

'Manifesto' for a Sustainable Labour Law: A Comment

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The authors of the 'Manifesto' are to be congratulated for their realism. They are sceptical of attempts to refound labour law by asserting the 'strong priority of ethics and rights over the logic of the economy'. Rather, the discipline of labour law 'must reconcile, not oppose, the regulation of labour rules and the governance of the labour market'. They are mindful of the historical role of the ILO, to reconcile 'the imperatives of social justice with the goals of growth', noting that growth refers among other things to 'the ability to guarantee the tangible and intangible goods necessary for the well-being and quality of individual and collective life'.

I agree that we need to be practical in response to the multiple crises of our time. Like them, I would like to think that labour law can be part of the solution, and not just another problem. We are also in agreement on the need for labour law to address the insights of other disciplines, including economics, without being reduced to them. Maybe labour law has insights which can contribute to a more realistic, and ethically grounded, economics.

Let us begin by going back to first principles. What is the relationship between labour law and the 'market economy', or, more broadly, 'capitalism'? I am going to approach this question from a 'realist', even descriptive, angle. To be clear, I am not condoning, just seeking to understand, what we can observe.

My understanding of labour law is that its historical role has been not just to manage capitalism, or somehow soften its consequences. Labour law, among other institutions, is one of the conditions for capitalism; it serves to constitute it. Without labour law, there would not be the commodity 'labour power', and so, no basis for accumulation, and everything that follows from it.

By labour law here I mean to include not just the norms which grant management power over labour ('subordination') and which reserve property rights in the residual from production to the capital interest (shareholders and other rentiers); the private law face of labour law. I mean to include also the worker-protective rules, the public-regulatory face, from the factory legislation of the industrial revolution through to today's multi-faceted labour law systems, with their rules on wage determination, employment protection, codetermination, dignity at work, and the like. Without these rules there would be no basis for the reproduction of labour power; no basis for the consumption of the goods which capitalist firms produce for profit; and no basis for the state, which taxes profits, consumption and labour together in order to subsist.

So understood, labour law is part of the cycle of capitalism; to adapt Piero Sraffa, it is part of the process through which commodities produce other commodities. If labour law is weakened, that cycle begins to break down. This is the paradox of policies of 'deregulation' and 'flexibilisation'. They have weakened what they were purporting to save: capitalism.

Capitalism is actually more than the market. We learn this from Karl Polanyi: in a crisis, the capitalist class itself needs to be protected from the market. It is why we have central banks. Capitalism is also more than the interests of capitalists. Capitalism drives firms to be profitable, and if they are not, they do not survive. The legal system has provided us with many mechanisms of selection to achieve this, from insolvency law to takeover bids.

In a monetary economy, value is detached from the material basis of production, and profit purified. It does not matter to the individual firm if its profits come from innovation or from exploitation. Firms prosper by buying low and selling high; from externalising social and environmental costs.

For capitalism as a system, however, this is catastrophic. It is an example of what J.M. Keynes called the 'fallacy of composition', or Lin Ostrom the 'collective action problem'. If a way is not found to make capital internalize its environmental and social costs, there can be no basis for capitalist production beyond the immediate term. This is how I understand the issue of 'sustainability'.

If capitalism is only extractive, only a zero sum game, it will not persist. Marx saw this clearly and predicted capitalism's end. He did not foresee that capitalism would survive into the twentieth century through institutions which include the employment contract, collective bargaining and the welfare state. But the stabilization these institutions achieved was precarious and temporary. The solutions arrived at in the middle decades of the twentieth century were unpicked, bit by bit.

In the process, there was a rebalancing of wealth and power. Returns to labour fell, while those to capital rose. Inequalities of income and wealth, declining for several decades, began to revive. Some of the capital 'liberated' by wage suppression went into innovation, but much of it was diverted into speculation. Consumption was skewed towards the wealthy, and innovation with it. So now we have innovation for the rich, which is producing a technology of surveillance and control.

For those who wish to bring on the end of capitalism, and to map a post-capitalist future, this is good news. Capitalism is facing the kind of existential crisis which Marx predicted. If so, now may be the moment to reflect on what Alexander Solzhenitsyn wrote about the end of the Soviet Union. The clock of communism had stopped ticking, but the building was about to collapse. The question was not how to build a new building, but to avoid being crushed in the rubble of the old one.

In fact, fortunately or otherwise, the clock of capitalism is not about to stop ticking. There was an alternative to the Soviet model at the end of the 1980s: the social democracies, as they then were, of western Europe and north America. Today, capitalism is a global system, within which there are increasingly few distinct varieties. The oligarchical capitalism of post-communist societies is being replicated across the developing world and has its adherents in parts of the global north. The oligarchical model sees a role for the protective aspects of labour law, although not its democratic ones; China has the employment contract and collective bargaining, but no freedom of association. Whether oligarchy proves to be sustainable remains to be seen. China has its satellites and would-be emulators. But maybe the China of today is an ancien régime, awaiting its revolution.

In Europe, the weakening of social democracy threatens democracy. There is no iron law linking capitalism and democracy. The widening gap between wages and profits is undermining trust in public institutions. Populism is filling the void. To save democracy, we urgently need to reinvigorate the egalitarian institutions of capitalism: collective bargaining and codetermination on the one hand; social insurance and progressive

taxation, on the other. We can by all means agree with the authors that 'our discipline must reconcile, not oppose, the regulation of labour rules and the governance of the labour market', while not accepting that deregulation, of the kind pursued in many countries since the 1980s and at certain points endorsed by the European institutions, served the public interest, as opposed to assuaging certain powerful private ones.

The Coronavirus episode shows what can be done during a crisis, and this time there should be no going back. I am somewhat more positive about the long-term relevance of measures introduced in response to the pandemic than the authors appear to be. It would be helpful, in my view, to spend less time talking about the end of the employment contract, and more time working out how to implement a living wage as part of wider shift to a sustainable labour law. This needs to be an EU-wide move. Brexit has provided the opportunity: Britain has disabled itself from playing its historical role of obstructing social progress in Europe.

If this seems like a throw-back, then of course it is, but labour law is cyclical. Neoliberalism was so called, by its proponents (the term was invented by Milton Friedman), because it envisaged a revival of the classical liberalism of the nineteenth century. Ordoliberalism imagines a return to a 'private law society'. Such a return is infeasible, of course, but as we know from the rise of ordoliberal thinking in official circles, even extending to the Court of Justice of the European Union, old ideas can develop a new life. We can look to the economics of Keynes and Sraffa, and latterly of Ostrom, for inspiration, while renewing their insights for our times.

Surpassing even the crisis of democracy is the unfolding climate catastrophe, the loss of what Alain Supiot calls the *ecumene*, or habitat, of human existence. Labour law needs to be part of the solution to a problem it helped to create. Labour law was only ever a partial response to the problem of externality. It enabled labour to share in the rents from production, but without addressing the wider harms resulting from a model which remained fundamentally extractive. Workers in sheltered or protected parts of the economy, in certain parts of the world including Europe, benefited from this model, but the costs it engendered are now too great to ignore.

It does not follow that the solution lies in suppressing production, and this is not, in general, what 'degrowth' should entail. The degrowth agenda risks being 'regressive' as well as 'unrealistic', as the Manifest insists. Just as a more equitable economy is a *sine qua non* for a less extractive one, so democracy in its egalitarian and deliberative form will be vital for engendering the consensus needed for radical changes to social and economic institutions.

The 'social problem' of the early decades of the twentieth century was similar in terms of its scale and the challenges it posed to peace and security as the climate crisis of today. Before the invention of labour standards the world lacked the institutions and even the language needed to address these challenges. Labour law offered not just one but many solutions, and in the end these have endured, outlasting the neoliberal critique. When contemplating the climate emergency, we might look to the historical experience of labour law to see how those solutions were proposed, developed and embedded in agreements, laws, and treaties. As the authors of the Manifesto observe, labour law has been in the eye of the neoliberal storm now for decades, but has nonetheless endured. We may see in labour law's perhaps not so surprising longevity some reason to hope that progressive solutions can be found to the challenges of our time.