# Debating Employment Law: Responses to Juridification

Edmund Heery

## Introduction

For much of the twentieth century, Britain possessed an essentially voluntarist system of job regulation. The terms of the employment relationship were set primarily through voluntary collective bargaining that generated non-binding collective agreements between employers and trade unions. The function of employment law within this system was 'auxiliary' (Davies and Freedland 1993: 29) in two distinct senses. On the one hand, collective employment law provided a framework that allowed voluntary collective bargaining to take place; principally by endowing trade unions with immunity from civil action by employers when they took strike action in furtherance of a trade dispute. On the other hand, individual employment law provided legal protection for vulnerable groups within the labour market who found it difficult to unionize and avail themselves of the benefits of collective bargaining. Protective legislation of this kind regulated the employment of women and young workers and was a notable feature of low wage industries, where statutory wages councils set terms and conditions of employment (Deakin and Morris 2005: 13-4).

Since the 1960s this voluntarist system has been swamped by a flood of statutory regulation (Davies and Freedland 1993: 59; Dickens and Neal 2006: 4-8). Beginning with the Contracts of Employment Act 1963, there has been a progressive juridification of the employment relationship as legal regulation has encompassed more and more aspects of the wage-work bargain (Deakin and Morris 2005: 25-6). Recent expressions of this trend in the period since the election of the Labour Government in 1997 have included the creation of a universal statutory minimum wage, regulations setting maximum working hours, the extension of anti-discrimination law to the issues of age, religion and belief and sexual orientation, and new statutory protections and entitlements to those with non-standard employment contracts, such as part-time and fixed-term workers, and those who combine paid work with caring responsibilities (Davies and Freedland 2007). There has also been a comprehensive refashioning of collective employment law, which has included legislation on trade union democracy and governance, a statutory procedure through which employers can be required to recognise trade unions, and collective rights for workers to be informed and consulted by their employers even when trade unions are absent (Davies and Freedland 2007). Much, though not all of this legislation, has originated from the European Union but, whatever its provenance, in combination it has transformed Britain's traditional system of industrial relations.

The purpose of this chapter is to examine how academic Industrial Relations (IR)[1] has responded to this progressive juridification of its field of study, arguably the most significant change in the real world of work since the establishment of IR as an academic field after the Second World War. In doing so, four issues are considered, all of which have loomed large in recent discussion of law. The first is the desirability of law and the extent to which increased regulation promotes both equity and efficiency in the employment relationship. The focus here is the contest between 'deregulationists' critical of the spread of law and their 'regulationist' opponents who believe that employment law imports both fairness and efficiency into the labour market. The

second is the efficacy of law and the degree to which statute has proved to be a potent means of shaping employment relations, especially when compared with other potential influences such as markets or the institutional matrix of different 'varieties of capitalism'. A key division here is between IR traditionalists who have long identified 'limits to the law' as a causal factor (Weekes et al. 1975) and other commentators, such as the American sociologist, Dobbin (Dobbin and Sutton 1998), who claim that even weak law can have potent effects, shaping workforce management. The third, related issue concerns the implementation of law and the role of different institutional actors in ensuring law is effectively 'mediated' at the level of the workplace (Dickens 1989: 170-1). The central question here concerns the conditions under which rights inscribed in statute have genuine effect at work, with different commentators ascribing differential significance to the mediating role of trade unions, employers, state agencies and social movement organizations. The final issue concerns the relationship of law to other means of regulating the employment relationship and the extent to which the increased volume of statute law has substituted for or complemented regulation through collective bargaining, long the centrepiece of industrial relations. For some commentators, employment law stands at the centre of a new 'employment rights regime' that, at least in the USA, has largely displaced industrial relations based on trade unions and collective bargaining (Piore and Safford 2006). Others, in contrast, have identified a new hybrid in which legal regulation is fused with collective bargaining and trade unions use the law as a resource within a post-voluntarist system of interest representation (Heery and Conley 2007).

## Desirability of Law

Opposition to the growth of employment law was once a characteristic of the political left and centre in Britain, amongst those committed to preserving the voluntarist settlement (Deakin and Morris 2005: 28). In more recent times, however, opposition has tended to come from the political right and to be articulated principally by economists of a neo-liberal stamp who claim that legal regulation inhibits the free working of the labour market and so generates a series of sub-optimal effects. Writers starting from this position typically oppose the introduction of new law and have mounted an intellectual case for 'deregulation'; that is for the removal of law or, when this is not possible, its weakening so that the legal burden on business is reduced. Where law is unavoidable, writers in this camp tend to argue that it should take the form of 'soft law', relying on voluntary adherence rather than coercive enforcement and incorporate exemptions and exclusions, such that laws do not apply to small enterprises or to young workers, those with non-standard contracts or without a minimum period of service.

The arguments of deregulationists conform to a long tradition of conservative opposition to progressive change, the core elements of which have been identified by Hirschman (1991). According to Hirschman, conservative opponents of reform have repeatedly deployed three rhetorical tropes. They have argued that reform generates perverse effects, rebounding against the very groups it is intended to help; that it is often futile, falling short of its objective of improving conditions; and that it jeopardises other desirable states and conditions such as liberty or efficiency. These same three arguments from perversity, futility and jeopardy run like red lines through the deregulationist case against employment law. They can be illustrated by the attack on

the introduction of Britain's National Minimum Wage, perhaps the most significant legal reform of the UK labour market of recent times.

The most frequent attack on the minimum wage by opponents has been on the grounds of perversity. Minimum wages, it is claimed, artificially raise the wage of low-productivity workers above the rate at which the labour market will clear and so contribute to falling demand for labour and a higher rate of unemployment. A reform of the labour market intended to improve conditions for the poor, therefore, acts in precisely the reverse way to what is intended and pushes low wage workers out of employment and into dependence on benefits (Minford and Haldenby 1999: 18; Oi 1997). Women and minorities, moreover, the very groups that well-meaning reformers most want to aid, will suffer the severest perverse effect (Forrest and Dennison 1984: 24-5).

This unintended, job-destroying capacity of minimum wages, and indeed other labour laws, is the most common but not the sole argument used by deregulationists. They have also claimed that minimum wage laws are futile, failing in their declared goal of reducing poverty and inequality. This may simply be because minimum wage law can be avoided, with workers and their employers colluding in non-compliance through cash-in-hand and other informal arrangements (Hatton 1997: 24; Hevia and Schwartz 1997: 16). Minimum wage law may provide a stimulus to the growth of the informal economy. Futility may also arise because the minimum wage is a blunt instrument for dealing with poverty. Many of its recipients, critics have pointed out, are married women or young workers living in multi-earner households whose standard of living is not related directly to their own level of earnings (Forrest and Dennison 1984: 44-7; Lal 1995). Instead of artificially raising the pay of those not in the direst need, it is suggested, the benefit system should be used to target those on lowest incomes. For deregulationists, wages should be set through the labour market, with additional, income support being made available to those whose earnings are so low they cannot experience an adequate standard of living.

Deregulationists have also deployed the rhetoric of jeopardy. Two basic types of this argument can be identified. It is suggested that employment law can jeopardise ethically desirable states or conditions; for example, by constraining the liberty of property owners or by reducing the self-reliance of workers in the labour market. It is also suggested that law imposes a burden on business, adds to costs and so reduces efficiency. In a context of a globalizing economy, this effect can result in reduced competitiveness: the sclerosis which is often said to characterize European economies when compared with more lightly regulated competitors in North America and Asia. It is the jeopardy to business efficiency that features most strongly in the argument against the minimum wage. In the debate surrounding the passage of the National Minimum Wage Act it was claimed by critics that the minimum wage would raise costs, generate inflation and reduce profits and that these effects would be exacerbated by increased earnings for the lower paid working their way up the pay structure through coercive comparisons (Minford and Haldenby 1999: 18). This magnified wage hike was seen as a major blow that threatened to halt the UK economic recovery and reduce competitiveness.

*'Regulationist' position*

Standing in opposition to the deregulationists is an equally entrenched camp that looks favourably on employment law. Adherents of this 'regulationist' position believe that labour law is essential to guarantee the just treatment of workers and serves as a counterweight within the employment relationship to the greater economic power of the employer. Increasingly, this social justice argument for law has been allied to a 'business case', which holds that regulation can enhance business efficiency, principally by providing incentives for business to upgrade human resource systems. Regulationists advocate the passing of new law to solve problems and generally are keen reformists, presenting a critique of existing law and urging it be strengthened and supported by more robust measures of enforcement. They also often argue that law should be supplemented by other pressures on business, such as trade unionism; that 'social regulation' can complement the law and make it more effective (Dickens 1999).

The arguments of regulationists are as similarly recurrent as those of their opponents and once again can be seen in the debate over minimum wages. Contrary to the futility thesis, regulationists believe that minimum wage law can help lift the working poor out of poverty and reduce inequality; they believe that law is effective (Brown 2006: 64-6). For these benefits to occur, however, minimum wage law must be effectively enforced and must be integrated with the tax and benefit system so that additional income received through the wage is not lost through higher tax or reduced benefits (Croucher and White 2007; Millar and Gardiner 2004; Simpson 2001). More generally, regulationists have tended to mount the case for employment law on the argument of 'market failure'; that unregulated business tends to produce sub-optimal effects within the labour market. Thus, the main economic justification for minimum wage law advanced by regulationists is the theory of monopsony (Manning 2003; see also Edwards and Gilman 1999). Essentially, this claims that the dominant position of employers in low wage labour markets enables them to hire labour at rates below the competitive, market-clearing wage. If wages are raised to this rate through minimum wage law the effect will be to increase, not reduce employment. Moreover, by attracting workers into the labour market the minimum wage has the capacity to lessen dependence on benefits and boost the employment rate, a primary objective of labour market policy (Davies and Freedland 2007: 182).

Another recurrent argument of regulationists is that law can exert a 'beneficial constraint' (Streeck 1997) on business, leading to the more effective management of labour with consequent gains in economic performance. In the context of minimum wages it has been argued that the 'shock' of their introduction can prompt employers to improve work and employment systems. This argument is essentially the reverse of the 'deregulationist' claim for perverse effects. Minimum wages, the regulationists argue, can have benign, unanticipated side-effects. Although introduced for social justice reasons, they can stabilise employment, reduce turnover, provide employers with an incentive to train and prompt the replacement of workers with technology (Deakin and Wilkinson 1996; Sachdev and Wilkinson 1998). Following this line of reasoning, one would expect efficiency wage gains from minimum wages and a stimulus to productivity growth.

The UK minimum wage has been in place for a decade now and there has been an extensive evaluation of its effects, which permits an assessment of the competing

claims of deregulationists and their opponents. The balance of evidence supports the regulationist case and it is notable that the neo-liberal critique of the minimum wage in Britain has more or less fallen silent in recent years. The main story that emerges from the research is as follows (see Metcalf 2008). Despite some non-compliance the minimum wage has increased the earnings of about two million low-wage workers in Britain (9.7 per cent) with a consequent tempering of wage inequality and a reduction in the gender wage gap. The broader impact on the incidence of poverty, however, has been slight (Millar and Gardiner 2004: 11). The benefit to the low-paid has not been paid for by higher unemployment and the main thrust of evidence is that the minimum wage has been neutral with regard to job growth. There is evidence of a modest positive effect on productivity in low wage sectors, much of which seems attributable to increased training. The cost of the minimum wage though has been a slight rise in prices and a slight fall in profits in these same sectors. This set of findings confounds the wilder predictions of disaster from deregulationists but also disappoints the more confident hopes of the regulationist camp[2]. The minimum wage emerges as a modest but benign labour market reform.

## Efficacy of Law

Within IR it is common to claim that law lacks efficacy when compared with other forces shaping the employment relationship. The classic statement of this position was Weekes et al.'s (1975) critique of the failed Industrial Relations Act 1971. This ambitious piece of legislation, introduced by the Conservative Government of Edward Heath was intended to provide a new framework for the conduct of industrial relations in Britain but failed almost completely and was largely repealed by Harold Wilson's incoming Labour Government of the mid-1970s. The key to its failure was that the main actors in industrial relations, trade unions and employers, declined to make use of the new legal framework and maintained their traditional pattern of interaction based on voluntary collective bargaining. The Trades Union Congress (TUC), in particular, organized a very effective boycott of most of the Act's provisions. Essentially, the parties to the employment relationship disregarded the new law and so killed it stone dead.

The failure of the Industrial Relations Act is a particularly graphic example but IR literature is replete with other cases of laws falling short of their objectives or failing to change the behaviour of workers, managers, trade unions and employers. This phenomenon often calls forth a policy response, with commentators urging the reform of law or stronger means of enforcement (Dickens 2007). Another response is theoretical. In this case, commentators claim essentially that employment law is a secondary or at best mediating influence on the pattern of employment relations, which is shaped more powerfully by other causal forces. To illustrate this response we can look at two examples, one dealing with collective employment law, which emphasises the primary influence of markets, and the other dealing with individual law, which emphasises the greater relative influence of national systems of pay determination.

In a series of articles Brown and colleagues have charted the impact of recent changes in collective employment law on the extent and quality of collective bargaining in Britain (Brown et al. 2001; Brown and Nash 2008; Oxenbridge et al. 2003). Examining principally the statutory recognition procedure, introduced by the Employment Relations Act 1999, they demonstrate that the legislation has failed to halt the decline of trade union membership and collective bargaining coverage, despite its

coinciding with a seemingly favourable context characterised by high levels of employment. They also argue that the nature of bargaining has continued to change during the period of the new law, with declining influence of unions over pay, a narrowing of the bargaining agenda and a shift towards consultation, rather than, negotiation, as the primary process through which union-employer relations are conducted. Because of the latter shift, Brown and colleagues were initially hopeful that another piece of collective employment law, the Information and Consultation Regulations 2004, would have a greater impact, diffusing consultative machinery within the UK economy. The latest analysis, however, by Brown and Nash (2008), points to failure in this regard as well, with joint consultation seemingly declining alongside bargaining.

The main explanation given for the failure of law to revive collective bargaining is the influence of adverse conditions within product markets and, indeed, in Brown's work there has been a persistent emphasis on the role of product markets in shaping employment relations (Brown 2008). The causal effect of product markets in cancelling the influence of employment law, it is argued, operates in two main ways. On the one hand, the internationalization of markets has undermined employer solidarity and led to a collapse of multi-employer bargaining in most industries, the basis for high levels of bargaining coverage for much of the 20th Century. The function of multi-employer bargaining was to regulate competition within national product markets but as the spatial reach of markets has extended beyond national borders so this function has become redundant. On the other hand, the increasing intensity of competition, including the exposure of public services to competitive pressure, has raised the incentive for employers to resist unionization and sapped the bargaining power of trade unions. This is most notable with regard to wage bargaining, where the capacity of unions to capture economic rents on behalf of their members has collapsed in the face of more intense competition. The incentive for workers to seek union protection has consequently diminished and, where unions survive, their role in determining wages has been whittled away. Increasingly, for Brown and colleagues, collective bargaining is an empty-shell and changing market forces have not only eroded bargaining coverage but reduced the significance of what was once the primary regulatory institution of the UK labour market. In the face of this deep-seated, structural change, the introduction of weak provisions to help unions secure recognition or require employers to consult with worker representatives has been insufficient to turn the historical trend.

The other example concerns equality law and the provisions that exist to secure equal pay for women. In the UK, there has been legislation to combat pay discrimination since the Equal Pay Act 1970 but despite this there is a persistent gender pay gap in the labour market and Britain has a larger gap than many other developed countries[3]. This poor relative performance in eliminating pay discrimination presents something of an empirical puzzle because public policy commitment to tackling the gender pay gap has been at least as strong as that elsewhere in Europe, especially over the last decade. Moreover, there is a seeming acceptance by many managers, at least in the corporate sector, of the business case for eliminating discrimination and the UK has a trade union movement that has increasingly pressed for action on equal pay (Colling and Dickens 2001). One response to this puzzle has been to argue that the commitment of government, employers and unions to eliminating unequal pay is shallow and that a stronger regulatory framework is required. A central demand in this

regard is for all employers to be given a statutory duty to promote pay equality through the medium of equal pay audits (Fredman 2008: 211-8; Hepple et al. 2000: 72-9).

Another response has been to seek structural explanations that can account for Britain's particular, relative failure in eliminating pay discrimination. The main structural influence that has been identified is the national system of pay determination. A number of empirical studies into the gender pay gap across national economies have shown that the gap is larger where the system of pay determination is fragmented and decisions on pay are taken primarily at the level of the enterprise (Almond and Rubery 1998; Blau and Kahn 1992; Whitehouse 1992). Where pay determination is centralized and conducted at a multi-employer level, wage inequality tends to be reduced and the earnings of the low-paid are protected by minimum rates, secured by using the bargaining strength of better-organized workers with labour market power. Because women disproportionately tend to be in lower-paid occupations, this system operates to their relative benefit and reduces the gender pay-gap, as part of a general reduction of inequality.

Equal pay law does not have this broad reach. It is based on the principle of comparison with a named comparator doing the same work or work of equal value *in the same employment*. While it can lead to the overhaul of company pay practices and the upgrading of women workers who work alongside men, vertical and horizontal segregation in the labour market mean that for many women finding a comparator is not possible. It follows, that there will always be limits to the efficacy of equal pay law. For writers, who accept the institutional explanation of pay inequality, therefore, further progress towards equal pay is 'dependent on much more than the enactment of equal opportunity legislation' (Whitehouse 1992: 83). Rubery and colleagues have called for the 'mainstreaming of gender pay equity across different levels of policy-making' (Grimshaw and Rubery 2001: iv; see also Rubery et al 1999: 250) and consideration of the impact on equal pay of a broad set of labour market policies. They are particularly concerned to maintain and strengthen centralized institutions of wage determination.

### *The strength of weak law*

While an emphasis on the 'limits to the law' has been one theme in the response to juridification, another has been to stress law's efficacy. A prime exponent of this view has been Dobbin and his colleagues who, in a series of empirical studies of the impact of American employment law, have argued that the 'employment rights revolution' of the early 1970s was a key turning point, stimulating the creation of the contemporary system of human resource management in the USA (Dobbin and Sutton 1998; Kelly and Dobbin 1999; Sutton et al. 1994; see also Edelman 1990; Piore and Safford 2006). New laws in the areas of equal opportunity, pensions and benefits and health and safety, they argue, stimulated the growth of specialist functions within business to monitor and ensure compliance with these laws, formal procedures to regulate conflict arising from law within the workplace and novel policies, such as those providing for maternity leave. The continuing elaboration of law through case law, the issuing of administrative regulations and new Congressional statutes has provided an impulse for the extension of policy and practice in all of these areas. Moreover, the empirical tests conducted by Dobbin and his co-researchers indicate that other potential sources of change, such as the feminization of the workforce or the growing size of business organizations, have

less effect than does the impact of law. For these writers, employment law is the primary causal factor generating the development of human resource systems[4].

This effect of law is puzzling, particularly in the case of the USA, where the federal state is typically regarded as weak and legal intervention in business activity is often fiercely contested. Dobbin and colleagues argue that the weakness of American law, paradoxically, has helped it exert influence. They note that the ambiguity and complexity of the law has encouraged employers to develop their own compliance mechanisms, based on specialist management functions, while the susceptibility of the law to challenge leads to its continuing elaboration and the need for continuous monitoring and adaptation. They also note that managers and other professional groups have seized on the opportunity presented by law to carve out positions within business based on interpreting the law and ensuring compliance. 'The uncertainties raised by legal reform created opportunities for ambitious personnel managers to expand their purview', note Dobbin and Sutton, 'and contributed to the rise of the HRM paradigm' (1998: 442). Once ensconced, moreover, these HR professionals 'retheorized' their role 'with business and market rationales'; that is, systems of management that were originally created to ensure compliance with law came to be interpreted as functional for the business enterprise in their own terms. This change in the justification of HR systems has helped sustain law-induced innovation over time, particularly in periods when legal enforcement mechanisms were weakened, such as the Reagan presidency of the 1980s.

There are different interpretations of the impact of juridification, therefore, which on the one hand emphasise the limits to the law and on the other stress its efficacy in comparison with other causal forces. In this case, however, the division between opposing sides is not as sharply drawn as that between regulationists and deregulationists; it is more a difference of emphasis. Thus, those who stress the limits of the law do not deny that it can have significant effects (Whitehouse 1992: 66) and those who stress its efficacy concede that its impact is patchy and contingent (Dobbin and Sutton 1998: 470). In both cases, moreover, there are arguments as to why the effects of law are contingent and variable, which in principle are complementary rather than competing. For the first camp, law's efficacy depends essentially on the degree to which legal incentives for particular forms of behaviour reinforce or contradict those emanating from markets and the institutional patterns of different national business systems. Theirs is an argument about structural complementarity and the degree to which law is integrated with other powerful forces shaping the employment relationship: 'The success of any legislation depends to a large extent on how far it goes with the grain of underlying societal changes and thereby steers rather than forces the process of adjustment' (Brown and Nash 2008: 300). In the two cases of collective bargaining and equality law the argument is that this complementarity was lacking.

For the second camp, the variable impact of law depends on the degree to which compliance is diffused across the economy. This analysis is rooted in neo-institutionalism with its central objective of explaining isomorphism across organizational fields (Edelman and Suchman 1997). Receptiveness to diffusion may partly be a function of organizations, such as their proximity to the public sphere, but is also critically dependent on the mediating role of managerial and professional groups within and across organizations who interpret the law and formulate standards of compliance. This is a more actor-centred explanation of the contingent effect of law: the

latter depends on the presence and activities of mediating agents. This process of mediation, and the involvement of different IR actors within it – the third theme in the debate over juridification - is considered directly in the next section.

## Mediating law

The concept of 'mediating' employment law was developed by Dickens (1989) and refers to processes initiated by actors within employing organizations that serve to translate legal regulations into changes in workplace practice or, alternatively, frustrate that translation. 'Positive mediation' in Dickens' terms involves ensuring compliance with the law but also guaranteeing that the objectives of law are secured; that equality law results in equal treatment, that collective rights result in joint regulation. 'Negative mediation', in contrast may involve outright flouting of the law but in many cases takes the form of seeming compliance with attempts to circumvent or blunt the effect of legislation. According to some of the American institutionalist writers discussed above, mediation by professional managers often takes this latter form. The law is used to promote the interest of the professional occupational group but the compliance procedures put in place may carry only a modest benefit for the workers they are ostensibly meant to benefit (Edelman 1990).

Debate on mediating institutions is concerned centrally with judgements of this kind and hinges on the question of which mediating institution or actor is most effective in translating law into substantive outcomes within the workplace. The default position for many IR academics in Britain is that trade unions are the most effective mediating agent. Accordingly, we first consider the nature and some evidence on the union mediating effect for individual employment law in Britain[5]. Not all commentators accept the positive, mediating effect of unions or believe it is sufficient to translate law into desirable outcomes, however, and we also consider their critique and the alternative mediating agents they have proposed.

Research on the mediating function of unions has identified three types of effect. First, trade unions alter the substantive elements of the employment contract to ensure that there is legal compliance with regulations and often provision of contractual terms that exceed statutory minima (Brown et al. 2000). Second, unions are associated with the presence of procedural rules and formal policies which are designed to ensure compliance with the law (Anderson et al. 2004; Saundry and Antcliff 2006). Partly for this reason, union members may be less likely to have recourse to external legal procedures to enforce their rights, at least for certain types of law (Hayward et al. 2004)[6]. Finally, unions are associated with a number of outcomes, which legislation was introduced to achieve. Thus, the gender wage gap is narrower in unionised establishments, there is a better health and safety record and less recourse to dismissal (Knight and Latreille 2000; Metcalf 2006).

Why do unions exercise this seemingly positive mediating effect? Surprisingly little has been written about this issue but we can suggest a number of reasons why unions positively mediate individual employment law. Part of the explanation is that unions are a primary institution advocating the introduction and strengthening of law in Britain and so are committed to making law work at the workplace. Moreover, unions educate workers about their employment rights and, through their lay and paid representatives, provide access to expertise and representation; unions have

representatives *in situ* who can interpret the law for workers. Finally, unions scrutinise employer policy and exert bargaining power to press managers to comply with law and institute policies and procedures that give effect to statutes. To a degree, there is an elective affinity between trade unionism and employment law in that both seek to regulate management decision-making and import formality into the employment relationship.

Despite the evidence pointing to a positive union effect, critics have identified two weaknesses. One flows simply from union decline. As union presence has diminished, particularly in the private sector, then there is a need to identify alternative mediating agents who can ensure employment law has genuine effect at the workplace. The argument here is simply that a declining trade union movement lacks the capacity to translate law into real change. The other criticism is more acute and identifies union failure even when capacity is present. This argument has been particularly applied with regard to equality law and rests on the claim that unions are dominated by male and majority interests and so fail systematically to mediate law framed in the interests of women and minority groups (Cockburn 1989; Virdee and Grint 1994). On this view, there is a failure of will, as well as of capacity. The solution though is the same: there is a need to identify alternative mediating agents who can better represent interests neglected by unions.

### *Mediation by non-union actors*

Three main alternatives to unions have been identified in the IR literature: human resource managers, voluntary, advocacy and identity-based organizations and government inspectors. Although the relationship to the law of HR specialists is a neglected topic in the UK, there is evidence that they perform an important mediating function. In the area of equality, for example, Hoque and Noon (2004) have shown that equal opportunities policy is likely to have more substance and to embody the spirit as well as the letter of anti-discrimination law where HR specialists are in place. This effect, moreover, is stronger than the impact of trade unions. Others have commented on the particularly significant role played by dedicated equality specialists and have identified the important part played by senior managers in supporting HR initiatives (Cockburn 1989). Notwithstanding these positive findings there is continuing scepticism about the role of HR managers in mediating employment law, with the issues of variable capacity and commitment being identified once more. HR specialists often lack power within the management team and studies of equal opportunities have observed the unravelling of positive attempts at mediation as HR lost influence to other management groups (Colling and Dickens 1998). The need for HR managers to demonstrate the business relevance of their initiatives can also affect mediation of the law, leading to a stronger commitment to action where the business case is more apparent. For example, in the area of equality, it has been argued that policy often focuses on women or minority employees in senior positions while neglecting the needs of more disadvantaged groups in low skilled or marginal employment (Richards 2001).

Another mediating institution, one that has attracted increasing interest from researchers in recent years, is the voluntary sector, composed of advisory, advocacy and campaigning organizations. One aspect of the work of this type of institution involves interpreting the law for workers. There are voluntary organizations that inform people of their employment rights, offer advice and act as advocates before courts and

tribunals. The best known institution of this kind in Britain is *Citizen's Advice*, which provides an employment advisory service to the general population through its local bureaux (Abbott 2004). Other, smaller organizations offer services dedicated to particular categories of worker, such as ethnic minorities, migrants or homeworkers. Voluntary organizations have also sought to mediate the law by targeting employers. Stonewall, the gay rights organization, for example, operates a Diversity Champions programme, which accredits employers on the basis of their adherence to a set of employment standards and which is reinforced by an award scheme that celebrates the achievements of 'gay-friendly' employers. Other organizations, concerned with older workers or the disabled, have launched similar initiatives. The background to these programmes is the introduction of equality law which outlaws discrimination against the identity groups served by bodies like Stonewall. Their aim though is to go beyond mere compliance with the law and foster voluntary adherence to best practice on the basis of the 'business case' for diversity management.

Voluntary organizations may have a number of positive features as an institution mediating employment law. They are often possessed of high legitimacy, allowing them to exert significant pressure on employers, can contact and articulate the interests of unorganized, vulnerable and other groups neglected by other representative agents, and have specialist knowledge in dealing with the needs of their particular constituency (Fine 2006; Freeman 2005; Holgate 2009; Holgate and Wills 2007). US research on living wage ordinances indicates that they have a greater impact on the earnings of low-wage workers when voluntary organizations are involved in monitoring and implementation (Luce 2004). Despite these benefits commentators have identified weaknesses in the role of voluntary organizations. It has been argued that the lack of a workplace presence reduces the capacity of voluntary organizations effectively to represent workers, confining their role to after-the-fact advocacy. Thus, Pollert (2007: 35) notes that, 'External, individual remedy is no substitute for union representation and organization which can prevent injustice, rather than attempting to rectify it in a piecemeal fashion'. Moreover, attempts to mediate the law by appealing to the 'business case' may suffer from the typical drawbacks of this approach: that only a proportion of employers are receptive, while the emphasis on working in cooperation with business militates against challenging those that are not.

A final mediating agent that has attracted renewed attention from both policy and academic commentators in recent years is government enforcement agencies (Dickens 2008). The principle of enforcing employment statutes through inspection is long established in UK employment law and is a feature of the law of many other countries. In the UK there is a variety of enforcement agencies with powers of inspection related to particular bodies of employment law. They include the Health and Safety Executive, the Employment Agencies Standards Inspectorate, the Gangmasters Licensing Authority and HM Revenue and Customs, which has responsibility for enforcing the National Minimum Wage (BERR 2008). The mediating role of these agencies incorporates two broad approaches. On the one hand, they seek to ensure that employers and workers are aware of the law. All operate dedicated helplines and webpages that both convey information and allow workers and third parties to make complaints about contravention of the law. On the other hand, they engage in targeted inspection, based on an assessment of risks. This work is backed by a range of sanctions that can be deployed against employers, including issuing notices for improvement and prohibition, prosecuting employers for breaking the law, requiring restitution to

workers and, in the case of the Gangmasters Licensing Authority, the withdrawal of a license to operate.

The value of this method is that it uses the sovereign authority of the state to mediate law and can be targeted at those employers that are least likely to comply with law; often the same employers who are beyond the reach of other mediating agents such as trade unions and professional HR managers. It also removes the burden of enforcing rights from individual workers through application to an Employment Tribunal. The latter is an enterprise fraught with risk for individuals and research indicates that many with legitimate grievances refrain from seeking to enforce their rights (Dickens 2008). The use of inspection-based enforcement, alongside individual application, has been identified as one of the main factors underpinning the successful implementation of the National Minimum Wage (Brown 2006).

Nevertheless, there are criticisms of enforcement agencies. In periods of unsympathetic government the number of inspectors has tended to fall and the adequacy of the resource committed to inspection has been questioned (Dickens 2008). Inspection, moreover, is often conducted with a light touch and, even with targeting, the risk to bad employers of facing inspection is low (Metcalf 2008). These criticisms imply a reform, not an abandoning of the system of inspection and calls for the extension and strengthening of the system have been a notable theme in recent public policy (Citizens Advice 2007; CoVE 2008). Partly in response to the latter, the Government has announced the creation of a single telephone gateway to all existing enforcement agencies and the creation of a Fair Employment Enforcement Board to integrate their activities (BERR 2008). Pressure for further action is likely. As unions have declined so commentators and pressure groups have urged the creation of a general labour inspectorate for Britain that will enforce all employment rights, in the manner of similar inspectorates in other countries (Brown 2004; Citizens Advice 2007).

Debate on the role of mediating agents attests to a significant change in the structure of interest representation within the British system of employment relations. In the past trade unions were the predominant institution of worker representation but union decline has been accompanied by the increased prominence of other institutions that offer representation to working people. There is now a more complex, multiform set of arrangements for representing the interests of people at work that embraces voluntary organizations, employer-sponsored systems of voice and state agencies, alongside trade unions. Assessments of the mediating role of these institutions often differ sharply (cf. Abbott 2004; Pollert 2007), with writers expressing clear preferences for particular mediating institutions. Much of the debate over mediation is not highly polarized, however, and many commentators are ready to concede the distinct but complementary contribution of different institutions (e.g. Brown 2004; Dickens 1999). Indeed, a major theme in academic commentary, but also in policy, is the need for cooperation between mediating agents. Thus, unions have worked with voluntary organizations to disseminate awareness of new employment rights (Heery 1998), voluntary organizations, like Stonewall, have tried to forge partnerships with professional managers through programmes like Diversity Champions and state enforcement agencies are committed to working with unions, business and voluntary organizations to improve compliance and identify bad employers (BERR 2008). Coalition, not competition, has become the watchword in mediating the law.

## An Employment Rights Regime?

The fourth and final area of debate concerns the implications of juridification for the traditional system of job regulation, based on trade unions and collective bargaining. The division here lies between those who perceive a progressive displacement of bargaining by legal regulation and those who believe that a recombination of the two methods is both possible and occurring in practice. The displacement thesis has been developed most forcefully by Piore and Safford (2006) with reference to change in American industrial relations though their argument could be applied equally well to Britain. At its heart is the claim that the New Deal system of industrial relations, founded in the mid-twentieth century and based on collective bargaining, has collapsed and been replaced by an 'employment rights regime'.

Piore and Safford's argument has three main components. First, they identify the distinguishing features of the new regime. At its heart lies a framework of 'substantive employment rights', the most important elements of which are equality and anti-discrimination statutes introduced since the early 1960s. This framework of law has stimulated the growth of HRM in American business, as professional managers have developed compliance procedures, and has generated major changes in labour market outcomes, including a narrowing of gender inequality, an enhancement of the relative position of older workers and improvements in the treatment of the disabled and ethnic minorities. Second, they identify the origins of the regime, which they locate in 'a shift in the axes of social mobilization'. The strategic actor that has created the employment rights regime is the new social movements, grounded in identities formed beyond the economy narrowly conceived; the Civil Rights movement, the women's movement and more latterly movements of older people, the disabled, carers and gays and lesbians. Within this new system, social movement organizations at national level propose law, federal and state governments legislate, HR managers ensure compliance and network groups of the same social movements mediate the law at workplace level and generate upward pressure for further change. The third element is a 'fundamental shift' in the 'nature of industrial society', which has simultaneously eroded the structural supports of the old, collective bargaining system and provided a context in which new social movements could flourish and create the employment rights regime. Among the changes identified are an erosion of the once sharp boundaries between the economic and other institutional domains, the associated collapse of the breadwinner family and the feminization of the workforce and a shift from a Fordist to a flexible economy. The new network economy, characterised by project working, sub-contracting and contingent work, provides an inhospitable habitat for trade unions but not for the new social movements, which themselves adopt fluid, network-based forms of organization.

This is a bold argument but viewed from a British perspective it has a number of problematic features. Taking the elements in reverse order, Piore and Safford exaggerate structural change in society and economy: in Britain we have a modified breadwinner economy in which men still account for the majority of working time, most workers continue to be engaged in a conventional employment relationship with traditional forms of work organization, and contingent work remains a minority phenomenon (Green 2006; Hakim 2004; Nolan and Wood 2003; White et al. 2004)[8]. They also ignore counter-mobilization by employers and state – what might loosely be described as the Reagan or Thatcher effect – in prompting the decline of the traditional, union-based system. The claim about the shift in axes of social mobilization

is also exaggerated. In the UK there has been an intertwining of the labour movement with newer social movements and the latter have colonised trade unions to a substantial degree and used them as vehicles to pursue change. The growth of equality and other substantive employment law in Britain has in many regards been driven by union pressure, as women's committees, black workers' sections and other groups have come to influence union activity (Bradley and Healy 2008: 100-117; Colgan and Ledwith 2002). Finally, while there is no denying the decline of trade union membership and collective bargaining it is not certain that the growth of substantive employment law is implicated in this development – in several European countries an extensive labour code has existed alongside high levels of union membership for much of the past century – and there is evidence that the two forms of regulation can support one another, as is indicated by the evidence on union mediation of employment law discussed above.

### *Recombination*

It is this theme of the mutual support of different methods of job regulation that stands at the heart of the opposing position in the debate; what might be termed the 'recombination thesis'. The starting point for this position is the observation, noted above, that for much of the twentieth century, UK unions were at best lukewarm about legal regulation and preferred to regulate the employment of their members through voluntary, non-binding collective agreements. From the mid-1970s, however, unions became major advocates of the extension of legal regulation in the UK labour market and, as we have seen, have also played an important role in mediating the law at workplace level. The critical point, however, is that this embrace of legal regulation has occurred alongside continuing commitment to collective bargaining and unions have devised means of fusing the two methods. For example, the development of union policy on part-time work has been marked by the sponsorship of strategic cases, the positive judgements from which have been diffused across the economy through collective bargaining (Heery and Conley 2007). In the area of equal pay unions have also used favourable judgements and the threat of further cases to open up negotiations with employers (Jackson et al. 1993: 94-5). Statutory employment rights, moreover, have often provided the agenda for collective bargaining with unions using negotiations to secure concessions above statutory minima (Brown et al. 2000; Heery 2006). In these cases, substantive law has not displaced collective bargaining but has been incorporated within it as a precedent, sanction and standard. In combination they point to British trade unions developing a post-voluntarist system of interest representation[9].

The fusion of law and bargaining has not just occurred on the union side, it has also been promoted by legislators. Since the 1970s both European and UK legislation has tied bodies of substantive law to a procedural obligation on employers to consult with worker representatives; who principally are trade unionists in a UK context. This linkage exists in health and safety law and the law on collective redundancies and transfer of undertakings. More recently, the growth of what is termed 'reflexive regulation' (McCrudden 2007) has provided further opportunities for unions to shape the application of substantive law. European statutes, such as the directive on working time, allow derogation through agreement with worker representatives, while the positive equality duties imposed on public authorities in the UK impose a requirement to consult stakeholders, including trade unions. Much of this law is weak (Jaffe et al. 2008) and does not provide a duty to bargain on employers but it nevertheless affords

an opportunity for unions to exert pressure and fuse the application of law with their established function as collective representatives of the workforce.

It is this emphasis on fusion, the creation of hybrid forms of regulation from the old and the new that is characteristic of the 'recombination thesis'. Its elements have been expressed in abstract form by Crouch (2005), who argues that endogenous change within societies (i.e. change that is not accounted for by external shocks) is invariably 'recombinant', as 'entrepreneurs' create hybrids from existing institutional forms. Institutional entrepreneurs in the labour movement and the legal system, we have argued, have acted in precisely this manner by creating hybrids from the institutions of collective bargaining and substantive, individual employment law. These hybrids are characteristic of the post-voluntarist system of interest representation that we see in contemporary Britain. This model of change, with its assumption of social complexity, is very different from that advanced by Piore and Safford. Here systems of regulation march through a succession of stages, each conforming to a common, unitary set of principles, driven by deep-seated change in the structure of economy and society. The debate about the 'employment rights regime' is ultimately therefore about social theory. Its adherents conceive of society as an expressive totality, with different institutions expressing common principles, while its opponents stress complexity; the jamming together of institutions based on competing principles in a single society.

## Conclusion

The growth of legal regulation is arguably the single most important trend in the real world of industrial relations of recent decades. From the 1960s onwards we have witnessed a progressive juridification of the employment relationship as an increasing volume of statutory employment law has set the terms on which labour is hired, performed and managed. The purpose of this chapter has been to examine how academic work within IR has responded to this development. It has done so by seeking to move beyond the perennial discussion of particular laws - how good or bad they are and what effects they generate – to examine more general areas of debate over law. Four such areas of debate have been identified: the debate over the desirability of law with its contest between rival anti- and pro-regulation positions; the debate over the limits of the law with its focus on the causal power of law as a force within industrial relations; the debate over the mediation of the law and the degree to which law is given effect by different industrial relations actors; and the debate over the relationship between legal regulation and regulation through trade unions and collective bargaining, which has polarized around the claims of displacement and recombination. Other areas of debate could have been included, such as that over the desirability of particular forms of law, such as soft law or the reflexive regulation mentioned above, but have had to be excluded for reasons of space. The underlying purpose of the chapter has been to draw attention to debate *per se*. Academic fields are composed of contending voices, competing normative and theoretical positions. They tend to be at their most vital when debate is intense and these competing positions clash. Theory is often developed to defend a particular position from attack and the best research projects launched to gather evidence against rival interpretations. In bringing to the surface debates that are often submerged, the aim has been to identify faultlines of contention and point to areas where industrial relations scholarship remains vital.

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## Notes

1. For the purpose of this chapter Industrial Relations, or Employment Relations as it is increasingly called, is described broadly as the academic study of work and employment relations (Frege 2007: 1). In what follows there is consideration of the work of human resource management scholars, employment lawyers, industrial sociologists and labour economists as well as those who unambiguously fall under the IR heading.

2. As a consequence, regulationists have entered reform-mode and called for the strengthening of the minimum wage (Simpson 2001). There has also been the emergence of a 'living wage' movement, based around a more ambitious wage target (Holgate and Wills 2007).

3. In 2006 women's hourly average earnings in the UK were 82 per cent of those of men and the UK ranked 18th out of a list of 28 European countries in terms of degree of success in narrowing the gender pay gap (Carley 2007; see also Grimshaw and Rubery 2001: 15-9).

4. Edelman contrasts her explanation of change in HR systems that identifies the legal environment as the central causal mechanisms with others that stress the contribution of HR procedures to business efficiency or worker control: 'The theory...considers the legal environment a central determinant of organizational change; it emphasizes legitimacy and survival over efficiency and control as the imperatives that define the form of organizational governance' (1990: 1401-3).

5. Our focus is on individual employment law but it has also been argued that union mediation is important to ensure the translation of collective employment law. The effective functioning of works councils, for example, may rest on the degree to which they are 'captured' by trade unions who offer training and support to union members who stand as works councillors (Jenkins and Blyton 2008: 348).

6. Although unions may help resolve employment disputes without recourse to formal legal procedures they can also have a contrary effect. Unions inform people of their rights and can assist them in taking cases and this support is particularly important where the law is complex and difficult to use. In the area of discrimination, for instance, applicants to tribunals in the UK are more likely to be union members (Peters et al. 2006).

7. Partly to rectify this problem, identity-based organizations, such as Stonewall, are keen to establish network groups in the organizations employing their members. The effectiveness of these networks in positively mediating the law, however,

remains uncertain. Most are dependent on the employer and operate under an obligation to cooperate with management (Healy and Oikelome 2007: 47-8).

8. This is not to say that no significant changes have occurred in the structure of the family, economy, enterprise or workforce. Among the fundamental changes that have occurred has been the globalization of economic activity, the shift to services, the intensification of work, the rise of part-time employment and inward migration, and widening income inequality. It is rather that the changes identified in Piore and Safford's 'grand narrative' are not as great as they claim.

9. A less positive assessment of trade union use of the law is offered by Colling (2006). Nevertheless, his account includes examples of unions initiating strategic cases to set important precedents and of law being used in negotiations as a means to secure concessions from employers.

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