Repositioning Labour Law

Research Program of the Hugo Sinzheimer Institute, 2013-2016

1 General description of the program

During a century of industrialization starting from the last quarter of the 19th century, a perceived political need to order labour relations has materialized into relatively autonomous systems of labour law, taking the legal shape of regulation at the level of the nation state, legitimized by a notion of compensation of workers' dependant, unequal position in what was legally considered to be a contractual relation. In several states, including The Netherlands, regulation allowed for partial self-regulation of labour relations at the level of organized negotiations between employers' and workers' organizations. Nowadays all of the suppositions that sustained labour-law-as-it-was have to some extent been challenged.

The aim of the research program is to contribute critically to a repositioning of 'labour law' in a world in which other levels (European, international) and other domains (competition, company law) of regulation, and other methods than regulation by the state (market, self-regulation) tend to have an increasing impact on labour relations, even to the extent that a reassessment and reconceptualization of the goals and basic tenets of labour law and thus a reassessment of its identity may be required. Research will analyse the impact of new labour market policies, of internationalization and of developments in other fields of law on the 'legal order of labour'. The novelty of this research program is that it will not only critically evaluate the results of these developments in terms of labour law's declared tenets of guaranteeing autonomy, structuring labour relations and of protecting workers, but also *vice versa* use them to work towards a refinement, reformulation, or revision of these tenets themselves.

1.1 Labour law's tenets

The 19th-century liberal project in labour relations aimed at liberating them from local and trade regulation by contractualizing them, as part of a civil codification at state level. A subsequent increasing inequality in industrial relations has been the basis of a mobilization of workers that changed the balance of power, resulting in legislation, starting in the last quarter of the 19th century, by which the 'freedom of contract' as to labour contracts was restricted and labour conditions were partly delimited by the state. While the liberal project had started by a relentless transfer of autonomy to private actors, during the 20th century 'protection of workers' became the typical argument to draw back from that accomplishment. Legislative measures included (a) directly restrictive, substantive rules, (b) procedural rules, intended to raise the bargaining power of workers' organizations and to contribute thereby indirectly to an improvement of the conditions of employment, (c) a social security system to insure dependent workers against risks of labour participation, and (d) a legal

framework for the provision of labour supply services and other measures to improve the functioning of a labour market. Gradually a field of state regulation developed, increasingly exceeding the boundaries of civil law, which in the course of the 20th century came to be defined by its proponents as the domain of 'labour law'.

Three, partly conflicting tenets are thus characterizing this field of labour law: (1) granting individual *autonomy* to all those active 'on the labour market' to interact and freely make contracts; (2) facilitating these actors by legal means, thus establishing *order* in their ways of interacting and contracting; and (3) offering *protection* to workers, compensating by legal means for substantial inequalities in their bargaining position towards employers.

1.2 A fourfold challenge

'Classical' labour law supposed that its aims could be realized by (1) creating a relatively *autonomous* domain of law, (2) building on mainly substantive *regulation* of the 'normal' contract of employment (3) at the level of the nation *state*, this regulation being (4) legitimized by the political need of *protection* of workers. In the course of the last decades all of the former suppositions have to some extent been challenged.

(1) Labour relations are increasingly not governed by labour law alone. Bankruptcy law interferes with protection of workers (note that in The Netherlands in 2011 no less than half of involuntary terminations of labour contracts were a consequence of bankruptcy), as does competition law (f.i.: collective agreements of independent workers are being challenged as cartels, while large companies one-sidedly enforce a collective 10-percent reduction of their tariffs). The boundaries between labour law and company law are blurring, both in the sense that labour law is sacrificing, and that company law is incorporating elements from the other side. In the political process labour regulation is increasingly subordinated to socio-economic objectives, legal to economic rationality.

(2) Next to, and partly instead of substantive regulation, other ways of structuring labour relations have been, and are being used, tried, or enforced. Formal, instead of substantive regulation ('leave it to the social partners'), self-regulation (certification, 'Corporate Social Responsibility'), financial incentives (employers' prolonged duty of payment of wages in case of disability) and other market mechanisms. Besides, actual contracting practices are moving away from the 'normal' labour contract towards temporary and flexible forms and towards hiring independent workers. The once central position of the substantively regulated employment contract is increasingly giving way to a plurality of contractual forms of engaging labour.

(3) Partly in competition with national regulation, international and in particular European regulation has been, and still is extending its force over a labour market that is increasingly no longer defined by national boundaries. Not only the amount of European regulation is increasing, but also the amount of boundary-crossing labour, both resulting in a restriction

of the hold that national legislators used to have on a territorially or personally defined field of labour relations and in an extension of the relevance of European instruments of governance. A formerly to a large extent national system of law is thus being superseded by a less systematic, multi-level plurality of jurisdictions.

(4) Labour law's central tenet of 'protection' has been, and is being challenged as partly outdated and overly paternalistic. It has been argued that law should bring order, but stop imposing substantive restrictions, as currently well-informed citizens should legally be considered to be capable of providing for their own position in negotiations with employers. The challenge of the central legitimating notion of 'protection' raises the question whether the three central tenets of labour law, and their interrelation, ought to be reconsidered and refined or revised.

All of these developments challenge the former concept of an autonomous 'labour law', necessarily based on state regulation for the sake of protection of workers. These challenges are no reason to sorrow, but they urge us to reassess the concept of 'labour law' as well as its present tenets, methods and instruments.

1.3 Three thematic fields

This fourfold challenge is turned positively into three thematic fields of research and one guiding question. The thematic fields concern different aspects of developments that are putting labour law in perspective; the guiding question specifically asks for labour law's (lost? new?) identity, in light of these developments. The three thematic fields of research are:

A. Multi-level governance of labour relations;
B. Repositioning labour law in relation to adjacent fields of law;
C. Instruments of governance of labour relations.

The guiding question is whether, how and to what extent labour law and its central tenets ought to be redefined, in light of the developments in these fields?

The thematic fields of research are not mutually exclusive, as far as concrete research project are concerned; they highlight different aspects of developments which may be closely interrelated. The thematic fields will now be outlined more extensively in § 2.1 to 2.3. We return to the guiding question in § 2.4.

2 Thematic fields and research questions

At the most general level, this research program focusses on the following questions. In what ways and to what extent has labour law's position as a relatively autonomous field of law, based on a practice of regulation at the level of the nation state, and legitimized by a notion of compensation of workers' dependant and unequal position, been challenged by socio-economic developments (change of the social relations on which labour law had been

based) as well as political and legal developments (increased importance of other modes of governance and of international and adjacent fields of law)? What are the consequences of these challenges for (politically) finding a new fair balance between (substantive / procedural) regulation and other modes of governance, and for a reassessment and repositioning of labour law, including a reassessment and a possible reformulation of its basic tenets? The themes and research and questions are further developed below.

2.1 Multi-level governance of labour relations (thematic field A)

International and in particular European regulation has been, and is extending its force over a labour market that is increasingly no longer defined by national boundaries. National governments are partly superseded in regulative power by supranational political organizations and the influence of, in particular, organizations at the European level on labour relations is increasing, at the same time that the labour market is becoming more 'European', involving larger flows of workers from one to another country. The shift to the European level implies a shift in the characteristics of regulation: in view of the European focus on a common market, the balance between the three basic tenets of labour law, distinguished above, is drawn up differently in European, compared to national regulation. European employment policies, implemented by way of the 'Open Method of Coordination', are defining objectives in terms of degrees of labour participation to be reached. Legal security of workers tends to be subordinated to 'flexibilization' of the labour market as a presupposed means to realize this level of participation. With regard to all kinds of boundary-crossing types of deployment of labour, not only national governments and institutions, but also social partners find part of their regulatory objectives defeated by European competition rules. These issues are thus in part closely allied to those of the second thematic field (see below at § 2.2).

The governance of labour relations is thus shifting from a predominantly nationally regulated institution towards a less coherent, multi-level system, comprising at least six levels: individual contracts, collective agreements, state regulation, international 'private' regulation (boundary-crossing agreements on labour conditions between organizations: employers' and workers' but also sector organizations or NGO's; hybrid public-private standard-setting), European regulation, supra-European international regulation (ILO).

Research questions in this thematic field are:

(a1) What shift is taking place in the levels at which labour relations are being regulated?

(a2) What consequences does this shift have for the possibilities of state regulation and of self-regulation by the social partners and other organisations at the national, sectoral, and European level?

(a3) In what way could current problems regarding valid legal regimes as to boundary-crossing types of deployment of labour be solved?

(a4) In what way is the balance between economic and social objectives being drawn up, what are its consequences for the balance between the three central tenets of labour law and how should, in view of these consequences, labour law reposition itself?

2.2 Repositioning labour law in its relation to adjacent fields of law (thematic field B)

In the course of the era of industrialization, the shifting balance of power between workers, employers, and nation state resulted in a relatively autonomous legal field of 'labour law', by way of legislation at state level combined with self-regulation by the social partners. This - for some time rather self-evident - autonomy has been, and is being contested by other, adjacent legal fields, in particular: company law, competition law, and bankruptcy law. Among the rules that effectively govern labour relations are more and more rules that have been defined within these adjacent legal fields. This development is in part due to the Europeanization of regulation (see § 2.1). Not only fields of private law are relevant here, however: the transfer of social security arrangements from the public to the private sphere has substantially changed the character of legal protection of employees.

Research questions in this thematic field are:

(b1) What developments are taking place in the rules that govern labour relations, relating rules of labour law to those of other, adjacent legal domains (company -, competition -, bankruptcy -, administrative law)?

(b2) In what way could contradicting elements of the rules regarding the position of workers be resolved?

(b3) How is, in view of the central tenets of labour law, the relation between these domains to be reassessed and labour law's position to be redefined?

2.3 Instruments of governance of labour relations (thematic field C)

In the wake of neoliberalism's taking a firm root in the fiscal crisis of the state in the course of the 1980s, governments started distancing themselves from the regular, regulatory mode of governance, and had recourse to other policy instruments, in particular based on market-like mechanisms. As to the field of labour, in particular social security and re-employment arrangements have been reformed in a way that reveals a large confidence in the effects of financial incentives. Governments' turn to neoliberal policies meanwhile does not appear to detract from their pursuit of a hold on other stake-holders and citizens. The EU system of 'employment governance' comprises an increasingly diverse set of policy instruments with different legal statuses (Directives, Fundamental Social Rights, OMC, ESF; c.f. Kilpatrick 2005, ter Haar 2012).

At the same time the formerly central position of the substantively regulated employment contract has been allowed to give way to a plurality of contractual forms of engaging labour. What used to be strict boundaries of what constitutes 'an employee' have become more permeable, 'independent' or 'self-employed workers' are increasingly doing work that used to be done by employees in 'jobs'. The set of persons to be covered by labour and social security law has become a political issue. Finally, new instruments of governance are being introduced in fields like health & safety regulation (f.i. certification, sectoral covenants, CSR).

Research questions in this thematic field are:

(c1) What developments have been, and are taking place in the modes of governance of labour relations, in particular with regard to the legally consolidated instruments of steering developments in the fields of labour relations, social security and (re-)employment services?

(c2) What experiences have been gained in using these legal instruments of governance and what can be learned from them with regard to the objective of striking a fair balance between the different instruments to be used?

(c3) How are, in view of the central tenets of labour law, the uses of these instruments and their effects to be evaluated?

(c4) To what extent and in what ways is labour law consequently to be repositioned and does a repositioning of labour law include drawing anew the boundaries of the circle of persons to be bound by protective regulation?

2.4 The guiding question: reassessing and repositioning labour law

On the one hand, labour law's central tenet of 'protection' has been, and is being challenged as partly outdated and overly paternalistic. It is argued that law should bring order, but stop imposing substantive restrictions, as currently well-informed citizens should nowadays legally be considered to be capable of providing for their own position in negotiations with employers. 'Protection' is thus contested as a legitimate objective of labour law.

On the other hand contractual autonomy has been, and still is being challenged as a legal model that is only partly fitting to the peculiarities of lasting personal involvement that labour relations tend to imply (Supiot 2001). 'Order', finally, is increasingly treated as something that markets may better provide for than law.

The central questions of repositioning labour law, therefore, are:

(d1) Has the relation between (1) the basic tenets of labour law and (2) the characteristics of the labour relations to which labour law should apply, changed to such an extent that these tenets have lost or changed part of their significance?

(d2) If so, then in what sense, and to what extent ought the three central tenets of labour law, and the way they are interrelated, to be reconsidered, and refined or revised?

(d3) What, finally, does this reconsideration, refinement, or revision mean for the identity of 'labour law'?

3 Methods

The pluralism of methods, characteristic of the legal sciences, is also to be recognized in the research projects which are part of this research program. Central to the program, however, are 'classical' methods of legal analysis: a *descriptive* analysis of developments in legislation and jurisprudence, including *comparative legal analysis* of developments in different legal systems (questions a1, a2, b1, c1) as well as an *examination* of these developments *for compatibility* with the central tenets of labour law (a4, b3, c3, d1). This examination is being extended to an ex-ante evaluation of law-to-come (on the basis of criteria of both legal-systematical fit and empirical goal attainment) and/or to reformulations of labour law tenets, in four of the questions (a3, b2, c4, d2).

In answering some of the questions, *empirical* data are used as an input, although the research is usually not itself involved in gathering these data (a2, a3, c1, c4; an exception might be c2). In as far as empirical research would be required, this will be planned in close cooperation with the Amsterdam Institute of Advanced labour Studies (AIAS).

Evaluating developments in the regulation of labour relations in light of their consequences for the central tenets of labour law also requires a historical perspective on these forms of regulation, so that *historical* research is in part involved in answering some of the research questions (a1, b1, c1, d1).

Finally, *theoretical* research is involved in answering the evaluative questions (a4, b3, c4, d2 and d3). Although most research projects will be characterised by one of these as the dominant method, some projects will bring together different methods, in particular legal and theoretical analysis.

4 Quality

4.1 Quality of research

There already is a substantial amount of descriptive research being done on changes in labour law under the influence of globalization or the growing impact of European law. The number of studies that relates these developments to a possible reformulation of the basic tenets of labour law or to a possible repositioning of labour law is, however, very restricted (for an exception see Davidov & Langille 2011). The new and original element in the present research program is that descriptive and normative analysis of developments that are being brought together under the label of 'challenges to labour law's autonomy', are systematically coupled to a theoretically based reassessment of labour law's central tenets. In this, it builds upon results of the HSI-program of 2009-2012, that indicated, among others, that

'protection' as a basic tenet of labour law should be considered as a political concept that does not adequately cover the functions that 'protective' labour legislation actually had for the parties involved.

Both the criterion of 'challenges to labour law's autonomy' and the objective of a critical reassessment and possible reformulation of the central tenets contribute to the coherence of research on the four research themes within the program.

4.2 Quality of research group

In the implementation of the program HSI has the disposal of a (in comparison with other Dutch universities) substantial number of researchers who cover a broad range of expertise on labour law and social security law. Thereby HSI is, in the Dutch academic landscape, pre-eminently equipped to implement a research program like the present one.

HSI will in its research be cooperating with AIAS (in which HSI participates as a member institute), with the Hugo Sinzheimer Institute in Frankfurt (Germany) and with a number of other research institutes with which we entertain regular contacts. HSI will, for instance, be co-organizing the large international ILERA conference, in June 2013 in Amsterdam. HSI is co-founder of the International Labour Law Research Network, Evert Verhulp is member of its steering committee.

Since a few months, the Labour Law Department is, in its education activities, cooperating with the same department of the Free University Amsterdam. HSI intends to try to extend this cooperation so that it would also cover the research activities of both departments. In this way we could bring together and organize a strong and in The Netherlands unique mass of researchers in labour and social security law, and act as a forerunner in establishing forms of cooperation that are to be expected between the University of Amsterdam and the Free University in the near future. It is only out of practical considerations that this initiative has been postponed to a somewhat later stage.

5 Productivity

The aim of the research program is to elicit, and to participate in an international debate on a reassessment of the central tenets, and on a repositioning of, labour law in a broad sense (including the law on social security, labour supply and re-employment of workers). Researchers will contribute by way of participation in international conferences and by way of publications in peer reviewed, national and international journals. The Law Faculty's criteria regarding publications will be maintained as a base norm of productivity. In 2015 the program will be completed by the publication of at least one book, to be published at an international publishing company, that brings together the results of research that has been part of the present program.

6 Relevance

The current program starts from the qualification of developments in the governance of labour relations being 'challenges' to the central tenets of labour law. 'Challenges' can be viewed both in a negative sense as bringing insecurities to a formerly well organized body of knowledge, and in a positive sense as an invitation to better reflect on the relation of central tenets to a changing reality of labour relations.

In both senses these challenges are an pre-eminently practical, and certainly not only a theoretical problem. Politicians, rule-makers, judges, labour lawyers and labour law scientist alike are in need of better conceptual handles to grasp the consequences of developments of the latest decades in the governance of labour relations for their own practices. The current program will contribute to provide for those handles that, when they are seized in legal practice, may result in an improvement of the relations as to work in society.

The results of the present program will contribute to a theoretical view on developments in the regulation of labour relations that does not restrict itself to those that are topical in the current political discussion, but aims at taking a more distanced position from which it will be able to better grasp the relations between changing labour relations, ways of governing these relations, and the legal forms used to mould and organize them.

The program will be valid for the period 2013 till 2015. It cannot be excluded, however that unexpected changes in the field of study or in the composition of the research group may give cause for a mid-term adjustment of the program at some point(s).

7 Vitality / sustainability

HSI has the disposal of a substantial number of researchers who cover a broad range of fields of expertise. Its staff comprises six professors, a research director, an associate professor, and ten other researchers (among them 3 PhD researchers).

Nevertheless it should be noted that the faculty's research policies have, during the last years, severely reduced the amount of time to be invested in research (from 5,0 to 1,9 fte and from 7 to 3 PhD-positions). Current policies in reaction to the financial situation of the faculty indicate a further reduction of the research budget in the near future.

In light of these developments it must be concluded that the means provided by the UvA to implement the present program, will be hardly sufficient, and that the successful implementation of the program will be dependent on our abilities to find other financial sources. Financing by NWO or from European sources will thus actively be sought.

8 Research group

The HSI group includes the following list of researchers (including PhD researchers). The second column states their research time in fte's:

Beltzer, prof. dr. R.M.	0.40	List of (visiting) researchers	
Franssen, mr. dr. E.J.A.	0.08	not to the account of	
Haar, mr. dr. B.P. ter	0.24	HSI's research budget:	
Hufman, P. LLM	0.70		
Jansen, mr. N.	0.59	Asscher-Vonk, prof. mr. I.P.	0.21
Keune, prof. dr. M.J.	0.16	De Becker, prof. mr. A.H.L.	0.08
Knegt, dr. R.	0.74	Nieuwenkamp, prof. dr. R.	0.08
Lanting, mr. dr. drs. B.B.B.	0.17	Peijpe, dr. T. van	0.21
Peters, mr. dr. S.S.M.	0.40		
Popma, dr. J.R.	0.21		
Ramos Martin, dr. N.E.	0.28		
Slooten, prof. mr. J.M. van	0.08		
Sol, dr. C.C.A.M.	0.08		
Verhulp, prof. dr. E.	0.30		
Westerveld, prof. dr. M.	0.16		
Zaal, mr. I.	0.34		
Total research time	*4.93*		*0.58*

Surnames of researchers working on each of the three thematic fields:

A: *Multi-level governance of labour relations (total: 2.14 fte*):

Beltzer	ter Haar	Nieuwenkamp	Ramos Martin
De Becker	Jansen	van Peijpe	Verhulp
Franssen	Keune	Peters	

B: *Repositioning labour law in relation to adjacent fields of law (total 1.52 fte)*:

Beltzer	van Slooten
Hufman	Zaal

C: *Instruments of governance of labour relations (total: 1.77 fte*):

Asscher-Vonk	Knegt	Sol
Ter Haar	Lanting	Westerveld
Keune	Popma	