Abnormal Justice and Globalised Labour Markets: Thinking Labour Law with Judy Fudge

Niklas Selberg
Hanna Pettersson, *Lund University*

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Globalisation, Fragmentation, Labour and Employment Law
– A Swedish Perspective

Editors
Laura Carlson, Örjan Edström, Birgitta Nyström
1. Prologue

“The contemporary world is an abnormal one for labour law scholars”.

This statement, by labour law professor Judy Fudge,\(^1\) seems an apt summary of the central insights inherent to her scholarship. Here, the statement refers to the discrepancy between traditional labour law concepts and worldviews on the one hand, and the current weakened position of both nation-states and working-class organisations on the other. However, it could just as well be understood as describing the

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\(^1\) Currently a professor at Kent Law School, UK, Fudge was appointed Doctor Honoris Causa at the Faculty of Law, Lund University, Sweden in 2014. She was a visiting professor at the Faculty in 2012, and continues to cooperate with researchers within the Norma Research Programme in Lund. She was a guest professor at the Institute for Research on Migration, Ethnicity and Society (REMESO) at Linköping University in 2014. Together with Emily Grabham, Judy Fudge recently initiated a network for feminist and critical labour law, the Gendering Labour Law Network (GLLRN), aiming to promote scholarship on gender, labour law and labour regulation that challenges received wisdom about the discipline’s assumptions, norms and practices in a range of social, historical and spatial contexts. (The GLLRN e-mail list can be joined at: https://www.jiscmail.ac.uk/cgi-bin/webadmin?SUBED1=Gendering-Labour-Law&A=1.)
approach of feminist legal scholarship on the limits of labour law when it comes to confronting gender inequality, or to any other critical scholarship approach uncovering and confronting the construction of the margins of labour law. Describing the world as “abnormal” in relation to labour law scholarship is a way of identifying acute challenges to legal scholarship, a discipline that should always be concerned – in the words of Fudge – with “how people struggle against unfreedom and how the law responds”.

The term “abnormal” refers to Nancy Fraser’s concept of “abnormal justice”. Fraser argues that today, as in other periods when important elements of the world order were renegotiated – such as before the Treaty of Westphalia in Europe, when feudal political imagery was unravelling – disputes over justice have an “abnormal” character. The reason is that debates over justice no longer rest on common assumptions to an extent that can be considered “normal”. Naturally, Fraser admits that the justice discourse very seldom rests entirely on a common set of assumptions, shared by any disputant, but current disputes over justice seem to rest on differing and contested assumptions in every crucial respect. There is an absence of shared views of the “what” of justice, as well as of the “who” of justice, and the “how” of justice. As for the “what” of justice: is justice about the allocation of economic goods, or is it perhaps about status equality or the absence of political domination? The diverging assumptions on the “who” of justice, then, are related mainly to territorial boundaries: in a given matter, is the subject of justice of a domestic, regional, transnational or even global character? The “how” of justice is of a procedural nature, and conflicts around such basic assumptions will automatically arise when the “what” and who” of justice are simultaneously disputed. What are the appropriate criteria and forums for resolving conflicts over the “what” and “who” of justice?2

All these matters are sources of confusion affecting current labour law development, as well as scholarship analysing it. The scholarly work of Fudge can, among many other things, provide tools for dealing with this confusion. It is our great pleasure to be able to present a

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2 Nancy Fraser, Abnormal Justice, 34 Critical Inquiry 393, 394–399 (2008).
conversation\(^3\) with Fudge\(^4\) about labour law, critical legal research and current challenges facing both of these phenomena – challenges that are constituted, to a large extent, by processes of globalisation.

As already indicated, the scholarly work of Fudge must be placed within a critical tradition. Critical legal scholarship – as well as all attempts at using the law to change society – is accompanied by a set of dilemmas. One of these dilemmas can be found in the dynamic between the unique normative power and institutional force generated by the legal argument and legal conflict resolution, and the inherent purpose of law to maintain – at least to some extent – the status quo. Fudge argues for the importance of critical research as a way to combine thorough investigations of the concrete and particular (legal scholarship in the classical sense is the benchmark here) with the development of theoretically informed understandings of society. In this vein, Fudge’s legal studies on “atypical” employment, domestic work and the legal standing of migrant workers have expanded the understanding of capitalist development, changes in the role of national states, and constructions of gender and race. Her contribution here lies in the conceptualisation of the role of labour law in such processes.

\(^3\) The elements of this conversation have been published previously in Retfaered; Hanna Pettersson & Niklas Selberg, *Gendering labour law and dilemmas in critical legal scholarship: A conversation with Judy Fudge*, 37 Retfaered. Nordic Journal of Law and Justice 97 (2014).

2. The Interview

You have used Nancy Fraser’s concept of “abnormal justice” to discuss how globalisation and the changing role of the nation-state poses new challenges to labour law. What is the strength of this concept, and how can it be incorporated in legal scholarship to address the issues facing labour law and labour lawyers?

Over the years I have found Nancy Fraser’s political theory to be extremely helpful for the work that I have done on equality law and labour law. She operates at just the right level of analysis for the kind of thinking that I like to do. Fraser draws upon general social theory, but she always locates it in the historical context. I find her concept of abnormal justice to be extremely helpful. By this concept she means the situation in which the typical normative frames no longer make sense of our world. So, for example, labour law in liberal capitalist economies after World War II depended upon a strong Keynesian welfare state to redistribute within the nation-state and to maintain high tariff barriers against goods from outside the nation’s border in order to create protected enclaves for national industries. Once these tariffs and trade barriers were dismantled, in part so that consumers could buy cheaper goods, and in part to allow for broader international redistribution, nation-states were constrained in their ability to redistribute gross domestic product from capital to labour. The contemporary world is an abnormal one for labour law scholars, because for us the nation-state has been the fount of law, whereas now the nation-state has, in many advanced industrialized countries, ceded much control of the market to capital. Another example of how the current situation is abnormal for labour law scholars is that labour law has been dependent upon working class-based organisations as the engine for the produc-

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tion of labour law since World War II. These working-class organisations, typically industrial unions, were tied to specific forms of firms and kinds of labour processes. As large vertically integrated firms have disintegrated labour processes, and shifted from Taylorist mass production to much more specialised and flexible forms of production in the advanced economies, industrial unions have lost their constituency. The third way that the current situation is abnormal is that the workers of today bear little resemblance to the standard worker of yesterday – a full-time employee with a single employer for an indefinite period of time. Fraser’s idea of abnormal justice helps us to diagnose the extent to which the fundaments upon which the discipline was built have shifted. But it also gives us reason to be optimistic about this shakeup, because it reminds us that it is wrong both to assume the world will always be the same, or that it would be better if it were to remain the same.

You have conceptualised several types of labour as unfree. Could you elaborate? What role could discourses on human rights have here?

In my work with, and in research and writing about migrant domestic workers and migrant agricultural workers, I have used the concept “unfree” to refer to the immigration controls that prohibit them from changing employers in the host country because they are not free to sell their labour power to whomsoever they choose. As a condition of their visa and labour permit, most migrant workers considered by the host country to be unskilled are not entitled to change employers – or, if they can change employers, it is only in a limited range of circumstances and with the permission of the host country’s government. So these workers are unfree when contrasted with the traditional Marxist sense of freedom, meaning the freedom of a wageworker to choose to whom she or he will sell her or his labour power. In this way, employment is distinguished from other mechanisms of procuring and allocating labour, such as indenture, slavery, and bondage. I was (and am) specifically concerned about political forms of unfreedom that interfere with the freedom to be mobile in a labour market. More recently, I have become more interested in seeing how unfreedom is used in the legal and political discourses of slavery, trafficking, and forced labour.
Now, I am concerned that the concept of unfreedom is being stretched to include any form of exploited labour conditions, without sufficient attention to the specificities of the modality of unfreedom. I have recently taken a position in the United Kingdom, where I am a skilled migrant worker and my visa is tied to my ongoing employment with my university. In that sense I am an unfree worker, because there is a political/legal constraint on my freedom to circulate freely within the United Kingdom labour market. However, I do not consider myself to be exploited, and do not think I am suffering from false consciousness because I regard myself as an agent rather than an exploited victim. My form of unfreedom, which is legally constructed, is very different from the unfreedom of a child who is physically coerced to work in a mine or a brothel. These forms of unfreedom are also different from the unfreedom of a Chinese worker who migrates from a rural area to a city and who takes a factory job that is dangerous in order to escape dire poverty. Legal, physical, and economic forms of unfreedom differ, and some constitute slavery, others a form of forced labour and others are neither. Within a liberal frame, and that is the frame within which human rights claims operate, labelling a particular activity as unfree attracts a great deal of attention to it. So, there is a tendency to want to up the unfreedom ante, and to label various forms of exploitation as unfree in the belief that this label will attract a more robust legal response. I am reconsidering whether it is analytically helpful to use the term unfree when describing different forms of labour. I am interested in human rights law in this context, or human rights claims more precisely, in the context of different forms of unfree labour, because I am interested in seeing how the workers articulate the injustice that they experience. Primarily, I am interested in human rights from the sociological perspective as a claim made by subordinated groups rather than the legal doctrine of human rights institutions. I think that the historian Eric Hobsbawm was correct when he said that rights are the natural language of political struggles, and the question that interests me is how people struggle against unfreedom and how the law responds.

The limits of labour law are a recurring theme in your work. Labour law has been criticised for its inability to address actual inequality affecting
women; for its male bias disguised as neutrality, and for actively contributing to gendering the social world. Back in the 1970s, even though feminist legal scholars were critical of the law, there was a notion that it had a potential to change society. What role can labour law play in transforming social relations of inequality, do you think?

In liberal societies, social conflicts get resolved by and through law, and this is true also with respect to conflict in the workplace – whether it is the vertical conflicts between capital and labour, or horizontal conflicts between women and men workers, or racialised workers and workers in dominant social locations. Labour law plays a dual role in these conflicts; it ameliorates social inequality, but it also maintains the status quo and hierarchical relations. It is the contradictory nature of law when it comes to conflicts at work and over social relations that really interests me. I think legal norms embedded in law can be used by groups of workers to advance their claims, and I think that can be useful instrumentally to assist people, for example workers who are owed wages by bankrupt employers. But legal institutions and doctrines can also be used to disempower working people. Legal norms need a social force, typically a social movement, behind them to give them a progressive social meaning.

We would like to ask you about your view on combining the role of legal scholar and feminist activist. What is the role of the critical legal scholar in relation to social movements?

For me there was no question but that I would be combining legal scholarship with feminist activism. I went to law school quite late in my academic career, while I was doing a doctorate in philosophy, and while I was working part-time at a rape crisis centre. When I was confronted with how rape law was taught in 1980, I knew I would always be engaged with social justice movements while pursuing my legal studies and, as I then hoped, a career as a legal academic. However, when I was in law school during the 1980s my interest shifted from the violence against women’s movement, radical feminism, to socialist feminist groups concerned with women’s work. In part the shift was because I do not like criminal law approaches to social problems, but the other reason was that I became fascinated by labour law. I had a
great labour law teacher, Harry Glasbeek, and I went to a law school (Osgoode Hall Law School) where labour law teaching and research flourished. What became apparent when I was in law school during the early 1980s was the profound restructuring that was happening in the Canadian economy and labour markets. Free trade with the United States was on the horizon, public-sector unions were under attack, wage controls had been imposed, manufacturing was in decline, and women’s employment trajectories were starting to conform to those of men just as men’s labour market outcomes were declining. There were a lot of strikes and a great deal of legislative change, often led by women workers, so I became very interested in labour law and struggles for justice in the workplace. It seemed to me that before my eyes a model that had been established at the end of World War II was beginning to be dismantled.

I have always found social movements, especially those that challenge hierarchy and substantive inequality, to be a source of inspiration for legal research. What inspires me is how people refuse to accept what has become received wisdom. In the early 1980s, the women’s movement was particularly vibrant in Canada, and there was a great deal of attention paid to rights at work for women. I became very interested in how social movements, particularly the women’s and labour movements, use the law both as a rhetorical resource and an instrument for social change. I worked with unorganised workers at a legal clinic that was operated in coordination with the law school I first began teaching at (Osgoode Hall Law School), and they opened my eyes to a range of issues that fell outside the traditional labour law curriculum. By working with unorganised workers – homeworkers in the garment industry, and domestic workers who worked in private households – I was able to see how much of what is clearly work, fell outside the scope of labour law, and was ignored by labour law scholarship. My role as a critical legal scholar has changed from working with the social movements to help them to use law, to suggesting that social movements be more critical of law. However, I continue to learn a great deal from watching social movements engage with law.
You have talked about “infusing labour law with a robust feminist engagement” as a way to revitalise legal scholarship. What would you argue are the central contributions of feminist theory to legal scholarship, and specifically labour law?

I have derived two key insights from feminist theory when it comes to my labour law scholarship. The first is to be attentive to horizontal conflicts between workers, and not only to be concerned with conflicts between labour and capital. The second is an appreciation of the fact that what we take as natural and inevitable social roles and relations is actually socially constructed, and change over time and across place. My initial scholarship in labour law was a history of the emergence of Canadian collective bargaining legislation. Because I had spent time as a feminist activist and because I read feminist scholarship, I was attentive to how, during the immediate post-war period, women workers were expelled from the jobs into which they had been recruited during World War II. While the immediate post-war period was a victory for working people generally, because they were able to achieve legal institutions which provided them with greater social power and therefore a larger share of the social resources that they produced, it was also a defeat for women who were expelled from the workplace, many of whom did not want to be confined to being wives who worked in the private household without a wage. What feminist theory offered to me, and what I think it offers to labour law scholars in general, is a way of deconstructing the normative worker who is assumed in any labour law regime. Thus, feminist theory provides a critical lens for examining the distributional consequences of labour law among workers, not only between labour and capital. The second insight I derived from feminism is related to the first, and it is the insight that social roles and locations, which we tend to see as natural at any particular moment in time, may have in fact been highly contested and only achieved as a result of struggle. Feminist theory teaches one to read against the grain, to test normative assumptions, and to see social relations as socially constructed rather than as ontologically given. I found these insights to be very helpful when I was studying law and later when I became a law teacher.
In this context, you also mention core concepts such as work, care, gender and social reproduction. These are central concepts in labour law as well as in feminist theory and research. What can legal scholarship offer feminist research in terms of understanding relations of production and reproduction?

I think legal scholarship can offer feminist research some valuable tools for understanding relations of production (what is traditionally seen as the realm of work and labour law) and reproduction (the conventional sphere of the family) and social relations of subordination. First, legal scholarship requires attentiveness to detail and to particularity, which is very important, I think, in doing any form of critical research well. Second, since law is about the legitimate exercise of power, especially coercive power, it brings power clearly into the picture. How power is exercised and justified, the latter that is the particular purview of law, is really important for feminist scholars to understand. Third, fundamental legal categories, for example, the distinction between private and public law, are key to understanding how the relations of production and reproduction are in fact managed. Feminist scholars can learn from legal scholars’ concern with details, power, and categorisation, especially in understanding the relationship between the workplace and the household.

You have also addressed the need to explore the ways in which subordination is “constructed, cultivated, challenged and transformed in work relations”. Our question is: how does one go about exploring these quite complex structures and actions through legal scholarship? One could question whether the epistemological and methodological tools to do that are available within the field of legal research.

I think that legal scholarship provides quite a few analytical tools and methodologies for helping to explore the way that subordination is constructed, cultivated, challenged, and transformed in work relations. For example, so much of legal advocacy of any kind involves transforming a contested interest into an accepted legal right. Simply observing and understanding how judges find facts illuminates how subordination is constructed and deconstructed. Second, since judicial decisions are reasoned arguments in favour of a particular result, it is
helpful to see how rhetorical tropes and recurring argument structures are used to justify outcome. Third, there is a robust debate in legal theory about the status of law, especially between positivists and natural law theorists, about the moral content of law and the relationship between morality and legal validity. Legal realism also brought a new epistemology to the study of law by analysing the law in terms of the interests that are embodied in different positions. What is particularly useful about law, for those of us who are interested in understanding subordination and work relations, is that law provides a public record of the legitimate use of state force when it comes to resolving conflicts. Legislation as well as tribunal and judicial decisions tell us what was considered legitimate at a particular moment in time and in a specific place. While this record is partial and incomplete, it is a record of conflict, and thus it is a valuable narrative of how conflict is resolved and power is legitimated. Understanding how legal reasoning, legal procedures, and legal institutions work on their own terms, which typically requires legal training, is also really important for understanding how subordination is legitimated and challenged. I do not think that legal scholarship provides all of the epistemological and methodological tools needed to think comprehensively about social subordination; legal scholarship needs to be supplemented by sociology and history, for example. But I also think much sociology of law would be vastly improved if sociologists were to take law more seriously and take its specific methodologies and epistemologies better into account.

One of the main debates in feminist scholarship during the last years has been the issue of categories, and influential gender scholars have argued for the need to destabilise and move beyond categories. At the same time, the law operates through categories. Is there a challenge here for feminist legal scholars as to how one should work with establishing or deconstructing categories?

One of the most useful techniques or methods that I have learned from reading feminist theory is about how important it is to deconstruct given categories. I have found it particularly useful to bring this understanding to legal categories in order to recognise their contingent construction. I have done quite a lot of work on the concepts of employee,
employer and contract of employment within labour law, particularly Canadian labour law. What feminist scholarship has taught me is not to look at the core of the definition but to look at the margins, for it is at the edges that it is possible to see where and why the boundary is contested. What I am interested in exploring is how legal categories construct social behaviour by channelling social relations along a path, and how value accrues to that behaviour because of the way it is categorised in law. Feminism has helped me to see (and I hope reveal) how law constructs, and not simply reflects, social reality. I think in every field of research we are always working within and against categories, and it is precisely because we must simultaneously use and criticise legal categories that intellectual engagement is exciting.

Some feminist activists and scholars argue that regularised work and the presence of a labour law framework will normalise the situation for and protect women involved in sex work/prostitution. Now that the EU is discussing adoption of Sweden’s model of prohibition against procurement of sexual services without sanctions against the “seller”, the European feminist movement is deeply divided. As a feminist labour law scholar, what is your take on the issue? We are especially interested to hear you talk a little bit about your view on the force of labour law in this context.

As I mentioned early on, I have never felt comfortable with using criminal law as a way of changing social norms. I appreciate the symbolic and instrumental powers of criminal law, and understand why some scholars, activists and advocates want to deploy it, but I think it over-spills with very negative social consequences. While I support any reform, such as the recent decision of the Supreme Court of Canada, that decriminalises sex work, I am not in favour of criminalising purchasing. I think it is absolutely crucial to regulate work relations to end exploitation. Many women who are part of the sex trade want different forms of regulation that are neither coercive against them directly, nor devices to coerce them indirectly. While I agree that there is pervasive violence against women, I do not believe that the sale of different kinds of bodywork – work that involves intimate physical interaction with others – is per se exploitative. I do not regard sex work as a distinctive form of bodywork, and I wonder why women’s disproportionate
employment in the personal care sector, which is often low paid, involves intimate interaction, and takes place in a context of sex stereotyping and economic inequality does not lead to similar calls to make the purchase illegal. I would prefer to see the market in sex regulated rather than criminalised, even if the target of sanctions is the purchaser. I do not think using the criminal law to deal with social problems to be very effective as a harm-reduction tool; it tends to reinforce simplistic moralising and “solutions” that have too many negative consequences.

**Is all work covered by labour law acceptable?**
I do not think that all work covered by labour law is acceptable. There is a lot of low-paid and insecure work in Canada that is covered by minimum-wage and working-time laws, as well as by ineffective collective-bargaining laws, which I do not consider to be acceptable because it does not provide the ability to live a life one has reason to value. Moreover there’s a great deal of work, for example self-employment, which is outside the scope of labour law that is quite good, especially if you are a professional. So simple coverage by labour law is not sufficient for work to be acceptable, but at the bottom end of the labour market, one of the benefits of coverage by labour law is that it provides the workers located there with institutional resources for making claims.

**A specific feature of critical engagement with law is the need for a conceptualisation of law and the force of law** – would you agree with that? You have stated that “By and large, feminist labour law scholars accept that law has no ‘essential’ meaning; although there are structural and institutional biases, there are contradictions in law that can be exploited with a view towards contesting existing gender roles and relations. The challenge is to develop nuanced accounts of law that are not confined to the nation state, while, at the same time, appreciating the specific power of legality, which is its close proximity to both justice and coercion, and harnessing this view of law with the overall goal of redressing women’s material inequality and discursive difference.” What are the strengths and weaknesses of the posi-
In my own research and scholarship, I have found the most difficult challenge to be that of conceptualising law and the force of law. I think there are two reasons for this difficulty. Law is a contradictory social force and institution. It is simultaneously an institution and normative source of repression and emancipation. The deep function of law is to protect the status quo, which is why the burden to find a legal cause of action or to prove the legal wrong is always on those seeking to change the status quo. At the same time, law provides a mechanism and resource for mounting challenges to perceived injustice. It is this contradiction or tension that is so difficult to understand. While theory makes it possible to appreciate the contradictory roles and functions of law, understanding the particular balance at any moment in time requires a historical and sociological analysis that is quite specific. The second source of the difficulty is in defining what we mean by law. If we adopt even a moderate pluralist approach, we can see that law encompasses values like liberty and equality that are not always in line. Moreover, there are a variety of legal institutions with different principles of legitimacy (expertise and autonomy for courts and tribunals, democracy for legislatures) and a variety of legal doctrines and instruments across a range of different legal fields. Thus, it is hard to generalise about law, even within a particular jurisdiction. For these reasons, I am interested in contradictions and nuance, and the relations between coercion and justice when it comes to legal outcomes. I think that it is challenging for feminist legal scholars to theorise law, but I think it is equally challenging for any legal scholar to do so too.

What do you think is the greatest challenge for labour law and labour lawyers at this moment in history?

I think the greatest challenge for labour law scholars today, in advanced capitalist economies with liberal political orders, is the absence of strong class-based organisations. Labour law is in reality a very young discipline with a short pedigree. The contract of employment only supplanted master and servant law as the dominant device for organising labour in the early part of the 20th century, and labour law only
truly came into existence between the 1930s and the mid-1940s, and then only in advanced economies. In most of what we refer to as the developing world, formal employment and standard employment relationships were never dominant. For example, in India 90% of all remunerated work falls outside the scope of formal labour law. So, if we understand formal employment relationships and formal labour law as historically and spatially very limited, labour lawyers face a real challenge because our subject is shrinking and becoming less relevant to working people. This challenge takes me back to the first questions that you asked me, about the relationship between critical legal scholarship and social movements. My research on the history of collective labour law, and my work with social movements, give me confidence that there will always be something for labour law scholars to study, since I am sure that people will always resist subordination at work.

Researchers often get asked why they do research, and they often say that it’s because of their inherent curiosity. As junior researchers, we are more interested in learning what you, as an accomplished legal scholar, find difficult in this regard. What is the hardest part of doing legal research?
For me there are two really difficult things that I need to confront constantly when I’m engaged in legal research. The first is to stay with the topic, once I figured out my approach to it and how I understand it. Once I figure out how I think about something I do not find it interesting. It means I tend to move through topics quite a bit, and therefore risk being superficial. However, I am reassured that I can return to a topic and rekindle interest in it. The second difficult thing, I find, is to be self-critical about my views. Usually, by the time I figure out what I think about something, I am persuaded that what I think is correct and I am beginning to lose my critical capacity. At such a point, I find it useful to present my ideas and try to treat every idea as tentative and preliminary so that I can return to it and improve it. Having students helps in this respect, as they can usually see when I am wrong.

To end on a positive note, what do you find most thrilling about labour law research, and what are the most compelling issues to work on?
Since labour law is so deeply embedded in particular historical mo-
ments and in particular places, what I find fascinating about labour law is how much it reveals about the significant relations within a society. The other source of inspiration is how much good work younger scholars and scholars from outside industrialised countries are doing. There is a whole world of work out there to learn about. I have been inspired by the work of Indian researchers working with waste pickers in West Kolkata and sex workers in different sites in India, because this work demonstrates that working people, regardless of the type of work or social status, will find ways to resist what they consider to be unjust treatment and will band together collectively in order to change things. I find collective resistance to subordination in work relations to be a constant source of inspiration. I find the constitutive power of law to be very fascinating. Different legal fields are used to characterise, categorise, regulate and value different forms and types of work. Why are conflicts in the household regulated by family law, whereas conflicts at the workplace are regulated by labour law? Why do we use criminal law to regulate the sex trade and consider labour law to be inappropriate for paid domestic work? I am interested in how these legal characterisations can be changed by a social movement. For example the ILO’s recent Domestic Workers Convention, which treats domestic work done in private homes as a form of labour to be regulated by labour law, illustrates that a social movement can change how the law characterises an activity, and become part of the cognitive map we use to make sense of our complex social world.

3. Epilogue: Thoughts on an agenda for labour law

The above discussion with Fudge about labour law is fuel for thought in developing the outline of a labour law agenda in times of globalisation.

In the wake of this ongoing globalisation, shifting notions have become visible within the field of labour law – and these two phenomena interact and enhance each other and trigger further changes to the system. The first shift regards the sources of law. Today it is common to view not only domestic legislation and (collective) agreements as sources of norms within labour law; international material is also gen-
erally expected to be relevant to solving legal problems within labour law. The second shift involves the set of “facts” to which labour law is applicable. What is perceived as a labour market-related problem, and thus a matter for labour law, is shifting and becoming more inclusive. The far-reaching process of including anti-discrimination,\(^6\) and more recently corporate social responsibility,\(^7\) whistleblowing,\(^8\) supply chain-regulation\(^9\) and corporate governance,\(^10\) has also challenged the boundaries of labour law. This trend is coupled with changes in societies in the wake of globalisation and late modernity, e.g. international trade and new migratory patterns. The process of labour lawyers transmitting these two interacting shifts – regarding the sources of law and the conceptualisation of relevant labour market “problems” or episodes – represents labour law’s management of globalisation.\(^11\)

Thus perceived, globalisation presents labour law (i.e. legal scholarship) with a number of particular challenges. In the words of Lizzie Barmes:

“labour law is best understood not just by decoding legal texts, but by uncovering its role in a legal system’s historical evolution, perceiving interactions with changing social and political practices and finding the


influence of philosophy, ideology and politics, all illuminated by comparison between nations and situated in a regional or global context.”

Processes of globalisation demand scholarship that does not confuse the law with reality – for example, in assuming that the struggles and negotiations taking place within a certain, geographically and politically-bounded legal community at a certain point in time always represent actual working-life struggles and negotiations taking place at the same point in time. Processes of globalisation also demand scholarship that makes explicit its object of study, together with its assumptions on the possibilities of obtaining knowledge on the matter. Alysia Blackham and Amy Ludlow have introduced the concept “[e]mpirical labour law research” “as a subset of socio-legal enquiry” for a distinct scholarly endeavour:

“Socio-legal research examines law in its social context, often by utilizing perspectives and research techniques from the social sciences. Socio-legal research and theory bring social considerations into legal study as objects of rigorous enquiry and emphasise the importance of approaching legal research as an ‘empirical, systematic study of a field of social experience’.”

When conducting comparative studies, the need for ontological and epistemological stringency is even more compelling, together with a clear and explicit theoretical framework. The interplay between different “levels” of the production of norms – be it “legislators” or state-administered application of law (courts) – also demands that the

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research is explicitly situated regarding epistemology and ontology. From European and Swedish perspectives, given the increased importance of EU law, there is also the danger of confusing the EU with the world.

The particularities of the Nordic context in themselves represent an important backdrop to labour law’s response to globalisation. The prominent standing of legal realism and legal positivism during the period in which the Swedish/Nordic welfare state developed, and where labour law was detached from general private law, has contributed to favourable conditions for the creation of an extensive and quite radical version of labour law. However, at the same time, these doctrines contributed to unfavourable conditions for the anchoring of labour law at a more fundamental level, by means of the development of general principles and thorough enquiries of inherent rationalities and goals of this legal field. The once so forceful doctrines of realism


and positivism thus helped in creating benevolent conditions for the use of law as a political tool and a means to reshape the labour market, but at the same time helped create a context in which labour law had difficulty being consolidated through discussions on the idea of labour law, the boundaries and frontiers of labour law and the basic assumptions of this field of law. Labour law scholarship has an important role in contributing to this discourse.19 This is especially true today; as the legislator is gradually withdrawing from reforming labour law, a void emerges that needs filling. Once upon a time, labour law developed from general private law and, as Fudge points out, from master and servant law. At that point, the boundary-work in relation to the new field of law was an important task. Nowadays this task certainly remains, but it has also become more complicated: today labour law must be co-ordinated with other areas of law, e.g. migration law,20 public procurement,21 human rights,22 free movement of workers within the EU,23 etc.

See, supra, note 18, regarding important interventions in the field. Cf, however in the Swedish context also Jonas Malmberg, Vad handlar arbetsrättslig reglering om? En essä om arbetsrättens uppgifter, Uppsala Faculty of Law Working Paper 2010:9 (2010).


22 Herzfeld-Olsson, Folkträten i arbetsrätten, in Rebecca Stern & Inger Österdahl eds., Folkträten i svensk rätt 204 (2011).

An interesting and topical labour law agenda would consist of following the line of Fraser and Fudge, asking questions regarding labour law in terms of (“abnormal”) justice, and focusing on the interrelationships of law, politics, science and advocacy within this field of law. The work of Hugh Collins might be helpful in structuring such a project. Collins argues that labour law is a field of law by virtue of its inherent vocation: its conviction that social problems need to be addressed and its vision of justice in the sphere of life that is regulated. The sense of vocation, which implies the definition of labour law, Collins claims, is represented in three aspects of the law: first, a field of inquiry in terms of an identification of a group of social problems to be addressed; second, criteria of relevance of legal materials, and a gathering of the legal materials relevant to that problem; and third, a critical vantage-point from which to assess the substance and techniques of current law, that is a normative vision of how these problems might best be resolved through the instrument of law.\footnote{Hugh Collins, \textit{Labour Law as a Vocation}, 105 \textit{Law Quarterly Review} 468 (1989), cf Hugh Collins, \textit{Contractual Autonomy}, in Alan Bogg, Cathryn Costello, ACL Davies \& Jeremias Prassl eds., \textit{The Autonomy of Labour Law}, 45 (2015).}

Understanding these assumptions regarding labour law is an important prerequisite to handling questions of globalisation, and might prevent these processes from amounting to nothing more than market integration. It is important that the basic categories of labour law evolve in relation to notions of labour law as a protective regime for subordinate sellers of labour. Finally the categories within labour law, and the boundary work surrounding that field of law, will be tested against processes of constitutionalisation of labour law, that are inherent to globalisation. Fudge defines constitutionalisation\footnote{Cf Ruth Dukes, \textit{The Labour Constitution: the Enduring Idea of Labour Law} (2014).} as a process of “securing the recognition of labour rights as fundamental rights at the transnational and national levels”.\footnote{Judy Fudge, \textit{Constitutionalizing Labour Rights in Europe}, in Tom Campbell, K.D. Ewing \& Adam Tomkins eds., \textit{The Legal Protection of Human Rights: Sceptical Essays}, 244, 249 (2011), with reference to Ruth Dukes.} Simon Deakin and Frank Wilkinson, referring specifically to the EU Charter of Fundamental
Rights, claim that social rights “are perhaps the most concrete expression of the idea that economic integration and social regulation are mutually complementary aspects of a process of market construction”.

Bob Hepple has pointed to the importance of social rights to express common values in the project of market integration, through decentralised and diverse soft-law techniques such as the open method of coordination and social dialogue. A clear vision of labour law’s normative stance is thus important to prevent processes of constitutionalisation and globalisation from degenerating into mere market creation and integration.

When discussing the emergence of the increasingly “unstable” employment contract, Katherine Stone and Harry Arthurs write that “[a]round the world, workers are embattled, labor markets are in disarray, and labor laws are in flux.” We believe that to avoid the threat of diminishing relevance of labour law and its scholarship in times of globalisation and abnormal justice, it is crucial to reflect on labour law’s normative stance. This reflective exercise must combine careful attention to the details of actual labour law development, with a theoretically informed inquiry into the changing conditions and the nature of both labour and the law.