

Ruth Dukes, *The Labour Constitution. The Enduring Idea of Labour Law* (Oxford University Press: 2014), 244pp, £60, ISBN 978-0-19-960169-1.

What is labour law? The answer to this question has challenged scholars since the birth of the discipline at the beginning of the twentieth century. Up until the 1980s, there was a broad consensus that labour law primarily served a protective purpose. This approach stressed the role of labour laws in correcting the imbalance in bargaining power inherent within the employment relationship. Otto Kahn-Freund made the point that the existence and pervasiveness of this imbalance in social power explained why labour law was necessary e.g. to regulate the terms and conditions of employment, and furnish rules on the hiring and dismissal of employees, the basic work-wage bargain and the exchange of the worker's services in return for remuneration. Where this protective function could not (or should not) be achieved through the protection of individual rights, labour law indirectly provided support for the effective functioning of collective bargaining under the umbrella of 'collective laissez-faire'. Since the 1980s, the concern with the correction of inequalities in bargaining power via the prophylactic of labour laws or the social practice of collective bargaining has lost some of its force. The decline in union strength coupled with attempts by successive governments to construct a new framework of labour law led scholars to question both the future of labour and labour law. The premise of the correction of imbalances in bargaining strength between the worker and the employer has therefore given way to two further justifications for labour law. First, by linking labour law closely to the functioning of the labour market and thereby anchoring it firmly within a market-driven ideology, it has been argued that there is a perceived need to regulate labour market failures in order to achieve efficient labour markets. Second, a continued focus on the traditional social objectives of labour law gives way to a realisation of social justice through the repulsion of the 'economic logic of the commodification of labour'¹. However, the continued debates surrounding the scope of labour law indicate that neither of these two justifications offers an all-encompassing explanation of the defining purpose of labour law and of its rationale for interference in contemporary employment relationships.

Ruth Dukes's work in *The Labour Constitution* presents an alternative framework for analysis. Dukes rightly criticises contemporary scholars for often either ignoring historical

¹ H. Collins, *Employment Law*, 2nd ed. (Oxford, OUP, 2010), p. 5.

writings on labour law or not properly engaging with their arguments. Her starting point is, therefore, to reconsider historical writings on labour law with a view to determining whether lessons could be learnt from the past. In doing so, Dukes has set herself an ambitious goal: to assess whether the labour constitution as developed by the German scholar, Hugo Sinzheimer, in the 1910s and 1920s can serve as a useful framework for the analysis of labour law today.

Dukes's starting point is the relationship between the labour constitution – as a theoretical concept – and its translation into practice (through legislation and industrial relations). Chapters two and three provide a fascinating and impressively detailed, contextualised, historical analysis of relevant academic works, political thoughts and political activities of three German scholars writing during the Weimar Republic: Hugo Sinzheimer, Ernst Fraenkel and Otto Kahn-Freund. For Sinzheimer, the labour constitution (in earlier works he refers to it as an economic constitution) should be seen as a body of law which brings together the regulation of labour and capital by 'economic organisations' such as trade unions, works councils, employers and employers' associations for the purpose of the common good. Labour law should therefore form an integral part of the (nation state) constitution with the state acting as its overseer and enforcer while practical implementation ultimately lies in the hands of economic actors. Sinzheimer's view of the labour constitution was underpinned by a firm belief that law should be used to achieve social justice and that the state – a social democratic state – had a particular role to play in empowering labour market actors. Dukes unpicks the criticism levelled at Sinzheimer's idea by his two students – Fraenkel and Kahn-Freund – and suggests that the differences in opinion between Kahn-Freund and Sinzheimer, in particular, may be due, in part, to the pragmatism of the former compared with the romanticism of the latter. Dukes uses Sinzheimer's labour constitution as a starting point from which to trace, and provide an understanding of, the development of the legal framework governing German industrial relations. She illustrates how, with the support of the state, trade unions and employers' associations developed into para-public organisations involved at every level of regulation of the legal framework governing labour law. This ties in with Fraenkel's suggestion that participation of trade unions and employers' associations in public administration could be considered as a first step towards the establishment of a real economic constitution. However, since the early 1990s, the gradual decentralisation of industrial relations in Germany has cast doubt on whether a labour constitution still exists.

Chapter four continues the historical narrative but focuses on Kahn-Freund's development of collective laissez-faire in the UK which rests on two principles: the collectivisation of labour and the autonomy of trade unions and employers. Much of the content of the chapter will be familiar to readers who are well-versed in the development of British labour law. Nonetheless, Dukes adds to the literature in this area by analysing Kahn-Freund's works of the 1950s in the context of his earlier (from the 1930s) and later work (up until 1979). This allows her to trace the influence of Sinzheimer's thinking on Kahn-Freund and throws up a broader picture of Kahn-Freund's belief in the necessary autonomy that trade unions and employers must enjoy from the state if they are to effectively regulate industrial relations. She also compares Kahn-Freund's writings with historical accounts of the factual circumstances which underpin collective laissez-faire. This throws up discrepancies in Kahn-Freund's understanding of British industrial relations which focusses too much on trade union strength and preference for autonomy from the state (the latter only every applied to some unions), and does not give sufficient consideration to the interests and motivations of employers. Dukes therefore dismisses collective laissez-faire as a useful, contemporary framework for analysis on the grounds that it 'brings with it a danger of encouraging a misleading appraisal of current labour laws and institutions, and a misguided set of recommendations for reform.' (p. 3)

Dukes's argument in favour of the usefulness of the labour constitution is framed by a critique of the work of five British labour law scholars: Paul Davies, Mark Freedland, Hugh Collins, Simon Deakin and Frank Wilkinson. In chapter five, Dukes traces the increasing focus in the literature – dominated by these five scholars – on the law of the labour market; whereby academic scholarship places increasing emphasis on questions of labour market regulation. For contemporary scholars, the efficient functioning of the market has come to be seen as the rationalising principle of labour law. She suggests that such a reorientation of the idea of labour law has helped academic scholarship to remain relevant and allowed scholars to make arguments which may influence government policy. Dukes also accepts the validity of this approach in so far as it treats the labour market as an object of study. However, problems arise when 'the market' *becomes* the frame of reference for labour law scholarship. For example, she questions whether "if laws were judged against their capacity to 'enhance labour market opportunity' [...] could the case still be made for provisions that aimed to guarantee workers a measure of job or income security?" (p. 121)

Chapters six and seven use the idea of the labour constitution as a framework through which to analyse the history of worker participation at the level of the European Union (EU) – through the social dialogue – and the attempts at upward harmonisation by the EU of national labour constitutions. As in the preceding chapters, Dukes presents a meticulous historical account of the development of collective labour rights and mechanisms at the EU level. However, the application of the concept of the labour constitution to the EU level is problematic partly due to the nature of the EU as a supranational body which only has very limited competence in the labour law (and particularly collective labour law) field, and partly due to the political compromises which underpin EU attempts at regulation. In chapter seven, Dukes refers to Sinzheimer's views on a European Community of Nations which, for him, required the creation of a supranational economic constitution, and an international or European trade union capable of figuring as a countervailing force to international capital (p. 190). Within the EU context, neither exists in the way envisaged by Sinzheimer. It is therefore not surprising that Dukes concludes that the social dialogue is not comparable to national level industrial relations traditions and that upward harmonisation of labour standards has stalled.

Finally, chapter eight concludes the book by arguing for the continued usefulness of the idea of the labour constitution as a framework for scholarly analysis. Dukes presents a convincing argument which outlines the attractiveness of the labour constitution as an idea. Yet, it is not obvious how the idea would overcome practical problems in its implementation. As such, it may be open to criticism. Dukes makes it clear at the outset that 'the idea of the labour constitution *can* be developed so as to provide a useful framework for the analysis of labour law' (p. 3) so engaging with the practical implications of the framework is beyond the scope of the book. For anyone interested in the question of 'what is labour law' this book is highly recommended reading and certainly makes a worthy contribution to the existing literature. It does therefore not come as a surprise that *The Labour Constitution* has been shortlisted for the Socio-Legal Studies Association's Socio-Legal Theory and History Prize 2016; it would certainly be a worthy recipient of the award.