related to the contemporary legal conception of the corporation as a *persona mystica*.²⁰ The meetings at which guild masters took collective decisions (C) were characterised by secrecy as well, maintained through ritual, and strictly oral in character. What members called the ‘law’ of the guild was not something ‘external’, but was actually being *lived* by them, performed by participating in ritual meetings, meals, drinks, greetings, funerals of members, and in the festive processions in the town.²¹ To be effective, guild rules required force also towards outsiders and, in this respect, guilds were dependent upon city governments for official proclamation. It allowed the city to monitor general interests; for instance, the city’s valued reputation as an exporter of quality products (O).

Could the craftsmen have made another choice of legal model? Their positions as urban citizens and independent economic competitors made the craftsmen prefer ‘horizontal’ over more hierarchical models available. In order to forge a strong compromise between civic and domestic orders, they transformed models of association already developed in the religious world. Since the thirteenth century, this fraternity structure and its legal rules have been constantly copied and partly adjusted by other guilds all over Europe – metaphorically they might be regarded as a kind of ‘Operating System’ that could everywhere base the ‘application programs’ of locally different craft practices.²²

¹⁸ G Dilcher, ‘Die genossenschaftliche Struktur von Gilden und Zünften’ in B Schweineköper (ed), *Gilden und Zünfte* (Sigmaringen, Jan Thorbecke, 1985) 71–11 (79).

¹⁹ W Reininghaus, *Die Entstehung der Gesellengilden im Spätmittelalter*, vol Beiheft 71 (Vierteljahrschrift für Sozial- und Wirtschaftsgeschichte, Wiesbaden, Franz Steiner Verlag, 1981) 79.

²⁰ Schermer, ‘Handwerker und Verleger’ (n 9) 23.

²¹ Brand, *Untersuchungen* (n 11) 77–85.

²² HJ Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass., Harvard University Press, 1983) 391–92.

The basis of the craft guild regime could be undermined by deficiencies or changes in power configurations. If the city was an insufficiently closed space, outsiders had an opportunity to ignore the guild's borders of control (D), and take away part of the internal demand. Individual members could be seduced to cheat on the rules (C); for instance, by employing more journeymen than allowed. In particular, with textiles, merchants could acquire a dominant position at the demand side (M), and thereby force guild masters into a dependent position (more on this below in IV(C)). Finally, the domestic relationship between masters and journeymen could be contested by a civic solidarity of journeymen.

B. Journeymen's Associations and the Tripartite Structure of Relations in Cities

At an early stage, journeymen figured as 'adolescent' members of guilds, subordinate to their masters (D), and lacking a voice at guild meetings. Over the course of the fourteenth century, German journeymen started to distance themselves from their domestic subordination and to organise separately (C), allegedly to defend their 'honour' (O) against intrusions by masters. In search for a normative mould, some of the journeymen's collectives selected a domestic alternative and appointed a 'king' to guide and represent them. Others claimed legitimacy on the basis of a reduced guild model, organising themselves around 'boxes', and creating collective funds (C) to provide for the costs of member funerals or festivities – or, as masters tended to suspect, subversive actions. The journeymen created their own space in town: they met in their inns (*Stuben*) and claimed their own jurisdiction. Their wandering practices, which involved regularly moving between cities in order to learn more of the trade, contributed to their organising at regional and even at empire level. It enabled them to enforce measures at a regional level which gave them temporary weight over (primarily locally organised) masters. The collective action of journeymen incited masters to take counteractions; for instance, to make regional collective agreements on maximum wages, and incited city governments to mediate between conflicting parties.²³ During 'the golden age of wage labour' – a term used to describe a short period in the mid-fourteenth century – masters complained to city governments that journeymen were trying 'to become lords over their masters' which, to some extent, mirrored actual relations.²⁴

The divide between masters and journeymen, and the role of city governments in their relationship, established a now familiar triangular structure comprised of employers, employees, and government. It can be regarded as a device that effects compromise between domestic, civic, market, and industrial orders.

²³ Schulz, *Handwerksgesellen und Lohnarbeiter* (n 8) 72–75.

²⁴ Reininghaus, *Die Entstehung der Gesellengilden* (n 19) 38.

Under normal conditions, all parties strive to realise their legitimate interests and, at the same time, desire to keep relations peaceful. As a compromise between incommensurable orders of worth, it institutes a balance that cannot be celebrated as a safe accomplishment, as it remains subject to changes in the (power) configuration underlying it.

C. Putting Out System and Corporate Structure

For a lengthy period until the end of the nineteenth century, the production of textiles dominated craft activities in the cities. Traditionally, it was organised as a *serial* processing of textile materials, in which each process was conducted by a separate trade, represented by a guild with its own jurisdiction and 'honour' within the social order of the city. As early as the fifteenth century, there are reports of a shift in the power configuration caused by the increasing concentration of capital in the hands of merchants. Textiles are predominantly products exported to foreign markets, therefore traders are interested both in increasing the efficiency of processes, and in gaining control of all of the consecutive stages of production. That way, they can attune the production process to increasingly rapid changes in preferences for textile styles and shifts in fashion. Merchants claiming expertise in marketing (M) started to impose the changing demands of international markets upon primarily traditionally (D) producing craftsmen. Merchants provided masters with raw materials and required well-defined products to be delivered to them – often, exclusively to them. The domestic-civic parataxis of the trades, each of which took relatively independent care of its 'own' part of the textile production process, tended to break down with the industrial logics of merchants orientated to market requirements. At the same time, merchants undermined guild regimes by exploiting the labour potential of farmers in the countryside, providing them with spinning wheels, looms, and raw materials, and requiring them to spin and weave at their homes (ie, a 'putting out' system).

The new commercial regime, however, conceiving of the production process as a chain of contractual deliveries, typically lacked some of the controls and commitments that made up the strength of guild regimes. Merchants were facing at least five problems.²⁵ First, they lacked direct supervision, so how were they to make sure that the work was done correctly? Secondly, they usually competed between themselves for workers, so how were they to ensure that the workers engaged by them were not poached by another? Thirdly, if the merchant had provided a worker with materials or given him an advance payment, how would they be retrieved if the worker disappeared? Fourthly, how to keep the worker committed and prevent him from using his machinery to produce textiles for others as well? Finally, the lack of control increased the risk of conflict at the moment of delivery.²⁶

²⁵ Brand, *Untersuchungen* (n 11) 172.

²⁶ *ibid* 399.

Are, for instance, product failures due to bad work or to bad materials provided by the merchant? How to deal with these conflicts? Brand highlights the massive embezzlement of raw materials that occurred in spite of penal sanctions, on which a whole black market could flourish, and interpreted this as a protest by independent workers against the constrictions to which they were subject. It was behaviour aimed at damaging the 'putting out' merchant, inspired by a fundamentally different normative model of labour relations that made the merchant appear to them as an 'uncompanionable alien'.²⁷

The problems mentioned above urged the merchants to try, not just to rule out the guild regime, but to exploit its excellent disciplinary potential, and therefore look for compromises between their commercial and the 'old' guild regime. This was primarily achieved in one of two ways. Either the commercial regime was incorporated into officially proclaimed guild regulations, whose character was largely preserved. Or guilds (or collectives of its members) figured as parties to civil law contracts, and committed themselves to collective deliveries to merchants.²⁸ The guild masters could retain the formal independence that was so important to their perceptions of 'honour' (O), and of their rightful place in city communities (C), whilst their economic position shifted towards an actual dependency (M) on a small number of merchants.

In this conflict of regimes, city governments have been ambivalent, and have changed their position over time. For a considerable period, their 'economic policy' (C-U) has been characterised by two basic tenets. First, international trade depended upon a city's reputation (O), which required supervision over the quality of its export products. Apart from institutional facilities (weigh-house, cloth hall), the city had to check the internal quality control mechanisms of the guilds involved. Secondly, the city had a duty of care to the common wealth of the city, in particular, to monitor whether its population had insufficient means of subsistence or if there were unused possibilities for economic growth. An important means to further economic activities was to attract skilled craftsmen from elsewhere by offering them easy entrance to citizenship, protection of their religion, or fiscal privileges.

Since the eighteenth century, there has been a persistent discussion regarding whether, or to what extent, guilds should be seen as conservative, monopolising forces resisting modernisation – as they have been depicted by revolutionaries in France, most protagonists of strong national states, and many orthodox economists; or whether their organisational structure has contributed significantly to the economic development of cities – a position nowadays supported by socio-economic historians.²⁹ Government policies towards guilds gradually developed

²⁷ *ibid* 199–207.

²⁸ Schermer, 'Handwerker und Verleger' (n 9) 38–45.

²⁹ J Lucassen, 'Labour and Early Modern Economic Development' in K Davids and J Lucassen (eds), *A Miracle Mirrored: The Dutch Republic in European Perspective* (Cambridge, Cambridge University Press, 1995).

from legal recognition of their relative autonomy, to efforts to supervise and control them and make them subservient to national economic policies (under absolutism) and, finally, to the withdrawal of support and efforts to eradicate them in favour of the commercial regime pursued by merchants.

D. Commercial/Contract Law Regime

The commercial regime, normatively based upon contract law, was initially pushed by commerce, then embraced by states that were gradually increasing their power at the cost of cities. Configurations changed in favour of states, firstly of newly developing absolutist states, in the nineteenth century of nation states. They rose by countering city-level structures such as the guilds, by supporting the commercial development of the countryside, and by pushing a universal civil law regime of *contract* upon labour relations. Initially, the purport of this regime was predominantly *negative*: to deny legitimacy to *Ancien Régime* structures, particularly the *domestic* elements of these structures in the cities.

The regime shift was prepared both in legal theory and in economics. ‘Labour’, as an abstract indication of productive activities, had been unknown until economics developed it in the eighteenth century as a measure of the value of things.³⁰ The idea that ‘hiring oneself out’ could be legally constructed as a transfer of *property*, had been developed by Samuel von Pufendorf and Hugo Grotius,³¹ who treated labour as a ‘particle of freedom’ that is owned, and thus may be alienated by a subject without thereby detracting from his freedom.³² A key concern in Enlightenment philosophy was how to reconcile the formal autonomy and equality accorded to free citizens, with the functional relations of inequality. The usual answer was ‘by contract’, and the smart ‘solution’ in relation to labour relations was to combine the notion of *property* of labour power with the legal freedom to transfer it by contract (C) to another, provided that this was for a *limited* period (no ‘slavery’!). The possibility of transfer, however, introduced labour into the market order. To treat labour as a ‘commodity’, as we have come to characterise it, remains a tortuous exercise (I have elsewhere outlined eleven reasons why it is still problematic to treat ‘labour’ as something that could be traded on a market).³³ A recent comparative,

³⁰ NJ Theocarakis, ‘Metamorphoses: The Concept of Labour in the History of Political Economy’ (2010) 20(2) *Economic and Labour Relations Review* 7, 13.

³¹ S Pufendorf, *The Whole Duty of Man According to the Law of Nature* (A Tooke tr, Indianapolis, Liberty Fund, 2003); H Grotius, *De iure belli et pacis* (Amsterdam, G Blaeuw, 1631).

³² K-P Nanz, *Die Entstehung des allgemeinen Vertragsbegriffs in 16. Bis 18. Jahrhundert* (München, J Schweitzer Verlag, 1985) 141.

³³ R Knegt, ‘A Farewell to “Protection”: Rethinking the Labour Law-Market Nexus’ (2nd Labour Law Research Network Conference, Amsterdam, 25 June 2015) 15–16 www.researchgate.net/publication/277308450 accessed 20 December 2018.

historical study of societies in which labour had been commodified, found that commodification contributed to a short period of economic growth, but was then followed by increasing social inequalities that have in all cases internally generated the downfall of market economies.³⁴

The contractual model was deployed as a crowbar to break up the local arrangements and normative models that characterised labour relations under the *Ancien Régime*. The way in which this model was subsequently received in practice has significantly differed across local cultures. In France, the model was initially applied quite radically, to the detriment of employers who suddenly lacked the traditional means of disciplining workers, whilst workers used their newly acquired freedoms to ‘vote with their feet’ and walked away in the event of disagreement. A solution, in part, was found with the introduction of the *Conseils de Prud’hommes*, a low-threshold dispute-resolution body that had not been saddled with substantial rules, and quickly began to refer back to ‘old’ conventional rules, thus succeeding in playing a reconciling role.³⁵ In Germany, in spite of regulation to the contrary, the guilds succeeded in upholding their local regimes, to a large extent, until the third quarter of the nineteenth century. Guild journeymen could not keep non-guild workers from being hired by a factory owner, but they could – and sometimes with a claim to their ‘honour’, they successfully did – resist working with non-guild workers in the same building.³⁶

Generally, the positive impact of the contractual regime has, at first, been minimal. No wonder *Civil Codes* only devoted three articles to labour contracts: it may retrospectively be regarded as the legislator’s adequate recognition of the sparse role that national law could play in this field – one that, primarily, was normatively structured by non-state law. In factories, workers were the ‘subjects’ of a patron-manufacturer. The domestic logic of this arrangement was incompatible with the civic logic of the new contractual regime. Workers were reluctant to address their patrons in terms of their ‘rights’, and patrons were furiously disappointed when they started to do so – it was only late in the nineteenth century when gradual industrialisation led to a change of configuration that elicited the normative figure of the ‘employment contract’ proper.

E. From the ‘Labour’ to the ‘Employment Contract’

During the last quarter of the nineteenth century, configurations of relevant actors were again changing significantly. The number of factory workers increased.

³⁴ B van Bavel, *The Invisible Hand? How Market Economies have Emerged and Declined since AD 500* (Oxford, Oxford University Press, 2016).

³⁵ A Cottureau, ‘Droit et bon droit: Un droit des ouvriers instauré, puis évincé par le droit du travail (France, XIXe siècle)’ (2002) 57 *Annales HSS* 1521.

³⁶ Brand, *Untersuchungen* (n 11) 118.

National states acquired an ever-firmer position, and the extension of the franchise required broader support for political decisions. Meanwhile, the negative consequences of capitalism and liberal economic politics were becoming more visible and frightening.

Industrialisation elicited pressures to change the normative structuring of relations between factory owners and workers. In the 1870s, industrial logic induced British, French, and German employers to claim that 'subordination' of the worker had always been, or would have to be, part of the labour contract. Assigning a right of direction (D) to the employer is, however, not easily reconcilable with the formal equality of contractual parties (C).³⁷ In Britain, an 'employment contract' only applied to a few categories of professional workers, with 'master and servant' rules applicable to most workers. These rules were significantly tightened in the last quarter of the century. Absent workers were threatened with criminal sanctions that were enforced on a large scale. In German writing on labour relations, legitimisation of the subordinate position of workers was sought in the putative 'German' tradition of allegiance ('*Gefolgschaft*') as a domestic basis for mutual relations of obedience, trust, and protection in factories. In France, suggestions from employers that subordination had always been part of the contract were obviously incompatible with French jurisprudence, and elicited heavy resistance from workers' organisations, but were nevertheless legally adopted.³⁸

In Germany, around 1900, one million German workers had contracts covered by collective labour agreements, at a moment that German law did not cover them in any way. Legal theory had shown no interest in labour relations which, from a conceptual Roman law standpoint, belonged to the legal wastelands of local conventions. Around 1900, Philip Lottmar started to reclaim the terrain and, in the 1910s, Sinzheimer developed the legal concept of *collective agreement*, which forged a compromise between the industrial logic of enterprises, the contractual autonomy of employers and workers, and civic requirements of democratic decision-making. After which, an alliance of legal professionals and politicians developed and lasted until the post-World War II heyday of the welfare state.

Around the turn of the twentieth century, the rise of protective legislation, in particular against risks of industrial injury, established a conception of *employment* as a contract of 'subordinated, and therefore vulnerable' workers. Rapid growth in the further protection of workers, and the codification of rules, led to the constitution of employment as an historical compromise between industrial, domestic, civic, and market orders. Control of production was left to employers, provided that employees were sufficiently protected against risks associated with their subordination to employers, as well as their dependency on the 'labour market'.

³⁷ Sinzheimer, *Grundzüge des Arbeitsrechts* (n 1).

³⁸ Cottureau, 'Droit et bon droit' (n 35).

F. Paternalist Welfare Capitalism

Stanzani has suggested that, at the start of the twentieth century, capitalism underwent significant change, transforming from a capitalism that for centuries had been based upon labour-intensive growth, and therefore sought to intensify its grip on the labour force, to a capitalism where innovation in the organisation of the work process, training, and qualifications became much more important.³⁹ This change may have inspired enterprises to develop, in the 'golden years of capitalism' between 1870 and 1920, a normative model that revived a paternalistic (D), next to a contractual (C) relation. In particular, family-run enterprises started to provide their employees with all kinds of facilities, such as housing, sport facilities, training, and education, for example.⁴⁰ This resulted in the creation of 'factory villages' by enterprises, which gained widespread support in the United States (US), France, the United Kingdom (UK), and Germany. They were intended to attract workers who would develop a stronger commitment to the enterprise, but the paternalistic attitude of capitalistic entrepreneurs also served to legitimate their position both to themselves and to others. It has been argued that a change in power configurations, in particular towards shareholder capitalism, has put an end to this development. One wonders whether future supply shortages on the labour market might urge employers to again explore comparable composite models.

G. The 'Legal Order' of Labour as a Post-War Social Compromise

During the first half of the twentieth century, the protective regulation of workers gradually intensified, by way of both state legislation and collective agreements. After World War II, labour-orientated parties enjoyed a stronger political position which, along with the cultural climate of restructuring the commonality of social life, resulted in many European countries becoming welfare states and establishing a 'legal order' for labour relations; namely, a well-defined legal framework that bestowed rights upon employees, in order to compensate them for risks that were deemed to follow from their dependent position. In Germany, the 'labour constitution', developed by Sinzheimer for the Weimar Republic, could now partly be realised.⁴¹ The employment model gained pre-eminence; and the distinction between employees and small businessmen or the self-employed, who had

³⁹ A Stanziani (ed), *Labour, Coercion, and Economic Growth in Eurasia, 17th–20th Centuries* (Leiden, Brill, 2013).

⁴⁰ E de Gier, *Capitalist Workingman's Paradises Revisited: Corporate Welfare Work in Great Britain, the USA, Germany and France in the Golden Age of Capitalism, 1880–1930* (Amsterdam, Amsterdam University Press, 2016).

⁴¹ R Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford, Oxford University Press, 2014).

to bear most of the risks themselves, was intensified.⁴² The triangular structure was restructured at a state level: employer and employee organisations were, as ‘social partners’, invited to participate in the socio-economic decision-making of governments. Economic developments, processes of industrial organisation, and the cultural climate favoured long-term labour relations and, in many countries, dismissal regulation endowed employment with a new social significance as a contract of indefinite duration.

This social compromise allowed labour law as a scholarly discipline to influence political decision-making, and to play an important role in shaping regulations. Prevailing concepts of citizenship came to regard citizens as *social* beings, differing in their economic dependency, and in their capacity to deal with its consequences; the state was considered to have a role in correcting for inequalities generated by these differential dependencies. The post-war employment model has thus strengthened, within the space of its compromise, the *civic* elements of equality and rights at the cost of market elements, which were integral to the contractual model.

H. Neo-Liberal Turn Towards ‘Entrepreneurial’ Citizenship

Now that I am reaching, in my concise overview, the more familiar ground of the labour relations of the last three decades, I can be more brief. The economic developments that elicited the turn to neo-liberal socio-economic policies occurred in the 1980s, although it should be remembered that their theoretical foundations were formulated in the period directly after World War II – in Europe, by the German ‘ordo-liberal school’; in the US, by Chicago School economists.⁴³ The primacy which they accord to markets over other types of coordination, and the definite but restricted role that they require of governments in guaranteeing competition, were foundational to the construction of the European Union’s forerunner (EEC) in 1957. The EEC’s deliberately one-sided approach in promoting economic competition, whilst leaving ‘social’ matters to member states, was not just a matter of respecting the peculiarities of national social policies, but was also compatible with ordo-liberal priorities. Since financial markets became dominant in the 1990s, and took the lead in economic relations, a quasi-natural development called ‘globalisation’ has been promoted to nation states as an argument for deconstructing legal frameworks of labour relations, in a manner that is reminiscent of what nation states did to cities at the start of the nineteenth century.

Next to, and often instead of (labour) law, it is now economics that is being embraced by politics as a framework of universalisation, and as a guide to shaping socio-economic policies. As a consequence, non-market (in particular: civic)

⁴² Deakin and Wilkinson, *Law of the Labour Market* (n 3).

⁴³ Dukes, *Labour Constitution* (n 41) 123; Foucault, *Birth of Biopolitics* (n 12).

types of coordinating activities have increasingly been placed under suspicion, from the perspective of both market ('too costly') and industrial orders ('bureaucratic', 'inefficient'). Instead of being compensated for their differential capabilities to participate in economic life, the citizen is now constructed 'as *autonomous activity* geared at the actualization of his productive and vital necessities'. Michel Foucault conceptualised this decollectivising shift, this increased attribution of individual responsibility, as a change in 'governmentality'. Neoliberal governmentality primarily operates towards fostering the maximum participation of the populace in labour markets. In the composite normative model of 'employment', the civic logic of equality and rights, dominant in the post-war era, is gradually being abandoned in favour of market logic. In the neoliberal normative model of labour relations, the worker appears as an entrepreneur, individually responsible for turning their capacities into money.⁴⁴

V. Conclusions and Outlook

In light of renewed discussions on the goals and methods of labour law, I argue for the importance of types of normative structuring for practices of labour relations, and for the need to take some distance from their current legal forms. I use Boltanski and Thévenot's six orders of worth to re-examine part of the history of labour relations in Europe, from the perspective of the impact of choices that had to be made from a repertoire of available legal models, and of the changes that were made to make these models fit requirements related to changes in power configurations.

From a long-term perspective, the idea that work can be the object of a contract of transfer of property (of labour power) is of relatively recent origin. The concept remains burdened with the consequences of its problematic presuppositions. It may be important to remember that the 'employment contract' as we know it, and tend to use it – as an almost timeless standard by which to judge the precariousness of recent types of contracts – has existed for no more than two generations.

This re-examination has brought to light how normative models of labour relations have been a constituent part of actual practices, and can fruitfully be analysed as compromises between mutually incompatible modes of evaluation. In the city economies of medieval and pre-modern times, civic and domestic logics were constitutive of normative models of labour relations. Guilds were a dominant framework of production for markets, the logic of which was tamed by civic notions of equality and fairness. Gradually, the universalising impact of the merchants' market-industrial logic, in combination with a political move towards

⁴⁴ Foucault, *Birth of Biopolitics* (n 12); A Rossi, *The Labour of Subjectivity: Foucault on Biopolitics, Economy, Critique* (London, Rowman & Littlefield, 2016) 161.

the formation of nation states, undermined the domestic base of the guild regime. Contract was pushed forward, in a negative sense, as an individualising crowbar to break up collective structures that were resisting the universalising powers. Their resistance was tenacious, and it was only late in the nineteenth century that contract, as a normative model of labour relations, had a real impact on labour relations.⁴⁵ It developed into 'employment' – a post-war compromise in which the logic of market, industrial, and domestic orders were tamed by civic notions of equality, fairness, and workers' rights. Neoliberal governmentality has shifted the balances embodied in the compromise of employment in favour of a normative model of individual entrepreneurship.

So what about normative models of the future? The strong point of 'contract' and 'price' (at market), in light of historically changing power configurations, is their universalising power. A century ago, Max Weber argued for the selective force of such formal mechanisms.⁴⁶ For comparable reasons, politicians prefer the appearance of value-free calculability offered by economics,⁴⁷ over and above evaluations supplied by (labour) law. At first sight, this might make the labour contract an unlikely candidate for replacement. However, the possibility of *other* formal mechanisms arising in the future – for instance, by way of new ICT facilities – should not be discarded prematurely. The outline above also suggests that the institutional 'embedding' of such formal mechanisms may strengthen their potential, and possibly prevent societies from succumbing to the inequalities that flow from use of these mechanisms by new elites seeking to monopolise power.⁴⁸

Medieval towns experienced a level of institutional variety that evened out different interests within the town, in a way that recognised conflicting positions, but did not let them undermine the communal base of city life. It has been argued that this strong (domestic and civil) base of communal institutions – which spread over Europe, from the Italian cities, through France and Germany, up to Britain – was the most important factor in the economic rise of parts of Europe, rather than the factor markets that established themselves afterwards.⁴⁹ Without some of the unique legal inventions (eg, the notion of a 'corporation') that were part of this communal movement, scientific progress and the Industrial Revolution would probably not have occurred.⁵⁰ Europe, one is tempted to argue, ought to be proud of its rich institutional past rather than dismantle it, because of the false hopes held out by orthodox economists of a millennium of 'free markets'.⁵¹

⁴⁵ A Stanzani, *Bondage: Labor and Rights in Eurasia from the Sixteenth to the Early Twentieth Centuries* (New York, Berghahn, 2016) 204–7.

⁴⁶ M Weber, *Wirtschaft und Gesellschaft* (Tübingen, Mohr, 1976).

⁴⁷ B Latour, *An Inquiry into Modes of Existence: An Anthropology of the Moderns*, 5th edn (C Porter tr, Cambridge, Harvard University Press, 2013) 446–49.

⁴⁸ van Bavel, *The Invisible Hand?* (n 34) 268.

⁴⁹ *ibid* 251–55.

⁵⁰ TE Huff, *Intellectual Curiosity and the Scientific Revolution: A Global Perspective* (Cambridge, Cambridge University Press, 2011).

⁵¹ van Bavel, *The Invisible Hand?* (n 34) 255.

The task of labour law, therefore, is to lay theoretical foundations for a revised or new institutional design that breaks the dominance of market logic, and reinstates the relevance of domestic and civic orders of worth in labour relations. But this is not the only task: according to Sinzheimer, labour law also has to 'find the forces that may realize the emerging ideas'. The current power of economic elites and financial markets, and the hegemony of economic theories that ignore the institutional foundation of markets, make these forces hard to find.⁵² In the meantime, labour law should not be blindfolded by the legal forms that preoccupy it now and, instead, should profit from broadening the perspective on its past manifestations, be aware of the character of compromise between different orders of worth, and search for possibilities to help design normative models that may be constitutive of labour relations in the future.

⁵² J Beckert, 'The Social Order of Markets' (2009) 38 *Theory and Society* 245, 246.