

Hugo Sinzheimer, 'Das Wesen des Arbeitsrechts' (1927h)

Translation of: 'Das Wesen des Arbeitsrechts' (Allgemeine Einleitung zu 'Grundfragen des Arbeitsrechts'). *Grundfragen des Arbeitsrechts* (ed. G. Hermes), Berlin: Verlag d. Allg. Deutschen Gewerkschaftsbundes 1927, p. 4-9. It has been reprinted in: *Arbeitsrecht und Rechtssoziologie: gesammelte Aufsätze und Reden* (2 vol.s). Ed. by Otto Kahn-Freund & Thilo Ramm; Schriftenreihe der Otto Brenner Stiftung nr 4. Frankfurt/Köln: Europäische Verlagsanstalt 1976, vol. I, p. 108-14. I am grateful to Ruth Dukes for comments on an earlier version. Translation by Robert Knecht.

General Introduction (to 'Fundamental Questions of Labour Law')

My task today is preface the individual presentations that are to follow with a general introduction on the essence and fundamental problems of labour law and its study. Such an introduction is necessary so that we might become acquainted with the general points that are relevant to the task of addressing labour law questions.

I.

The first question arises: *What is labour law?*¹ By labour law we understand by the unitary body of law which regulates the relationships of workers. Let's examine that definition in more detail. Such an examination will take us immediately to the heart of labour law.

1. Labour law is, first of all, a unitary body of law. It comprises public and private law. Both types of law are inextricably linked within labour law, giving the subject a 'double' character. Labour law has to do not only with the private interests of individuals but especially also with public interests that concern the collectivity. The manner in which the labour power of the people is exploited does not concern only the worker and the employer. The labour power of the vast majority of the people is the people's power. What happens to that power is a matter of concern for the people and for the state, the latter being nothing other than the organisation of the people. That concern, which is a future as well as a current one, must be expressed in statutes/laws which prevent the supreme good of the people from being ruthlessly exploited. In the past, it was usual to separate out the private law and public law elements of labour law. There was no unitary labour law: labour law was merely an amalgam of a chapter of obligations law and a chapter of administrative law. Today labour law has been recognised as a discrete legal discipline, the rules of which are not scattered between civil and public law but rooted upon their own piece of ground. Labour law is, above all, no longer a mere appendix of property law. Labour law has become a discrete, independent field of law with its own² distinctive principles and legal forms. As such, labour law has broken with the traditional legal system, abolishing within its domain the distinction between public and private law and introducing to the whole of law a new social 'order of persons' next to the existing 'order of things'.

¹ All text in italics in this translation has been interspaced in the original, German text.

² End of page 108 in the reprint in *Arbeitsrecht und Rechtssoziologie* (1976), Band 1, p. 108-14.

2. Labour law regulates the relations of *workers*.³ It is by no means identical with a 'law of labour'; it is narrower than that. Labour law concerns specifically the labour of 'workers', ie of persons who perform dependent labour.⁴ Neither is labour law identical with a 'law of labourers'; it is broader than that. 'Workers' are not merely labourers, they are also white collar workers, apprentices, and civil servants. All of these perform dependent labour, especially the civil servants – even if they do so in the context of particular relationships, their law is rooted in labour law. We can see that labour law has already distanced itself from the historical point of departure that was critical for its early development. Labour law was born out of the labour movement, which was to begin with a movement of labourers in the proper sense, factory workers etc. The forces that now propel the development of labour law are wider than those which first propelled it. The vanguard of labour law is today the vanguard of all working people, that is of all those who seek and find their means of living in the exploitation of their labour power. Since dependent labour has become a life-long status, since being a 'journeyman' is not any longer a transitional stage towards becoming an independent tradesman, since the employment contract has become for millions of our people the only mechanism available for securing a means of existence, labour law is the true 'law of the people' seizing the roots of human existence. That is indeed why today one of the biggest legislative tasks confronting us is the creation of a unitary labour law intended to apply to all classes of worker.

It is by no means identical with a law of labour, it is more narrow. Labour law has to do with a law of labour only in so far as it concerns the labour of employees, that is of persons who perform dependent labour. Neither is labour law identical with a law of labourers, it is broader. Workers are not merely labourers, they are also clerks, apprentices and officers. They all perform dependent labour, particularly also the officers – even if they do that in particular relations, their law is rooted in labour law. By this labour law has already distanced itself from its historical point of departure that used to be representative for the development of labour law. It originated from the large labour movement which at first comprised labourers in the proper sense, factory workers etc. The forces that are now backing labour law, have a wider scope than those that at first urged it. The vanguard of labour law – that is today the vanguard of all labouring people, that is of the big mass which tries and finds its existence in the productive realization of its labour force. Since dependent labour has become an occupation for life, since the 'journey man' cannot any longer expect to just become an independent master, since the employment contract has become for millions of our people the only personal security paper upon which their life-long existence depends, labour law is the real people's law seizing the roots of human existence. That is indeed why nowadays one of the biggest tasks of legislation that confronts us, is the creation of a uniform labour law that is destined to apply to all workers.

3. Labour law regulates *all relations* of workers. Formerly when one spoke of labour law, one thought only of the contract of employment. Even today, a large portion of the academic literature assumes that the basic pillar of labour law is the contract. But the employment contract is just one relation among those that are to be regulated by labour law. When we consider the whole range of relationships of the worker which form the subject matter of labour law, we must consider the worker from two perspectives. One perspective is conditioned by the worker's relationship with the employer. The other is conditioned by his membership of a particular social class. As a member of

³ German: *Arbeitnehmer*.

⁴ End of page 4 in original. 'Labour law' = *Arbeitsrecht* in the original, German text; 'law of labour' = *Recht der Arbeit*; 'law of labourers' = *Arbeiterrecht*.

that class, one can be a 'worker' even if one has no relationship to any employer. The unemployed textile worker is also a 'worker', as is the disabled miner, unable to work. We can see then that labour law does not only regulate relationships⁵ between workers and employers but also those which arise from the workers' membership of a certain class with certain concrete needs, the elementary fulfilment of which is the task of a social law which takes as its point of departure not the abstract conception of a 'person', but the concrete phenomenon of human beings in need. It is for that reason that the law regulating employment services and employment insurance also forms part of labour law alongside the law of contracts of employment. On the other hand, the employment contract does in no way exhaust the relationships between workers and employers.⁶ The labour movement has inspired among workers the desire to be not only the object, but also become the subject of the economy. The economy is being conceived as comprising all the forces that are active within it, not only those of capital, but also of labour. Therefore, as long as there is private capital, the economy is not only supported by the owners of capital but also by the employees. 'The economy' is conceived as comprising all of the forces active within it – not only those of capital but also those of labour. For as long as we have private ownership of capital, the economy will be borne not only by the owners of capital but also by the workers. Workers are, therefore, not merely the servants of capitalist enterprises. They are also co-entitled, together with capital, to economic control. From this entitlement springs the idea of the labour constitution: of an order which calls upon labour – within parameters set by legislation or by agreement – to participate in the making of decisions which in the past were for capital alone to make. The labour constitution stands today beside the employment contract, of equal importance to it. The contract of employment and the labour constitution are the two fundamental relationships that fall to be regulated between the worker and employer. Labour law is therefore the comprehensive law of the worker. It comprises the worker as a whole, in all the relationships that he has qua worker.

II

If we have by now gained a picture of what labour law nowadays is, then we can raise a further question, the answering of which shall introduce us still deeper into the essence of labour law: *What is the ground for the particular interest in labour law that nowadays generally does exist?*

1. The particular interest in labour law is grounded, firstly, in that it deals with *labour*. Labour is a peculiar kind of energy. In performing labour, one does not deliver an object of property, but oneself. Labour is man himself in the state of working. Labour is a source of property but not expenditure of property. Property is something that exists outside of man. Labour has, in Karl Marx' words, "no other container than human flesh and blood". Property is the material basis of human life, it belongs to the world of things, that in themselves have no goal⁷ and are destined to be means to man. Labour power is the personal basis of human life, it belongs to the world of mental beings who have their own goals, and whose destination cannot be confined to being means to the goals of others. "In the Kingdom of Ends", Kant tells us, "everything has either a price or a value." Man has value, and to preserve that value is the special task of labour law. Its destiny consists in preventing people from being treated like things. Whoever wishes to grasp the spirit of labour law, should see this basic idea guiding the thousandfold provisions that it controls. Labour law thus consciously

⁵ End of page 109 in the reprint (see note 2).

⁶ End of page 5 of original, German text.

⁷ End of page 110 in the reprint.

opposes the merely property-economic perspective on things and gives expression to the idea of a human economy that in our times penetrates and expands⁸ ever further. Labour law asserts a new conception of man, it realizes the 'real humanity' which is much more than a mere ideological humanism. If we face up to the history of labour law, we see clearly this humanitarian impulse that is coming about in labour law.

How did it use to be? Once man was merely a thing. The slave was nothing but the precious cattle of the lord. The 'free labour contract' made him into a 'person'. The person is an abstract being, to such an extent that all people are equal because of the disregard of this view for their particular social situation. The transition from thing to person was a huge step forwards in the legal history of humanity. All people became equal, could legally become anything, could have all rights. The world was legally open to all people. If only the social order would not have remained what it was! Here yawns the big gap that the elevation of man from the world of things into that of persons, where merely spirits but not sensual people rule, has left us. The social order is different from the legal order. It refers to the control and distribution of goods. People are unequal there and are all differing in power. It is not private manorial rights that reign there, as in feudal times, but private economic power that has founded the capitalistic era. What does legal equality mean in this unequal distribution of power? This is how the labour movement originated. It wants to make 'persons' into people, that is: into beings that not only abstract-legally want all sort of things, but are also in a new social-legal order provided with the elementary foundations of a decent existence, so not only legal, but also social forces inhere in them. The naked human being, this volatile shadow of man expressed in the 'person', should be turned into a socially secured human being which does not only live in the air of spirit but also in that of a fully conditioned existence. Labour law is participating in front in the construction of such a social-legal order that in its regulation not only centres on property but on humanity. Labour law aims to fill the gap between 'person' and human being⁹, to include the social order into the legal order, to give the new social era its law.

2. The particular interest in labour law is further based in the fact that it concerns *dependent* labour. *Dependency is the fundamental problem of labour law.* It has been overlooked for a long time, and still is, in a large portion of the jurisprudential literature of our days.¹⁰ The relationship of a worker to his employer is not merely a matter of contract law, it is in particular also a power relation. It is also a matter of the law of persons. Therefore, the dependency of workers is not only economic, social, or technical, merely factual and irrelevant to law; it¹¹ is rather a legal power relation, which has certain legal effects that contrast entirely with those of the law of obligations. Take the right of employers to give orders: no creditor can give orders to a debtor; the law of obligations does not include a duty of obedience of debtors. However, nobody doubts that the employer can give orders to the worker, and that the worker is obliged to follow the instructions of the employer. This subordination can only be explained therein, that an employer has at his disposal not only a creditor's right as defined by the law of obligations, but also a right to exercise authority based on the law of persons.

Take also the direct acquisition by an employer of a worker's product; everything the worker produces, does not belong to him but to the employer. This direct acquisition by the employer

⁸ End of page 6 in original, German text.

⁹ End of page 111 in the reprint.

¹⁰ N.B. that is: September 1926!

¹¹ End of page 7 of the original, German text.

cannot be explained by the law of obligations, but only by the legal power relation that joins employer and worker into a legal unity, the exclusive bearer of which is the employer. It is unitary law that works this way, and has other legal forms of expression than a law between individuals. The peculiarity of the labour relation is that the obligations and rights resulting from the employment contract do exist between persons tied into a unit characterized by the exertion of authority. This distinguishes the worker from all other persons who perform labour but are independent, such as a physician, lawyer, farmer, entrepreneur, commercial agent etc. Dependent labour is labour that the worker performs neither for himself nor for the commonwealth, but for a private person. Working man is mediatized, is alienated from himself and from the commonwealth. While in the natural state of man labour is an individual and social function, in the state of dependency it is a foreign function and the function of a stranger. For labour law this raises the problem of human freedom that is, more than almost any other problem,¹² rooted in the primordial elements of the human soul. It is true that the problem is raised in a new way: it concerns neither abstract legal freedom, nor political freedom, but freedom in the factories of our times that compress people more heavily and severely than ever before.

This freedom will be realized in forms that repeat, now in the social field, the process of transformation that has taken place in the field of the state. In the state there is a triple freedom. First, freedom from private legal domination, which has not released man from any duty, but from private duties and burdens. In the state, man is subjugated, not to private persons but to a political commonwealth. Freedom in the state is, second, personal freedom: there are spheres free from state interference where individuals are secured in the free conduct of their affairs. These free spheres are supplemented with¹³ so-called fundamental rights that withdraw personal goods from state control. And, finally, it is freedom in the state: the free citizen is not the subject (of a ruler), he participates in a 'general will' and cooperates in its formation.

In the same way the 'liberation of labour' is never a mere release from social bonds and unity, it does not bring about a dream world in which everyone can do or let go as he wants. It is not freedom from labour. It will not, as far as we can see, smash the large enterprises of our times, but preserve, develop and rationalize them. It will, like freedom in the state, secure in its own field a triple freedom. It will grant to man *social fundamental rights* that guarantee him a decent existence, the preservation of his labour power, and a free sphere of life. The 'liberation of labour' will further secure the cooperation of labour in the exercise of economic powers, it will transform *economic subjugation into an economic citizenship*. And, last but not least, that which requires ultimate patience, wisdom and social disposition: it will lead to an *economic commonwealth*¹⁴ in which no longer private persons will operate trade and industry as a business, but in which an economic 'general will', based on manifold, common support, will direct the whole of the economy. The way the state, as embodiment of the political 'general will', has wrenched itself from private hands, so will the economy as embodiment of an economic 'general will'. Only when such a commonwealth has developed, will the 'liberation of labour' be completed, wage labour lapsed, the contracted worker replaced by the free citizen in the labour state.¹⁵ Dependent labour will acquire a new meaning, it will not any longer be performed for a private stranger, but for the commonwealth, in

¹² End of page 112 in the reprint.

¹³ End of page 8 of the original, German text.

¹⁴ In German original: *Gemeinwesen der Wirtschaft*.

¹⁵ In German original: *Arbeitsstaat*.

which working man in his position will be a member with equal rights and will be protected in his human particularity.

It is thus the most important and valuable goods of life that labour law has to protect. *The development of labour law is the development of¹⁶ humanity and freedom in the relation between labour and property.* Through labour law run the fountain of life of the social movement, the blood of freedom; in it the destiny and passion of the nation determine themselves. It is the living law of the present day.¹⁷

¹⁶ End of page 113 in the reprint.

¹⁷ At the end Sinzheimer refers the interested reader to the second edition of his book *Grundzüge des Arbeitsrechts* (Jena: Verlag Gustav Fischer), 1927i.