Foreword

The International Labour Organisation (ILO) Constitution declares that 'labour is not a commodity'. But what was once a bold claim has again become a cruel solecism in a world of rampant global capitalism, characterised by deregulation, privatisation and competitiveness. Alongside product markets and financial markets, we now have labour markets (a term used without either irony or shame), characterised in turn by insecurity, inequality and unfairness, in which people have again become 'neither more nor less than sugar'. In this world in which workers have become objects conspicuously bought and sold, labour law has become the servant of free market economists, with little scope for either humanity or empathy, and even less for equality and social justice.

In this new orthodoxy (which continues to endure), everything must be justified in terms of a 'business case'. The choice is thus presented sometimes as a choice between (i) no regulation (regulation is unnecessary and will impede wealth creation from which everyone benefits), or (ii) regulation for efficiency (smart regulation) whereby businesses can be required to accept (or may even desire) certain forms of regulation because they require a more efficient use of labour than the market might otherwise dictate (as in the case of race and gender discrimination), or (iii) regulation for market failure (regulation is desirable in order to alleviate the worst excesses of free market capitalism, and desirable as a result to safeguard the reputation of the latter).

THE FALSE PROSPECTUS

Yet despite these contemporary concerns, the relationship between labour law and economics is by no means new, though it no doubt finds expression in different ways in different countries. Labour law has always been subordinate to prevailing economic orthodoxy; it is just that many labour lawyers approved the prevailing orthodoxy until it changed in 1976 or thereabouts. So although labour lawyers tend to highlight great pieces of legislation as the key events in the development of their discipline, this obscures the truth that it is economics not politics that has been crucial: in the British case, for example, the seminal events in the development of labour law were not the great statutes of 1906 or 1974, but the ignominious events of 1929–1931 and 1976–1979.

The events of 1929–1931 led, in 1934, to the beginning of the end of the period of state regulatory inactivity since 1921, and to the end of the process of trade union decline. In the fall-out from the Great Depression,

a Conservative government engineered a major revision of policy when it re-invested in the Whitley Council system, with the then Minister of Labour announcing to the House of Commons in 1938 that it was now government policy to 'foster and encourage the establishment of [collective bargaining] machinery over an ever-widening field' (House of Commons Debates, 11 May 1938). The reasons now seem obvious: even the Conservatives saw the wisdom of a virtuous circle which would raise wages, equalise incomes, stimulate demand, reduce unemployment, and promote social stability.

The latter events of 1974–1979 were crucial because a new economic crisis led to a rejection of the assumptions that had inspired the response to the last, and set in train a strategy for labour law that is well known, and with which we continue to live, subject only to a few mild adjustments since Labour came to power in 1997. That crisis helped to create a new economic orthodoxy which saw no room for trade unions and little room for employment standards determined by the state. So we have seen a massive programme of deconstruction and deregulation, in order to increase the supply of cheap labour, in order to release managerial prerogative, and in order to enhance the competitiveness of firms. Although commentators will point to the volume of 'progressive' legislation since 1997 and poke fun at the sceptics, that post-1997 legislation is to be judged by its regulatory impact, not by the number of pages it consumes in the statute book.

Despite the increase in the volume of labour law in recent years, at best this can be said to have moderated the harsh effects of the market rather than to have subordinated the latter to the needs of people. For all the achievements of initiatives like the national minimum wage, social inequality in the United Kingdom is at its highest levels since the early 1960s; there is a growing army of unregulated labour in the shape of agency workers; and trade unions (the instruments of social justice) operate under tight legal controls, with statutory bargaining rights that have been shown by experience to have been largely ineffective to prevent the continuing decline in collective bargaining coverage, which now stands proudly—or shamefully—at 33 per cent of the workforce. It is one of the great disappointments that the most recent global financial crisis has left this orthodoxy unshaken.

LABOUR LAW AND HUMAN RIGHTS

Which brings us eventually to the inspiring volume edited by Colin Fenwick and Tonia Novitz, and its frank assessment of an alternative vision for the study of labour law, a vision in which markets are subordinated to the interests of all people rather than one in which workers are sacrificed on the altar of free enterprise. It is a collection which in its different parts invites us to ask some very basic questions which have been notably absent in recent debates about the core and scope of labour law. Thus,

WHAT IS LABOUR LAW FOR?

Are labour lawyers merely handmaidens in the service of those who work in other disciplines, or does labour law have an identity of its own, separate from and beyond the interests of these other disciplines? If so,

WHAT ARE THE VALUES BY WHICH LABOUR LAW IS UNDERPINNED?

In making an important contribution to our understanding of the core values of labour law, this book invites us to cast aside old-fashioned and inappropriate private law concepts which have been a source of enduring restraint, and to put down roots in a new and different location. Human rights based in principles of public law provides the fertile soil for this new development, significant in the labour law context because of the growing global awareness of human rights treaties such as ILO Convention Nos 87 and 98, the International Covenant on Economic, Social and Cultural Rights, and the European Social Charters of 1961 and 1996. This is not to say that human rights discourse alone provides a convincing explanation of the core values of labour law in which equality and social justice also compete for attention. But at least for the time being, it is a convenient and convincing tool which is helpful (for some of the reasons addressed by Lance Compa in chapter ten) to overcome many of the problems encountered by labour lawyers schooled in private law techniques.

It is true that traditionally labour lawyers would have been sceptical of human rights as a defining framework for labour law, partly because—as pointed out in chapters one and twenty one—civil and political rights have traditionally been narrowly construed to exclude trade union rights or expansively construed to undermine these rights. But the mood has changed, not least because of the decision of the Strasbourg Court in *Demir and Baykara v Turkey* on 12 November 2008. There the Court repudiated more than three decades of case law and held that

> the right to bargain collectively with the employer has, in principle, become one of the essential elements of the 'right to form and to join trade unions for the protection of [one's] interests' set forth in Article 11 of the Convention, it being understood that States remain free to organise their system so as, if appropriate, to grant special status to representative trade unions.

Even more remarkable than the fact that the Court was prepared to change its mind so frankly, *and* that it was willing to do so by 17 votes to nil in the Grand Chamber, is that it held that in determining the substance of the new article 11 right to bargain collectively, it was necessary to have regard to core ILO conventions, the Council of Europe's Social Charter, and also the jurisprudence of the supervisory bodies of each.

Even more remarkable still is that this line of reasoning on the part of the Court opened the door to other 'essential' trade union rights, notably the right to strike which has been held to be a convention right, with no fewer than four cases on the right to strike (from Russia and Turkey) having been decided by the Court in the first 12 months following the landmark decision in *Demir and Baykara*. The applicants succeeded in all four cases. In the process, the Court considered a wide range of issues which tend to indicate (i) that the Convention right to strike follows a human rights rather than an industrial relations approach (the ILO model, which means that it is not confined to collective bargaining), (ii) that it is a right of the trade union as well as its members (with the victim in the first of the four cases being a Turkish trade union), and (iii) that various forms of penalty (from criminal sanctions to disciplinary warnings) imposed on individual workers constitute a breach of this right.

THE LIMITS OF HUMAN RIGHTS

The European Court of Human Rights is not alone in elevating the debate about labour standards beyond the horizons of economics and private law. Similar forces are at work in the Supreme Court of Canada, with Canadian labour law in a process of an unsteady transition, as we learn in chapter four. But as this book makes very clear, we should have a realistic sense of the capabilities of human rights—or more particularly human rights litigation—as a source of liberation. To a very large extent the reliance on human rights is a reflection of the failure of the promise of democracy, and of the capture of the democratic process by economic power, in a way which is now well documented by political sociologists (amongst whom the most notable is probably Ralph Miliband). It is a reflection of the claim attributed to Adam Smith by the great lawyer DN Pritt that 'whenever the legislature attempts to regulate the differences between masters and their workmen, its counsellors are always the masters' (DN Pritt, *Law, Class and Society, Book One: Employers, Workers and Trade Unions* (1970) 3).

In addressing the failure of democracy through law, we are faced with the most remarkable contradiction, at least for those of us schooled in the common law. It was the problem of law—notably in decisions such as the *Taff Vale* case in the United Kingdom and its equivalents elsewhere—that fuelled demands for more democratic participation and political institutions to enhance that participation. But it is the very failure of that democracy that has led trade unions in some jurisdictions to return to the very law by which they were initially oppressed. Instead of relying on 'counsellors who are "always the masters"', the need now is to rely on 'high priests' of the law—legal professionals and judges—despite the latter in the past having been nearly always unsympathetic to trade unions and their goals,

and despite the fact that democracy is eclipsed by a process in which trade unions participate only as litigants with no opportunity, ever, to secure the reins of power in this particular forum.

Yet while the move from legislation to litigation as a trade union strategy may lead to significant advances, as this book reveals, it is one in which significant obstacles have to be overcome. So while helpful, human rights are no panacea and particular forms of human rights protections are no guarantee of respect for labour standards. In the pages that follow we learn from a number of national case studies that (i) in Brazil the acknowledgement of fundamental rights in the federal Constitution does not overcome 'difficulties in realizing these rights in practice' (chapter three); (ii) in China there is no system for the legal enforcement of constitutional rights (and indeed that labour law is a weak line of defence against the forces of economic reform) (chapter five); and (iii) in India the courts are falling into line behind new economic orthodoxy to reveal 'a shift in the approach of the court', particularly in areas where 'the interests of workers appear to be sharply pitted against those of the state and other employers' (chapter seven).

Apart from these problems of process (litigation rather than legislation) and substance (narrow rather than expansive reading of rights), there are other unexpected and mundane—but nevertheless real—problems of procedure that conspire to undermine the human rights approach. By a cruel irony these have been identified most powerfully in relation to South Africa, a jurisdiction that was a source of hope and optimism for progressives everywhere, and a jurisdiction with a constitution based on values 'including worker's rights' (chapter nine). These values find eloquent expression in the 1996 Constitution with its guarantees of 'fair labour standards' and core trade union rights (such as the right to bargain collectively and the right to strike). Yet as we also discover in the pages that follow, this 'constitutional-isation of workers' rights' has 'spawned unforeseen jurisdictional problems which to a certain extent, is leading the way to the de-compartmentalisation of labour law as an independent legal subject'.

THE LIMITS OF HUMAN RIGHTS INSTITUTIONS

Along with certain weaknesses of human rights law, this book also identifies a number of serious failings of political institutions and human rights instruments (chapters eleven to sixteen). Despite their rich formal content, the contribution of the United Nations (UN) covenants (the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) has 'not been auspicious': many important labour rights (such as the right to bargain collectively) have not been 'meaningfully addressed', while others (such as

the right to strike) have been the 'subject of unsatisfactory jurisprudence', revealing a failure to deal with the 'impact of globalisation upon labour rights … coherently and strategically' (chapter eleven). The ILO has also been found wanting, with intervention to deal with freedom of association problems in specific jurisdictions having 'failed', and with the state of trade union rights in other parts of the world a testament to the fact that this is a global concern (chapter twelve).

While the application of international labour standards in national systems continues to be a problem caused in part by weak enforcement mechanisms, problems relating to the international agencies themselves are also nicely examined, especially in relation to the ILO (chapter twelve). The problems of the ILO are such, however, that its future role may have to be one in which it continues to work in what is an emerging and complex set of informal relationships with other political, judicial and non-governmental actors to implement and develop the standards it creates. The urge for institutional reform should not deflect attention from the real contemporary value of the supervisory bodies, which are now helping to inform the jurisprudence of international and national courts. Although there is a strong case for standards' modernisation in the context of globalisation, the contemporary importance of the ILO is not in standard-setting, but rather in the development of its existing standards.

As pointed out below in the treatment of regional human rights instruments, the value of developing ILO standards is to be seen specifically in the jurisprudence relating to the European Convention on Human Rights, where the European Court of Human Rights (ECtHR) is now making full use of ILO material of a wide and varied kind in the development of Convention rights. Nevertheless, there is a cautionary tale to be told here too, for while there has been a gradual and incremental extension of human rights (including workers' rights) protection under regional human rights instruments, there is a concern that 'this may not always be sufficient to ensure that the collective dimension of workers' rights is recognised as opposed to negative freedoms, such as that not to associate' (chapter fourteen), though as is also pointed out, 'the ECtHR (which has been the most active in developing the negative right) has not explored thoroughly the conditions in which union security clauses can be compatible with the ECHR' (chapter fifteen).

However, it is not only the problem of institutional failings: there is also the related problem of institutional danger, as in the case of the EU where there is an apparent attempt to reconcile fundamental social rights of workers with the economic freedoms of business under the one umbrella through various treaty mechanisms. As we discover, however, it is a case of giving with the one hand and taking with the other, with more being taken than being given (chapter sixteen). For as made very clear in the pages that follow, the economic rights of business have triumphed over the human rights

of workers, much as they did under the common law in the nineteenth and twentieth centuries. It is not clear, however, whether this matter has been finally resolved, for as is also made clear in chapter one (and as has been suggested above), the dynamic nature of human rights instruments and their construction suggests that this matter will have to be revisited. Although it is impossible to predict what the outcome will be when this does eventually take place, some of the issues—to be canvassed in the shadow of the Lisbon Treaty—are carefully explored in chapter sixteen.

HUMAN RIGHTS AND CORPORATIONS

In addition to international and national laws promoting the human rights of workers, there are of course other instruments that can be used by regional bodies (such as the EU) or nations to encourage compliance with human rights obligations, whether in the form of trade preferences (chapter seventeen), supply-chain compliance (chapter twenty), or by other means (such as global framework agreements between multinationals and global union federations). The latter techniques raise questions too about the nature of the obligations that are or should be imposed on corporations by international or national law, and the scope for litigation against multinationals in the developed world that abuse workers' rights elsewhere. This is the subject of fierce debate within the UN, with the substance of the debate most recently captured by a helpful (if tepid) report of the Westminster Parliament's Joint Committee on Human Rights (HL Paper 5, HC 64, 2009–10).

Nevertheless, there remain important questions to be addressed about the capacity of human rights to tame the power of the global corporations based in the highly developed countries of the world. With the exception of the Organisation for Economic Co-operation and Development (OECD) Guidelines on Multinational Enterprises (under which some notable successes have been won (see HL Paper 5-II, HC 64-II, 2009–10, Ev 250 (ICTUR))), this is a regulation-free zone. The companies will tell us of course that they respect human rights through their highly developed codes of conduct and their corporate social responsibility programmes. Well, if the still naïve need any convincing about corporate social responsibility, take a look at the global financial crisis, caused by the corporate social irresponsibility of some of the biggest corporations in the world, now compounding their irresponsibility by insisting on paying their executives massive bonuses at the public's expense, after having been bailed out by taxpayers in what amounts to the biggest welfare scheme in history.

If global banks and other global corporations are to behave responsibly, it can only be because they are required to do so by law, by which they become accountable as a result of legal obligations to public institutions in

the form of courts. This means regulation of all their activities, including the terms by which they or their agents or partners employ people. Here too the human rights framework cultivated by this book has an indispensable role to play in informing this debate, in the sense that companies ought to be subject to legally enforceable human rights norms wherever they operate, with accountability to the courts of the home country if necessary. The freedom of association guarantees of ILO Convention Nos 87 and 98 are directed to national governments rather than companies, and they require governments rather than companies to comply with minimum standards. If companies misbehave, it is governments which take the hit, being responsible for the law operating in their jurisdiction, even though they may be at the implicit or explicit mercy of the transnational corporations (TNCs).

So while the contemporary focus of the ILO is on the development of its existing standards, rather than on standard-setting, there nevertheless remains a compelling case for modernising ILO and other human rights standards to recognise these new realities, and to recognise the role of global union federations as well as the role of national trade unions. To this end, an important agenda of the labour rights is to expand the frontiers of existing standards so that:

— workers and trade unions have a right (as against TNCs) to organise in global union federations (GUFs);
— workers and trade unions have a right (through GUFs) to bargain collectively with TNCs with a view to negotiating global framework agreements (GFAs); and
— workers and trade unions (through GUFs and otherwise) have a right to organise and take part in transnational collective action.

Part of that reform agenda must involve creating a complaints mechanism that enables companies (as well as governments) to be held publicly to account for their failure to comply with these standards.

CONCLUSION

All of which is to say that this volume is a timely and extremely important contribution to the future shape of labour law, at a moment when the discipline is in crisis, bereft of function and lacking any coherence as to its core values or identity. While human rights may not necessarily provide an enduring framework, this book makes it very clear at various points that such a framework is useful at a number of levels, for the time being. Not the least of these is rhetorical, for as Compa points out in chapter ten below, the language of human rights is empowering for workers, while also putting employers on the defensive (though it is also a currency likely to be devalued by its over-use). At a more practical level, human rights

instruments provide an opportunity for workers to fight back, at a time when democracy has failed them, and when human rights courts (if not yet common law courts) appear at the moment to be responsive to the claim that workers' rights are human rights. Indeed, it is all the more important that workers' organisations should be present in these forums, especially as they are now being used by employers alleging that labour law curtails their human rights.

Human rights thus provide trade unions with an opportunity to go on the offensive to reclaim lost rights, although a human rights strategy also needs to build in defence mechanisms to deal with complaints that trade union rights violate the human rights of others. A defensive human rights strategy is thus necessary to retain established rights from further erosion, with complaints being made in forums as diverse as the ECtHR and the European Court of Justice. But while using human rights as part of a strategy of advance, we should heed the advice of Compa and not 'overstate the case for human rights or exaggerate the effect of the human rights argument'. Recent decisions of the ECtHR may be only temporal victories which may not endure, and while there is a strong momentum driving them forward, it remains to be seen how well this jurisprudence operates outside of countries like Turkey, Russia and the United Kingdom. Nevertheless, the human rights dimension cannot be overlooked while it provides (i) litigation opportunities, as well as (ii) firmer political ground in which to root the discipline of labour law, (iii) quite apart from any need to have a highly visible presence in this arena for defensive reasons.

In provoking an argument about the future direction of their discipline, Fenwick and Novitz—along with each of the contributors to this impressive volume—have made an immense contribution, for which labour lawyers everywhere have reason to be deeply grateful. We must now engage with the debate that they have initiated.

KD Ewing
Institute of Employment Rights
18 December 2009