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# Industrial relations and the sociological study of labour law

Andrew D. Frazer

*University of Wollongong*, [afrazer@uow.edu.au](mailto:afrazer@uow.edu.au)

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# Industrial relations and the sociological study of labour law

## **Abstract**

This article examines the prospect for more fruitful collaborative research between labour law and industrial relations, using recent studies in labour law as a starting point. An increased and more sophisticated interest in labour law as regulation, particularly in Australia, has moved the discipline towards some of the traditional interest areas of industrial relations. However there remains a need for more empirically-based research, with the social reality of law as its primary focus. The legal studies paradigm is not well geared to social science research and an interdisciplinary approach is required. Industrial relations is the obvious candidate for such a partnership, but it currently lacks the basis for a law-centred methodology. The paper argues that the established field of sociology of law provides the most suitable basis for such work. To adopt this approach would, however, require scholars in both labour law and industrial relations to move onto new terrain and to ask new questions.

## **Keywords**

industrial relations, sociology of law, labour law, Ehrlich

## **Disciplines**

Labor and Employment Law | Law | Law and Society | Other Legal Studies | Work, Economy and Organizations

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## INDUSTRIAL RELATIONS AND THE SOCIOLOGICAL STUDY OF LABOUR LAW

ANDREW FRAZER\*

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*ABSTRACT: This article examines the prospect for more fruitful collaborative research between labour law and industrial relations, using recent studies in labour law as a starting point. An increased and more sophisticated interest in labour law as regulation, particularly in Australia, has moved the discipline towards some of the traditional interest areas of industrial relations. However there remains a need for more empirically-based research, with the social reality of law as its primary focus. The legal studies paradigm is not well geared to social science research and an interdisciplinary approach is required. Industrial relations is the obvious candidate for such a partnership, but it currently lacks the basis for a law-centred methodology. The paper argues that the established field of sociology of law provides the most suitable basis for such work. To adopt this approach would, however, require scholars in both labour law and industrial relations to move onto new terrain and to ask new questions.*

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IN THIS ARTICLE I want to table a plea, not for greater collaboration between labour law academics and industrial relations scholars (for that has been going on for a long time), nor for a closer convergence between the two disciplines (a developing trend), but for a new approach to law on the part of both disciplines. While labour lawyers have drawn on empirical research in industrial relations as the context for doctrinal analysis, and industrial relations has used studies by

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\* Senior Lecturer, Faculty of Law, University of Wollongong. Correspondence to: [afrazer@uow.edu.au](mailto:afrazer@uow.edu.au).

labour lawyers for an explanation of the more formal dimension of workplace regulation, neither has embraced a truly sociological approach to law. It is in the perspective provided by the distinct area of the sociology of law, I argue, that a new collaborative approach and fresh insights may be obtained into the role of law in the constitution and regulation of work.

The argument for a closer relationship between labour law and industrial relations has been made before. Hammond and Ronfeldt (1998) called for labour lawyers to reconceptualise their approach by building on industrial relations theory and research, while recognising that a truly interdisciplinary approach “requires social scientists to recognize the knowledge of labour layers regarding the themes and history of law as much as it requires traditionally trained lawyers to adopt methods used by social scientists” (Hammond and Ronfeldt 1998: 238) Collaborative work between the two has certainly been going on for some time particularly, it seems, in Australia where both fields have a long and close association (Frazer 2008). Industrial relations academics are well aware of the need to take account of law in their analysis, and labour lawyers are strongly guided by industrial relations research in the directions they take. However researchers in both fields continue to adopt a narrow view of what law is, even as they aim to uncover the social dimensions in which the law operates. While something may be gained by adopting a sociological *theory* of law, more important is the research program which this leads to: “the systematic *empirical* study of law as an aspect of social experience” (Cotterrell 2005: 29, emphasis added).

### **The Doctrinal Paradigm of Legal Studies**

The study of law as an academic discipline, instituted in the late nineteenth century, has been developed by distinguishing it from other academic disciplines, as well as from the legal profession with its apprenticeship approach. The paradigm for scholarly legal studies quickly became the close study of authoritative texts in order to discover the inner logic of the law, its “general or universal principles” (Sugarman 1986: 34). Although the doctrinal or ‘black letter’ approach has been challenged periodically by demands for a more realistic and sociologically-

based account, these have not managed to displace the prevailing orthodoxy of law's "scholarly isolation" (Tomlins 2000: 943). While interdisciplinary perspectives have colonised some of its cavities and outbuildings, the modern Anglophone law school is raised on footings which are ant-capped against the social sciences.

Rubin (1997: 542) has identified the distinctive feature of legal scholarship as its "prescriptive voice" or normativity: it is concerned with what ought to be, in terms of either doctrinal purity or policy effectiveness. In his view, legal scholars are primarily engaged in discourse with law-makers, and so "are not trying to describe the causes of observed phenomena, but to evaluate a series of events, to express values, and to prescribe alternatives" (Rubin 1997: 527). If Rubin is correct then, as he claims, there is no necessary incompatibility between law and social science, for they are concerned with different objectives. It is not difficult for legal discourse to appropriate social science research to provide the context for its normative accounts. However, this research can never resolve legal issues. Conversely, legal discourse is not geared towards providing socially-grounded descriptions. While this may be undertaken by legal scholars using legal documentary sources, they step outside conventional legal discourse when they do. In fact, the law and society movement in the United States (US) was largely founded and pursued by social scientists located outside the legal academy; their vision was of "the study of law as a social phenomenon, not the use of social science *in or by law*" (Levine 1990: 70).

The greatest obstacle to empirical research in law is the skills deficit among legal academics. In the US, fieldwork in the operation of law has mainly been carried out by sociologists, criminologists and anthropologists working in the sociology of law. In the United Kingdom (UK) this field has remained underdeveloped and an interdisciplinary approach to law has been mainly confined to the law schools as the more limited field of 'socio-legal studies' or 'law in context.' A recent British investigation has revealed the dearth of training and skills in empirical research which would enable inquiry to become more systematic and revealing (Genn, Partington and Wheeler 2006, Partington 2008). Australia has followed the British pattern, with no strong

tradition of studying law in the social sciences and little basis for empirical research within the law schools.

### **Law as Regulation**

The focus on doctrine has been diluted to some extent by the rising interest in law as regulation. Legal academics in many fields have begun to adopt an approach based on regulation theory, with its interdisciplinary approach and a perspective on governance in which law plays a central but by no means exclusive role. In her survey of fieldwork on law, Greenhouse has identified a renewed interest in law, regulation and individual rights across the social sciences. This interest gives emphasis to “new uses of law and new law users, as well as contexts where individuals and communities are exposed to the unmediated power of their governments, employers, and other major private sector actors” (Greenhouse 2006: 193). Among Australian lawyers a regulatory perspective has been followed in criminal, environmental and corporations law, but notably also in labour law with the project on labour market regulation over the last decade (Arup, Gahan, Howe, Johnstone, Mitchell and O’Donnell 2006; Frazer 2008).

The sociology of law has been one of the foundations for the development of the new interdisciplinary field of regulation studies, along with scholars in organisation studies and political science. It is the law-oriented social science perspective which has given regulation its pluralistic viewpoint and orientation away from the state and towards regulatory communities.

### **Regulation and the Study of Labour Law**

The recent project on law and labour market regulation, conducted out of the Centre for Employment and Labour Relations at Melbourne University’s law school, was conceived as a way of moving beyond the trap of normative discourse and engaging instead in a positive account of law based in empirical investigation. This path was seen as important both for expanding the scope

of the field of labour law beyond the employment relationship, and to provide a more realistic account of the functions of labour law (Mitchell and Arup 2006: 13-14).

To date, much of the work on regulation by labour lawyers has been concerned with expanding the boundaries of the field, taking into account the effects of other areas of law (business structures, tax, immigration) on the constitution and conditions of work. This has been in response to structural changes in work and the labour market, especially the increasing importance of 'atypical' forms of engagement other than permanent employment. The decline of institutions of arbitration and collective bargaining have also required that attention be paid to more informal methods of labour regulation. The resulting work has often been a collaboration between researchers from law and industrial relations, and has appeared in journals from both disciplines.

Labour lawyers have made increasing use of workplace research as a way of placing their analyses in a wider context, and to establish the incidence and importance of the legal issues discussed. Yet apart from the regulation studies, there are few examples of detailed empirical research on the operation of labour law in Australia. Most common among empirical research are documentary studies which treat case decisions as events, and legal texts as evidence of socially meaningful actions rather than as internal sources of doctrine (Frazer 1999: 80-81). Less common are specific case studies and the use of content analysis; while there has been little specific deployment of survey, interview or ethnographic methods.<sup>1</sup>

Notable among empirical studies is research by Mitchell and Fetter (2003) on the content of enterprise agreements and their (lack of) connection with high productivity work environments, which engendered a brusque methodological debate (Gollan and Hamberger 2003). Similar work utilising quantitative analysis of agreement contents has been conducted on the operation and outcomes of the statutory no-disadvantage test (Mitchell, Campbell, Barnes, Bicknell, Creighton, Fetter and Korman 2005). Such output, while produced by scholars who were (at the time) located within a law faculty, is probably indistinguishable from work by researchers located in industrial

relations — apart, perhaps, from a more detailed attention to the legislative rules. By contrast, related work on agreements by the same authors more closely fits the mould of legal research by focusing on the specifically legal issue of overlapping legal instruments at the workplace and the potential impact of this regulatory complexity on labour flexibility when the relationship between the different sources is not well articulated (Fetter and Mitchell 2004).

In recent years some research associated with the labour market regulation approach has made substantial use of case studies. Case studies have recently been used in investigating trade unions' use of shareholder activism and its potential as an alternative regulatory strategy (Anderson, Ramsay, Marshall and Mitchell 2007), and the prospects of corporate social responsibility charters in promoting union recognition and collective bargaining (Jones, Marshall and Mitchell 2007). In this work the connection with law is largely contextual, being mainly provided by an expanded concept of regulation in which labour law forms but part of the ensemble of techniques which regulate relations between the parties. In response to speculations on the potential of new regulatory strategies to replace traditional direct legal regulation of industrial relations, the research has provided (still inconclusive) empirical evidence of the very limited effect of efforts to promote bargaining and representation by unions using corporate governance avenues.

While labour lawyers tend to be more interdisciplinary in orientation than most other legal academics, and usually have some background in other disciplines (usually history or economics and sometimes industrial relations), this does not necessarily provide them with the skills needed to design and conduct empirically robust social science research projects. Hammond and Ronfeldt (1998) noted a decade ago and from an international perspective that, while there is an established body of literature exploring the influence of political values on labour law decisions, and no lack of broad evaluations of the social impact of labour law, few labour law studies have been grounded in detailed empirical research. Until recently this was the case even with 'law in context' studies, which relied heavily on secondary literature for their contextual framework. In the UK it has been

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<sup>1</sup> Research by Hunter (2006) used interviews extensively but did not report on the perception or operation of law at the workplaces studied.



noted that while labour lawyers have contributed to critical analysis at a general level, both lawyers and social scientists have been uncurious about the social operation and impact of law in industrial relations:

Academic labour lawyers have provided critical analyses of why the state intervenes; why particular forms of intervention (legislation) are chosen; policy evaluation; assessments of the legislative provisions and policy intentions; analysis of case law; and critical commentary on the agencies selected to administer the law. There is generally less attention, however, to how the law is used: not simply whether it achieves its objectives (however defined) but how people come to accommodate and live with it; and on how it impacts on, and interacts with, various aspects of employment relations, labour markets and outcomes (such as performance, competitiveness). (Dickens, Hall and Wood 2005: 32)

The gap between law and industrial relations does not seem to be as great in Australia, largely as the result of the expanded horizons of labour law scholarship induced by the labour market regulation studies already mentioned. This work has been effective in taking labour law beyond the study of formal legal rules to embrace norms and practices operating in the labour market and the workplace, even though the concentration on labour market regulation means that the emphasis still remains strongly on state-originated rules and norms (Frazer 2008: 41).

The next step in the law-as-regulation agenda is the analysis of rules and procedures within the employing organisation, as state deregulation increasingly results in the devolution of power and discretion to the employer and a regime approaching enforced self-regulation (Marshall and Mitchell 2006, Arup 2006: 727). A beginning has been made in studying the connection between corporate law and labour law, including the effect of various forms of corporate governance (directors' and managerial responsibilities, shareholders' rights etc) on conditions and relations at the workplace (Marshall, Mitchell and Ramsay 2008). But the study of the social reality of legal norms within the employing organisation and the employment relationship remains largely unexplored terrain.

### **Industrial Relations and Law**

Australian industrial relations (IR) scholarship certainly gives attention to law as part of the framework of industrial relations and has long been concerned with workplace norms and the ‘rules of the game.’ This interest is the legacy not only of the arbitration system which so dominated industrial relations for so long, but perhaps also the influence of the Oxford school’s focus on formal “institutional rule-making” (Ackers and Wilkinson 2005: 447). However an interest in the operation of law has not been a major research theme among IR academics; in particular, the relationship between legal and social norms in the regulation of work is not at the centre of analysis. Industrial relations as a field traditionally relied on systems models where the main focus was on the institutional players and the complex interplay of rules. The part played by law in such models was largely constitutive, setting the terms for the parties’ interaction. The more recent shift to the study of organisations and management has perhaps led to even less focus on external sources of norms and their specific impact. This trend does not seem confined to Australia and may even be less pronounced here than elsewhere, owing to the continuing high level of legalism in work relations. The British authors who were so critical of labour lawyers’ lack of empirical grounding also claimed that industrial relations scholars have not explored issues where law might be expected to have particular effect and so “their research throws little light on the role of law as a factor among others shaping employment practice and outcomes” (Dickens, Hall and Wood 2005: 32).<sup>2</sup>

One of the great strengths of industrial relations as a scholarly field is its ability to embrace and evaluate a wide range of factors, and it would be a backward step to lay claim to the centrality of law. What is surprising, though, is how little IR research with substantial legal focus is being published. A cursory survey of articles published in the two leading Australian industrial relations journals over the last eight years identifies less than 10 percent which give specific attention to the

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<sup>2</sup> For a similar critique of French scholarship, see Bonafé-Schmitt (1994).

operation of labour law.<sup>3</sup> Apart from critiques of *WorkChoices* and the law-based regulation studies by Mitchell *et al*, research with a significant legal dimension falls into three main types: factors affecting the choice of regulatory instrument (awards, individual and collective agreements); the effects of state deregulation on particular industries; and the operation of regulatory sources in relation to specific issues such as drug testing, maternity leave and gender pay equity. Two recent presidential addresses at the annual conference of the Association of Industrial Relations Academics of Australia and New Zealand (AIRAANZ) have called for greater attention to formal regulation and its effects. Marian Baird expressed a need to return to the “core business” of industrial relations, “the impact of regulatory frameworks” on working lives of women as well as men (Baird 2003: 110). Julian Teicher argued that law “as an institution of society,” is deeply embedded in Australian industrial relations and needs to be accorded its ‘proper place’ at the centre of research and policy. He averred that the majority of new workplace issues “have a legal complexion that draws them into the domain of industrial relations” (Teicher 2004: 115-6).

This is not to say that industrial relations is ignoring labour law; it remains a significant part of the descriptive context in many studies. The impact of legal regulation also remains a central concern for some research. For example, an Australian study of the growing use of 12-hour shifts engaged closely with the effects of legal changes in the deregulation of working hours (Loudoun and Harley 2001). Some other studies indirectly address the operation of law as a part of workplace social norms. Van Gramberg (2006) provides some evidence of norm transmission in her analysis of workplace dispute mediation. Her study of attitudes among alternative dispute resolution (ADR) practitioners showed strong agreement with the view that compliance with external legal and other norms would be complied with by mediators. Only 14 percent believed that ADR was idiosyncratic and that external norms should not be followed. The study also probes the mediator’s independence through case studies, noting the role of outside practitioners in defusing and legitimating management decisions. In this study the creation and application of

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<sup>3</sup> Study by the author of contents of the *Journal of Industrial Relations* and *Labour and Industry*, 2000-

norms was part of the context for the specific research questions addressed, and it only requires a slight reorientation to interpret the results as significant for an understanding of the operation of law and regulation.

A few studies continue to examine the effect of legal norms at the workplace. Lee's examination of award and agreement enforcement explicitly adopted a framework based in regulation theory and set out to apply a socio-legal perspective by showing "how the parties use the legal rules" and the variety of factors influencing their operation (Lee 2006: 43). One recent UK paper used survey and interview methods to analyse the effect of employment regulation on small firms, showing that such firms were able to absorb any effect of increased regulation through, in part, their informal approach (Edwards, Ram and Black 2004). However, even this kind of research is not concerned with socio-legal issues. While it might recognise the diversity and complex social operation of law, it does not focus on law *per se* or in its social operation. Even when socio-legal issues are identified, such as the informal attitude taken towards legal rules by employers (an issue of recognition and implementation) or the connection between external legal regulation and internal managerial prerogative (a potential case of legal pluralism), they are not the primary focus of attention.

One significant exception here is the ongoing *Australia at Work* study, which specifically sets out to examine the operation of legal norms at the shop-floor level by surveying workers' understanding of how their working lives are regulated. Unusually, the survey deliberately sets out to uncover workers' perceptions of legal coverage, "what they believe the legal situation to be" as a social phenomenon distinct from the technical legal position, and to chart the gap between the two (van Wanrooy, Jakubauskas, Buchanan, Wilson and Scalmer 2007: 13). This attempt to capture "the lived reality of the labour contract" has shown, for example, that employees overemphasise the operation of awards, suggesting a strong cultural attachment to that form of regulation (van Wanrooy et al 2008: 5, 22). The survey also identifies an apparently healthy informal labour market unaffected by formal awards and agreements (at least to the eyes of the

workers questioned) covering some 4 percent of permanent employees and 9 percent of casuals (van Wanrooy, Jakubauskas, Buchanan, Wilson and Scalmer 2008: 24).

Potentially we are at a point where we can give a greater appreciation of law's place in the world of work. However the traditional paradigm of legal studies is simply not attuned to this direction. It is time for both labour law and industrial relations to turn more closely to the field where the study of law as social fact is well established: the sociology of law.

### **The Sociological Study of Law**

Some legal scholars have always studied the social experience of law while at the same time trying to account for its distinctiveness. In most jurisprudence, law exists as a distinct category, derived independently of social norms. Roscoe Pound (1910: 15) contrasted “the law in books” and “the law in action” — the legal rules which purport to govern and the “judicial administration” of rules in practice. It was Eugen Ehrlich, though, who early last century declared that law, like other social norms, are simply a part of social life (Ehrlich 1936: 38-9). The living law, said Ehrlich, cannot be found by looking only in the law books. While judicial decisions and legal documents can be used as evidence of social events, “even the judicial decisions do not give a perfect picture of legal life. Only a tiny bit of real life is brought before the courts and other tribunals; and much is excluded from litigation either on principle or as a matter of fact. Moreover the legal relation which is being litigated shows distorted features which are quite different from, and foreign to, the same relation when it is in repose.” (Ehrlich 1936: 495).

Ehrlich's approach rested on three concepts. First, there is “the living law” which is distinct from state-issued rules and can only be understood by studying concrete practices “which the parties actually observe in life” (Ehrlich 1936: 497). Secondly, part of the living law is the “inner order of the association” which is the normative practices operating as private law within organisations. Finally, Ehrlich distinguished between legal propositions, those technical legal rules

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contained in statutes and law books, and “norms for decision” which are a mixture of legal, moral and other norms actually applied by judges to decide cases. In making their decisions, judges mediate between technical legal rules and particular social norms such as those arising from within an association (Ehrlich 1936: 123).

For Ehrlich, a truly sociological approach to law involved empirical research into actual social practices, as well as an appreciation of the norms developed by the courts in reaching their decisions:

We must know what kinds of marriages and families exist in a country, what kinds of contracts are being entered into, what their content is as a general rule,... how all of these things ought to be adjudged according to the law that is in force in the courts and other tribunals, how they are actually being adjudged, and to what extent these judgments and other decisions are actually effective (Ehrlich 1936: 504-5).

This approach embraces both legal pluralism (with its idea of law existing beyond and outside the state) and an institutionalist approach to regulation. The living law consists of practices and relations which are concretised into customs and norms by their repeated observance, particularly within and between organisations. In this view, any distinctiveness which law might have lies in its institutional basis and social occurrence rather than any inherent nature or quality.

In the succeeding decades since Ehrlich, the sociological approach to law has produced several propositions which are both grounded in observation and eminently testable (Ziegert 2002a). I venture that for modern capitalist societies these propositions include:

1. Law is part of society; legal rules and institutions are social phenomena which are the product of particular social and economic forces. In this view, even legal reasoning is a social process, with the validity of legal propositions dependent on their acceptance by a legal community (Cotterrell 1998).
2. Law is not self-executing but operates through social norms. Legal rules are effective at a social level only to the extent that they exist as social norms. Obedience to legal rules and

practices occurs largely through their acceptance as procedurally fair and in accordance with widely internalised social norms (Tyler 2006).

3. Legal norms are observable in specific contexts, within “semi-autonomous social fields” (Merry 1973). Within a social field, legal and other norms combine to produce regulation or social control. Modern societies are legally pluralistic, with numerous social fields and their overlapping legal norms.
4. The legal system has a life of its own: its rules and institutions are not reducible to other social relations or interests, but are to a greater or lesser extent autonomous or self-directed (autopoietic).<sup>4</sup> Legal institutions like courts are themselves distinct sites of particular social relations. At the same time, participants within institutions and in wider society currently tend to believe in the need for law to be responsive to and reflective of social relations.
5. The development and application of legal rules is a social practice formalised and largely carried out by lawyers as a technocratic elite; because of this, legal practices are specialised and subject to internal forces such as consistency and conceptual coherence.

The sociological study of law should not be regarded as confined to the academic and professional discipline carried out by academic and professional sociologists. As Cotterrell (2006) notes, the sociological study of law should be understood more widely, as “any systematic, empirically-oriented study of the social (the human relations that make up social life), whether or not conducted by scholars who are identified or identify themselves in any way with sociology as a discipline” (Cotterrell 2006: 18). This is the meaning understood since Ehrlich’s enthusiastic embrace of the study of “living law”, and it distinguishes work by socio-legal scholars from either social theory or sociological jurisprudence. A key insight of the sociology of law is that “the

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<sup>4</sup> There is considerable disagreement over the extent to which law is viewed as an operatively closed sub-system, depending on whether the focus of study is on the formal institutions of law. Systems theorists like Luhmann recognise the interchange of norms between the legal system and other social systems, and the pressure of expectations placed by these other systems on the legal system, although they deny direct communication between systems as they speak in different codes (see Ziegert 2002b: 66, 69-72).

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meaning of law is constructed within the social (and economic) realms that it seeks to regulate” (Edelman 2004: 189).

The sociological approach to law is distinct from work by legal scholars operating under the banner of critical legal studies (CLS). While CLS, like the law and society movement, began as a reaction to formal and doctrinal legal studies and took sustenance from the legal realist tradition, in practice CLS has become highly focused on legal doctrine as a field of autonomous discourse; and while it aims to reveal the socially hegemonic foundations of doctrine, it does so through an immanent analysis of texts rather than through concrete observation of social effects. Tomlins (2000) sees this difference as foundational, resting on CLS’s “emphatic denial of the core assumption upon which Law and Society’s field of encounter between social science and law had been founded in the first place: namely, that the resort to social science to undertake empirical mapping of “exogenous forces” would produce systematic and objective results” (Tomlins 2000: 961). By contrast, for CLS and its successors under various banners of critical theory, the prospect of empirical observation is a delusional positivism.

To study law systematically as an aspect of social life is more than to study courts, legal processes, lawyers and their behaviour: we must consider what it is that labels them as legal. To label a rule or norm as ‘law’ is socially meaningful and as a social phenomenon must be distinguished from other normative ordering and social control, although the difference may be more of degree than of kind (Griffiths 2005: 58). To engage in a sociological (or social-scientific) study of law, one must have an interest in law as an object of study, and this entails a notion of what law is and is not. In this regard it is possible to adopt a sociological approach to what has usually been regarded as a jurisprudential question. Rather than resort to a notion of law as having an essence (which is to ignore it as being tethered in place and time), we can adopt a social definition of law itself: as whatever is identified and described as law by social convention within a particular social arena (Tamanaha 2001: 197).

The sociological approach to law has been developed and applied by scholars from a range of disciplines (notably legal anthropology) by particular studies of: communities and customs; the



construction of meaning in legal processes, events, spaces and localities; and, most especially, relations between disputants and their encounters with legal agencies and tribunals. It is done using the full range of social science methods, including statistical surveys, case studies, textual analysis and ethnographic research (Baldwin and Davies 2003: 891-2; Banakar and Travers 2005). In the US, where the sociology of law has become professionally established over more than three decades, there is a substantial body of studies, particularly in the areas of disputes, justice processes and the role of lawyers (Seron and Silbey 2004).

Recently there has been renewed interest in the social operation and effectiveness of law, enforced not automatically as self-legitimizing rules of the state, but through social norms (Ellickson 1998). Moreover, such norms are considered as conveying not just behavioural injunctions but social meaning on a collective level (Lessig 1995). This leads to a new, socially-based, approach to regulation (Lessig 1998). Although problematic in its treatment of norms as vehicles for public policy rather than as social phenomena, the law and social norms approach represents a greater realisation of the social basis of compliance with legal rules (Rostain 2000: 975, 1000). Research has grown in such areas as: popular attitudes towards law, perceptions of risks and liability, the effectiveness of new litigation processes and punishment regimes, the impact of legal changes on behaviour within a target group, outcomes of mediation and negotiation processes, the content of particular kinds of contracts. This work appears in the established law-and-society journals (*Law and Society Review*, *Journal of Law and Society*) and in the more recently established *Journal of Empirical Legal Studies*.

Yet little of this kind of research has been done in labour law. There are some studies of collective bargaining strategies and their outcomes, which are common in the labour law literature in the US. Some work of a socio-legal kind *has* been done in industrial relations, as I have noted. Industrial relations scholars have been more interested in the totality of relations between parties at specific sites than with the distinctiveness of rules, norms and relations of legal origin. Until recently, legal scholarship has not tried to fill the gap. And we have not yet seen the development of an empirically-based sociology of labour law.

### **The Sociology of Labour Law**

We can get some guidance as to a sociological approach to labour law from the work of a follower of Ehrlich, the Austrian labour law jurist Hugo Sinzheimer, and his student Otto Kahn-Freund.<sup>5</sup> Sinzheimer engaged in a detailed study of collective agreements when they were not even recognised in law, showing their importance as a source of social norms governing the workplace. His research extended to the functions of works councils and the operation of labour tribunals. While Kahn-Freund's English writings are known for their sweeping generalisations, his analysis was informed by close observation of the daily practice of industrial relations. In both their work, the norms actually governing employment relationships were to be uncovered by comprehensive study of the living law. There are four dimensions to their sociological approach (Clark 1983: 86-7):

1. *Historical* and comparative analysis provides an understanding the influence of social forces and the development of legal norms and the specific form which they have taken;
2. There is a *descriptive* account of the norms regulating actual behaviour. This can only be done by rigorous empirical means (Clark 1983: 102). Description is accompanied by classification, as the first stage of what we would now call grounded theory.
3. The core of the analysis is a *critical* account of the relationship between the formal rules and social practices, including the gap between them. It presents “the confrontation between the “formal” norm and the “real” rule, the conflict between the norm and the normal” (Kahn-Freund 1981: 98).
4. A *theoretical* synthesis seeks to explain the relationship between socio-economic conditions and the ideas used by legal authorities, the material foundations of legal ideology as well as

the influence of law on social attitudes, and the political forces behind the choice of available policy alternatives (Kahn-Freund 1981: 151-2, 177-8; Clark 1983: 90, 94-5).

The ultimate aim is to capture both the social dimensions of law and the legal dimensions of society, especially “the social effect of the norm, with the way in which it appears in society and with its social function” (Kahn-Freund 1981: 98). The results of the analysis may then be used to frame public policy.<sup>6</sup> It was Sinzheimer’s appreciation, taken from Ehrlich, that legal rules were ineffective unless grounded in social norms, that led him to advocate an “economic constitution” for codetermination by labour and capital, with state law providing the framework of rights and procedures for industrial democracy (Dukes 2008: 347).

While we have as yet few studies which take this precise approach, three books exemplify the kind of deeply contextualised analysis of labour law which a sociological approach demands. Bennett (1994) demonstrated the inherently political nature of industrial relations in Australia, giving a ‘thick’ descriptive account of major legal developments. Stone (2004) discusses US labour law from a perspective richly informed by research on labour market patterns, employee attitudes and management practices. Deakin and Williamson (2005) showed in relation to the UK that labour law concepts are deeply embedded in the institutional fabric of the labour market. All these studies are founded in detailed historical analysis and all display an appreciation of the social dimension of law. Bennett’s decision to concentrate on the formal institutions of industrial relations was to allow “links to be made between the characteristics of the institutions, the way they mediate change and the production of law. Such an approach allows labour law to be conceptualised as a social phenomenon without losing sight of its distinctive legal characteristics.” (Bennett 1994: 3-4).

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<sup>5</sup> Sinzheimer’s works are not available in English, however summaries are provided in Kahn-Freund (1983) and Clark (1983). Otto Kahn-Freund was a postgraduate student and research assistant of Sinzheimer in the 1920s.

<sup>6</sup> In the hands of Kahn-Freund it led to an emphasis on social norms, on collective bargaining as ‘crystallised custom’, on social as well as legal sanctions, and on the need for a framework of legal procedures to help renew the practice of collective bargaining in the UK which, under the pressure of changes in the labour market, had fallen into disuse (Kahn-Freund 1969).

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Most recently, the historical and social groundings of labour law have been explored in critiques of the ‘legal origins’ thesis which claims that a national legal system’s origins in either the civil or common law tradition is a crucial determinant of national labour market conditions (Botero Djankov, La Porta, Lopez-De-Silanes and Schleifer 2004). Apart from demolishing the methodology used, critics of this argument have emphasised the importance of law as an integral part of social relations at the workplace and the labour market, yet at the same time insulated from economic, political and social forces. It is difficult to go past Deakin and Sarkar’s (2008) recent explanation of this relationship. While such analysis remains largely at the macro-level, it provides a path-breaking context for detailed research:

Formal legal rules are not so much external forces reshaping markets according to political will, as they are codified conventions, which to a certain extent reflect and embody existing market practices. The impacts of changes in the formal law are mediated through self-regulatory mechanisms and social norms of varying degrees of formality, introducing an element of unpredictability into their operation. In addition, legal rules do not operate upon exchange relationships in isolation, but in conjunction with other, interlocking elements within the regulatory framework. In particular, labour regulations interact with complementary mechanisms such as corporate governance rules and product market regulation. (Deakin and Sarkar 2008: 454)

Deakin and Sarkar remind us that when a new wage-setting policy is proclaimed or the legal rules about unfair dismissal are overhauled, all that really happens is ‘an internal communication from one part of the legal system to another.’ (ibid) It is only when the new law is recognised and acted upon *beyond* the legal system, in ongoing social relationships, that anything changes apart from a kind of internal juridical bookkeeping. The transformation of rules into social norms depends in turn on the ability and desire of actors in the economic system to receive, interpret and act upon the new rules:

The effects of labour law depend, then, on the existence of processes beyond the legal system, referred to in systems theory as mechanisms of ‘structural coupling’, which serve to translate them, however imperfectly, into practice. Under these circumstances, few a priori assumptions can be made about the impact of labour law rules. The impact of changes in formal rules at the national level will depend on a range of factors in play at the level of the relevant industry or firm. At the micro level, the translation

process may well be most problematic in precisely those sectors or enterprises that did not previously observe the social norm or practice from which part of the content of the rule is derived. (Deakin and Sarkar 2008: 460)

When we take the contingent and non-self-acting nature of legal rules into account in the field of labour law, the need for detailed empirical research on the reception and understanding of law in everyday work relations must surely become pressing for both labour lawyers and industrial relations scholars.

### **Towards a Sociology of Labour Law in Industrial Relations**

Following the example of Ehrlich and his followers, we might say that the task of a sociological approach to labour law is to separate the technical rules which have no operative effect from those which do have an effect “and to demonstrate their organising power” (Ehrlich 1936: 41). Then we might seek explanations for the difference: the conditions under which some laws are translated into social norms and others are not. This work is best done by survey and ethnographic methods in the here and now. While historical research is an established method of getting at the connectedness of labour law, it has difficulties in uncovering its full dimensions because it cannot interrogate participants’ understandings and perception sufficiently closely.

When the *WorkChoices* legislation was announced, we saw instances of employers acting on the new freedom being given to them (unbounded freedom, as some saw it) even before the legislation was passed, and soon after the policy did become law some employers quickly took advantage of it. Yet most were reported as holding back, and sometimes it seems this was because the norms of the employing organisation were inconsonant with the new legal rules and the vision they represented. Sometimes it was the fear of jumping first, or concern at a public backlash. No doubt there were many factors motivating individual and group decisions, but in each case some were weightier than others. In any event, legislation did not translate completely into social norm, and it is important to know why. We have little more than anecdote for seeing how and why this

happened, but closer analysis of the processes by which paths were *not* taken — and the motivations of the people who did not take them — would aid immeasurably our understanding of the relationship between law and the organisation of work.

We need studies which examine the construction of legal meaning as a social process, through the understanding and interactions of participants. We also need research which explore the translation of legal relations into organisational ones. This should be able to test the claims that employers are able to ensure compliance with legal rules by internalising them into organisational norms, and can therefore become self-regulating, as the mining industry claimed some years ago (see Murray 2000). We need close case studies of the relationship between state-originated legal rules and the norms actually operating within organisations. There is strong evidence in some contexts that within organisations, employment rights become compromised and “managerialised” into the organisation's own interests (Nelson, Berrey and Nielson 2008: 113).

A list of possible avenues of enquiry may assist in showing the directions in which a sociological approach to labour law can lead us:

- *Sources of rights*: what is the level of awareness of the legal nature of pay and condition rights? How closely is the law observed, ie how close is the correlation between the organisational norms and procedures and the legal rules? What differences emerge with the internalisation of legal rules by organisations? How many workers regard themselves as working informally, and where are they?
- *Forms of engagement*: how influential are legal factors in decisions to outsource or casualise? How did the category of casual employment, particularly the ‘permanent casual’ become so institutionalised, and what part did its legal recognition affect this process?
- *Discrimination*: To what extent is non-discrimination embedded as a social norm at the workplace; is it regarded as an externally imposed legal requirement? How is discrimination defined and understood by workers? What is the level of understanding of the legal coverage of discrimination among managers and employees (especially in complex areas like indirect

sex discrimination, the scope of family and carer responsibilities, mental illness as disability, discrimination against carers and other associates of people with disability)? Are these difficult areas covered in human resources policies?

- *Race/Gender/Age*: Several accounts show the difficulty of establishing grounds of discrimination because prejudice can easily be reinterpreted in terms of individual performance and suitability. Does the legal definition of discrimination reinforce that elusiveness?
- *Employee duties*: What kind of responsibilities do employees regard themselves as owing to their employers? How does this understanding accord with their common law contractual duties, such as the duty of fidelity?
- *Discipline*: what sanctions short of dismissal are used by management, how are they regarded, and do they accord with legal rights of employees (eg to full payment of wages)?
- *Dismissal*: To what extent do the procedures used by supervisors when terminating purport to follow and adopt concepts from unfair dismissal law? Who brings unfair dismissal claims and why? What are the expectations of claimants? In redundancies, how enshrined are workplace social norms such as ‘last on, first off’?
- *Bargaining*: what are employee perceptions of the bargaining process and the role played by law in regulating it?
- *Entitlements*: what do workers know about protection of their accrued leave entitlements and the risks involved? What are their preferences for treatment of these entitlements?
- *Right of entry*: are unions regarded as protectors and legitimate enforcers of law by employees, particularly among non-unionists? Does this perception change with legal recognition of entry rights?

### Conclusion

The disciplines of industrial relations and labour law are both sympathetic and complementary, yet there lies a gap between the two. For both there is a need to explore the living law, especially the ‘inner order of associations’ as represented in policies, practices and attitudes at the workplace. Industrial relations academics have the methodology and techniques which are required for the empirical research that needs to be done, while labour lawyers with their interest in law as regulation are able to supply the legal focus and technical expertise. In providing for an understanding of the connection between legal rules and social norms, the sociological approach to law can provide a substantial bridge between the two disciplines.

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