Freedom of Association in the UK: The Public/Private Distinction in Labour Law.

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Abstract

This thesis traces the evolution of freedom of association as it relates to and is informed by the public/private distinction in legal and political thought, by public and private law and by the public and private dimensions of contracting for work. Within legal theory the public/private distinction has sparked much controversy due to its capacity to depoliticize certain key questions and to obscure the significance of distributive outcomes. This thesis identifies two distinct concepts of workers' Freedom of Association, (neo)liberal and social democratic, and gives a detailed account of the historical origins of these conceptions. The former which – in either its classical or 'neo' instantiation – ultimately prioritises private ordering and the latter which subordinates it to public-political concerns as dictated by collective interests, are disaggregated in order to sharpen and assess their place within labour law and legal scholarship today. Disaggregating the concepts in these ways illustrates that the contours of Freedom of Association in the UK are determined in large part by prior political decisions concerning the goods and ends of unionization and association and how they relate to the social and economic world. The thesis argues that the public-political concerns, the class relations as well as relations between individual workers and employers, which are at stake must not be overlooked or obscured. On that basis, it argues that the social democratic conception of workers Freedom of Association is the more coherent and morally compelling and the one which should inform current and future debates concerning workers' rights today.

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Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

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Introduction

Freedom of association (hereinafter FOA) establishes a legally protected human right to pursue social and human progress through collective action and, as such, is an essential freedom in any democratic society.[1] The focus of this thesis lies with its evolving manifestations in the world of work in the UK after it emerged there following the liberal revolutions of the 1830s.[2] Within labour law[3] it is commonly understood to be an 'enabling right' in the sense that it 'entitles workers to form and join workers' organisations of their own choice in order to promote common organisational interests.' [4] From it flows rights and without it other rights may be unachievable.[5] It can therefore be seen as *the* fundamental right, regulating society's paramount conflict line, its critical cleavage, providing a way in which workers and societies may address inequalities inherent in the capitalist mode of production. At the core of FOA lies the right of workers and employers to form 'associations' to bargain collectively over the terms of supply and hire of labour. 'Collective bargaining makes any contractual settlement, any substantive terms of exchange between buyers and sellers of labour power, temporary and provisional, subject to revision in the light of

[1] Ruth Dukes and Wolfgang Streeck, *Democracy at Work: Contract, Status and Post-Industrial Justice* (Polity Press, 2022), 106.

[2] See Bob Hepple, *The Making of Labour Law in Europe: A Comparative Study of Nine Countries Up to 1945* (London: Mansell, 1986), 17-20. On the liberal revolutions of the 1830s, 'In Britain the new-found political power was mainly of importance in the removal of penal sanctions for breach of contract and securing the freedom of association (1871) and the freedom to strike (1875 and 1906) against renewed judicial attack.' See also Tonia Novitz, 'Freedom of Association: Its emergence and the case for prevention of its decline?' Law Research Dissertation Series, (002), 2018, 4-5. It was in its incremental extension from 'political nobility' to the 'mercantile guilds' that its scope evolved from, as it originally emerged, protection of groups created for religious charitable, or scientific purpose to – with organization of the mercantile professions into 'guilds' – the 'mercantile guilds' that FOA extended into the sphere of labour and industry. See also Tonia Novitz, *International and European Protection of the Right to Strike: A Comparative Study of Standards Set by the International Labour Organization, the Council of Europe and the European Union* (Oxford, 2003), 65-69.

[3] Whilst, for some authors, FOA describes 'no more than a useful shorthand expression for a bundle of rights and freedoms relating to membership of associations', see Ferdinand Von Prondzynski, *Freedom of Association and Industrial Relations: A Comparative Study* (London: Mansell, 1987), 26. Our focus within this thesis is on its interaction with and protection of labour relations, particularly as it relates to unionization. See Alan Bogg and Cynthia Estlund, 'Chapter 7: Freedom of Association and the Right to Contest' in Alan Bogg and Tonia Novitz, *Voices at Work: Continuity and Change in the Common Law World* (Oxford, 2014), 143. The authors describe the 'traditional core of FOA' as being 'the right to form and act through trade unions'.

[4] Mpfariseni Budeli, 'Workers' Right to Freedom of Association and Trade Unionism in South Africa : An Historical Perspective' *Fundamina: A Journal of Legal History* 15(2) (2009), 57. Describing FOA as a 'means of facilitating the realisation of further rights, rather than just a right in itself… For instance, the right to organise, the right to bargain collectively and the right to strike unfold seamlessly from the basic right to freedom of association. They all have in common the balancing of the rights of employers and employees in the workplace.'

[5] Alan Bogg, 'Subsidiarity Or Freedom of Association? A Perspective from Labor Law' *The American Journal of Jurisprudence* 61(1) (2016), 159: 'Freedom of association now occupies centre-stage as a legal strategy for reversing trade union decline.'

technological and economic, but also social and political, change.'[6] Over and above that, it offers workers, often by way of trade union representation, collective voice not only at work, 'democracy at work' (what might be thought of as in the private sphere) but also in wider public debate and politics, that is, 'more widely conceived economic democracy'.[7] As such, it constitutes a main axis in the unfolding of labour relations, involving nothing less than the interaction between work relations and politics in Britain's free market capitalist society. Despite the respect accorded to it in international law and human rights law,[8] workers' FOA remains a deeply contested concept and little consensus has formed around where to mark its contours.[9] Antagonist readings emerge on the liberal-political right of the spectrum, where workplace FOA figures as an exercise of individual will, 'to associate or not with other persons of their choice in a totally non-coercive way, subject only to such compelling considerations as national security or public morals.'[10] On the other side of the political spectrum, workers' FOA is understood to counter the 'inherent asymmetries of contracting

[6] Ibid.

[7] See supra n.1 Dukes and Streeck, 115. The authors caution against the 'mistake of positing an all-or-nothing relationship' between these and highlighting their ability to reinforce each other in a 'multi-level process'.

[8] It has been entrenched across numerous institutions such as the United Nations, International Labour Organisation and regional human rights institutions. It is one of the International Labour Organisation's Core Labour Standards. See Philip Alston, '"Core Labour Standards" and the Transformation of the International Labour Rights Regime' *European Journal of International Law* 11 (2004), 457-521. In the UK, FOA is now protected by Article 11 of the Human Rights Act 1998. The significance of Article 11 and its interpretation by the European Court of Human Rights, specifically around whether it can accurately be categorised as a civil political and or social right, whilst outwith the scope of this thesis which is, for the most, a normative-theoretical exploration of FOA and its underpinnings, illustrates well its contingent and contested nature. Following *Demir and Baykara v Turkey* [2008] ECHR 1345 optimism could be detected around its ability to form a transformative constitutional basis for advancing trade union rights see Keith Ewing and John Hendy, 'The Dramatic Implications of Demir and Baykara' (2010) 39 *Industrial Law Journal* 2-51. More recently, optimism that this would continue has dwindled following *RMT v UK* [2014] ECHR 366. For commentary see Alan Bogg and Keith Ewing, 'The Implications of the RMT Case' *Industrial Law Journal* 43 (2014,) 221-252. See also Keith Ewing and John Hendy, 'Strasbourg Court Treats Trade Unionists with Contempt' *Industrial Law Journal* 46(3) (2017) 46(3), 435-443 and Kalina Arabadjieva, 'Another Disappointment in Strasbourg: Unite the Union v United Kingdom' *Industrial Law Journal* 46(2) (2017), 289–302.

[9] For an additionally important point of controversy prominent within labour scholarship, outside the ambit of this thesis, centres around whether labour rights such as workers' FOA should be protected as human rights. See Tonia Novitz and Colin Fenwick, *Human Rights at Work* (Hart, 2010), Keith Ewing, 'Constitutional Reform and Human Rights: Unfinished Business?' *Edinburgh Law Review* 5 (2010), 297-324, Kevin Kolben, 'Labour Rights as Human Rights?' *Virginia Journal of International Law* 50 (2010), 449-484 and Virginia Mantouvalou, 'Are Labour Rights Human Rights?' *European Labour Law Journal* 3 (2012), 51-72.

[10] Ferdinand Von Prondzynski, 'Freedom of Association in Modern Industrial Relations', *Industrial Relations Journal* (15) 1 (1984), 10. See also Tonia Novitz, 'Chapter 5: Workers' Freedom of Association' in James Gross and Lance Compa *Human Rights in Labor and Employment Relations: International and Domestic Perspectives* (Cornell University Press, 2005), 124. Here the *negative entitlement* of workers FOA is emphasised and rights *not* to associate or unionize, whereas matters of public-political, most fundamentally concerning the distributive outcomes of the inequities inherent in the capitalist mode of production, (at least immediately) of concern.

for work',[11] adding 'collective bargaining to the ways and means by which workers and societies may address the inequities inherent in the capitalist mode of production.' [12]

Along this spectrum, a second interaction can be traced – supplementary or core, depending on one's point of view – between public law and private law, the public sphere and the private sphere. Along the spectrum, starkly different answers are provided to questions such as, is there a tenable distinction between private law and public law? Is private law fundamentally different to public law? Can the former be de-politicized such that only the latter be used as an instrument of public- purposes? How this axis relates and interacts with the evolving conceptions and concomitant contours of FOA forms the primary point of interest in this thesis. Its central contention is that tracking the way in which public law and private law intersect and interact with workers' FOA remains critical to understanding its divergent conceptions and institutional formulations, at different times and in different places, whilst offering a conceptual map through or axes from which to assess developments (and/or asymmetries). It is Karl Klare's famous description of the public/private distinction as 'an analytical tool in labour law', 'as a form of political rhetoric used to justify particular results', which surfaces and re-surfaces throughout this thesis and acts as a lens through which to understand and ideologically critique diverging formulations of workers' FOA.[13] Whilst, following Klare and other critical legal scholars, it will be argued that the distinction may be descriptively untenable, it is also maintained that *deployment* of the distinction does conceptual work which has *real effects*, not just in labour law, but 'across all areas of enquiry into legal doctrines and institutions which sustain illegitimate inequalities: that there is a politics to the rhetorical deployment of the distinction through which determinate power relations produce, reproduce and rationalise harmful results.'[14] It is these effects, and the

[11] As such it can be viewed as a political entitlement and a socio-economic right, as well as a civil liberty. See. supra n.2, Novitz, 'Freedom of Association', 4. '[F]reedom of association operates as a civil liberty to join associations for whatever purpose and act collectively, as a political right to voice, as well as a socio-economic claim to more radical redistribution of the fruits of workers' labour.'

[12] This forms the core of what we elaborate under the label of the social democratic conception of workers' FOA which aims to achieve a more equitable distribution of power within labour relations and political economic society generally. On democratic socialism generally see William Forbath, 'Caste, Class, and Equal Citizenship' *Michigan Law Review* 98(1) (1999), 1-91. Along this spectrum numerous attempts to ground workers' FOA can be found, for one such approach centred around the idea that 'freedom of persons to do collectively what they are allowed to do individually' see Sheldon Leader *Freedom of Association, A Study in Labour Law and Political Theory* (Yale University Press, 1992), 23, 200. On issues that arise in Leader's 'symmetry argument' and ways to overcome them see supra n.2 Novitz, *Legal Protection of the Right to Strike*, 67-69.

[13] Karl Klare, 'The Public/Private Distinction in Labor Law', *University of Pennsylvania Law Review* 130(6) (1982), 1361.

[14] Scott Veitch, 'Chapter 8: Law and the public private distinction' in Emilios Christodoulidis, Ruth Dukes and Marco Goldoni, *Research Handbook on Critical Legal Theory*' (Edward Elgar Publishing, 2019), 135.

body of labour law which resulted in Britain, itself the outcome of power relationships between different social actors and ideologies, which provide the thesis with a historical plot line.

The significance of the public/private distinction to FOA is examined, then, not only from a legal but, also, importantly, an historical perspective. The main research question is that of how the public/private distinction served to shape the nature and scope of our current conception of workers' FOA. The history of labour relations and workers' FOA in the UK's constitutional landscape is divided roughly into three time periods. Beginning with a considered look back to the era before industrial capitalist relations of production became dominant and with the advent of the industrial revolution and the move to wage-labour relations, to the rise of (traditional) labour law and the post-war consensus in the middle of the twentieth century to the watershed shift in economic orthodoxy marked by the election to power of the Conservative Party in 1979 and neoliberal ascent to today.[15] Analysis of the historically specific conditions under which FOA operated within the industrial sphere reveals it as constituting a pivotal interface in the relationship between labour and capital, the interaction between work relations and politics, situated at the intersection of labour law and Britain's political economy. [16] In doing so, it provides profoundly fertile ground for understanding how the distinction and interaction between public law and private law unravelled throughout British labour relations which, in turn, reveals itself as institutionally formalized in the various conceptions that FOA assumed before, during and after the neoliberal revolution of the 1980s.[17] It is in this way that this thesis defines the social-theoretical and political-practical significance of workers' FOA, and it is from this perspective that it explores what labour law scholarship and critical legal realism might learn

[15] Since the neoliberal shift in political economy labour law has been declared in some corners as in 'crisis', no longer fit for its core and defining purpose of protecting workers from unequal and unfair treatment see Karl Klare, 'Chapter 1: The Horizons of Transformative Labour and Employment Law', in Joanne Conaghan, Richard Fischl, and Karl Klare, *Labour Law in an Era of Globalization*. (Oxford University Press, 2004)

[16] See Bob Hepple 'Chapter 2: Factors Influencing the Making and transformation of Labour Law in Europe' in Guy Davidov, and Brian Langille, *The Idea of Labour Law* (Oxford, 2011), 37. 'The form of state under which labour law was "made" was liberal constitutionalism (with some notable exceptions, such as the German Empire before 1914), characterized by the active promotion of *laissez-faire*, which meant giving almost uncontrolled power to property owners, particularly the owners of capital.'

[17] From the perspective of macroeconomic policy, 'the neoliberal revolution' involved a shift from Keynesian and a social democratic political economy, which supported collective bargaining as a welcome feature of the economy to a neoliberal agenda which sees labour laws as market impeding. See Ruth Dukes, *The Labour Constitution: The Enduring Idea of Labour Law'* (Oxford University Press, 2014), 199-201.

from each other.[18] The thesis is thereby centrally concerned with an investigation of workers' FOA normative underpinnings, and uses its interaction with the public and private dimensions of contracting for work, as a means of enriching debates surrounding workers FOA, finding, crucially, that 'doing so highlights that the scope of FOA in particular cases cannot be determined ex ante, or by some abstract ideal of FOA.'[19] In attempting to ground FOA in a fundamental normative premise, namely, the social democratic concept of workers FOA, and in arguing for its continuing saliency, the thesis aims to provide a firm foothold for future debates.

Chapter outline

With the ultimate aim of understanding how workers' FOA might best be conceptualised today and in the future, the thesis begins by examining the 'first' period of labour relations. With the emergence, as most famously schematised by Thomas Marshall in his foundational book *Citizenship and Social Class,* of 'civil liberties' at the dawn of industrial capitalism, freedom of association was conceptualised as a right necessary for individual freedom in resistance to feudal command.[20] It is here that we begin to analyse FOA, in its original, libertarian, conception against the backdrop of public law and private law, and how they interacted with its formulation. To do so it is necessary to explore the way in which classic liberalism, as a liberal political theory generally, divided public and private law, and the ramifications this had for workers' FOA and for labour law generally. What becomes clear is that where there is a strict dichotomisation of public law and private law, as under classic liberalism, in which the former is politicized and the latter is depoliticized respectively, FOA– where it is understood as having social or public-orientated reasons for respecting it – takes a shape so narrow as to be, particularly from the perspective of labour scholars, 'no

[18] See supra n.1 Dukes and Streeck, 4. 'Theoretical progress can be made when for whatever reason [hidden, unrecognized] assumptions and premises are forced into the open, making them visible and debatable. Brought to the surface, they can be clarified, corrected, confirmed or thrown out; the theory can thereby be improved, narrowing or, to the contrary, widening its scope.'

[19] Brishen Rogers, 'Three Concepts of Workplace Freedom of Association', *Berkeley Journal of Employment and Labor Law*, 37(2) (2016), 182. Referencing what 'legal realism taught long ago' Rogers argues that to attempt to do so 'gets things backwards. We should not be asking, "What is FOA**?**" We should instead be asking, "What are the effects of recognizing particular entitlements to associate or not associate?"

[20] Thomas Marshall, *Citizenship and Social Class* (Cambridge University Press, 1950), 10, 17. These categories are commonly viewed as interconnected, for example, within the UK social rights provided by legislation such as the right to strike, join a trade union and bargain collectively may be protected in legislation by virtue of their connection with FOA as a longstanding civil liberty. See supra n.10 Novitz and Fenwick, 12-13. See also supra n.2 Novitz, *Legal Protection of the Right to Strike*, 45-46.

more than a right to associate together, not a right to do anything at all in association.'[21] Here, as elsewhere in the dissertation, Klare's seminal article suggests the critical argument that the deployment of the posited public/private distinction, in its sophisticated operation, often explained the continued influence of dominant material interests by ensuring their inviolability, lifting material interests and private property above the scrutiny of political deliberation, deflecting 'scrutiny from the question whether [industrial relations] can or should be altered so as to increase employee control over the institutions that dominate their working lives.'[22] Klare's insights, which debunk the distinction as unwarranted, incoherent and implausible, have their roots in American legal realism, which we explore in greater depth in this chapter and the nature of the arguments that led to the widespread abandonment of the distinction from the early twentieth century.[23] We conclude this chapter by explaining 'the lie of the "laissez faire" economy', particularly as it relates to the coercive role of property and fiction of 'free contracting' in a capitalist free market society, which threads throughout this dissertation, as so powerfully captured, in this instance, by the realists.[24]

With the public and private dimensions of contracting for work's normative dimensions up in the air, we turn, in the second chapter to what is argued to be a theoretically more attractive alternative approach to workers' FOA, namely, the 'social democratic conception of workers' FOA'.[25] Whilst we recognise (and discuss in more depth in chapter 4), that in its original institutional formulation it is today largely outdated, we focus, in this chapter, on its normative basis and in particular on the intellectual insights which are its core (and at the core, more generally, of the analytical edifice of 'traditional' labour law scholarship) . By the time Hugo Sinzheimer, in Germany, and later, Kahn-Freund in Britain, were writing, 'massive social and political conduct had forced "the labour question onto legislative agendas."[26] We look, in this chapter, at the body of labour which resulted when the economic

[21] Lord Wedderburn, 'Freedom of Association and Philosophies of Labour Law' *Industrial law journal* 18 (1989, 16. Here Wedderburn is referring to FOA's treatment under neoliberalism but, as it will be argued in chapter 3, this is equally applicable to classical liberalism.
[22] See supra n.14 Klare, 1418.
[23] See e.g. Duncan Kennedy 'The Stages of Decline of the Private/Public Distinction' *University of Pennsylvania Law Review* 130(6) (1982), 1349-1357. For an account of the unfolding narrative in European law, see William Habermas, *Paradigms of Law, in Between Facts and Norms: Contributions to a Discourse Theory of Daw and Democracy* (Cambridge Polity Press, 1997).
[24] See supra n.15 Veitch, 'Chapter 8', 40. 'The lie of "laissez-faire" economy' is that 'freedom of property of property in ownership and exchange decreases coercion and compulsion'. The thesis draws on Veitch's use of this label throughout to shorthandedly refer to this and the critiques of the assumptions which underlie it.
[25] See supra n.20 Rogers, 177.
[26] Cynthia Estlund, 'Chapter 24: The fall and rise of the private law of work' in Hanoch Dagan and Benjamin Zipursky *Research Handbook on Private Law Theory* (Edward Elgar Publishing, 2020), 416.

foundations of the vision of the 'egalitarian' market economy held by liberals began, with the onset of the Industrial Revolution, to crumble as 'the holders of state power felt unable to pacify the conflict between capital and labour'.[27] In this setting, a strong, socially democratic workers' FOA was paramount, as a harbinger of a measure of social and economic equality. Indeed, it is when recognising that capital and labour possess only a formal equality (in any contractual settlement) in so far as it pertains to the entitlement to associate, that workers' FOA 'has a particular potency'.[28] 'When linked to trade unions or other workers' organisations, collective bargaining and a right to strike, this apparent bare liberty has potentially disruptive effects regarding distribution of wealth and challenges to social hierarchies.'[29] In order to shed light on its institutional formulation as a *positive entitlement,* emphasising and endorsing various labour reforms towards unionization and association over this period in the UK, we consider the legislative history of the uniquely British system of labour law in Britain and how workers' FOA was protected as part of it.

We then place our focus more squarely on the normative-theoretical dimension of workers' FOA and its interaction with public and private law in its 'social democratic conception', a term coined by Brishen Rogers to describe an approach to workers' FOA which functions to ensure a measure of economic equality and economic democracy, which forms a central focus throughout the thesis.[30] We argue that Kahn-Freund's theory of labour law and workers' FOA, as it was conceptualised in post-war Britain, during the 'heyday' of his principle of 'collective laissez-faire', was socially democratic in substance.[31] To do so, it becomes necessary to fully examine whether his principle does, in fact, collapse the public/private distinction, as some commentators have doubted in recent years. To be sure, there are fundamental divergences between Kahn-Freund's theory of collective laissez-faire government and the idea of 'laissez-faire' government propounded by the liberal predecessors discussed in chapter 1. These mustn't be overlooked, as becomes clear when we consider the importance of the role of the state (public law) in a conception of workers' FOA which wishes to address, in Scott Veitch's summation of legal realist arguments, 'the lie of

[27] See supra n.1 Dukes and Streeck, 3. On Adam Smith and his view of 'egalitarian' labour markets in the mid-eighteenth century see also Simon Deakin and Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (Oxford, 2005), 2-20.
[28] See supra n.2 Novitz, 'Freedom of Association', 2.
[29] Ibid.
[30] See supra n.26.
[31] Paul Davies and Mark Freedland *Labour Legislation and Public Policy* (Oxford 1993), 99. The authors identified this at the time in which 'the traditional values of collective laissez-faire reasserted themselves.'

the "laissez-faire" economy'.[32]A deeper look at how the scholar viewed the public/private divide, with a comparative departure to Weimar-era labour law architect, Hugo Sinzheimer before him, helps us to further elucidate what exactly warrants the label 'social democratic' in this context. Indeed, for our purposes, an in depth exploration of the underlying commitments the scholars' shared in their collective endeavour to reconcile socialism with democracy helps us to under the ways in which the social democratic concept of workers' FOA necessarily entails its conceptual *widening*. What becomes clear, in this chapter, is that it is precisely Kahn-Freund's recognition of the fundamental 'fictions' behind, in realist terms the 'lie of the "laissez-faire" economy", and the role he envisions for labour law in addressing them, that allows us to argue that he conceptualises a theory of workers' FOA which both collapses the public/private distinction and appreciates the importance of the state's role in doing so.[33]

Chapter 3 then turns to the challenge posed by neoclassical economics and neoliberalism, from the late 1970s, to the then established thinking about labour law[34] as 'no sooner had labour law established itself in this way than its boundaries and rationale began to be seriously questioned.'[35] We draw in this chapter on Lord Wedderburn's seminal article, 'Freedom of Association and Philosophies of Labour Law' which provides a careful historical analysis of the legislative history of trade union reforms over this period in Britain.[36] The work of Friedrich Hayek is of particular importance here, as it related – quite directly, as Wedderburn explains – to British labour law reform and workers' freedom of association. Under the Thatcher (Conservative) government elected in 1979 Britain's approach to industrial relations became increasingly 'deregulatory'.[37] In order to understand the in normative-theoretical significance of this 'watershed' shift in governmental policy, we

[32] See supra n.15.
[33] Otto Kahn-Freund in Paul Davies and Mark Freedland, *Kahn-Freund's Labour and the Law* (London, 1983), 18. Kahn-Freund understood the notion of 'freedom' of contract to be a fiction of imagination: employee subordination was 'concealed by that indispensable figment of the legal mind known as "the contract of employment". Here, we recognise the asymmetries in legal realist and labour scholarship in their shared recognition of the inability of private (particularly, contract) law to address the unequal power of parties to a work contract and the substantive subjugation of the worker hidden behind formal 'freedom' of contract (what is shorthandedly referred to as 'the lie of the "laissez-faire" economy throughout', see supra n.15).
[34] What Wedderburn terms 'the traditional analysis' of workers' FOA see supra n.22.
[35] See supra n.17 Hepple, 'Chapter 2', 31.
[36] See supra n.22 Wedderburn.
[37] The phrase 'deregulatory', as we will explore in depth in our discussion of legal realism is misleading as it implies a lack of regulation, in some sense natural, yet what it typically means is removing impediments to the 'laissez faire' economy, 'giving almost uncontrolled power to property owners, particularly the owners of capital, see supra n.17 Hepple, 37.

turn in this chapter to the meaning of 'neoliberalism' as a strand of liberal political theory, looking specifically at how the public/private distinction figures in neoliberal thought. We ask, that is, what accounted for the 'neo' of neoliberalism, and we locate our answer precisely in neoliberalism's conception and *manipulation* of the public and private spheres. Like legal realists and the 'traditional' labour scholars, explored in the previous chapters, neoliberalism collapsed the public/private distinction (though of course it did so to very different ends). 'The laissez-faire conservatives came to abandon the very core of the distinction they had once relied upon. Still utilizing the label "private law" to denote the same subjects (i.e., largely contract, tort, and property), they candidly admitted that the state was pursuing its own goal—efficiency—through these forms of law.'[38] Now in the name of 'efficiency', 'flexibility' and 'competitiveness', the state became actively involved in the economy. It is argued, however, that, despite its presentation as a theory with more sophisticated rationality than any before, it its promise to collapse the public/private distinction and thereby shelter it from the critiques directed at its liberal predecessors acts as more of a rhetorical smokescreen than a firm theoretical commitment. Workers' FOA faced enormous blows; and was in large measure restored to a conception similar to that explored in the first chapter under classic liberal political theory. (That this, required mass regulatory upheaval – despite being frequently portrayed as an absence of regulation - and a huge amount of state power acts as a pertinent illustration of the realist lesson that there was nothing 'natural' or apolitical about (re)inforcing a system of private ordering.) Moreover, it serves to remind us of that 'lie of the "laissez-faire" economy' which, at the time of its classical emergence, promised workers' liberation (chapter 1) and, in the socio-economic circumstances it returned, highlights with particular potency its main shortcoming: its failure to recognise or address distributive concerns.[39]

In chapter 4 we turn to the ideology and policies of the 'Third Way' under 'New' Labour (1997-2010), as it proposed to resolve the predicament labour law faced at a time of increasingly global markets and global competition, and the decentralization and fragmentation of work and the workforce. What becomes clear, in this chapter, is the importance of the role of the state and, inextricably linked with this, the way in which New

[38] See supra n.27 Dagan and Ziphursky, 1.
[39] Samuel Moyn, 'A Powerless Companion: Human Rights in the Age of Neoliberalism' *Law and Contemporary Problems* (2014), 147, 151: '[T]he real significance of neoliberalism has been to obliterate the previous limitation of inequality.'

Labour conceived of the public and private law dimensions of Britain's labour markets. The neoliberal assault to workers' FOA entailed '[t]he downsizing of the British state in controlling the economy… with the deregulation of capital movements, so removing "a basic building block for the state's control over the economy".'[40] To return in the aftermath of that assault to a social democratic form of FOA would have required the 'harness[ing] rather than clamp[ing]' of state power as an engine for reform.[41] Yet the predicament of how to respond to globalisation – of remaining competitive on a global stage – was everywhere understood to be urgent, rendering a return to 'old' social democracy untenable. [42] Unlike their predecessors, however, New Labour were not content to simply let markets run 'freely, and rejected the unquestioning liberal faith in free markets and the straightforwardly deregulatory agenda of their neoliberal predecessors and 'complete hollowing out of the welfare state'.[43] New Labour heralded as a 'central tenet', for example, 'equality of opportunity [and] stressed the importance of social inclusion, active citizenship, and democracy.'[44] In terms of the public/private distinction they did, it could be said, hold a greater 'space' for public-political, socio-economic (non-private-sphere based) concerns in their formulation of work policies. What distinguishes the 'New' from the 'Old' Labour governments so fundamentally then was their expansion of the scope of common interests between employers, or of the compatibility of 'fairness' and 'economic efficiency' as transcending 'old' notions of conflict between the two.[45] This is typified, it is argued, in their approach to workers' FOA and made explicit in their theme of 'partnership'.[46] The result is that trade unions remained very severely constrained; where collective bargaining does make some gains under the statutory recognition procedure, which formed the centrepiece of New Labour's developments in this field, the aim is *not* to set terms and conditions of employment or correct inequalities of bargaining power between employers and employees as it was under 'collective laissez faire', but for the parties to reach 'co-operative' and 'voluntary' agreements on how best to achieve

[40] See supra n.17 Hepple, 38. Hepple describes how that welfare spending declined as 'economists ceased to believe that [running large deficits] could achieve full employment.'
[41] Keith Ewing, 'Democratic Socialism and Labour Law' *Industrial law journal* 24(2) 1995, 104.
[42] Stuart White, *New Labour: The Progressive Future?* (Palgrave Macmillan: 2001), xiv-xv.
[43] See supra n.17 Hepple, 41.
[44] Ibid.
[45] In scholarship, this is associated most clearly with Marshal's categorization of social rights as in opposition to the market see supra n. 21, Marshall, 344: 'social rights imply . . . the subordination of market price to social justice'.
[46] These aims are made explicit throughout the 1998 White Paper *Fairness at Work*, Cm 3968 (London 1998), see esp 1.8, 1.12, 4.12, 6.1. Although the partnership model is used with reference to individual employment rights too.

'competitiveness'.[47] The central contention of this chapter is that, New Labour, in attempting to steer a 'third way' for labour law and workers' FOA, failed to take adequate stock of the public-political approach that is needed for (collective) labour law, at least from the perspective of social and economic equality. In placing social and economic equality and democracy at the centre of workers' FOA at its centre, the social democratic conception of workers' FOA, is, it is argued, therefore both more theoretically coherent and morally compelling in its appreciation of the actual nature of existing free market capitalist economies, based on private property in which inequality is – by the very logic of accumulative capitalism-structurally mandated, exposing, as it were, 'the lie of the "laissez-faire" economy'.

The final three chapters, then, explore the failings, in terms of distributive justice, of workers' FOA association today (which, it is argued, has, since, continued since 1979 on a more or less neoliberal trajectory).[48] We consider the effects of its marked contraction and the sharp decline in union membership in the increasingly diverse compositions of work. In this current context, it considers; what might be gained from bringing the social democratic perspective back into the analysis? What insights do legal realism and social democratic theory provide today? While the composition of work has undergone significant and myriad changes, the realists' direction to pay particular attention to underlying social relations (not ex ante, as systematically pre-ordained) helps us to provide an answer. Above all, following Ruth Dukes and Wolfgang Streeck, it is argued that there is a need to bring capitalism back into the analysis of workers' freedom of association. Rather than rendering labour law's founding narratives irrelevant, this points to their normative saliency, and the need for FOA's re-configuration of this normative core to fit around existing realities of the world of work today, fostering futures that fit with the changed circumstances of the new century, one that,

[47] We focus in this chapter on collective labour law specifically and how it relates to workers' FOA, on the individualization and juridification of labour law more generally (in continuation with the trend set in motion by the Conservatives in 1979) see Keith Ewing, 'Foreword' in supra n.10 Novitz and Fenwick, viii. Even this form of labour regulation was to remain limited in light of the perceived need to work with, and not against, the market; to, above all, encourage *flexible* employment relations. At most, it was 'said to have moderated the harsh effects of the market rather than to have subordinated the latter to the needs of the people'.

[48] On the more recent turn to nationalism and 'controlling immigration' in line with policies promoting 'British jobs for British workers' see supra n.2 Novitz, 'Freedom of Association', 3, 18-20. This nationalistic turn has formed part of what some scholars are detecting as a move away from neoliberalism towards a more authoritarian strand of governmental approach and the rise of populism. See Ruth Dukes and Wolfgang Streeck, 'After Neoliberalism' (Working paper), (2022), 1-24 and Keith Ewing, 'Chapter 4: Right-Wing Populism, Illiberal Democracy, Trade Unions and Workers rights in Angela Cornell and Mark Barenberg *The Cambridge Handbook of Labor and* Democracy (Cambridge University Press, 2022).

accounts for the new world of 'gigging' and other forms of highly precarious works and 'reoragnis[es] the relationship between capital and labour in a capitalist society in line with norms of social and industrial justice.'[49]

[49] See supra n.1 Dukes and Streeck, 8. 'Daunting [as it may be, this will require] institutional reconstruction on a major scale and over an extended period of time, not just of work regimes but also of capitalism as a socio-economic order.'

Chapter 1: The Public/Private Distinction in Labour Law

In 1982, Klare published a seminal article dedicated to understanding the role of the public/private distinction in labour law.[50] According to Klare, '*There is no "public/private distinction",* yet he nonetheless commits the long article to this task because: 'What does exist is a series of ways of thinking about the public and private that are constantly undergoing revision, reformulation, and refinement... The public/ private distinction poses as an analytical tool in labour law, but it functions more as a form of political rhetoric used to justify particular results.'[51] It is the *real effects* that the public/private distinction has within and beyond labour law that are the focus of this thesis; the ways in which it, and the public and private law, relate and inform the normative underpinnings of workers' FOA. As we will aim to demonstrate, the distinction, and its evolution within legal scholarship, help us to track the different political movements, which have provided UK labour law with its diverging normative underpinnings from the time of the Industrial Revolution until today.

In this first chapter, our aim is to set address the theoretical basis of Klare's insights into the public/private distinction in labour law. A socio-economic history is intrinsic to our understanding of the public/private distinction and lays the groundwork for a deeper exploration of the school or body of thought which cast doubt on tenability of the theoretical distinction and achieved widespread prominence and consensus within critical legal scholarship and elsewhere towards the conclusion that there was, in fact, 'no real distinction' in the early parts of the twentieth century, namely, American legal realism.[52] To set the stage for this, the chapter begins with a considered look back to the mainstream political theory or ideology from which it sought to depart, namely, classic liberalism. In the first section, we consider the main tenets of classic liberalism and, above all, the vehemently defended distinction it held between public and private law as they were claimed to relate to the public and private dimensions of social life. In the second section, we move to the deployment of the public/private distinction within labour relations at the end of the nineteenth century and consider the treatment that workers' FOA received under classical liberal political theory.[53]

[50] See supra n.14 Klare.
[51] Ibid, 1361.
[52] supra n.27 Dagan and Ziphursky, 1-3.
[53] See supra n.17 Hepple, 'Chapter 2', 31-32, This was the period when, as a response to 'a set of problems resulting from industrialization, including the degradation of women and children, poverty, unemployment, and

What becomes clear is the ways in which classical liberalism acts, as a normative underpinning, to emphasise the *negative,* individualistic character of FOA.[54] The final section then turns to the American legal realism and its crucial intellectual insights and the role they played in in variously debunking the public/private distinction within legal scholarship, persuading scholars to abandon the distinction in the early twentieth century. In particular we focus on its devastating critique of liberalism: that there is no neat separation of institutions that maps onto the public/private distinction because there is no private power or realm 'that is different from any [public] realm or any other kind of power.'[55]

1.1 The emergence of classic liberalism and the public/private distinction

The Industrial Revolution brought with it a change in perspective from labour regarded as a scarcity – taking the form mostly of either independent or bonded labour – to labour regarded as something that could be sold for a wage under an agreement known as a contract.[56] According to Henry Maine's famous dictum the 'movement from Status to Contract' was to be a marker of 'progressive societies'.[57] Prior to this 'movement', work relations had been characterised as master-servant status-based relations and governed by the Law of Master and Servant.[58] The subordination of the worker to the employer was supported accordingly by laws that granted control to 'masters' over the labour power of 'servants'.[59] Contract, or 'free contracting' in a 'market society', was thereby perceived by Maine and other nineteenth

strikes as well as the legal treatment of trade unions and collective agreements' (the 'social question'), the 'origins of modern conceptions of labour law' can be traced back to.

[54] Negative FOA emphasises rights *not* to associate or unionize see supra n.11 Novitz, 'Chapter 5', 126. See also Jedediah Purdy and David Grewal 'Introduction: Law and Neoliberalism' *Law and Contemporary* Problems (2014) 4, 19-21. '[N]egative economic liberty [is] a touchstone freedom.' The authors outline the influence of neoliberalism on American constitutional law but this is equally applicable to classic liberalism here.

[55] See supra n.15 Veitch 'Chapter 8', 136.

[56] Alan Bogg, and Ruth Dukes, 'Chapter 5: The Contract of Employment and Collective Labour Law', in Mark Freedland and others (eds), *The Contract of Employment* (Oxford University Press, 2016), 96.

[57] Henry Maine, *Ancient Law: Its Connection with The Early History of Society and Its Relation to Modern Ideas* (London: John Murray, 1861). See also Katharina Schmidt. 'Henry Maine's "Modern Law": From Status to Contract and Back again?', *The American Journal of Comparative Law* (2017), 147: The 'status' which Maine referred to was that of 'the various relational and often hierarchical social networks that determined the rights and obligations of a person in premodern society.' See, however, Simon Deakin and Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (Oxford University Press, 2005), 1-40: cautioning against the view that this master-servant model of employment (status) was straightforwardly replaced by contract, 'contractualized', but it instead continued to shape and influence the nature and shape of the contractual model.

[58] See ibid, Deakin and Wilkinson, 2-14.

[59] Ibid. See also Otto Kahn-Freund, 'Blackstone's Neglected Child: the Contract of Employment', *Law Quarterly Review* 93(4) (1977), 513-514.

century liberals of that period to be an attractive and emancipatory alternative for workers to free themselves from feudal bonds, to contract 'freely' without external imposition of any kind of rights or obligations pre-ordained by their status relations.[60] On this vision, a fair society – an 'egalitarian market economy' - could be secured by freedom of contract or the free contracting of workers comprising freedom to enter and exit employment when one chose, '[t]he reciprocal relations that prevailed within the very small workplaces of the time were able to adequately constrain the exploitation and domination of workers at the time.'[61] 'Freedom of contract' was, then, understood for proponents of this early market period, to provide 'the necessary justification for the inherent imbalance of power within the employment relation, preventing employee oppression.[62]

1.2. Classic liberalism and the public/private distinction

In his exposition of 'liberal constitutionalism', Bob Hepple identified a primary feature of liberal societies in continental Europe as lying:

> 'in the somewhat artificial distinction between this 'private sphere' of economic life – what Adam Smith called "civil society" - and the "public" sphere of all that was directly controlled or administered by the state. This was conceptualised in the Continental countries in the distinction between "public" and "private" law. The state did not rule over "society". It left economic interests to take care of themselves, except by preventing fraud, facilitating the enforcement of contracts and the like.' [63]

Classic liberalism in the economic sphere, in line with the doctrine of economic libertarianism or laissez-faire, viewed 'market ordering under the common law' as 'part of

[60] Proponents of the early market economy, such as Adam Smith, believed that early markets would provide liberation due to the viability and predominance of independent production, for this reason classic liberalism was in this way inextricably linked with the time period – the sixteenth and seventeenth century – in which it emerged. A time described, in the introductory chapter to Elizabeth Anderson's illuminating book on that period, 'When the market was "Left".' Elizabeth Anderson, 'Chapter 1: When The Market was "Left"' in Elizabeth Anderson and Stephen Macedo *Private Government: How Employers Rule our Lives (and Why we Don't Talk about it)* (Princeton University Press, 2017).
[61] Cynthia Estlund, 'Rethinking Autocracy at Work', *Harvard Law Review*, 131 (3) (2018), 798.
[62] Ibid. See supra n.27 Estlund, 'Chapter 24', 414. Describing this "emancipatory" market period vision as, for its defenders, a time in which 'individuals fundamental and inalienable self-ownership plus the freedom of contract—two entitlements that slavery denied—were held to be both necessary and sufficient to constitute labour freedom and to prevent oppression'.
[63] See supra n.2 Hepple, 18-19.

nature rather than a legal construct' [my emphasis added].[64] For the apostles of laissez-faire 'market ordering', the area of social life described by classic liberals as 'the market' or 'the economy', was perceived to be a parcel of social life positioned prior to or outside of political deliberation and governance, This 'traditional view' therefore saw private law – conceptualised around a 'commitment to the values of formal freedom and equality' – as a as a realm of pre-political or apolitical interactions.[65] Private law, forming part of the innocuous private sphere in which 'private law subjects relate to the transactions and rights of parties with respect to one another.'[66] This was 'typified as a regime of strong property rights that both sets the boundaries of protected domains and establishes strict rules for identifying valid transfer of entitlements.'[67]

The 'apolitical' mission of private law (the common law triumvirate of property tort and contract) was therefore understood in terms of guarding the laissez-faire system of labour contracts in the 'free market' economy outlined above by protecting against interference with property owners' respective private entitlements.[68] The public realm of social life and, to which it corresponds, public law - centred on the relationship between the state and individuals - was where political deliberation over public purposes such as distributive just or democratic citizenship was appropriate, and topics such as welfare or social values could be considered and politically contested. 'The essence of the public/private distinction' Klare

[64] Cass Sustein, 'Lochner's Legacy', *Columbia Law Review* (87) 5 (1987), 873-919. In this widely cited article, Sustein argues that the Court's reasoning in the *Lochner* verdict was based on an understanding of market rationality as being part of nature and not a legal construct, rending redistributive regulations unconstitutional.
[65] Hanoch Dagan and Avihay Dorfman, 'Just Relationships' *Columbia Law Review* 116(6) (2016), 1401-1406.
[66] See supra n.27 Hanoch and Ziphursky, 3.
[67] Ibid, 1401. See also Eric Tucker, 'Freedom to Strike? What Freedom to Strike? Back-to-Work Legislation and the Freedom to Strike in Historical and Legal Perspective' *Labour (Halifax)* 86 (2020), 136. Explaining the commitment to values of formal freedom and equality within liberal property theory as '[t]he individual as property owner enjoys the right to exclude, freedom to use, privilege to transfer, and immunity from taking. Within broad limits, property owners can use their property as they see fit without regard to its impact on anyone else. As sovereign individuals, they are also free to contract with other sovereign individuals, on terms and conditions they find mutually agreeable.' For an excellent overview of legal realist critiques of this liberal 'exclusionary' interpretation of property see Maria Marella, ''The Commons as a Legal Concept' *Law and Critique* 28(1) (2017), 61-86. On this see also supra n.14 Klare, 1367-1371.
[68] Ibid. The focus of this thesis lies with the private/public law dichotomy as it relates to the law. There are numerous other, overlapping, ways to define this dichotomy such as between private and public action or spheres. See supra n.27 Dagan and Ziphursky, 4-5. As with the authors in this book, our particular focus in this thesis is on the 'assumptions about what follows in regard to what that area of the law should be used for, how it should be evaluated, who should apply it, and—maybe especially—what sorts of considerations should be brought to bear in applying it.'

concluded is captured in 'the conviction that it is possible to conceive of social and economic life apart from government and law.'[69]

1.3. Classic liberalism and labour law: workers' FOA

> 'To begin at the beginning, it is essential to recognize that collective action by workers in capitalist social formations runs against the grain of their foundational commitment to a liberal order founded on individualism… '[b]ecause the liberal order is committed to the formal equality of sovereign individuals, it starts from the premise that employers and workers should only bargain with each other individually. Combinations of workers to improve the terms and conditions of their employment are anticompetitive and contrary to the notion of individualism.'[70]

As it emerged in liberal societies, workers' FOA was given its primary intellectual groundwork by Adam Smith and his contemporaries whose ultimate concern was to remove anything which 'obstruct[s] the free circulation of labour'.[71] For labour law, at the most fundamental level, 'the legal doctrines of classical liberalism typically worked to secure boundaries between the claims of capital and those of labour', '[f]rom the prohibition of labour unions through the shackling of government regulations, the ideology of classic liberalism secured the structures and fundamental relations of early industrial capitalism from collective interventions that threatened its ideal of "free contract"'.[72] They worked, in the words of Klare, to secure the workplace, as a 'private domain', to be governed in the main 'as a private relationship governed by contract law' from 'democratic political processes… and leave existing economic hierarchies in place'.[73] 'Positing a "private" domain of life that is not

[69] See supra n.14, 1417. Within classical liberal legal discourse it functions Klare contends, as 'an intellectual practice designed to generate images of the world conducing to a belief that one can meaningfully conceive of the realm of social and economic intercourse apart from the realm of politics'
[70] supra n.78 Tucker, 135-137. Tucker explains that 'individualism', constitutively 'privileges individual rights and freedoms, including the right to private property and freedom of contract'.
[71] Adam Smith cited in Mpfariseni Budeli, 'Understanding The Right to Freedom of Association At the Workplace: Components and Scope', *Obiter*, 31(1) (2021), 18-19.Smith believed that the advancement of individual rights was for the good of society as a whole, that society would best be served by a state of affairs "where things were left to follow their natural course". See also supra n.2 Hepple, 17: '[l]iberal states swept aside the guild regulations and other obstacles to free labour markets, used Poor Laws to promote the development of those markets and maintained 'order' and the disciplinary power and penal sanctions deserting workers in Britain and in most other countries until the last quarter of the nineteenth century.'
[72] See supra n.55 Grewal and Purdy, 11.
[73] See supra n.14, 1417-1418. The 'fundamental tenet of democratic politics, that human communities are capable of fashioning appropriate institutions' was, then, not applied to industrial relations.

presumptively constrained by a democratic nomos', Klare explained, held a place for only 'apolitical unions concerned about a narrow range of economic issues'.[74] 'Liberal collective bargaining law makes it seem implausible that the union can function as a locus of group life and public discourse'. '[T]he paradigmatic form of this sort of conceptual repression' for workers' FOA materialised in 'the belief that employees lack the capacity collectively to organize and govern complex industrial enterprises.'[75]

In its liberal form, workers' FOA, was thus conceived of as an individual civil liberty,[76] derived from the libertarian assertion that 'people may do whatever they wish as long as they do not harm others.'[77] 'Accordingly, an individual should be free to join an organization and to act in association with others, as long as no harm is caused by doing so.'[78] Workers, on this view, are free 'to associate or not with other persons of their choice in a totally non-coercive way, subject only to such compelling considerations as national security or public morals.'[79] When emphasis is put on the *negative entitlement* of workers' FOA and rights *not* to association or unionize (the right to *dissociate*) it follows, Tonia Novitz explains, 'that priority has been given to an employer's freedom not to negotiate with a trade union.'[80] Where freedom of association is viewed 'solely as a civil liberty,'

> 'a decision to join an organization, whether an employer's association or a trade union, is regarded as personal and individual. At least two consequences might seem to follow. First, the same status is given to the negative entitlement to disassociate as to positive manifestations of association. Second, the state would seem to have performed its duty to protect freedom of association merely when there are laws that prohibit interference with the formal rights to join and form trade unions. There is little basis for an obligation to be placed on the state to promote and facilitate collective bargaining.'[81]

[74] Ibid, 1421.
[75] Ibid, 1417.
[76] See supra n.21 Marshall, 21. Civil liberties were defined by Marshall as the rights necessary for individual freedom in resistance to feudalism. On this see also supra n.2 Novitz, 'Freedom of Association', 5.
[77] John Mill, *Utilitarianism* (Glasgow: Fontana Press, 1962), 138.
[78] See supra n.2 Novitz, *International protection of the right to strike*, 66. Novitz explains Mill's 'harm principle' in the context of FOA.
[79] See supra n.3 Von Prondzynski, 225.
[80] See supra n.11 Novitz, 'Chapter 5', 124.
[81] Ibid.

The content of workers' FOA, as a liberal political right, can, according to Ferdinand Von Prondzynski best be understood when considering certain practical issues which have arisen in trade union law.[82] On (i) 'trade union independence', the 'liberal political approach would clearly require that if the law protects any association of workers it must protect all such[and not just independent] associations',[83] On (ii) 'recognition', the liberal reading 'is satisfied once the desired action of association is taken' 'but it would not require of employers any co-operation with those unions going beyond that. In particular, it would be difficult to read into freedom of association an obligation to recognise trade unions for bargaining purposes'.[84] Finally, in the context of (iii) closed shop agreements, the liberal political view is 'reflected in the call for legal safeguards against the abuse of trade union power and for the specific protection of those individuals who choose not to be members of any association, or of a particular association, or who have grievances arising out of their membership.'[85] As we can see, then, 'in accordance with the concept of the free play of supply and demand which then prevailed [closed shop agreements were] strictly penalised.'[86] Overall, the tendency of the liberal approach to workers' FOA as an individual right, 'even though it is exercised collectively' is, as described by Novitz, 'to conclude that where the individual is in tension with the community the individual must prevail.'[87]

1.4. American legal realism and the public/private distinction

From the nineteenth century on, the coherence and tenability of the theoretical distinction between public and private law has increasingly been subject to contestation and critique.[88] By the mid to late parts of the twentieth century it had been variously debunked by a group of legal scholars named American Legal Realists. In time, the legal realists' argument that there was 'no real distinction' at all, but that the idea of a distinction was nonetheless used to

[82] See supra n.11, 9-16.
[83] Ibid, 10-11.
[84] Ibid, 11-12.
[85] Ibid, 13.
[86] Ibid.
[87] See supra n.2 *International protection of the right to strike,* 67. Novitz citing Alexis de Tocqueville *Democracy in America* (New York: Harper and Row, 1996), 177: 'freedom of association has become a necessary guarantee against the tyranny of the majority' as a classical exposition of a view in which the freedom *not* to associate taking precedence over the freedom to associate.
[88] For an early, classic, account of this in relation to private property in particular see Karl Marx, 'On the Jewish Question', in David McLellan *Karl Marx: Selected Writings* (Oxford, 1997), 45. For commentary articulating Karl Marx's position on the public/private distinction see Gerald Türkei, 'The Public/Private Distinction: Approaches to the Critique of Legal Ideology' *Law and Society Review* 22 (1988), 801, 805-09.

legitimate exclusionary political practice and social inequality, gained widespread acceptance within legal thought.[89] A number of important political, social, economic and philosophical critiques of 'private ordering' emerged 'the gist [of which were] that so-called private ordering in fact amounts to a system of social control implicating issues of public policy.'[90] The overarching criticism of the public/private distinction, then, came from the recognition that not regulating in fact amount to a form of regulation, and that decisions *not* to legislate are every bit as much political as decisions *to* regulate. All decisions, that is, 'should be challengeable politically and not left in place as natural or necessary – for these latter claims will themselves be the deposit of prior political decisions or structures, and it is precisely through their coercive depoliticization that much of their harm continues and is rationalised.'[91]

When extended to the institution of private property (property as an ostensibly apolitical institution) this form of argument is particularly clear.[92] In the introduction to their impressive book on private law theory, Hanoch Dagan and Benjamin Zipursky explain that 'vested property interests were understood by many to have evolved over time, rather than being direct assignments by the state. In that sense, they struck some judges as natural rights rather than politically created ones.'[93] Property law protected the private interests of owners, simply in the sense of securing non-interference with their property and 'the law of transactions between private parties facilitated spontaneous development in this way.'[94] In a

[89] See supra n.27 Hanoch and Ziphursky, 7: 'Together, these arguments did not so much undermine the distinction between public law and private law as undermine any reason to think that private law should be understood as abstracting away from—rather than embedding—social values and public goals in a manner that rendered it politically neutral.'

[90]See supra n.14 Klare, 1358.

[91] See supra n.15 Veitch, 'Chapter 8'. 142. See also supra n.27 Hanoch and Ziphursky, 7, 18-20. The authors undermine the idea that private law rules are somehow apolitical by outlining the 'judicial dependency critique' which highlights that '[p]rivate law exists as law only because of the institutions that sustain it, and indeed make it. In choosing to supply rights and remedies for plaintiffs in some cases but not others, courts are making normative choices, whether they like it or not.' On this see also supra n.14 Klare, 1350: '[J]udges and other legal thinkers beginning from an identical premises about the 'publicness' or 'privateness' of a particular legal phenomenon will arrive at sharply contrasting or opposed legal conclusions regarding it; or, beginning from opposed premises they will arrive at identical legal conclusions.

[92]This is commonly associated with the rejection of some version of natural rights thinking (stemming most famously from John Locke) and the contention that vested property interests were not some naturally evolved right, for which the law of transactions facilitated spontaneous development over, but were direct assignments by the state *See* Morris Cohen 'The Basis of Contract', *Harvard Law Review* 46 (1933), 553-592; Morris Cohen, 'Property and Sovereignty', *Cornell Law Review* 13 (1928), 8-30; Robert Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State', *Political Science Quarterly* 38 (1923), 470-494; Roscoe Pound, 'Liberty of Contract' *The Yale Law Journal* 18(7) (1909), 454-487.

[93] See supra n.27 Hanoch and Ziphursky, 6.

[94] Ibid.

powerful critique, however, Robert Hale famously argued that 'when the state 'protects a property right', '[p]assively it is abstaining from interference with the owner when he deals with the thing owned; actively it is forcing the non-owner to desist from handling it, unless the owner consents.'[95] The private law of property, that is, exists – not in the abstract – but within the capitalist free market which is characterised by private ownership of the means of production by the few, as the many, the workers, own only their labour power and are dependent on its sale.[96] Once the *coercive role of property in* a capitalist market economy is recognised, as fundamentally privileging and empowering those who own the means of production against those whom must work for a living, we also understand that formal freedom of contract conceals and buttresses systems of mass domination and inequality.[97] 'As sovereign individuals they are free to contract with other sovereign individuals, on terms and conditions they find mutually agreeable. Individuals within the liberal order framework are formally equal, but historically the liberal order did not apply universally to all those within its territorial boundaries. The 'liberal order framework recognizes workers as equal sovereign individuals who are free to sell their labour power to other property owners on mutually agreeable terms', but 'ignores the structural advantages enjoyed by owners of capital in the bargaining game' and that workers' 'abstract freedom is significantly constrained by their material circumstances.'[98]

Crucially, in applying his insights to labour relations, Hale exposes the ways in which the public/private distinction is fundamental to securing the subjugation of labour power as those who own the means of production have power over those who don't and their subsistence: 'unless, then, the non-owner can produce his own food, the law compels him to starve if he has no wages, and compels him to go without wages unless he obeys the behest of some employer. It is the law that coerces him into wage-work under penalty of starvation.'[99] As Scott Veitch eloquently deduces from Hale's insights:

[95] See supra n.93 Hale, 'Coercion and Distribution', 471-473.
[96] Ibid, See also supra n.68 Tucker, 135-136.
[97] See Hancoh Dagan 'Autonomy, Pluralism, and Contract Law Theory', *Law and Contemporary Problems,* 76 (2), (2013), 19-38, on the ways in which formal freedom of equality and contract insofar as it is viewed as 'passive structurally monist' depicts a fiction.
[98] See supra n. supra n.68 Tucker, 135: 'Capitalists can exercise their ownership rights to decide whether to invest, what to produce, where to produce, how much to produce, and how many workers to hire. Workers lack the means to survive for long outside the labour market and thus are dependent on finding a capitalist willing to hire them, while competing against other, equally dependent workers.'
[99] See supra n.93 Hale, 'Coercion and Distribution', 472.

> 'Property law protects the private interests of owners not simply in the sense of securing noninterference with their property – it is doing this that, in turn, allows market forces to operate as precisely that: *forces*, generated within the legally organised market affecting social relations in compulsive ways… Given the public role of the state in licensing such coercion, there is *no difference* with respect to the operation of force between a supposedly 'free' market and a welfarist one. To believe otherwise is to accept the lie of the "laissez faire" economy.'[100]

Once the coercive role of property in a capitalist market economy is exposed in this way, the idea that private law (and the private realm to which is relates) is a pre-political or apolitical domain collapses, and along with it, the public/private distinction. In considering the effects of the deployment of the public/private distinction – in Klare's terms, of its 'political rhetoric' – in feminist legal scholarship, Nicola Lacey explains that these are best seen in the way the distinction works in a normative and ideological manner:

> It exposes the way in which the ideology of the public/private dichotomy allows government to clean its hands of any *responsibility* for the state of the "private" world and *depoliticises* the disadvantages which inevitably spill over the alleged divide by affecting the position of the 'privately' disadvantaged in the "public" world.'[101]

If all state or any other (institutional) form of power (or coercion) is ideologically driven and dispersed not according to some abstract notion of nature or common sense, the task of legal scholars is, then, in Veitch's terms, 'to 'unveil the workings of this technique with a view to challenging their "normalising" operations, coercive underpinnings and detrimental effects.'[102] The distributive effects (certain regressive or otherwise oppressive features of private law in particular) of law must not be overlooked or obscured, that is, and shielded from scrutiny.[103] This requires that we look beyond the 'traditional conception of private law as the realm of independence and formal equality' which, in the stark words of Morris Cohen

[100] See Veitch supra n.15, 'Chapter 8', 140.
[101] Nicola Lacey, *Unspeakable Subjects* (Oxford, Hart, 1998), 77. Generally, feminist scholars compellingly criticize the implications of the 'traditional' private law understanding (see supra n.69 'Just Relationships') of doctrines relating to the family such that they denote it as a 'private' or 'personal' sphere which can lead to sheltering domestic arrangements from (patriarchal) abuses and insist that it must be open to scrutiny and public review as an appropriate subject of political and social justice theories.
[102] See supra n.15 Veitch, 'Chapter 8', 142.
[103] Ibid

can serve to 'perpetuate class prejudices and uncritical assumptions which could not survive the sunlight of free ethical controversy'.[104]

We turn in the following chapter to Cohen's foundational insight that 'we must not overlook that dominion over things is also *imperium* over our fellow beings' and to the coercive role of property in the subjugation of labour power.[105] Here it will be asked what these crucial insights tell us about how workers' FOA was understood in the postwar decades. Exploring legal realists critiques of the public/private distinction at the outset specifically around (i) the coercive role of property in capitalist market economies which privileges and empowers those who own the means of production against those whom must work for a living, and therein (ii) the falsity of 'freedom of contract', that formal freedom of contract conceals and buttresses systems of mass domination and inequality - what we, drawing on Veitch, refer to, in shorthand, as 'the lie of the "laissez-faire" economy' - allows us to lay the groundwork for, as will be argued for in the remainder of the thesis, the democratization of the social and economic spheres of labour relations.[106]

[104] See supra n.69 Hanoch and Dorfman, 1407, citing Felix Cohen, 'Transcendental Nonsense and the Functional Approach, *Columbia Law Review* 809 (1935), 814-818.
[105] See supra n.95 Cohen. 'Property and Sovereignty', 13
[106] It is to these two insights in particular that we explore in more depth in relation to how workers' FOA was interpreted in the post-war era in chapter 2, as they relate to its normative underpinnings and the public/private distinction in its social democratic conception.

Chapter 2: Workers' FOA and Post-war Consensus in the UK: The Social Democratic Conception

'By the mid-nineteenth century, the rise of the factory system and the rule of capital and managers over labour had shattered the egalitarian vision of market society.'[107]

The aim of this chapter is to assess how modern conceptions of labour law developed out of a century of struggle by workers and trade unions for recognition of the public stake in their working relationships and how workers' FOA came to incorporate the shift, as labour law broke free of its narrow categorisation as a subset of private law.[108] That struggle also provides the historical plot line for an analysis of UK labour law, from the (publicly enforced) dominance of private law under the banner of 'freedom of contract' and classic liberalism, as explored in the previous chapter, to state support for 'collective laissez-faire', with collective bargaining at its core, and the subsequent rise of a public law of employment until collective bargaining machinery began to unravel and break-down in the 1960's.[109] This historical migration transcending the public/private boundary aids our understanding of the 'social democratic conception of workers' FOA, which 'centred on decent work and livelihoods, social provision, and a measure of economic and independence and democracy' as, it is argued, it informed the post-war consensus in Britain.[110]

In the first section of this chapter, we turn our focus to the normative theoretical underpinnings of the social democratic conception of workers' FOA and, in particular, what this implied for the interaction of public and private law in the middle of the twentieth century. We then address the question of whether the post-war British

[107] See supra n.62 Estlund, 107. See also n.27 Estlund 'Chapter 24', 414, supra n.61 Anderson, 'Chapter 1' and supra n.17 Hepple, 'Chapter 2', 31-32,

[108] See supra .18 Dukes, 14. Noting the influence of Karl Marx, Karl Renner and Otto von Gierke and their influence on Hugo Sinzheimer in conceiving of 'labour law, in essence, as a corrective to private law.' See also supra n.17, Hepple, *Idea of Labour Law,* 32. Citing a 1910 article written by Sinzheimer which justified labour law as a separate discipline on several grounds, including, importantly for our purposes, the 'special nature of the subject containing elements of both public and private law.'

[109] A similar movement was mirrored across industrialising countries of the global North and has numerous historical precedents in mid-twentieth century labour law systems. For an account, in these terms, of the paralleled shift in America with the New Deal Settlement see supra n.27 Estlund, 'Chapter 24'.

[110] See supra n.13, Forbath. Here we draw on Brishen's definition of the 'social democratic conception of workplace FOA' as it related to the parallel movement in America and informed the New-Deal era labour legislation see supra n.20 Rogers.

conception of workers' FOA can correctly be categorised as socially democratic.[111] Here, we consider how workers' FOA came to be interpreted in the UK as the political economy evolved from broadly liberal to broadly social democratic in nature. Crucially, we consider how the state supported and enforced 'positive' workers' FOA and the ways in which this fundamentally collapsed the liberal public/private distinction by giving workers, as political and economic citizens, a voice in both realms.[112] What becomes clear, in this second section, is that any depiction of British labour law as synonymous with state abstentionism, at least in the sense of portraying non-intervention or neutrality on the part of the state, is misleading. Enforcement of the kind of social democratic conception of workers' FOA outlined in the previous section involved, by definition, a significant role for the state in industrial relations and Britain was no exception.

To fully understand the role of public law and state involvement implied by a social democratic conception of workers' FOA, and the theoretical commitments which underlay it, we turn, in the third section, to Kahn-Freund's principle of 'collective laissez-faire'. This was an idea developed by Kahn-Freund in a trilogy of works published between 1954 and 1959, to describe the British system of industrial relations which achieved its 'heyday' during the post-war period.[113] Kahn-Freund was a masterful scholar and his work is widely understood to offer an influential reading of the law then in force, producing a conceptual framework for analysing the pattern of British labour law and building - according to Wedderburn, an '"analytical edifice" which had housed all scholars of British labour law since he built it'.[114] In arguing that the post-war consensus within the UK endorsed and promoted a social democratic conception of workers' FOA, it therefore seems necessary to consider an alternative interpretation of Kahn-Freund's principle, as intended to denote that British industrial relations 'were somehow insulated from government intervention: that this was a

[111] More broadly, this involves an elucidation of one of the most influential illustrations within labour scholarship of the 'traditional' purpose or analytical 'core' of collective labour law, namely, Kahn-Freund's principle of 'collective-laissez faire.

[112] See supra n.11 Novitz 'Chapter 5', 148: if freedom of association is viewed as a democratic and socioeconomic entitlement, it becomes possible to present arguments as to why a positive approach could prevail, at least in certain circumstances.'

[113]See Otto Kahn-Freund, 'Legal Framework' in Alan Flanders and Hugh Clegg, *The System of Industrial Relations in Great Britain: its history, law and institutions* (Oxford: Blackwell, 1954), Otto Kahn-Freund, 'Intergroup Conflicts and their Settlement' (1954) 5 *British Journal of Sociology* 193–227, Otto Kahn-Freund, 'Labour Law' in Morris Ginsberg, *Law and Opinion in England in the 20th Century* (London 1959), 215–63.

[114] Lord Wedderburn, 'Otto Kahn-Freund and British Labour Law' in Lord Wedderburn, Roy Lewis and John Clark, *Labour Law and Industrial Relations: Building on Kahn-Freund* (Oxford: Clarendon Press, 1983), 33, 69.

sphere of action that the state left alone'.[115] In doing so, we place the role of public law and power in a social democratic theory of workers' FOA into sharp focus, in particular, the way in which it figures and necessarily entails its conceptual widening. Crucially, in making the argument that Kahn-Freund's theory and the British labour law system which he sought to conceptually underpin were indeed of a social democratic nature, in their promulgation of the public (workers') interest over private law entitlements, it becomes important to address whether his theory of collective laissez-faire does in fact collapse the public/private distinction. What becomes clear, is that it is precisely on the issue of the role of public law (and the role of the state) that controversy arises and upon which (legal realist) critiques of Kahn-Freund's theory, as deploying the public/private distinction to insulate industrial relations from state oversight, hinge.

In considering whether the assessment of Kahn-Freund's principle as an essentially liberal one is accurate, we make a comparative departure, in section 4, to the scholarship of Kahn-Freund's one-time teacher, Hugo Sinzheimer. Widely regarded as a founding father of German labour law, Sinzheimer was a labour law scholar and politician in Weimar-era Germany, architect of the influential theory of a new 'labour constitution' as the key to achieving social democracy in the new German Republic.[116] Focussing on how Kahn-Freund, and Sinzheimer before him, understood and dealt with public and private law in their respective theories of labour law aids in our understanding of the label 'social democratic', and the various instantiations it can house.[117] Importantly, it brings into sharp focus the fundamental asymmetries that exist between the respective scholars' theories of labour law and the legal realist insights explored in the previous chapter. What is more, our efforts, in this chapter, to discredit critiques of his theory as one of 'political indifference' to state power in collective bargaining, allow us to set the stage for the remainder of the thesis which argues for the continued saliency of the social democratic conception of workers' FOA today (chapter 4), highlighting, and bringing to our close attention the ways in which the public and private law necessarily configure in a theory which can accurately be described as socially democratic. Crucially, it is on Kahn-Freund's recognition of the 'lie of the "laissez-faire"

[115] See supra n.18 Dukes, 69.

[116] For a detailed discussion of Sinzheimer's influence on labour law see Otto Kahn-Freund, 'Postscript' in Roy Lewis and Jon Clark, *Labour Law and Politics in the Weimar Republic* (Oxford, 1981).

[117] On the way in which the German labour law system relied more heavily on state regulation to structure the economy in the post-war period see Ruth Dukes 'Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labour *Law' Journal of Law and Society* 35 (2008), 341-344.

economy' – the coercive role of property and the fundamental 'fiction' of freedom of contract in Britain's capitalist society – that we are able to conclude that his theory does, fundamentally, collapse the public/private distinction and was socially democratic in nature.

2.1. The social democratic conception of workers' FOA and the public/private distinction

In his excellent article 'Three Concepts of Workplace Freedom of Association', Rogers characterises the 'social democratic conception of workplace FOA' as that which 'views workplace FOA as a means to the end of ensuring economic equality and economic democracy'.[118] In part, this conception reflects the social citizenship tradition of labour constitutionalism, neatly summarised by Novitz as having

> 'long argued that the individualistic conception of freedom of association should be modified in the context of trade union affiliation and collective bargaining. In this context, freedom of association can be viewed as having a particular purpose over and above the protection of an individual's desire to meet, study, or worship with others; that purpose being to redress longstanding inequalities of bargaining power between employer and worker. Through membership of trade unions, workers can appoint representatives to voice their opinions, argue their case in collective bargaining, and organize industrial action. In other words, freedom to associate allows workers to participate in making those decisions which affect their working environment and thereby their working lives. It is a means by which to secure recognition of workers' *political, social, and economic interests*.' [my emphasis added].[119]

> As Rogers explains, '[t]he social democratic conception accordingly conceives of workers as both political and economic citizens, in the sense that they collectively set

[118] See supra n.20 Rogers, 'Three Concepts', 117. Brishen argues that it was this concept of workers' FOA which informed, as it was originally passed, the National Labour Relations Act in America and had influence over their courts and the National Labour Relations Board from the New Deal era until the 1960s.
[119] See supra n.2 Novitz, *International protection of the right to,* 67. Novitz contrasts this with the negative, individualistic conception of FOA (as explored in chapter 1). See also supra n.11 von Prondzynski, 225-229. In contrast to the liberal political interpretation treating it as a 'functional guarantee' (i) requires trade union independence, on (ii) recognition 'trade union membership must be regarded not as an end in itself but as a means of achieving greater bargaining strength on the workers side in industrial relations and on (iii) the closed shop, 'the functional view would regard both the closed shop itself and the position of non-unionists in a wider setting [as acceptable where] it was considered necessary to secure effective union representation'.

> the terms of social cooperation.'[120] The label 'social democratic' reflects that it 'explicitly incorporates the traditional social democratic concern with building an egalitarian political economy'.[121] The role of the state in this, 'is to establish the legal entitlements necessary for those deliberations and choices to take place'.[122] More broadly, in his article on 'Democratic Socialism and Labour Law', Keith Ewing explains that the function of democratic socialist government is to 'promote socialism (whatever that may mean) by democratic means.'[123] Writing in 1998, Ewing recognised that socialism for many may no longer have meant the common ownership of the means of production, but 'would still require some commitment to the social accountability if not the social ownership of private property, and to the promotion of the social and economic welfare of all individuals in the community, if not the realisation of economic equality.'[124] In legal realist terms, the coercive role of property in a laissez-faire economy is addressed and the public (social) purposes of a measure of social and economic stability are imported into the myth of 'freedom of contract' as the only legitimate institution for its regulation. For the social democrat, Ewing concludes, 'strong government is a necessary pre-condition' for 'social and economic progress'.[125]

The social democratic conception of FOA therefore has at its very core a rejection of the classical liberal public/private distinction. In Rogers' terms, it shares with legal realists, a 'skepticism toward any strong political-commercial divide',

> 'because a more egalitarian political economy cannot be achieved realistically without politicizing economic relations and encouraging citizens to support egalitarian policies such as collective bargaining rights and redistributive taxation. Workplace FOA, in this view is best understood as a part of a charter of economic democracy, and legal claims based on FOA should be interpreted in light of such commitments. In practice, then, the social democratic concept of FOA strongly emphasizes positive workplace FOA, and

[120] See supra n.20 Rogers, 209.
[121] Ibid, 206.
[122] Ibid, 209.
[123] See supra n.42 Ewing, 104. Ewing highlights the period of 'between 1945 and 1951 in particular' in Britain, as when 'a wide range of recognisably democratic socialist initiatives [were] implemented by legislation'.
[124]Ibid, 103: 'Democratic socialism may not now mean social equality, but it does mean social equity.'
[125] See supra n.42 Ewing, 105.

even affirmatively promotes unionization and collective bargaining, while de-emphasizing negative FOA.'[126]

On this view, to ensure a measure of social and economic equality and democracy (social equity) the role of the state goes *beyond* providing legal entitlements to workers aimed at merely ensuring labour's role in collective bargaining on a parity with employers (as some industrial pluralists might have it).[127] Indeed, as explored in the previous chapter with reference to legal realism, such was a critical concern of Klare's caution against the 'central premise of collective bargaining theory that the industrial rule of law is the "autonomous" creation of labour and management.[128] The liberal deployment of the public/private distinction, in this instance' 'suggests that democratic political processes ought not to meddle in industrial relations and should leave existing economic hierarchies in place. It denies the crucial role of public law in establishing and protecting the "autonomous" industrial rule of law.'[129] As Ewing argues, '[f]or the fact is that if collective bargaining as a process is to be seen or developed as an instrument of democratic socialism to secure a public goal, it is difficult to argue that it should be treated as an incident of "civil rights", that is to say as a purely private bargain between two autonomous parties, subject to the ebb and flow of the market.'[130] To ensure social equity, and avoid the perceived shortcoming of approaches which maintain, in Klare's terms, the "autonomous" industrial rule of law, Ewing, when considering the role of labour law in a democratic socialist constitutionalism, explains 'labour law serves two distinct, though not unrelated purposes. First, it is about recognising the fact that the private law relationship between employer and worker serves a public as well as a private function; and it is about importing public law principles – in the wides sense that term – into the private relationship between employer and employee' (this second purpose, dubbed the 'social

[126] See supra n.20 Rogers, 206.
[127] This is what Paul Davies and Mark Davies refer to as 'regulated bargaining' see supra n.32, 652-653. See also supra n.20 Rogers, 209. Rogers compares the social democratic conception with the industrial pluralist tradition, noting that both 'endorsed industrial governance based on collective bargaining and are willing, at times, to emphasise union power over individual rights.' The difference lying, however, in the fact that 'the conception of economic democracy is far more robust in the social democratic tradition than in the industrial pluralist tradition, which limited labour's role to collective bargaining and tended to assume rather than to ensure equality between labour and management.'
[128] See supra n.14 Klare,1417-1418.
[129] Ibid.
[130] See supra n.42 Ewing, 115

purpose of labour law', is critical, as we shall see in section 4 below).[131] Where longstanding inequalities of bargaining power between employers and workers exist, the public goal of 'ensuring that workers collectively and democratically set the terms of social cooperation', of extending the basic principles of democracy from the political to economic sphere, collapsing the public/private distinction in the process, meant the social democratic conception 'strongly emphasized positive FOA, and would endorse various labour law reforms to ensure workplace equality and social democracy, including even the union shop.'[132]

2.2. Workers' FOA in the UK: from a liberal to a social democratic state, the active promotion of collective bargaining and public law's reconstitution of the world of work

In this section we turn to the protection of workers' FOA under the uniquely British system of industrial relations. Analysing labour law over this period in its wider political and economic context, Hepple explores the juncture at which Britain moved from a liberal laissez faire state which 'actively promoted liberal doctrines, purporting to leave the economy alone to be regulated by market forces operating through the legal mechanism of voluntary contracts' to a liberal democracy as 'the new electorate made demands upon the state to attend to the host of social questions produced by capitalist accumulation'.[133] In Britain as elsewhere in Europe, participation by workers in the "public" sphere in order to improve their situation in the 'private' realm of the economy' grew, eroding the division between public law and private law.[134] Liberal doctrine', Hepple summarised, 'had come, first in Britain, to espouse freedom of association for workers. In the "private sphere", this entailed modifying

[131] Ibid, 111, 120: Labour law must promote 'two social goals: the first is "social justice" and the second is democracy within the social institution of work.'
[132] To use Marshall's schematisation, workers' FOA, on this conception, has a critically socio-economic dimension. In describing, for example, the right to strike as a socio-economic right (seen, on this view, as a pivotal addendum to workers' FOA), supra n.2 Novitz, *International protection of the eight to strike,* 49-50:'the ability of workers to take industrial action is said to be an important factor in the maintenance of fair wage and reasonable working conditions thereby improving the economic and social welfare of a significant proportion of the population. This is premised on the understanding that there is an imbalance in bargaining power between an employer and worker, such that in the absence of a right to strike 'collective bargaining would amount to collective begging'
[133] See supra n.2 Hepple, 18-20. Here Hepple captures the legal realist insight that whilst liberal doctrine had 'purpot[ed] to leave the economy alone', this 'was, of course, a form of "intervention", in the sense that it gave uncontrolled support to the power of property (in the form of capital)'.
[134] Ibid

the classical liberal ideas of "free" market. In the "public sphere" it meant labour legislation to tolerate and later actively promote collective bargaining.'[135]

The birth of modern trade unions and the emergent concomitant rise of workers' FOA associate could be observed in Britain from the mid-19th century.[136] By 1875, the various Master and Servant Acts which had stayed in force to prohibit union organization and rendered trade unionism illegal were repealed. Rather than joining its European counterparts upon 'the second step', however, Wedderburn describes, regulation of collective labour relations or worker organisations was not primarily established in Britain by 'positive' rights for workers to associate which, for example, suspended the terms of the contract of employment during industrial action, but by the introduction of 'immunities' against the common law liabilities arising from a breach of the employment contract.[137] That is, '[f]rom 1871 onwards, freedom of association in Britain was created not by rights but by immunities.'[138] Instead of affirming the lawful status of unions by positively entrenching a right to freely associate, an exemption was introduced in the Trade Disputes Act 1906 which legally immunised industrial action from the common law doctrine of 'restraint of trade', provided that its organisers were able to show they 'acted in contemplation or furtherance of a trade dispute'.[139] The system of industrial relations that then came to be in place revolved around the collective negotiation of wages and the collective resolution of disputes at industry level; 'collective bargaining was promoted by government as the preferred means of setting terms and conditions of employment and of settling industrial disputes.'[140] 'Rather than intervening directly in employment relations, successive British governments left it to trade unions and employers to negotiate the rules that would govern working lives and production.'[141]

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[135] Ibid. See also Alan Bogg, 'Labour, Love and Futility: Philosophical Perspectives on Labour Law' *Industrial Journal of Comparative Labour Law and Industrial Relations* 33 (2019), 7, 17. In this way, labour law could be said to explicitly '*re-order* the legal entitlements of employers and workers that had been established through the private law of contract, property and tort.'

[136] Keith Ewing, 'The State and Industrial Relations: Collective Laissez-Faire" Revisited' *Historical Studies in Industrial Relations* (1998), 3-5.

[137] See supra n.22, Wedderburn, 4-6.

[138] Ibid, 6.

[139] This was known as the once 'golden formula' of labour law, and developed over time via common law extensions of the tortious liabilities followed by statutory amendments to recapture such new liabilities.

[140] Dukes, supra n.18 69. For an in-depth analysis of this period see Chris Howell, *Trade Unions and the State: The Construction of Industrial Relations Institutions in Britain, 1890–2000* (Princeton, 2005), 7-14.

[141] Ruth Dukes, 'Otto Kahn-Freund and Collective Laissez-Faire: An Edifice without a Keystone?' *The Modern Law Review*, 72(2) (2009), 221. See also Alan Bogg *The Democratic Aspects of Trade Union Recognition* 31-32 (Hart Pub, Oxford, 2009) (discussing the origins of collective laissez-faire).

That legal intervention in the UK tended, in this way, to be 'indirect' did not, however, imply straightforward 'state abstentionism' or 'voluntarism' on the part of the state in industrial society.[142] 'What was unique about the British industrial relations system, then, was not so much the quantity of labour law as its quality.'[143] Workers' FOA developed by way of industrial autonomy, aimed at increasing industrial power by reinforcing its freedom of action in negotiating the terms and conditions of employment and collective dispute resolution.[144] Indeed, by the mid twentieth century, 'the private law's constitution of the labour market had failed in the view of most voters, and judicial efforts to entrench private ordering against public and collective intervention had made things worse.'[145] The 1945 Labour Party was elected to power by a landslide majority on a Manifesto which promised 'Freedom for the Trade Unions' and proceeded to deliver this by steadily rolling out measures which promoted trade union growth and strengthened collective bargaining machinery through introducing myriad legal and non-legal measures designed to actively encourage employers and unions to enter into collective bargaining arrangements with one another.[146] This process was buttressed by widespread acceptance of Keynesian macro-economic thinking and demand management; towards the 'building of [a] neo-corporatist social democratic welfare state… based on steady economic growth, and rising levels of employment until the 1970s'.[147] The result was a dramatic shift towards the use of law and state power in the field of labour relations. 'The welfare state aimed to provide the institutions and processes, mainly collective, that created a "fair" balance between employers and workers… Rights were of

[142] Supra n.136 Ewing, 1-31. A central contention of Ewing's article is that the British state's role in the institution and maintenance of the system of collectivised industrial relations in the post-wad period within the UK was routinely underestimated.

[143] In most cases, that is, legal intervention aimed at persuading or inducing employers to recognise and bargain with unions but not at determining or influencing those collectively agreed outcomes. See supra n.18 Dukes, 84.

[144] Significantly, for example, one of the last acts of the Labour government was to enact the Industrial Disputes Order 1951 (Order 1367) which removed restrictions placed on industrial action in the wartime Order 1305 and continued the compulsory arbitration and compulsory extension provisions. Where an employer refused to bargain with an employee this allowed for an independent Industrial Disputes Tribunal to make an award on terms and conditions of employment which would become legally binding as terms in the contracts of employment of the relevant workers. On this see supra n.32 Davies and Freedland, 17.

[145] See supra n.22 Estlund, Chapter 24, 416. Estlund writes in the context of this movement in mid twentieth century in America, with equal applicability to the parallel shift which occurred in the UK and across many industrialising countries during this period.

[146] *Let us Face the Future: A Declaration of Labour Policy for the Consideration of the Nation* (London 1945).See also supra n.141 Dukes, 220-246 and supra n.114 Otto Kahn-Freund, 'Legal Framework'. Kahn-Freund discusses in particular the use of compulsory arbitration (83-101), of a range of statutory provisions intended to make the terms of collective agreements legally binding (58-65), 'Minimum Wage legislation' (65-75) and fair wages clauses (75-83).

[147] See supra n.17 'Chapter 2', 37. See also supra n.18 Dukes, 199-201. 'In the UK at the end of the Second World War, governments of all political persuasions adhered broadly to the teaching of Keynes and his school that trade unions and collective bargaining were essentially a welcome feature of the economy, since they contributed to making wages downwardly rigid, stabilizing demand in periods of recession.'

increasing importance in order to end the distinction in liberal states between the 'private' sphere of economic life and the 'public' sphere of what was now directly controlled by the state.'[148] For workers' FOA, in Britain, these 'rights' took the form of "social and organizational "rights" won through industrial struggle, using the law on a pragmatic basis only when voluntary means were inadequate'.[149] It was in this way that the British state 'combined strong state support for the creation and maintenance of collective-bargaining and dispute-resolution machinery with respect for a broad measure of union and employer autonomy, [taking] steps to persuade or induce employers to recognise unions and to bargain with them, but it did not attempt to control or influence the outcomes of the bargaining process.' [150]

2.3. Kahn-Freund and the principle of Collective Laissez-Faire

Kahn-Freund coined the term 'collective laissez-faire' and elaborated the principle during the 1950s in a trilogy of works to explain, and provide a theoretical basis for, what he understood to be the particularities of the British system of industrial relations and labour law.[151] In the decades since, numerous commentators have interpreted Kahn-Freund's principle as depicting the British state in by and large abstentionist terms, emphasising a limited role for the state, and thereby departing from a social democratic theory altogether.[152] In an important article published in 1998, for example, Ewing characterised Kahn-Freund as a liberal at heart.[153] In contrast to those who sought to emphasise the social democratic intent of his academic endeavours – envisaging a much more proactive role for the state in the harnessing of public law (state power) towards the achievement of particular political and economic

[148] See supra n.17 Hepple, 'Chapter 2', 37-38. That the focus, under this political constellation, was on subordinated workers within the employment relationship and not on the wider labour market is a point we will return to in the final chaprer in order to consider how we may re-fit workers' FOA to fit with existing realities of the world of work today.
[149] Ibid.
[150] See supra n.18 Dukes, 89. See also supra n.113 Kahn-Freund, 'Legal Framework'. Highly significant in this regard was the fact that collective agreements were [57-58] 'binding in honour only'; enforceable only through social, and not legal sanctions. Although these could become legally binding through incorporation into a contract of employment, this was consensual and non-compulsory, 58-61.
[151] See supra n.113.
[152] Amongst these scholars, his theory has been critiqued on the basis that it does not provide a descriptively accurate account of the historical development of labour law in Britain in the post-war period as it actively undermines the importance of state support for British labour relations. See supra n.136 Ewing, 1-31 and Roy Lewis 'Kahn-Freund and Labour Law: an Outline Critique' (1979) 8 *Industrial Law Journal*, 217–18. For an overview of critiques of Kahn-Freund's theory of collective-laissez faire generally see supra n.141 Bogg, 3-76.
[153] See Ibid, Ewing, 1-31. See also Hugh Collins and Virginia Mantouvalou, 'Redfearn v UK' *Modern Law Review* 73 (2013), 909-934. The authors suggest that in *Redfearn v UK* [2013] ECHR 1878 Kahn-Freund would have endorsed 'the strongest liberal position'.

(democratic) ends - collective laissez faire, as a principle, was in Ewing's estimation 'by definition one of political indifference, in the sense that while the state removes the impediments which prevent trade unions from operating, it is largely indifferent to the success or failure of trade union organization.'[154] On his reading, collective-laissez faire was strongly resonant with 'social liberalism'.[155]

In order to assess the role of the public and private within Kahn-Freund's theory of labour law and the merits of Ewing's characterisation of it as essentially liberal, it is instructive to turn, for comparison, to Sinzheimer, an intellectual mentor of Kahn-Freund, with an unequivocally socially democratic record.[156] Indeed, importantly, it is in respect of the role of the state that Kahn-Freund could, on the basis of the critiques outlined above, be seen to have departed most markedly from Sinzheimer's social democratic theory of labour law and his key notion of the 'labour' or 'economic constitution'. It is nonetheless clear, it is argued in what follows, that the authors did in fact share an ambition to reconcile socialism with democracy.

2.4. Hugo Sinzheimer: the role of the public in the economic constitution

According to Kahn-Freund, Sinzheimer was responsible for giving 'form and content to German collective bargaining law in particular and German labour law in general'.[157] In the aftermath of the 1918 Revolution, Sinzheimer formulated and theorised a particular role for labour law in the creation of an 'economic constitution' for the new German Republic as the key to achieving social democracy:

> 'In substance, the economic constitution referred to the various laws that allowed for the participation of labour, together with other economic actors, in the regulation of the economy: not only terms and conditions of employment, but also production—what should be produced and how. Use of the term 'constitution' here was intended to emphasize the democratic function that Sinzheimer believed that such laws fulfilled. Time and again, he emphasized that the economy was *a public and not a private matter*;

[154] Ibid, Ewing, 5.
[155] Ibid.
[156] See supra n.18 Dukes, 12-20.
[157] Otto Kahn-Freund, *Labour law and politics in the Weimar Republic* (Oxford, 1981), 75.

a sphere of activity that required to be regulated in furtherance of the common interest.' (my emphasis added)'[158]

Like the legal realists, Sinzheimer believed that '[p]rivate law concepts were not up to the task of reflecting the economic and social reality of employment relations, or of regulating those relations, or of regulating those relations justly.'[159] He, too, strongly rejected the 'bourgeois' notion of the economy as a private domain and insisted instead on its public nature. The 'consitutionalizaition' of the economy (or free market) which entailed a transferal of power from private persons to 'an economic common will', was, ultimately, subordinated to society (the political constitution) which (through state power) was to set limits on that process, in the furtherance of the social and economic conditions of its citizens – where required, to limit the economic interests of powerful economic actors.[160] State power exerted through legal regulation, then, comes to the fore as a key vehicle for realising the new economic order; '[t]he very purpose of the labour constitution was to ensure that the economy was managed in furtherance of the common good and not in the interests of any particular individuals or interest groups…. The state was not only the architect of the system of collective administration of the economy, it was also the ultimate guarantor of the public interest.'[161]

2.5. Kahn-Freund, Sinzheimer and the role of public and private law in workers' FOA

That this task would invariably require large scale regulatory upheaval and inherently held a primary role for the state as initiator, vehicle and guarantor in this process thereby appears, on the face of it, to contrast considerably with Kahn-Freund's desire that industrial relations proceed 'voluntarily', with collective bargaining figuring as a process decidedly private to the collective parties engaged in it.[162] Indeed, it is an apparently stark point of contestation, where one takes Kahn-Freund's statements, famously those like,

[158] See supra n.18 Dukes, 12-13.
[159] Ibid, 12. The 'employment relationship for example, was only formally a legal contract; substantively it was a relation of dictatorship of the economically strong employer over the economically weak employee.'
[160] Ibid, 12-32.
[161] Ruth Dukes 'Chapter 12: The liberal socialist tradition in UK labour law' In Alan Bogg, Jacob Rowbottom and Alison Young *The Constitution of Social Democracy* (Hart Publishing, 2020), 19.
[162] Ibid.

'[e]mployers and employees [should] formulate their own codes of conduct and devise machinery for enforcing them' to denote a complete absence of law.[163] '[T]he retreat of law from industrial relations and industrial relations from the law.' [164]As Dukes argues, however, 'when one delves deeper… the initial impression of foreignness wanes.'[165] Contexutalising his lifelong body of work along a number of different axes, Dukes demonstrates convincingly, throughout a number of her works, that to compartmentalise and interpret Kahn-Freund's theory as liberal is, on deeper inspection, a category mistake.[166] Differences though there may be, particularly when it comes to the *amount* of state intervention each scholar advocated, there are also fundamental affinities between the scholars which should not be overlooked.[167] Critically, for our purposes, it is on the scholars' convergence around 'the lie of the "laissez faire" economy', namely, their collective recognition of the fundamental power (property) imbalance at the heart of Britain's and Germany's capitalist labour markets respectively (the coercive role of property) and the 'fiction' of the idea of free contracting in this market, that their *shared* social democratic commitments are formed.

Kahn-Freund analysed labour law's role with reference to what was 'concealed by that indispensable figment of the legal mind known as "the contract of employment'', namely, 'the inequality of bargaining power which is inherent and must be inherent in the employment relationship.'[168] Like Sinzheimer before him, he recognised that in a laissez-faire free market capitalist economy, property-less workers were, in the words in Sinzheimer 'those who belonged to the social class that could only find a material basis for its existence by performing dependent labour'.[169] Of course, Kahn-Freund's recognition that 'the relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power' would not, in and of itself, make his

[163] See supra n.113, Kahn-Freund, 'Legal Framework', 44.
[164] See supra n.150 Kahn-Freund, 'Labour Law', 9.
[165] See supra n.18 Dukes, Labour Constitution, 23.
[166] See supra .162, Dukes 'Chapter 12. 1-22. See also supra n.117 Dukes, 341–63, supra n.141,Dukes, 220-46, supra n.18 Dukes, *Labour Constitution,* 69-91 and Ruth Dukes 'Otto Kahn-Freund: a Weimar Life' (2017) 80(6) *Modern Law Review* 1164-77.
[167] Ibid. Dukes explains Kahn-Freund's - who did himself very much identify as a social democrat, and who did, from early in his career commit much of his academic and political engagement to a socialist or social democratic pursuit - ability to at times over-emphasise the degree of independence from the state which collective parties enjoyed in Britain during the post-war consensus, and underestimate the importance of state support, could be, in part, attributed to his own experience, as a refugee who had moved to London to escape Nazism in 1993 and his inherent mistrust of the (totalitarian) state, stemming from his view of the Weimar state as suppressing the expression of collective parties interests and too interventionist in industrial relations.
[168] See supra n.34 Kahn-Freund, 18, 27.
[169] See supra n.18, Dukes, 15-16.

theory of labour law, and workers' FOA therein informed by it, socially democratic.[170] Indeed, if, as Ewing put it, the state remained 'largely indifferent to the success or failure of trade union organization' under Kahn-Freund's principle of collective-laissez faire then there appears to be a clear instantiation of Klare's 'example combining [the deployment of] both roles of the public/private distinction', that which, 'denies the crucial role of public law in establishing the "autonomous' industrial rule of law' and 'suggests that democratic political process ought not to meddle in industrial relations and should leave existing economic hierarchies in place.'[171] If collective bargaining, under Kahn-Freund's theory was indeed a 'purely private process of bargaining between two autonomous parties subject to the ebb and flow of the market' (see section 1), then it would indeed seem appropriate to mount such a critique.[172]

Yet, Kahn-Freund's theory goes further than giving collective labour a proverbial seat at the table in collective bargaining, 'assum[ing] rather than ensur[ing] equality between labour and management'as some industrial pluralists may been content to have it.[173] He recognized, contra Ewing, that in order to ensure 'a measure of economic or social security' in Britain workers' FOA must also enable and positively encourage unions to, in the words of Joeseph Fishkin and William Forbath, 'offset the political power of concentrated wealth'.[174] Indeed, it was in recognition of the *social purpose* of labour law that Kahn-Freund developed a conception of workers' FOA as an instrument of democratic socialism, according to which labour law had to secure a fundamentally public goal,

> 'The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.'[175]

[170] See supra n.34 Kahn-Freund,18. See also supra n.20 Rogers, 209.
[171] See supra n.14 Klare,1417-1418.
[172] See supra n.42 Ewing, 115
[173] See supra n.20 Rogers, 209.
[174] Joseph Fishkin and William Forbath, 'The Anti-Oligarchy Constitution' *Boston University Law Review,* (94)3, (2014), 669.
[175] See supra n.34 Kahn-Freund, 27. See also supra n.18 Dukes, 72, 85, 107. Dukes highlights the need to differentiate between his *normative* vision of collectivised labour bargaining collectively with management as the best way to ensure industrial democracy, and his theory as a description of the ongoing policy priorities and the nature of political compromises in the historical development of labour law in the UK.

For Kahn-Freund, as for Sinzheimer, then, labour law's critical purpose was to act a *as a corrective to private law* by firstly, unveiling the mass domination that 'freedom of contract' preserved and 'concealed'.[176] Crucially, for our purposes, delivering a measure of democracy within the enterprise - weaving unions into economic governance processes by establishing corporatist structures and negotiating systems – was the way in which labour law was to secure social and economic security. As Lord Wedderburn argued, that Kahn-Freund signalled approval of the 'primacy' of voluntary collective bargaining in British labour law was a strong statement of advocacy of trade unionism and industrial democracy, rather than a blanket disapproval of state intervention in industrial relations.[177] In other words, Kahn-Freund understood social democracy to be best 'asserted through consultation and negotiation with the employer and ultimately through withholding labour' and not with direct legal intervention into the *outcomes* of collective bargaining and arbitration procedures.[178] Indeed, in his 1998 article on 'Freedom of Association and Philosophies of Labour Law', Wedderburn analysed Kahn-Freund's support of workers' FOA as in line with the social democratic conception (what he termed the 'traditional analysis' of workers' FOA, see chapter 3) because, citing Kahn-Freund, the employees "submission" to the command of the employer clothed by 'figment of legal mind' that is formal freedom of contract meant that workers' FOA, 'effective combination in trade unions' was 'necessary to redress the balance.'[179]

It is well recognised that Kahn-Freund may at times have understated the importance of state support, governmental policy or priorities and employer preferences to British industrial relations.[180] This tendency has been explained by later scholars with reference variously to Kahn-Freund's own life experience, to the fact that wrote 'with a comparatist's pen', and to his eagerness to highlight those aspects of British sectoral collective bargaining and dispute

[176] See section 4. See supra n.17 Hepple, 'Chapter 2', 32. Citing a 1910 article by Sinzheimer in which he states that one of the main features of his conception of labour law was that the contact of employment is 'emancipated' from the nexus of property law.
[177] Lord Wedderburn, 'Change, Struggle and Ideology in British Labour Law' in Lord Wedderburn, *Labour Law and Freedom: Further Essays in Labour Law* (London 1995), 6-7
[178] See supra n.34 Kahn-Freund, 15. Indeed, it was no accident that the decline of the labour and welfare movement was accompanied a rise in income inequality, see Wolfgang Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (London, 2014), 110-112. 'Central to the Keynesian political economy' which, it is argued Kahn-Freund supported 'were the corporatist interest associations of labour and capital, together with the negotiating system established between them.'
[179] See supra n.22 Lord Wedderburn, 2-4.
[180] See supra n.141 Bogg, 3-76. Bogg mounts a sustained defence of the theory of collective laissez-faire. See also supra n.18 Dukes, 86, supra n.117 Dukes, 341–63, supra n.141 Dukes, 220-46 and supra n.166 and Dukes, 'Chapter 12', 1-9.

resolution which proceeded with autonomy from the state.[181] Sinzheimer, too, emphasised 'time and again', 'the importance of the autonomy of the economic constitution from the political constitution, and of the economic actors from the state… regulation of the economy was to proceed autonomously of the state insofar as was possible.'[182] Whereas, however, Sinzheimer saw the state as the 'ultimate guarantor of the public interest', Kahn-Freund felt that the idea that the state could be trusted to curtail economic power for the common good, was overly optimistic, 'tied up with Sinzheimer's hopes for the new social democracy of the Weimer Republic.'[183] Kahn-Freund was, by his own admission later in life, too optimistic in his 'implicit suggestion that collective parties could be relied upon to bargain not only in furtherance of but with the public interest in mind'.[184] His principle was nevertheless a '*fundamental inversion* of the laissez-faire, so that it was not the individual but the collective which enjoyed freedom of action in the public sphere'.[185] In legal realists terms we might say this was a fundamental inversion of private ordering, with the role of public (collective) interests and power, and categorically not formal 'freedom of contract', as the linchpin of workers' liberation; importing the fundamentally public (social democratic) principle of industrial democracy to the core of workers' FOA. In collapsing the liberal public/private distinction, in this way, Kahn-Freund recognised that to ensure workers' FOA in a capitalist economy in which labour is in a structurally disadvantaged position and in which the owners of the means of production will generally resits collective bargaining, 'it is not enough to just protect workers' freedom to choose unionization while leaving other property relations in tact.'[186] In line with the *social purpose* of labour law he recognised, and in line with the social democratic conception of workers' FOA outlined in section 1,Kahn-Freund recognised, in other words, that to eliminate workers' subornation, and to achieve a measure of economic equality and democracy, demanded 'the regulation of managerial and trade union power with a view to extending basic principles of democracy from the political to the economic sphere'.[187] 'As is quite clear from his own writing on the subject Kahn-Freund, approved 'of a range of measures designed specifically to override the wishes of the individual, as was

[181] Ibid. supra n.18 Dukes, 86.
[182] Ibid, 23-24.
[183] Ibid, 32. Sinzheimer, on the other hand, believed that what he termed 'collective liberalism' – which we can view as very similar to Kahn-Freund's principle of collective laissez faire - 'did not result in collective regulation by means of collective bargaining, but rather in the reassertion of employers' control through the "free" negotiation of individual contracts of employment.'
[184] See supra n.141 Dukes, 244.
[185] See supra n.161 Dukes 'Chapter 12', 20.
[186] Brishen Rogers, 'Libertarian Corporatism is Not an Oxymoron' *Texas Law Review* 94(7) (2016), 1623-1624.
[187] See supra n.42 Ewing, 116.

necessary in any particular case, in the name of collectivization and the furtherance of collective interests'.[188]

[188] See supra n.161 Dukes 'Chapter 12', 20-21.

Chapter 3: Workers' FOA and Challenge From Neoliberalism: collapsing the public/private distinction?

> 'The United Kingdom has never had to face that chasm between public and private law which for long denied State and other public servants in so many other countries a place in the realm of collective bargaining.'[189]

Writing in 1989, after the Conservative government had banned civil servants working at GCHQ from belonging to trade unions, Lord Wedderburn opened his 'GCHQ lecture' with this statement. This chapter examines how the 'chasm' identified by Wedderburn was 'faced' by legal scholars and governmental policy following the election to power of the Conservative Party under Margaret Thatcher (1979-90) as the 'alternative analysis' supplanted what Wedderburn termed the 'traditional analysis' of workers' FOA.[190] In doing so, it aims to assess the theoretical approach to labour law which, from 1979, replaced that explored in the preceding chapter, resulting in a dramatic shift backwards, in the directly opposite direction to the previous chapter, towards private ordering and away from state support in the field of labour relations. In order to understand how neoliberalism informed the watershed shift in thinking, and governmental policy within the UK, regarding workers' FOA this chapter begins with the notoriously difficult task of identifying and disaggregating what 'neoliberalism' means in doctrinal terms, as a political theory. As elsewhere in the thesis, a particular point of focus lies with the public/private distinction and with earlier classical liberal understandings of the appropriate roles of public and private law. The chapter begins, then, with a return to neoliberalism's theoretical predecessor, 'classic liberalism' or, in the economic sphere, economic libertarianism and considers what, precisely, can be attributed to the 'neo' of neoliberalism – how does it differ, in other words, from its predecessors? Crucially, that is, understanding the ideological significance of this, at least ostensibly, 'new' or 'revived' form of liberalism turns out to involve a closer examination of its purported collapsing of the public/private distinction.

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[189] See supra n.22 Lord Wedderburn, 1-38.

[190] Ibid, 3. The traditional analysis, to which, importantly (see chapter 2), Wedderburn cites Kahn-Freund as a primary defender, derived workers' FOA's normative basis from the idea that 'the law should always give full recognition to the inherent weakness of the individual worker *vis-à-vis* his employer, to the need for him to be organised in a union and to the need for his union to have such exceptional liberties as may be necessary to redress the balance.'

Turning more concretely, in the second section of this chapter, to the consequences of the ascent of neoliberal thinking for UK labour law, and its political effect in terms of workers' FOA, we consider Wedderburn's highly influential article on 'Freedom of Association and the Philosophies of Labour Law'.[191] There, Wedderburn considered at length the ways in which 'neoliberalism' informed and was reflected in public policy and law reform during this period, the leitmotif of which is that governmental attitude towards workers' FOA over this time, and underpinned by the writings of neoliberal apostle – Friedrich Hayek – fell under part of a wider strategy of achieving 'free' labour markets, with the result that any form of collective activity was necessarily seen as having entirely adverse consequences.[192] We see how 'the neoliberal programme that took control with the onset of globalisation',

> 're-privatised contracting for work step by step by eliminating collective intermediaries endowed with public status. In their absence, direct state rule began to restore direct market and employer rule, leaving it to employers and "market forces" lording it over re-individualised workers to put into practice their own ideas of efficiency and justice and of how to accommodate the two.'[193]

Once we have briefly summarised the reforms affecting, or more accurately eroding, workers' FOA tracked in Wedderburn's legislative history of the period we refine our focus more explicitly to his work on legal ideology, and the ideological significance of the neoliberal character which theoretically underpinned the reforms. At this point, we take particular stock of neoliberalism's presentation as a theory which departed from classic liberalism, and in particular its pledge to collapse the public/private distinction. Ultimately, it is argued that this rhetorical commitment acts as more of a smokescreen in terms of avoiding the critiques made of its liberal predecessor (as explored in the preceding chapters), than it does a firm theoretical commitment, with workers' FOA being, in large measure, restored to its libertarian conception as explored in chapter 1.[194] The result, for growing sections of the workforce, was - now 'unchecked' - growing inequality and precarity.[195] This, it is argued, serves as a powerful illustration of the 'lie of the "laissez faire" economy', both in terms of

[191] Ibid.
[192] See supra n.22 Lord Wedderburn, 7: citing, then, British Prime Minister, Margaret Thatcher's description of Hayek's three-volume work on legal and political theory as "absolutely supreme".
[193] See supra n.49 Dukes and Streeck, 7.
[194] It having, as will be argued, an almost identical *political effect* to its theoretical predecessor.
[195] See supra n.40 Moyn,147, 151: '[T]he real significance of neoliberalism has been to obliterate the previous limitation of inequality.' See also supra n.178

the fact that - despite, in line with the 'liberal' depoliticization ideal, being frequently portrayed as an absence of regulation - it required mass regulatory upheaval (revealing the realist lessons that there is nothing 'natural' or apolitical about (re)inforcing a system of private ordering)[196] and, moreover, that this had very real distributive outcomes, which augmented distributive injustice. Ultimately, it is argued, that this throws into stark relief the need for an approach to replace the neoliberal conception of workers' FOA which – in one form or another – is still ascendant today and sets the stage for the following, final, chapters which explore in more depth the need for an approach to workers' FOA which re-centres social and economic equality and democracy today.[197]

3.1. Workers' FOA and the end of the post-war consensus

By the 1970's, the apparent inability of Keynesianism to contain intractably increasing inflation and unemployment saw the postwar period of economic growth slow down and brake, ending in the 1980's in 'stagnation and slump'.[198] The economic downturn beginning in the latter half of the twentieth century resubmerged 'concrete material conflicts over the distribution of resources and power in all advanced industrial countries.'[199] 'As time passed', Dukes and Streeck explained, the 'functionalist argument'[200] for the post-war consensus lost tract,

> 'reconciling collective bargaining with a Keynesian macroeconomic responsibility for the government to provide for full employment proved to be difficult. An inherent tension or incompatibility made itself felt; a zone of conflict and uncertainty in the institutional structure of the postwar settlement. Full employment empowered trade

[196] See supra n.1 Dukes and Streeck, 58; '[t]o the extent that it is de-politicized, it is so for political purposes and by political means, which is why it remains politicized at its core.'
[197] See supra n.20 Rogers, 220.
[198] See supra n.17 Hepple, 'Chapter 2', 36-38. Hepple suggests that the 'deep explanation' for the paradox that the 'crisis of profitability' occurred during the 'golden age of labour legislation and the welfare state' may lie in the fact that demands for greater job security and welfare came from a markedly increased proportion of enfranchised workers (women as well as men), whose democratically mandated demands for equal treatment in the labour market were met 'as the price for continuing economic subordination, even when they had become less affordable.' On the increasing criticism of the post-war social democratic consensus as the 'trade-off' between 'social peace and profitability began to brake down in the 1970s' see also Robert Knox, 'Chapter 15: Neoliberalism, Labour Law and New Labour's Turn to Constitutionalism' in Michael Gordon and Adam Tucker *The New Labour Constitution: Twenty Years On* (Oxford: Hart Publishing, 2022), 323-324. For an extended discussion of the transition to neoliberalism in advanced market economies in the 1970s generally see supra n.178, Streeck, 26-31
[199] Supra n.55, Grewal and Purdy, 1-23.
[200] See supra n.1 Dukes and Streeck, 13. Functionalist logic 'characterized workers' rights, especially to collective bargaining, as the price that capital had to pay to ensure economic cooperation and social stability.'

> unions to make gains in collective bargaining and at the workplace that capitalist employers were willing and able to concede only if the state allowed for a going rate of inflation that curtailed workers' distributional gains ex post – while in the longer run it also undermined capital's willingness to invest and employ. Ultimately this encouraged the neoliberal revolution, as states and governments felt pressured by threats of capital flight in the course of "globalization" to give in to capitalist revisionism.'[201]

Focussing, more concretely, on the 'globalization' which advanced and intensified this 'revolution' in the following chapter, our emphasis in this chapter is on the 'neoliberalism' as a purportedly reinvented strand of liberalism which supplanted the Keynesian consensus towards the end of the 1970's. Spearheaded by Margaret Thatcher, the newly elected 1979 Conservative government acted swiftly to erode the power of organised labour; moving quickly, in the words of Friedrich Hayek, to strip the trade unions of their 'unique privileges' which had allowed them to 'cartelize the market through protectionist labour laws which hindered the operation of the ordinary operation of private law'.[202] 'State intervention in the economy and welfare spending declined and this was accompanied by privatization and the breaking of collective union power through legal restrictions and by crushing strikes such as that of the miners in 1984.'[203]

Emphasising the pervasive influential force of neoliberal thinking, and in particular of Hayek's liberal political philosophy, on trade union reforms throughout the 'watershed' shift in governmental policy towards industrial relations between 1979 and 1989, Wedderburn's article 'endures as a masterpiece of the period, subjecting the legislative reform of the period to a searing ideological critique.'[204] Surveying the entire pattern of trade union legislation, he identified five principal movements in the restriction of trade union power and workers' FOA, the first being the 'Disestablishing [of] Collectivism'.[205] Under this, he grouped the

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[201] Ibid.
[202] Friedrich Hayek, *Law, legislation and liberty: a new statement of the liberal principles of justice and political economy* (London: Routledge: 1982), 89–90.
[203] See supra n.17, Hepple, 'Chapter 2', 38.
[204] Alan Bogg, 'Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State', *Industrial Law Journal (London)* 45(3) (2016), 304. There are a number of possible explanations for the 'anti-trade union legislation' of the 1980s, however, this thesis, like Wedderburn's article, is especially interested in their neoliberal character. For an extended account of the multitude of reasons and policy arguments such as that overprivileged unions had their part in encouraging social disorder and the inability of collective bargaining to meet the demands of certain interest groups see supra n.32 Davies and Freedland, 423- 530.
[205] See supra n.22 Lord Wedderburn, 17.

Conservative governments erosion, from the late 1970s, of measures 'designed since the turn of the century to support collective bargaining and to prop up collective organisation.'[206] It was, then, the 'peculiarity of the British system that no further steps were needed to facilitate a process of non-recognition or even de-recognition of trade unions' after the repeal of the 'weak' duty to bargain in 1980.[207]

The second theme perceived by Wedderburn was the 'Deregulation in Employment Law', the 'creeping erosion of the floor of rights on employment protection, hand-in-hand with a gradual reduction of social security rights towards a bare floor on proof of need.'[208] Importantly, the 'specifically Hayekian characteristic', which 'hit hardest at the millions of "atypical" workers removing all but 'basic legislation on health and safety' was asserted under the 'non-existent or minimal' research evidence that such legislation is a "burden on business".[209] The 'thread of the programme [to be] unravelled' Wedderburn headed under 'Union Control and Ballots for Individuals'. In 1982 the requirement of a ballot for a closed shop introduced an 'absurdly high' majority of 80 percent of the electorate or 85 per cent of voters and placed 'non-unionism on par with, or in some ways superior to, trade unionism.'[210] Citing the then Secretary of State for Employment, Norman Tebbit, as this providing the "most comprehensive… statutory protection for non-union employees we have ever had in this country."[211] Indeed, the 1988 Employment Act abolished the closed shop altogether. Strike ballots followed a similar course beginning with the Trade Union Act 1984 which required a majority in ballot for retention of the central immunity in trade disputes.[212] So did the prohibition of unions expelling or penalising a dissident member who defies a strike order by opposing or going to work in defiance of the majority decisions to strike.[213] The 'link

[206] Ibid. Employment Act 1980, s19. This involved the rescission of the Fair Wages Resolution and various statutes ensuring minimum 'fair wages' between 1980 and 1984 the reduction of Wage Councils' powers - protecting nearly three million workers' minimum conditions - to setting one basic rate.
[207] Ibid, 18-19. Indeed the uniquely British leitmotif of 'deregulation by repeal' threads through all of Wedderburn's mentioned governmental imperatives. 'In Britain "flexibility" is taken to be a synonym for deregulation by repeal.'
[208] Ibid, 22. Whilst 'individual employment rights' are not as directly linked to workers FOA they are, it is argued, inextricably interconnected with it as protective measures which work to improve workers' social and economic security are important and work to buttress and re-enforce workers' collective rights by increasing workers' power.
[209] Ibid.
[210] Ibid, 23.
[211] Ibid. 'This was a crucial shift in 1982 away from the traditional analysis… to secure the paramount rights of the non-unionist.' On the importance of closed shops to the social democratic conception of workers' FOA see supra n.20 Rogers, 177-222.
[212] Ibid, 23-24.
[213] Ibid.

with Hayek', to explored further in the final section of this chapter, as 'group pressure, the collective organisation *itself*' become 'the target' was 'immediate' and 'strong'.[214]

The fourth 'thread' of Wedderburn themes was the method of 'Enterprise Confinement' which worked to discourage solidaristic practices amongst or across workers' organisations.[215] In 1980, secondary action and picketing away from the worker's own workplace was banned and in 1982 a trade union dispute was redefined so as to confine it to entail only disputes between workers and their *own* employer.[216] 'The common principle running through this [theme] is more than consistent with Hayek's concern that, if trade unions are to continue, they may need to be confined to the plant or to the enterprise. The principle is that the needs of the market demand the confinement of workers' influence within each enterprise… [a]t every step, the new laws do just that.' Action 'taken in solidarity with other workers outside the enterprise is banned as a sin against competition. The Hayek doctrine is embraced in all its rigour.'[217] Finally, under the heading titled 'Sanctions without Martyrs' Lord Wedderburn detailed how the 'sweeping reductions of the immunities readmitted the tides of the common law and put the union, its property and its organisation increasingly at risk'.[218] In the 1982 Act, those immunities, giving protection given to trade unions against tort liability (the 'golden formula') were appealed, subjecting all union membership and property to civil liability under the common law.[219] The culminative result of the 'step by step salami slicing' of trade union immunities (and contaminant powers), Wedderburn concluded, saw their role 'squeezed until [collective organisation] is lawful only in a narrower and narrower compass, confined within the enterprise, preferably in a friendly society role'; 'unions [to be] confined to organising the consent of workers choosing between the alternative offers of their employer.'[220]

[214] Ibid.
[215] Ibid, 27.
[216] Ibid. Employment Act 1980, s16, 17 and 1982, s13, 14 and 18.
[217] Ibid, 29.
[218] Ibid, 32.
[219] Ibid, 30-31. Employment Act 1982, s15, 16. At, 32: 'The old common law doctrines fit the bill for the new philosophy precisely because they lean, once deimmunised, in favour of property and the "individual" and against any combination or group action by individual workers.'
[220] Ibid, 11, 33.

3.2. Neoliberalism: defined

In this section we turn to 'the grand ideological architecture of the entire edifice'that overlay or underpinned Wedderburn's explanation of the legislative reforms to workers' FOA association during this period.[221] As discussed by Wedderburn with specific reference to Hayek's influence (as 'the leading author of the alternative philosophy'), we turn, that is, more squarely, to 'neoliberalism' as a political theory.[222] What did this comprise, as a doctrine of 'revived' liberal theory or ideology? What accounted, in other words, for the '*neo*' of neoliberalism?

We'll return to Wedderburn and in particular the influence of Hayek on Thatcher's government below; in the meantime, let us note that within political theory, the 'neoliberal revolution' has been understood as a revival of 'liberalism' but presented as a new set of arguments, a more sophisticated rationality, better attuned to deal with the economic downturns of the time.[223] Neoliberalism, like legal realism before it, denied the distinction between public law and private law and teaches that *all* areas of law were to be a subject and object of legislative or regulatory scrutiny. [224] Expressing neoliberal thinking in the field of law, for example, scholars from the law-and-economics school collapsed the public/private distinction as they 'sought to re-legitimate the state by limiting it to ensuring an *efficient allocation of resources,* ensuring competition and other market freedoms.'[225] The 'major difference' then, separating neoliberalism from classic liberalism, and collapsing the public/private distinction, stemmed from its view of the market not as a 'part of nature' (see chapter 1) but 'as a creature of law – not as a natural phenomenon.'[226] 'Hence, the state should not retreat from the economic sphere, but rather it 'should act positively in that sphere "so that competitive mechanisms can play a regulatory role at every moment and every point in society."'[227] To do so, it 'rests on an almost unquestioning belief in the power of markets

[221] See supra n.205 Bogg, 304.
[222] See supra n.17 Wedderburn, 7. Whilst Wedderburn does not refer to neoliberalism explicitly, we take Wedderburn's use of 'the alternative analysis' to be more or less synonymous with neoliberal thinking.
[223] This found expression in legal scholarship as the 'law-and-economics' movement, see supra n.22, Dagan and Ziphursky, 1-3, supra n.55, Grewal and Purdy, '1-4 and supra n.20 Rogers, 200-201.
[224] See supra n. Grewal and Purdy, 8.
[225] See also supra n. Rogers, 200-201. This had its origins with a group of German political and economic scholars named 'Ordoliberals" in the 1930s.
[226] Ibid.
[227] Ibid.

and the profit-motive.'[228] The 'state is [therefore] legitimate only insofar as it creates and polices systems of market ordering... [a]s an approach to policy, neoliberalism systematically favours market imperatives over egalitarian commitments.'[229] That is, any ground - other than a nonefficiency-based value, which has included in its various instantiations, fairness, overall welfare maximization, liberty and many other efficiency based values – which 'disciplines the market for planning redistribution' is deemed inappropriate.[230] The 're-privatisation of industrial relations and labour law' was, then, 'to turn policy- and law-making into essentially technical exercises, best left to experts, promising that free markets and liberated contracting would benefit all provided only that they were allowed to function "optimally".'[231]

3.3. Neoliberalism and workers' FOA, the revival of liberalism and the public/private distinction

Refracting the 'neoliberal revolution' through Wedderburn's work on legal ideology allows us to see the distinctly Hayekian character which underpinned the reform of trade unions legislation, that is, with Hayek's desire to 'constitutionalise' the 'free market order' via the framing of a 'constitution of liberty'.[232] In turn, we bring into sharp focus its political effect – as a purportedly novel way of understanding the (labour) market (collapsing the public/private distinction) and treating workers' FOA. In order to 'constitutionalise' the 'free market order' Hayek objected to all 'social legislation', characterised as any legislation which could not be justified on the basis of being the most 'efficient', such as distributional values which have their normative basis in different justification such as equality or fairness.[233] From this, Wedderburn explains, Hayek derived that '*all* regulation of work' was 'inherently bad': '[r]egulation of the terms and conditions on which workers worked was a 'burden on business' and the 'restoration of the employer prerogative and property rights' was 'a necessary part of jettisoning legal and collective controls over labour'.[234] For workers' FOA,

[228] See supra n.17 Hepple, 'Chapter 2', 40.
[229] supra n.20 Rogers, 220. For an in depth account of the neoliberal view of the role of the state see also Joshua Cohen and Joel Rogers, 'Secondary Associations and Democratic Governance', *Politics and Society* (1995), 393-472.
[230] See supra n.178 Streek, 24-25. On the grounds on which the efficiency imperative has been defended, including welfare maximization and fairness (insofar as efficiency provides this) see supra n.55 Grewal and Purdy, 10-11.
[231] See supra n.49 Dukes and Streeck, 8.
[232] See supra n.22 Wedderburn, 15-18.
[233] Ibid.
[234] Ibid, 33.

Novitz summarises, Hayek objected to any 'legislation that is designed to promote collective bargaining or protect collective action, on the basis that such laws constitute distortions of the market in a way that impinge unacceptably on individual freedom . On such reasoning, the private legal order—the common law of contract, tort, restitution, and property is the precondition for human freedom and is to be preferred to state interference and coercion through legislation. '[235] In this way, Wedderburn explained how the 'old common law doctrine' – which was increasingly returned to via the reduction of immunities – 'fits the bill in favour of property and the individual' and removed inhibitions to the "spontaneous order" for, by Hayek's 'not-up-for-debate' assertation, 'the good of society'.[236]

Returning to our discussion in chapter 1 of the doctrine of classic liberalism, the stark similarities are at once apparent. The 'private legal order' is, on this vision, too, vehemently protected from public law or concerns. So, whilst neoliberalism shared the view, with legal realists, that the market was in fact a creature of law and not a 'natural phenomenon', collapsing the public/private distinction as classically understood in the process, it did, nonetheless, view the well-functioning market as an impenetrable sphere (at least from the perspective of public-political concerns), advocating intervention in it merely in terms of 'solving market failures'.[237] The issue being that this largely (if not wilfully) ignores the fact that, as the realists were adept to emphasise, *markets are made up by a state enforced framework of contract and property rights.*[238] The idea, that is, that you can act to merely solve market, within it, already assumes the 'correct' model for the institutions legitimacy as the 'private legal order' which, as was argued under our extrapolation of 'the lie of the "laissez-faire" economy' in chapter 1, meant, in fact, 'giving almost uncontrolled power to property owners, particularly the owners of capital.'[239] Indeed, from the perspective of legal realists and labour lawyers in the previous chapters, whom sought a measure of economic and social democracy, *capitalist* labour markets – which structurally perpetuated inequality and domination – were surely 'failing', certainly not functioning, in Hayekian terms, for 'the good of society'.[240] So, whilst 'neoliberalism' does admit that the market is a creature of law,

[235] See supra n.11 Novitz, 'Chapter 5', 126.
[236] See supra n.22 Wedderburn, 33. Wedderburn repeatedly makes the point, throughout his article, that Hayek makes this argument largely by assertation alone, couched in the 'language of truth' yet unsubstantiated by research or evidence.
[237] See supra n.22 Wedderburn, 12.
[238] See supra n.20 Rogers, 201: the market is both the object and the subject of neoliberalism-both a consciously designed institution and a model for that institution's legitimacy.'
[239] See supra n.17 Hepple, 37.
[240] See supra n.22 Wedderburn, 33.

in the sense that it must be designed and configurated to ensure 'efficiency' at all points, it still assumes, ex ante, the normative position that private ordering - the 'private legal order' - in its capitalist social formulation (as characterised by private ownership of the means of production whilst the many are significantly constrained by their material circumstances), as normatively 'not up-for-debate'.[241]

Despite the intended re-legitimization of labour law, the effect, then of the 'neo', this 'more sophisticated rationality', on workers' FOA was essentially – as we explored in depth with relation to Wedderburn's analysis of trade union reforms – to erode the gains made to workers' FOA in the post-war era, as there was indeed a re-appraisal or return to the negative, individualistic libertarian conception of workers' FOA in which it initially emerged in the nineteenth century in Britain as explored in chapter 1; reduced to a right *not* to associate; with as Wedderburn concluded, legislation no longer accepting the legitimacy of collective labour power, FOA becoming 'really no freedom at all'.[242] From a comparative vantage point, Jeremy Waddington summarised, 'with the stated objective of deregulating or "freeing" the UK economy, the Conservative governments regulated trade union practice and activity on a scale not matched elsewhere in Western Europe.'[243] Indeed, then, the striking similarities with its classical labour counterpart, in terms of its clear protection and reinforcement of private ordering over and above any public-political concerns, albeit couched in new terminology, bore out in its strikingly similar approach to workers' FOA which was in large measure restored to a conception far more similar to the libertarian conception of FOA as explored in the first chapter under classic liberal political theory. That this 're-privatisation of industrial relations' required an enormous amount of legislation, requiring the state to 'turn increasingly to state regulatory measures' was, in Wedderburn's words, the 'paradox' of the Hayekian 'rhetoric of deregulation'.[244] Indeed, Wedderburn's emphasis of the need for a 'strong state' to enforce the 'general rules of just conduct underpinning the [purportedly] spontaneous order of the market' act, for our purposes, as a particularly pertinent illustration of that which the legal realists taught, of liberalism, long ago, of the "lie of the laissez-faire

[241] Ibid, 15: 'The "constitution of liberty" must deny liberty to those who do not share [Hayeks] beliefs'.
[242] See supra n.22 Wedderburn, 16, 25.
[243] Jeremy Waddington, 'Chapter 29: United Kingdom: a long-term assault on collective bargaining' in Torsten Müller, Kurt Vandaele and Jeremy Waddington, *Collective bargaining in Europe: towards an endgame* (Volume II, ETUI 2019), 605: 'Between 1980 and 1993 no fewer than nine pieces of legislation were enacted, each of which restricted trade unions' scope of action. In addition to weakening trade unions these measures promoted individual rather than collective rights and values, and encouraged employer prerogative, evidenced in the form of increasing derecognition of trade unions from the mid-1980s.'
[244] See supra n.22 Wedderburn, 15.

economy".[245] In the words of Dukes and Streeck, there was, that is, 'exactly as much politics in neoliberalism as there was in social democracy or state-administered capitalism, albeit of a different kind.'[246] Markets under neoliberalism, as 'political constructions that need to be politically defended against those disentangled by them' require 'powerful guardians', now 'now in a newly liberated condition… the state [needs] to defend itself against being taken over by social classes interested in an active interventionist state'.[247]

In comparing the 'new generation of arguments' revived by neoliberalism with its predecessor, classical economic laissez-faire, Grewal and Purdy contend, '[w]hat unites the two periods of economic liberalism is their political effect: the assertation and defence of particular market imperatives and unequal economic power against political intervention.'[248] Crucially, then, that the political effect of neoliberalism was to exacerbate distributive injustice, serves as a powerful reminder of the way in which treating the private sphere as innocuous (now in its new guise of 'market justice', and abstract appeals to 'efficiency') – and, in this way, upholding the public/private distinction - tends to 'to obscure certain regressive or otherwise oppressive features of private law and thereby shield it from scrutiny'.[249] Indeed, '[w]here there had been something like industrial democracy promoting industrial justice, there was now market justice, promising individual freedom and just-desserts while it delivered, for growing sections of the workforce, precarity and inequality.'[250] Indeed, the 'major shortcoming' of 'the neoliberal conception' of workers' FOA is, in Rogers view, that it 'disregards distributive justice.'[251] It is to the effects of this major omission on labour law and workers' FOA today that we turn in the final chapter, as markets were, by *political and legal intervention,* globally 'set free, borders opened and regulation lifted.'[252]

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[245] Ibid, 13-15.
[246] See supra n.1 Dukes and Streeck, 59.
[247] Ibid.
[248] Grewal and Purdy, supra n.55, 1.
[249] See supra n.15 Veitch, 'Chapter 8', 142.
[250] See supra n.49, Dukes and Streeck', 8. For an exploration of the causes and consequences of growth in inequality in recent decades, and what came to be called by some 'the Great Compression' generally see Thomas Piketty and Arthur Goldhammer, *Capital in the Twenty-First Century* (Harvard University Press, 2014).
[251] See supra n.20 Rogers, 220.
[252] See supra n.1 Dukes and Streeck, 59. See Paul O'Higgins, 'The End of Labour Law as We Have Known It?' in Catharine Barnard, Simon Deakin, Gillian Morris *The Future of Labour Law; Liber Amicorum Bob Hepple QC* (Oxford 2004), 289. O'Higgins notes that globalization is often presented in academic writing as political neutral, as a natural course-of events, and emphasizes that the state has played an important role here in facilitating, encouraging and even institutionalizing the expanded power and freedom of employing organisations relative to labour, the effect of which has been to increase inequality within and between nation states, greatly weakening labour to capital across the globe. See also Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization* (New York: Columbia University Press, 1996).

Chapter 4: New Labour and Workers' FOA today

> 'History shows how hard it is to re-introduce shared assumptions once they are driven off the agenda. Each step, [of the restoration of employer prerogative and property rights under neoliberalism] is intended to be far as possible irreversible, eliminating any alternative, preventing the threat of even an inadvertent-slide-into error that would, by definition, destroy the market order.'[253]

In recent decades the capacity of national labour legislation and collective bargaining to protect workers has come under increasing pressure globally; the concomitant attack on workers' FOA in the context of the UK forms the focus of this chapter.[254] The 'forces' at work, which can broadly be subsumed under the rubric 'globalisation' include cross-border mobility of capital, goods, services and (to a less significant extent) labour; the development and dominance of multinational enterprises; trade liberalization and the proliferation of multilateral and regional trade initiatives; and intense global product market and wage competition.[255] Buttressed by rapidly advancing communications, information and transportation technology, these have shifted the balance of power steadily shift away from national governments and labour unions and their ability to protect workers' FOA.[256] This is,

> 'generating unbalanced outcomes, both between and within countries. Wealth is being created, but too many countries and people are not sharing in its benefits. They also

[253] See supra n.22 Wedderburn, 33-34.
[254] See Judy Fudge 'Constitutionalizing Labour Rights in Canada and Europe: Freedom of Association, Collective Bargaining, and Strikes', *Current Legal Problems* 68(1) (2015), 267-305 on the growing disjuncture between the partial 'constitutionalization' of labour rights (such a workers' FOA), termed within political economy discourse, as 'new constitutionalism' and the process by which markets have expanded throughout the globe, anchoring the power of capital by placing property and contract rights beyond the reach of national states, as part of a larger project of the neoliberal social structure of accumulation. On this see also Eric Tucker, 'Labour Law's Many Constitutions (and Capital's Too)', *Comparative Labour Law & Policy Journal*, 33 (2012), 101-123. See also supra n.1 Novitz, 'Freedom of Association', 1 describing how the 'imperatives of global capitalism' are 'neutering' workers' FOA protection under international law, resulting in a 'diminution of its efficacy and content, with corresponding effects in domestic labour markets.'
[255] See supra n.16 Klare, 25. It is important to emphasise that such 'forces' are not disembodied; they are largely intertwined with and supported by institutional arrangements: the proliferation of international institutions which, inspired by neo-liberal values, demand deregulation, privatization, and emphasise the market, and categorically not the 'market impeding' welfare state, as the best mechanism to govern distribution. See Brishen Rogers, 'Law and the Global Sweatshop Problem' in Richard Appelbaum and Nelson Lichenstein, *Achieving Workers' Rights in the Global Economy,* (New York: IRL Press, 2016). Rogers describes the emerging international and transnational architecture or 'constitution' governing trade and investment is 'thick' and 'hard'; investor friendly policies predominate and countries, particularly those which are capital-poor, have powerful incentives to join bilateral and international treaties that create favorable conditions for foreign direct investment and entrench strong protections for investors' property and contractual rights. See also supra n.253.
[256] See supra n.255

have little or no voice in shaping the process. Seen through the eyes of the vast majority of women and men, globalisation has not met their simple and legitimate aspirations for decent jobs and a better future for their children.'[257]

The aim of this chapter is to explore the approach of 'New' Labour and successive British governments to the 'neoliberal revolution', and notion, expressed above, that the 'globalization of market forces' diminishes the possibility of challenging or diminishing distributive injustice at the national level. The critical question to be answered is why Britain's approach to labour law and workers' FOA has left the call for global (labour) justice largely unanswered, if not worsened, almost two decades later.

The backdrop for this discussion is the neoliberal revolution discussed in chapter 3 and the accompanying shift in thinking regarding workers' FOA and the public/private distinction, its re-privatization, and the shift back towards private ordering as 'the economy [became, once again] responsible to capital rather than a collectively defined public interest, was to govern society.'[258] We aim to lay out how this broad shit, from public to private law and public to private ordering in the field of labour relations, was approached by the 'third way' ideology of 'New' Labour and in the labour scholarship published during the period in office of the Labour Party under Tony Blair (1997-2007). Ultimately, the central contention of this chapter is that it was their failure to in some way reverse this shift, and to appreciate the importance of the inherently public considerations that labour law scholarship in the post-war era had at the core of its conception of labour law, that goes to the root of its theoretical inability to reverse the very real 'unbalanced outcomes' that are present in the British labour market today. It is argued New Labour's failure to re-instate (some form) of the social democratic conception of workers' FOA has left workers' FOA, both devoid of a public-political normative foundation, (industrial) democracy, and unrecovered from the 'neoliberal assault' explored in the previous chapter.[259] Today, that is, dominant conceptions of FOA continue to be shaped by 'deregulatory' policies, dramatically weakened collective bargaining and trade union organization.[260]

[257] World Commission on the Social Dimension of Globalization (ILO), 'A Fair Globalization, Making it Happen', (2004), < https://www.ilo.org/fairglobalization/lang--en/index.htm>
[258] See supra n.1, Dukes and Streeck, 34.
[259] See supra n.199 Knox, 323-324.
[260] See Tonia Novitz, 'A Revised Role for Trade Unions as Designed by New Labour: The Representation Pyramid and 'Partnership'', *Journal of Law and Society*, 29(3) (2002), 487-488. At the time New Labour were elected to power Novitz notes that British trade union membership had drastically declined from 53 per cent of

The chapter begins by examining New Labour's approach to workers' FOA, and its purportedly 'rather more nuanced vision of the labour market and labour market flexibility than its predecessors'.[261] It will consider whether and to what extent the New Labour approach did break from the dogma of neoliberalism by examining its conception of public/private distinction as made explicit in the theme of 'partnership'.[262] As presented in third way discourse, partnership would transcend 'old' (post-war era) Labour's core recognition of the conflict of interest inherent in the employment relation between capital and labour by expanding the scope of the common interests shared by workers and employers, the compatibility of 'fairness' and 'economic efficiency' – in its 'dynamism… with the public interest in mind.'[263] With reference to key legislation from the period, the chapter then argues that, despite rhetorical commitments to the contrary, New Labour did in fact largely continue the 'depoliticization' and privatization of labour law which began with the progressive crushing of organised labour with the election to power of the Conservatives from 1979.[264] Indeed, 'governments elected after 1997, irrespective of their composition, have retained the principal elements of the neoliberal programme'.[265] 'Contraction in the coverage and scope of collective bargaining, coupled with the decentralisation of bargaining were thus features of the entire period 1980 to 2017, albeit occurring at different annual rates.'[266] Indeed, the coverage of collective bargaining contracted from 31 per cent in 2010 to 26 per cent in 2016 and trade union membership within the UK fell from 26.6 per cent in 2010 to 23.2 per cent in

workers in 1979 to 27 per cent, the author argues that for New Labour to reverse this more would need to be done to support workers and trade unions in gaining recognition. Failure to head these claims has, indeed, resulted in the percipient decline of trade unions continuing today (see below).

[261] See supra n.18 Dukes, 101.

[262] See supra n. 47.

[263]Anthony Giddens, *The Third Way: The Renewal of Social Democracy* (Cambridge: Polity Press, 1998),100.

[264] See Robert Knox, 'Chapter 15: Neoliberalism, Labour Law and New Labour's Turn to Constitutionalism' in Michael Gordon and Adam Tucker *The New Labour Constitution: Twenty Years On* (Oxford: Hart Publishing), 323-324. Knox argues that 'New' Labour, in fact, remained 'impeccably neoliberal'.

[265] Ibid.

[266] Ibid. See also supra n.244 Waddington, 'Chapter 29', 605-620. On the more recent significant rise of 'right-wing populism and the effect of 'illiberal democracy' on labour law and the threat it poses to workers' FOA at a time when trade unions have been weakened by decades of economic liberalism see supra n.49 Ewing, 'Chapter 4'.

2017.[267] A trend which shows no indication of slowing, and likely accelerating, under the current Conservative governments legislative agenda.[268]

This, it is therefore argued in this chapter, serves as a powerful, current, illustration or example of, as explored in chapter 1 with reference to legal realism and the untenability of the public/private distinction, the ongoing pertinence of the need to properly examine the underlying social relations of capitalist economy, and, in particular, its distributive outcomes. For workers' FOA, this highlights the continued saliency of the social democratic conception, as the failure of New Labour to re-instate it after two decades of its erosion at the hands of the Conservatives – their failure, in other words, of the legal realist instruction to take account, to treat as political, the private sphere, the 'background rules' (concerning the distribution of capital) in Britain's capitalist free market economy - is brought into sharp focus. In short, that is, New Labour's failure to reverse the dramatic shift from public to private law after 1997, has left workers' FOA, unrestored by previous Governments, unable to adequately protect workers' in the face of new economic pressures and the 'unbalanced outcomes' highlighted by the ILO (above) at the start of this century, ever evasive, in Britain today. The social democratic conception of FOA, it is ultimately argued, is both more morally coherent and compelling as an approach to workers' FOA which re-centres and gives adequate weight to public-political concerns and values, appreciating that – as indeed by the very logic prescribed by accumulative capitalism' requires a 'pushing back' against private interests/ordering.

4.1 New Labour and Workers' FOA

After eighteen years in which the Conservative government had actively dismantled workers' freedom of association in the UK, leaving little by way of power in unions' hands, Tony

[267] See supra n.244 Waddington, 'Chapter 29', 607-608. The most noteworthy change to workers FOA came after 1997, came with the enactment of the Trade Union Act 2016, which significantly limited the right to strike and imposed significant restrictions on trade union activity, particularly regarding strike ballots on this see Ruth Dukes and Nicola Kountouris, 'Pre-strike Ballots, Picketing and Protest: Banning Industrial Action by the Back Door?' *Industrial Law Journal* 45(3) (2016) 45(3), 337-362 and supra n.141 Bogg, 299-336.

[268] The right picket peacefully has been curtailed by the creation of new police powers to prevent and put a stop to demonstrations see e.g. David Mead, 'The Police, Crime, Sentencing and Courts Bill: a Look at the Public Order Provisions' <https://uklabourlawblog.com/2022/01/21/the-police-crime-sentencing-and-courts-bill-a-look-at-the-public-order-provisions-by-david-mead%ef%bf%bc/> (January 2022) . With Conservative Government proposals to restrict the right to strike have being threatened in 2022, see e.g. Keith Ewing. 'Three attacks on the right to strike' <thttps://www.ier.org.uk/comments/three-attacks-on-the-right-to-strike/> (June 2022).

Blair, announced in the foreword to the 1998 *Fairness at Work* Labour Manifesto, that New Labour sought 'to draw a line under the issue of industrial relations law'.[269] It was to steer 'a way between the absence of minimum standards of protection at the workplace, and a return to the laws of the past'.[270] 'There will be no going back. The days of strikes without ballots, mass picketing, closed shops and secondary action are over. Even after the changes we propose, Britain will have the most lightly regulated labour market of any leading economy in the world.'[271]

Globalisation, for proponents of the third way, had rendered a return to an the 'old', social democratic conception of workers' freedom of association untenable and undesirable.[272] 'It was seen to have had the twin effect of weaking the capacity of states to deliver the Keynensian macro-economic policies adhered to the post-war era at the same time as making them undesirable in light of the need to compete on a global stage.[273] To this, labour market regulation could be made not just on the basis – as neoliberals would have it – of letting markets fun 'freely'[274], but also on their ability to ensure the 'fair' treatment of workers.[275] Under contemporary economic conditions, it was claimed 'fairness' could be guaranteed to workers through 'partnership' between workers and employers, whom shared a vested interest in the latters ability to function in as 'economically efficiently' a way as possible.[276] In line with this being a 'voluntary' relationship the law's contribution was, for the most part, to be in the background, acting to 'shape and support these new understandings and to act as a last resort to help resolve differences and disputes if they should arise.'[277] In this way, there

[269] See supra n.263.
[270] Ibid,
[271] Ibid.
[272] See supra n.264 Giddens.
[273] See supra n.18 Dukes, 92-122. See also supra n.1 Dukes and Streeck, 13: 'states and governments felt pressured by threats of capital flight in the course of "globalization" to give in to capitalist revisionism. See generally supra n.16 Klare, 'Chapter 1'. Klare describes details how deep economic integration has not meant a commensurate deepening of national labour rights protection which lead states – alive to external pressures – participate in their own 'hollowing out'. For a, then current, argument in this vein see supra n.43 White, wiv-xv which critiques the ability of 'old social democracy' to deal with the new pressures.
[274] Strongly resonant of legal realist lessons, Hepple cautions the reader when using this term see Bob Hepple, *Labour Laws and Global Trade* (Oxford Hart Publishing: 2005), 262, 'it is important '[not] to treat the market and private law of contract and property as a state of nature into which legal institutions intrude.'
[275] See supra n.47 *Fairness at Work*. See also Department of Trade and Industry, *Towards Equality and Diversity* (London 2001) in which policy objectives are stated as based not only in the interests of social inclusion and fairness, but also on a recognition of the 'dignity of the individual'.
[276] See Hugh Collins, 'Regulating the Employment Relation for Competitiveness' *Industrial Law Journal,* 30(1) (2001), 18–24. In brief, the received wisdom was that in order for employers to gain the most from their workforce – that their human capital is fully realised – they must treat them as if partners and so with fairness; benefits would then accrue to employer and employee alike in the form of increased 'competitiveness'
[277] See supra n.47 *Fairness at Work.*

may appear a certain affinity with Old Labour's approach to workers' freedom of association which encouraged voluntary settlement and agreement and was, too, reluctant to use the law in determining the outcomes of those agreements.[278] It will be remembered, however, that whilst this did have the appearance of 'abstentionism' state support and public-political concerns were of the upmost importance in supporting trade unions and a strong workers' FOA was a precondition. A closer analysis of the 'new' role that trade unions were to play in the notion of partnership and, in turn, the aims behind it indeed reveals an entirely different story; one which the statutory recognition legislation illustrates well.

The most notable extension, or prop, to workers' FOA made under New Labour was the statutory recognition procedure introduced by the Employment Relations Act 1999 and placed on a statutory footing in Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992. The details of this procedure are outwith the scope of this discussion; for our purposes it suffices to note that it was designed to make provision for a union to be recognised by an employer at enterprise level where it could be shown that a majority of the workers were in favour of it.[279] The Schedule is structured the encourage voluntary agreement between an applicant union and employer on the issue of recognition.[280] In contrast to the way in which the compulsory arbitration and extension legislation of the 1950's was drafted so as to incentivise voluntary union recognition,[281] however, the sanctions which underpin Schedule 1A amount to nothing more than a 'specification' to parties of 'the method by which they are to conduct collective bargaining.'[282]As Ruth Dukes explains 'the process of collective bargaining — meeting and holding talks —is disconnected from its objective —improved terms and conditions of employment for the relevant workers — and only the former is secured by the legislation. Voluntary agreement is promoted *as a good in itself,* conducive to the furtherance of

[278] A continuation of the post-war 'voluntarist' tradition indeed seemed to be the impression New Labour wishes to make in *Fairness at Work,* see supra n.47, *Fairness at Work*. Part 4 refers on a number of occasions to the desirability of 'voluntary' choices and agreement.
[279] Schedule A1, para 36. The CAC must be satisfied that at least 10% of the workers are members of the applicant union and that a majority 'would be likely to favour recognition.'
[280] S. Wood, 'From voluntarism to partnership: a third way overview of the public policy debate in British industrial relations'. In Hugh Collins, Mark Davies and Roger Rideout, *Legal Regulation of the Employment Relation* (Amsterdam: Kluwer Law International, 2002), 131.
[281] See R. Dukes, 'The Statutory Recognition Procedure 1999: No Bias in Favour of Recognition?, *Industrial Law Journal,* 37 (2008), 240-241: 'There is evidence that from 1940 the compulsory arbitration and compulsory effect legislation was used by the Ministry of Labour and by trade unions in a variety of ways to encourage recognition.'
[282] Ibid. 253.

flexibility and the safeguarding of business choices.' [283] This is in stark contrast to the social democratic conception of workers' FOA which, as we saw in chapter two, was promoted as the preferred means of setting the terms and conditions of employment.[284] Ultimately, individual choice is given priority over collective rights and action.[285]

4.2. Workers' FOA: a 'partnership'? New Labour and the role of the state

In the postwar decades, state support for a strong workers' FOA had been understood as imperative in Britain securing a measure of social and economic security, and strong trade union rights, critically, the ability of trade unions and workers to engage lawfully in industrial action, was pivotal to its meaningful operation. The post-war Labour Government had relied on the ability of trade unions to represent workers and manage issues in the public sphere, more specifically the distribution of power and wealth by setting the terms and conditions of employment and correcting inequalities of bargaining power between employers and employees. Workers FOA was built and developed as part of what became a flourishing neo-corporatist social democratic welfare state.[286] A strong, publicly enforced, workers FOA was indeed seen as a means (procedure for delivering) those social rights (public goods) which a free market could and would not, by way of design, deliver; 'free market capitalism had been understood to produce undesirable outcomes, which had to be remedied by the state. The state had been regarded as responsible, ultimately, for the provision of those public goods which markets could not deliver.'[287]

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[283] Ibid, 238, 265.
[284] The imbalance of power was such that only increasing workers' industrial power, b*y encouraging trade union growth and* effective collective bargaining machinery, would allow them to influence those conditions and produce fair and mutually acceptable outcomes within the public sphere (the distribution of power and wealth).
[285] For an in-depth analysis of the 'primarily individualistic' approach of New Labours industrial relations settlements, of which trade unions are not 'social partners' see Tonia Novitz and Paul Skidmore, *Fairness at work: a critical analysis of the Employment Relations Act 1999 and its treatment of collective rights*, (Oxford: 2001). See also Tonia Novitz, 'International Promises and Domestic Pragmatism: To What Extent will the Employment Relations Act 1999 Implement International Labour Standards Relating to Freedom of Association?' *The Modern Law Review*, 63 (2000), 379-393 on its incompatibility with ILO Conventions 87 and 98 on freedom of association.
[286] See supra n.18, Dukes, 111. See also chapter 2.
[287] Ibid.

'Globalisation was, [however], said to make it necessary for social democrats to reconsider what they understood to be the appropriate role for the state.'[288] Labour law was understood in postwar era as a redistributive tool with which to 'push back' against Britain's free market capitalist economy; to use New Labour's terms 'fairness' to workers would necessarily come at a cost to the ability of employers to advance their capital interests and, at least from their view, 'economic efficiency'.[289] New Labour and third way thinking, in a bid to avoid this cost – seen as unpayable under contemporary economic conditions – reframed the issue, labour law could now be understood as advancing employers' capital interests *and* providing fair treatment to workers. How, then, were 'New' Labour able to argue that they did, in fact or substance, keep the 'public interest in mind'? How, that is, were they able to 'replace the notion of conflict between employers and employees with the promotion of partnership'? On what basis, that is, did New Labour, assert *in Fairness at Work,* that 'partnership' and, specifically, 'mutually agreed arrangements for representation, whether involving trade unions or not, are the best way for employers and employees to move forward'?[290]

In this section we will answer these questions with reference to the normative underpinnings of New Labour's approach to workers' FOA, with a particular focus on how its proponents understood and manipulated the public/private distinction and the public and private dimensions of the world of work. It is here, and in particular in relation to the role of the state, that it becomes clear why, despite at least rhetorical commitment directed towards those who hoped that public-political concerns might again feature in British labour law, private ordering was to, for the most part, remain ascendant and workers' FOA was to remain substantially unaltered and eroded. It is indeed, around workers' FOA and the issue of trade union and collective labour rights, as encapsulated in their theme of 'partnership' that New Labour's concern with achieving 'the most lightly regulated labour market' after the 'neoliberal assault' to workers' FOA appears most pronounced; and their refusal to act to loosen the restrictions on workers' FOA put in place by the preceding Conservative governments is brought into sharp focus. [291]

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[288] Dukes, constitution

[289] E. Tucker, 'Renorming Labour Law: Can we Escape Labour Law's Recurring Regulatory Dilemmas?', *Industrial Law Journal,* 39, 126. Describing this 'pluralist political economy' framework as common to both Britain and North America in the post-war period.

[290] See supra n.47 *Fairness at Work.*

[291] See Paul Davies, and Mark Freedland *Towards a Flexible Labour Market: Labour Legislation and Regulation since the 1990s* (Oxford University Press, 2007), 111: emphasising the 'profound significance' of

In their book *Towards a Flexible Labour Market,* comparing Blair governments of 1997 to 2007 with the Conservative governments before them, Davies and Freeland, whilst identifying a 'a deep vein of continuity between the two',[292] described differences allowing for the conclusion that 'the Blair administration [had] a rather more nuanced vision of the labour market and labour market flexibility than its predecessors'.[293] New Labour did, that is, appreciate a public interest and role for public law in promoting 'fairness at work'. 'Instead of deregulation across the board, New had used a variety of methods — including labour deregulation, re-regulation, and 'light' regulation—to achieve the goal of greater labour market flexibility.'[294] Indeed, 'the amelioration of social problems in the areas of social exclusion and child poverty' featured as a prominent concern.[295] Flexibility was understood to offer not only a route to a more competitive economy, jobs were valued as 'the most effective route out of poverty and the most effective way of promoting self-respect and improving social welfare.'[296] For New Labour, there was, then, the 'the need for a different kind of relationship between states and markets: instead of subordinating markets to governments, states should direct their resources at promoting competitive and well-functioning markets.'[297] New Labour, when compared with their Conservative predecessors did, in this way, appreciate the need for an *increased role of the state* in directly regulating the employment relation.[298] Conferring some rights on individual workers could improve their chances of obtaining work, maximizing labour market participation, and increasing the productivity and competitiveness of the economy.[299] 'Contrary to the dogma of neoliberalism, markets did not necessarily function optimally when unregulated. Government could take positive steps to improve the functioning of markets, utilizing their "dynamism… with the public interest in mind".'[300]

'the failure of the Labour government elected in 1998 to take similar action in relation to the reforms of the 1980s', as 'mark[ing] a shift in the political consensus of the most significant kind.'

[292] Ibid, 101: It was 'accurate and appropriate to regard the Blair administration as it was to regard the Thatcher administration as having subsumed labour legislation and its associated body of social policy into a larger activity or pursuit of labour market regulation in the interests of a free and competitive market economy'

[293] See supra n.18 Dukes, 101.

[294] Ibid.

[295] See supra n.292 Davies and Freedland, 234.

[296] Ibid.

[297] See supra n.18 Dukes, 111.

[298] See for example the introduction of the National Minimum Wage Act 1999. For a critique on the basis of 'the *total absence* of a collective dimension' in its enforcement machinery see Bob Simpson 'A Milestone in The Legal Regulation of Pay: The National Minimum Wage Act 1998' *Industrial Law Journal,* 28 (1999), 31.

[299] See generally supra n.277 Collins, 18–24.

[300] See supra n.18 Dukes, 111, citing supra n.264 Giddens, 100.

The desired role of the state in the economy, in line with this thinking, is well captured by Deakin and Wilkinson's question, posed in the final chapter of their book: 'The question which we wish to address is: *what kind of normative or regulatory framework is needed in order for labour markets to function in the interests of a range of societal goals, of which efficiency is one?*'[301] The case could be made for a greater degree of legal (and therefore state) intervention – beyond the liberal notion of enforcing contract and property rights – where this would guarantee 'the effective conditions for [the labour markets] functioning.'[302] Of critical importance here is that this would only be the case where labour law – or regulatory intervention into the labour market - could, in at least some instances, work with, and not against, the interests of a competitive market. Social rights, that is, could have a mutuality constitutive interaction with the public and private sphere, they could work with (rather than against) the free market) *and* deliver other social goods towards public-political ends such as fairness. This 'mutually constitutive' approach to labour rights, and workers' FOA in particular, was made remarkably explicit in the theme of 'partnership' which was to 'replace the notion of conflict' within labour law.[303]

For workers' FOA, in line with the theme of partnership, support could be garnered where to do so would be to further efficiency *and* other social goods.[304] In a bid to transcend 'old' notions of the inherent conflict between workers and employers in a working relationship, New Labour *expanded* the scope of common interests between workers and employers, workers' FOA would be protected where it could be understood as advancing employers' capital interests *and* providing fair treatment to workers. Partnerships at work were to institutionally embody and guarantee 'fairness' to workers and 'economic efficiency' to businesses' in tandem; parties to reach 'co-operative' and 'voluntary' agreements on how best to achieve 'competitiveness'.[305] Deakin and Wilkinson recognised the existence of a conflict of interest between employees and workers with respect to distribution of profits, yet argued that 'social rights' were a means by which to create a balance of power both within the workplace and society at large, improving 'the creation,

[301] See supra n.28, Deakin and Wilkinson, 277.
[302] Ibid, 345
[303] See supra n.47 *Fairness at Work*.
[304] This in contrast to Marshall's classical conceptualisation of social rights in opposition to the market, see supra n.21 Marshall, 344: 'social rights imply . . . the subordination of market price to social justice'.
[305] See supra n.47 *Fairness at Work*, in particular at 1.8, 2.4, 6.1.

development and use of productive resources, and [preventing] their dissipation in unemployment and poverty'.[306]

Why, then, was not more done to reverse the Conservative erosion of workers' FOA with the result that trade unions were to remain very severely constrained?[307] Where collective bargaining does make some gains under the statutory recognition procedure, which formed the centrepiece of New Labour's developments in this field, why was the categorically not, as it has been in the post-war era, to set terms and conditions of employment or correct inequalities of bargaining power as it had been under 'collective laissez-faire'?

4.3. New Labour and the public/private distinction

'The focal point for realists was to show that inequalities are not the result of "nature" but are the product of social processes'.[308]

Writing over two decades after the publication of his famous article on the public/private distinction in labour law, Klare highlighted a 'characteristic silence' of the (then) current labour law scholarship and its failure to 'envision the background rules that structure the fields upon which distributive conflict plays out between capital and labour, between subgroups of workers, and between workers and other subordinated groups.'[309] Klare's concern was that the 'the lie of the "laissez faire" economy', as we might put it, presenting the market as a de-politicized and somehow natural order, was going largely unchallenged by scholars of labour law.

Here, as in the previous chapters, the realists' core critique of the public/private distinction and its tendency to present the market as ex ante, normatively not-up for -debate (under neoliberalism) or as, pre-political/legal, a part of nature (under liberalism), again, resonates strongly. As Dukes argued, in her critique of third way scholarship's interaction with the private sphere (the market), 'it was only by considering (labour) markets in abstract terms', as a 'spontaneous order… themselves the outcome of an evolutionary process', and apolitically,

[306] See supra n.28, Deakin and Wilkinson, 348–349. Social rights, that is, could have a mutuality constitutive interaction with the public and private sphere, they could work with (rather than against) the free market) *and* deliver other social goods towards public-political ends such as fairness.
[307] See supra 292.
[308] Eric Wright, 'Compass Points: Towards a Socialist Alternative', *New Left Review* 41 (2006), 95.
[309] See supra n.16 Klare, 'Chapter 1', 8.

'simply as a site where willing buyers of labour meet with willing sellers', that social rights could be viewed as 'market constituting in a way that transcended old notions of conflict between social interests and the market.'[310] Indeed, as we saw in the previous chapter, from the perspective of neoliberalism a 'well-functioning' labour market was one with almost no labour laws, workers' FOA configured as, in Wedderburn's estimation, 'really no freedom at all'. What the legal realists would again be quick to emphasise is, then, that whether a certain configuration of this is 'efficient' or 'market constituting' is 'a mixed empirical and normative question.'[311] Indeed, in his response to Deakin and Wilkinson's account of the labour market, Eric Tucker, argues, in starkly similar terms to those of the realists, that to define social rights as market constituting or constraining is a matter of perspective.[312] 'In short, what might be market constituting law in a social engineer's eyes, may very well be experienced as market regulating law for economic actors for whom such laws constitute a barrier to be overcome.'[313] Deakin and Wilkinson's account depending 'on the happy coincidence of the normatively desirable and the efficient, and on an unnamed agent capable of its enactment'.[314]

What third way discourse underplays, as Tucker points out, is the enduring importance today of 'the structural features of capitalism'.[315] In doing so, it overlooks the fact that we must understand markets not in abstract or apolitical terms but as institutions of *capitalist* political economy, 'the configuration of which can impact very differently on different sections of society.' [316] Capitalist social formulations, where appraised under neoliberalism, in a Hayekian terms, as a 'constitution of liberty', are now either ignored or overlooked in order to present a story that '*in general* the workplace is a "win-win" game, where what is good for workers is always right for the firm.'[317] In legal realist terms, we could say that legal imagination remained (after the 'neoliberal revolution') stuck within parameters systematically pre-ordained by 'the structural features of capitalism', built, Tucker reminds the reader, not on an inflexible logic embedded in capitalism but 'on definite social and

[310] See supra n.18 Dukes, 103, 116.
[311] See supra n.20, 200. See also supra n.290 Tucker, 99-138.
[312] Ibid, Tucker 124.
[313] Ibid,
[314] Ibid, 136.
[315] Ibid, 120.
[316] Ibid. See also supra n18 Dukes, 115. Dukes argues that talking about the market without mentioning capitalism is like recounting the tale of 'little red riding hood without the wolf'.
[317] Alan Hyde, 'What Is Labour Law? 'in Guy Davidov and Brian Langille, *Boundaries and Frontiers in Labour* Law (Oxford: Hart Publishing, 2006), 53.

property relations and a social logic of accumulation, which privileges the owners of the means of production over those who sell their labour power.'[318] The result, within Third way discourse, Dukes concludes, is that '[c]onflicts of interest between buyers and sellers are thereby greatly underemphasised- confined, on the face of it, to the matter of price- and the scope of common interests overstated.'[319]

Recognition of such realities, an appreciation of the underlying social relations of capitalism, and to which we might add, in Veitch's terms, 'the public role of the state in licensing such coercion',[320] reveals an 'unfounded optimism about the possibilities of reconstructing markets without confronting ['pushing back against'] the property and social relations that underlie actually existing *capitalist* labour markets.'[321] Today, over a decade after Tucker's estimation cast doubt on the 'overly optimistic' assessment typical of third way proponents as offering a win-win vision of social rights upon which to normatively base labour law, within Britain's largely unchanged capitalist economy, has added forced. Dukes, writing after the financial crisis of 2007-8, over which 'capitalism reared its ugly head again… casting fresh light on the win-win promises of the third way', certainly seems to have renewed vigour as 'income inequalities augmented under the watch of third way governments, have been stretched to new extremes.'[322] Today, faced with a fresh set of economic pressures in a hyper-globalised free market economy, capitalism seems to have once again 'reared its ugly head'.[323] A decade after the financial crisis, in an article titled 'After Neoliberalism', Dukes and Streeck, detail how 'the invisible hand of state', 'following its neoliberal withdrawal into the role of a technocratic guarantor of an allegedly non-political free play of market forces' has very easily and very quickly reappeared, under right-wing populism 'to force the market to work in favour of the national's loyal citizens to the exclusion of other, less-deserving groups.'[324] 'Growing inequality between classes, regions and countries has been accompanied by rising political discontent.'[325] Yet, 'what is categorically not on the agenda, for any right-

[318] See supra n.290 Tucker, 126.
[319] See supra n.18 Dukes, 115.
[320]See supra n.15, 'Chapter 8', 101.
[321] See supra n.290 Tucker, 102.
[322] See supra n.18 Dukes, 118.
[323] Ibid.
[324] See supra n.49, 1.
[325] Ibid, 9.

wing populist government, is a labour constitution that allows workers a collective, independent voice on their wages and working conditions.'[326]

The social democratic conception of workers' FOA, it will be recalled from chapter 2, began with an appreciation of the nature of capitalism, and the presence of conflict, 'extend[ing] far beyond the price of labour to include even the fundamental question whether or to what extent labour ought to be treated as something that is bought and sold'.[327] Both our labour law scholars, drawing on Karl Marx, recognised the coercive role of property upon, in the words of Sinzehimer 'dependent labour', as typified by Marx in that capitalist property is domination over human beings'.[328] The laissez-faire idea of private (or 'free') contracting being a product of nature was exposed by legal realists and these labour law scholars alike, as de-politicizing and, in doing so, safeguarding coercion and unfreedom in the sphere of the labour market. For both labour law scholars, following Marx, with this power imbalance or conflict 'at the center of the story rather than a naturalized labour market which produces terms and conditions of employment based on the economic value of labour services', the labour market 'is viewed as a social institution produced and shaped by class struggle' and 'workers' agency and humanity, their drive through class struggle to satisfy their unmet needs' takes centre stage in their theories of labour law.[329] The social democratic conception of workers' FOA puts this conflictual interplay, and the characteristic asymmetries of power inherent in the employment relation, at its centre, where, it is argued, they belong if workers' FOA is to restore some measure of social and economic democracy and equality to the increasingly unequal work of work today. Allowing workers' FOA the potential to, again, create and open space for 'unimpeded articulation of conflicting interests', as its 'refocused around conflict facilitation in addition to conflict adjudication.'[330]

[326] Ibid, 12. 'Statist, anti-union labourism is rampant and has resulted, everywhere, in continued or reinvigorated attacks on already weakened trade unions and collective institutions.'
For trade unions, right wing populism poses an existential threat.[326] In claiming for itself the role of champion of workers' interests, the state both usurps unions' primary function and courts the support of its membership.
[327] See supra n.18 Dukes, 116.
[328] See supra n.158, Kahn-Freund, 79. See also supra n.18 Dukes, 12-32.
[329] See supra n.290 Tucker, 209. The critical function of labour law emerges 'as a project to redistribute more of the socially produced wealth to labour and to humanize the production process, through the promotion of collective action'.
[330] See supra n.1 Dukes and Streeck, 48, 109: 'Conflict kept latent must be allowed to become manifest before it can be adjudicated, and labour law must help to bring conflict into the open before it can proceed to resolve it.'

Chapter 5: Conclusion: Re-imagining Workers' FOA Today

'Poverty in the midst of plenty does not reflect some unalterable law of nature: it reflects the existing social organization of power'.[331]

In the course of Chapter 4, key arguments of the thesis were tied together, concerning the importance of state power and public-political concerns to restore a level of distributive justice within the UK, and the need for a re-introduction of an approach to workers' FOA which re-centres social and economic equality and democracy in Britain's capitalist society. The analysis presented in Chapters 1-4 pointed to the enduring desirability of a social democratic conception of workers' freedom of association, with its appreciation of the underlying social relations of capitalism, and resolve to 'push back', as Eric Tucker put it.[332] Precisely how a re-invigorated, or re-imagined, social democratic conception of freedom of association would look today lies outside of the scope of this thesis, which aims more modestly to illustrate the ongoing importance of the realists' lesson of long ago, that we must pay close attention to the underlying social relations. Any approach to workers' FOA which aims to promote social and economic equality must keep in sight Britain's capitalist labour market, the conflicts inherent within it.

In his famous article 'Compass Points', Erik Olin Wright wrote that:

> If the particular institutional arrangements historically associated with socialism are now seen as incapable of delivering on their promises, many of the traditional socialist criticisms of capitalism seem more appropriate than ever: inequality, economic polarization and job insecurity are worsening; giant corporations dominate the media and cultural production; politics is increasingly run by big money and unresponsive to those without it. The need for a vibrant alternative to capitalism is as great as ever.[333]

[331] Eric Wright, 'Real Utopias', *Sage Journal* 10(2) (2011), 37.
[332] See supra n.290 Tucker, 122.
[333] See supra n. 310 Wright, 93.

While it is recognised that the post-war configuration of the socially democratic conception of workers' FOA looks increasingly outdated in today's world of work,[334] the thesis has aimed to show that its *normative underpinnings*, particularly its recognition, at its core, of the collective and public-political nature of the legal regulation of work and its appreciation of the important collective class and social interests - despite, being, as Wedderburn wrote in the wake of neoliberalism being increasingly 'driven off the agenda', and the challenge therein foresaw to it being - 'reintroduced' - may help it to regain a foothold within current and future debates concerning workers' rights and the contours of FOA today.[335] Indeed, 'viewed from today, the most striking success of industrial citizenship [which incorporated the social democratic conception of workers' FOA] was its narrowing of income and wealth inequalities between the poorest and richest in our societies.'[336] Agreeing with Wright that, 'the need for a vibrant alternative to capitalism is as great as ever', it is therefore argued that a re-alignment with the social democratic conception of workers' FOA, and its re-imagination to fit with the realities of work today, could form a central component in fostering a future with a measure of social and economic security in our increasingly 'unbalanced' and ever changing word of work. For workers' FOA, however, the ever-increasingly shrinking union sector is compounded by that fact that today work relations 'may be characterised above all by their impermanence and precariousness'.[337] The 'financialization of the economy'[338] has seen 'transformation of the forces of production, and a shift from the production of goods to services provide new opportunities for capitalists to escape the contract of employment and substitute other forms of contracting.'[339] As, Cynthia

[334] Its increasingly outdated design was centred upon the work regime as it developed in the 1950-70s with the rise of the factory-work system and so rested on the so-called male breadwinner model which protected regularized full-tie employment and prioritised white male (trade union membership) excluded women and immigrants. Indeed, it suffered, even then, from a number of shortcomings see supra n.1 Dukes and Streek, 14: 'Taylorism and Fordism rested on the willingness of workers to accept often extremely monotonous work in exchange for job security and the promise of "career", or at least wage, progression.'
[335] See supra n.22 Wedderburn, 33-34.
[336] See supra n.1 Dukes and Streeck, 113. See also supra n.20 Rogers, 220: 'There is powerful evidence that national bargaining by encompassing unions substantially enhances distributive justice by compressing wages and checking elites' power.' For a compelling argument of this nature see also Stuart White, 'Trade Unionism in a Liberal State' in Amy Guttmann, *Freedom of Association* (Princeton University Press, 1998), 253-254.
[337] Ibid, 7.
[338] See Judy Fudge, 'The Future of the Standard Employment Relationship: Labour Law, New Institutional Economics and Old Power Resource Theory', *Journal of Industrial Relations* 59(3) (2017), 374-392 on the shift from industrial to financial capitalism and the ways in which this has transformed the composition of contracting for work today.
[339] Eric Tucker 'Towards a political economy of platform-mediated work' *Studies in Political Economy* 101(3) 2020, 188. One result of this has been the fissured workplace – which involving firms outsourcing and subcontracting to avoid direct management of production see David Weil, *The Fissured Work Place* (Cambridge: Harvard University Press, 2014). This has been compounded by the ability of the firm to fissure

Estlund astutely analyses such developments, 'fissuring has opened up yet another gap that challenges both the collective bargaining model and other enterprise-based forms of voice: the gap between workers and the firms with the economic power to determine their wages and working conditions.'[340]

What does this mean for those concerned to ensure a renewal of workers' freedom of association, particularly, one built on social democratic commitments? One built on the concept of dependent labour and, in adverse, employer domination? Is redressing the power imbalance at the heart of Kahn-Freund's labour law still of relevance when 'many workers find themselves plagued less by employer domination than by the insecurity of having no employer at all'?[341] 'When the very concept of 'workplace' is acquiring a quaint ring in some quarters, and when gaining a voice within the workplace is looking ever more futile in others'?[342] Far from eliminating social democratic labour laws concern with social and economic equality and the re-centering of public-political concerns 'the lower-profile, less capitalized supplier firms in which a growing share of workers are employed often exercise more brutal forms of control over their workers — more brutal partly because they are less regulated — in their own effort to compete by driving down labour costs.'[343] There is, then, in fact, a significant re-enforcement of private ordering (and a squeezing out of public ordering) albeit of a much more varied and global instantiation. Indeed writing most recently in 'the context of the growth of precarious labour markets, which makes possible the extraction of surplus value through labour contracting regardless of the form the contracting takes' Tucker has, once more, located the 'profit-maximizing, imperative that is part of the DNA of capitalism'. as the 'root cause' of structural inequality, this time in the context 'of the growth of precarious and gig work'.[344] It is capitalism, Tucker argues, which 'has given unprecedented impetus to the development of the forces of production', as 'the relentless drive to expand capital stimulates the constant revolutionizing of the forces of production,

workplaces across national boundaries as new technologies have resulted in the proliferation of global production and supply chains see ibid, Fudge, 413.

[340] Supra n.62 Estlund, 823. Although, as Dukes and Streeck caution, this point can be overstated see supra n.1, 108: 'Even today, it seems to us that most types of paid work involve the exercise of at least some forms of discretion by the worker, creating opportunities for acts of aggression or sabotage.'

[341] Ibid.

[342] Ibid.

[343] Ibid, 821.

[344] See supra n.341 Tucker, 186-193.

creating the opportunity to produce greater wealth with less labour.'[345] Today, capitalism continues to 'forgo opportunities to realise its emancipatory potential', 'exacerbating inequality and exploitation precisely because it is developed and organised to facilitate capitalist accumulation.'[346]

Once again, the theoretical instruction from legal realism is key: that we must examine the existing social organisation of power, and in particular the underlying social relations of production.[347] Leaving, following Marx 'this sphere of simple circulation of exchange of commodities' and looking, as the realists would, at the underlying social relations, and mechanisms for extracting surplus value has important 'implications for strategies of resistance.'[348] The point of production may be changing given the shift away from contract of employment (driven by advancements of technologies and the potential to escape protective labour and employment laws), what Tucker dubs 'the exteriorization of the production process', but it is precisely by looking at the underlying social relations of this process, to 'differences in the ways surplus is extract and how surplus is distributed between clients and platforms' that clarifies structures of exploitation [and] provides a foundation for thinking about the possibilities of challenging them' and helps us to better 'understand the pathways of worker resistance'. What's more, allowing workers to 'resist their subordination' in fact reveals 'that change requires collective organisation and struggle, often at the point of production. For labour law, Estlund concludes that the (changing composition of work), requires 'a serious re-thinking of what kind of voice workers actually need, and whom their voices need to reach'.[349]

[345] Ibid, 187: 'Great wealth is produced, but capitalist social relations of production and structures of accumulation enable capital to extract the lion's share of socially produced wealth for itself, leaving the mass of people trapped in the realm of necessity.'
[346] Ibid, In this article Tucker outlines the extent to which capital plays an 'interior' or 'exterior' role in production. He argues that (187-188): '[t]he development of digital technologies and AI expands capital's ability to intensify wage labour while also creating new possibilities to avoid it. Under cognitive capitalism, knowledge becomes re-embodied in living labour rather than capital, so that capital can take on an increasingly exterior role in the production process.'
[347] Ibid, 185-207.Tucker argues that the extent of capital's 'exterioration; bares directly on the extent to which emergent practices of resistance achieve success. Regard is had in particular to 'differences in the ways surplus is extracted and how that surplus is distributed between clients and platforms'. Looking at the underlying social relations is critical in that it 'clarifies structures of exploitation provides a foundation for thinking about the possibilities of challenging them'.
[348] Ibid, 186.
[349] Supra n.62 Estlund, 823.

To be sure, the contours of workers' FOA in the post-war era, which presupposed a standard employment relationship and was based, at that time, on a male-breadwinner model must surely be 'newly conceived to fit with changing social and economic circumstances.'[350] 'Rights to freedom of association must be redrawn to ensure that workers are empowered to take collective action against any "employer" or other organisation that wields power over them as workers: the parent company as well as the subsidiary, for example, or the "end-user" in a labour supply chain as well as the small, local agency or gangmaster.'[351] We must not overlook the difference between this necessary institutional reconfiguration, to fit with the the changing nature of contracting for work, and the moral dimension of industrial democracy and industrial justice which 'may have become all the more important.'[352] To conclude that the social democratic concept of workers' FOA is best equipped to reconcile the inherent conflict between capital and labour in Britain today may indeed be troubling to one well versed in 'the discourse of crisis in respect of collective worker voice.'[353] It is suggested, however, that the contemporary constellation makes this case, while at once difficult, all the more crucial to construct. In a world where the difficulty of 'impos[ing] social responsibilities on national economies other than the maximization of profits in increasingly global markets and global value chains' only increases, the question of how to again center 'social responsibilities', *public concerns,* is everywhere urgent and demands answers to which post-war labour scholars, in explicitly re-ordering labour law to do so, allows us to, at least begin, to respond to.[354] In doing so, the social democratic conception of workers' FOA demands that we avoid 'the tendency to reduce labour law to a subdiscipline of private law, overlooking its role as constitutional law for contracting for work as a matter of public-political concern, one that includes class relations and class interests as well as relations between individual workers and employers.'[355] An approach which takes seriously the normative demands on and by social actors for social and economic equality against the imperative of capital accumulation must, above all, 'keep the space for conflict open by establishing a legally protected right to pursue social and human progress at work through

[350] See supra n1. Dukes and Streeck, 24, 110: A recreated industrial citizenship adapted to the conditions of today must differ from its post-war predecessor, among other things by accommodating changed life-courses and family structures. It must not pre-suppose a standard relationship between work life and social, or family, life – as it did with the male-breadwinner model – but must allow, rather, for more diversity and choice.'
[351] See supra n1. Dukes and Streeck, 113.
[352] Ibid, 107, 108: 'From a legal perspective, the need for a just normative order is not invalidated if it cannot be derived from the need to make a profit; rather, it precedes that need and conditions and contains it.'
[353] See supra n.2 Bogg and Estlund 'Chapter 7', 141.
[354] See supra n1. Dukes and Streeck, 34.
[355] Ibid, 109-110.

collective action.'[356] As has long been recognised within labour scholarship, if labour is to have political capacity within that space, 'this requires, above all, that employers be prevented from organizing work in such a way that strikes – the strongest expression of a strong collective grievance – become impossible.'[357] Trade unions, however weakened in today's fragmented world of work, remain indispensable here as the primary advocate 'for subject to [the class conflict] to make themselves heard, if need be, through industrial action… driven by the strength of countervailing powers of the sellers of that imperfect commodity, labour power.'[358]

[356] Ibid, 106.
[357] Ibid, 114.
[358] Ibid, 5-6.

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