Introduction

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MODES OF COLLECTIVE ACTION IN DEFENCE OF SOLIDARITY

This is a book about collective bargaining and its insertion in changing dynamics of collective action. Our perspective on bargaining places this fundamental component of the system that regulates labour relations in the context of the forces, processes and principles that influence its transformations. The volume's approach makes it possible to identify and make sense out of major contemporary transformations in bargaining, their determinants and their consequences. By placing collective bargaining in a broader 'family' of closely related phenomena – most prominently including collective action – the contributions collected here make it possible to understand alterations in current institutional practice more fully than is possible with conventional framings of bargaining that focus exclusively on formal institutional features. Much of our analysis examines legal instruments and institutions, but by placing those themes in a broad framework we contribute to an understanding of legal regulation and social realties that looks beyond narrow disciplinary boundaries in order to promote an understanding of changes in the world itself. In this volume's view, legal analysis and the study of other types of social interaction are most effective when scholars take full cognisance of interactions and connections as we constantly seek to do in this volume.

Collective action includes various forms of joint conduct developed by actors seeking to promote the shared interests of groups of persons engaged in collective conflict. Collective action transcends individual interests and centres on collective ones. For this reason, the idea of solidarity thoroughly impregnates collective action and therefore offers a useful analytic frame for its study. The complexity of the concept was posed by Mancur Olson in his classic study *The Logic of Collective Action* (1965). Olson is concerned to identify foundations in individual rationality – and in material incentives underpinning such calculations – for efforts that benefit large groups of persons. For Rolfe,[1]

[1] See M Rolfe 'Collective Action' in P Bearman and P Hedström (eds), *The Oxford Handbook of Analytical Sociology*, Oxford Handbooks Online, June 2017.

collective action processes include the coordination of collective and individual interests, and rely on both cooperative and conflictual elements. In his perspective, mechanisms of both consensus and conflict underpin the complex dynamics of action shaped by the political and social frames of actors. It seems clear that collective bargaining is built on both consensus-oriented and conflict-oriented forms of collective action.

Solidarity plays a crucial role in collective action in two ways. First, it is a principle that helps to explain why individuals support group goals and actions. In this sense solidarity can be focused on the joint actions of workers, unions, employers and so on. However, solidarity can also be concerned with the society as a whole and with its most vulnerable members. Durkheim's classic understanding of solidarity, and his distinction between organic and mechanical forms of it,[2] has to do with society-wide social cohesion in this sense. We are concerned here with both group-oriented and society-wide solidarity.

Much of our work concerns the translation of collective action into legally recognised collective rights, including freedom of association and the rights to collective bargaining and to strike. In this way we see collective bargaining as a centrally important component of a larger range of actions and institutions, all of them shaped by the evolution of labour law. Thus we locate institutionalised forms of conflict regulation within the broader study of modes of collective action or, in the influential formulation of sociologist Charles Tilly,[3] 'repertoires of contention'. The repertoires of protest and action and of collective bargaining models are to a large degree the result of the evolution of labour law in response to the solidarity principle and efforts to improve the regulation of labour. Of course, other interests and conceptions, such as neoliberal ones, have also played a role in the changing nature of labour law. As Bogg and Freedland argue in their chapter in this volume, collective action and the robust use of the freedom of association are crucial to offer responses to the rise of populism, authoritarian tendencies, and the reduction of social rights.

One of the main parameters of collective activity is the multilevel scenario that regulates the conduct of actors and the institutional regulation of their interactions. Legal norms, protest and collective bargaining itself are all articulated in different legally defined territories and levels of governance. The interrelationship between those levels is subject to change over time. Multilevel dynamics are crucial for our themes of study.

A main reference in the construction of the meaning of collective activity is the Charter of Fundamental Rights of the European Union. The Charter has many points of relevance for collective action, including the freedom of association, the right to collective bargaining and to protest, and the right to strike. Crucially, the Charter constitutionalises these collective rights as part of its

[2] E Durkeim, *The Division of Labor in Society* (The Free Press, 1984) 31–38.
[3] C Tilly, *Regimes and Repertoires* (Chicago University Press, 2006) chapter 3.

definition of solidarity. As Catherine Barnard,[4] in an analysis of the reinforcement of labour standards, has argued, Article 28 of the Charter of Fundamental Rights has as a prior reference Article 6 of the European Social Charter, which integrates within the right to bargain collectively various other important principles and activities, including voluntary negotiation, mechanisms of conciliation and arbitration and collective action including strikes. The integration of all these rights, including strikes, under the principle of solidarity serves to remind us that collective action involves processes of both consensus and disagreement.

This integration of collective action within the Charter's reading of the principle of solidarity offers protection to collective bargaining, protest, strikes, workplace information and consultation as a deliberative process, as well as other matters. The Charter further recognises, in the same definition, decent work as fair labour conditions guaranteed under the right of dignity; protection against termination of contracts as a matter of stability; and social security and social assistance as collective rights constituting the main stone in the definition of solidarity as supporting the agency of collective actors. An interdependent principle of solidarity is raised in the Charter, recognising both individual rights and collective ones as connected to this principle. The inclusion of protection against dismissal and collective rights together under the umbrella of solidarity provides support for the argument that there is an important interaction between individual, plural and collective social rights. This, in turn, offers an avenue to constructing challenges to neoliberal legal policies on labour conditions and unions. The value of this principle, not only at the EU level, but also at the national level, can potentially increase the role of courts in the application of both individual and collective rights and principles.[5]

The increased level of individualisation of labour relations is an important theme in the debate on collective action. The political underpinnings of labour law have been conditioned during the last decade by the globalisation of the economy and markets, the increasing pace of technological innovation, and, at the same time, by the rise of nationalism and the emergence of disruptions produced by financial crisis and the massive movements of people due to poverty or war. The changing context has produced a non-ceasing sequence of new challenges for the functioning of existing institutions and forms of practice. New actors, institutions and sources of regulation have emerged from this reality. The regulation of labour in this period of time has been shaped most powerfully by the politics of austerity programmes; the economic goals of governments have informed the politics of labour regulation around the world. The individualisation of labour employment regulation, the segmentation of rights, increased

[4] C Barnard, 'Using Procurement Law to Enforce Labour Standards' in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford University Press, 2011).

[5] N Busby, 'The EU Charter of Fundamental Rights' in A Bogg, C Costello and ACL Davies (eds), *Research Handbook on EU Labour Law* (Edward Elgar, 2016).

vulnerability for individual workers, anti-union policies and the repression of protest[6] have all emerged as major labour law tendencies in this period of time. Both individual-level labour guarantees and collective rights have been reframed by certain institutional actors. In this sense, the previously predominant social models have been affected by the financial crisis and other macro-level factors. The new environment has also been marked by new forms of spillover between the national and supranational levels.[7] These shifts in regulatory logics, and the conditions that promoted their emergence, have of course been met by transformations in the actions and strategies of workers as well as unions. These changes pose the need for scholars, as well, to reframe their studies and analyses, a broad and complex challenge that we collectively take up in this volume.

Difficulties have emerged in the pursuit or defence of solidarity because the individualisation of labour regulation has been a central feature of the dominant institutional approach in the new context. A clear example of this tendency is the Commission Green Paper 'Modernising Labour Law' (2006),[8] which 'modernised' its subject matter without any reference to *collective rights*. This shift has, in turn, generated important socio-economic consequences such as more inequality and growing vulnerability for underprivileged people. These dynamics have been expressed in various ways, including the upsurge of precarious contracts that undercut the viability of 'decent work'.[9] The goal of labour law has historically been to reduce inequality, not only in labour markets, but also in society at large. However, this goal can only be successfully defended through combinatory strategies involving workers' representation not only within enterprises or the labour relations system, but also via the use of 'political voice' and other forms of collective expression to defend labour.[10]

The elements of complexity in the changing panorama of labour legislation and conflict are quite considerable. Employment regulation increasingly involves interactions between soft and hard law, while the transformed regulatory scenario of workers' rights has developed growing tensions among the different layers of the legal order, leading to important debates about the

[6] See T Novitz, 'The Restricted Right to Strike: Far-reaching ILO Jurisprudence on the Public Sector and Essential Services' (2017) 3 *Comparative Labor Law and Policy Journal* 353. See T Novitz, *International and European Protection of the Right to Strike* (Oxford University Press, 2003).

[7] See JE Delvik and A Martin, 'From Crisis to Crisis: European Social Models and Labor Market Outcomes in the Era of Monetary Integration' in JE Dolvkand and A Martin (eds), *European Social Models from Crisis to Crisis. Employment and Inequality in the Era of Monetary Integration* (Oxford University Press, 2015) 385.

[8] Commission Green Paper of 22 November 2006 entitled 'Modernising Labour Law to Meet the Challenges of the 21st Century' COM (2006) 78 final.

[9] See G Davidov, *A Purposive Approach to Labour Law*, Oxford Monographs on Labour Law (Oxford University Press, 2016) 36–37.

[10] K Ewing, 'The Importance of Trade Union Political Voice. Labour Law Meets Constitutional Law' in A Bogg and T Novitz, *Voices at Work. Continuity and Change in the Common Law World* (Oxford University Press, 2014) 277.

autonomy of labour law.[11] Judges have emerged as newly predominant actors of governance. In this panorama, labour has tried to reorganise and unions have promoted new global structures to increase their agency in the multilevel dynamics of the current era; the initiatives of labour organisations are often expressed through globalising initiatives and discourse,[12] as well as a newly cosmopolitan activism.[13]

In this context, the goal of this volume is to reframe our understanding of collective bargaining to fully incorporate within it several phenomena that are rooted in the pursuit of solidarity. These solidarity-related phenomena include collective action, labour's agency, especially through conflict itself, and the placement of bargaining within broader governance structures. This broad reframing of collective bargaining and labour regulation draws within the broadly construed study of bargaining the processes through which workers come to be entitled to rights and freedoms as well as initiatives in which labour participates in deliberative interactions and in decisions on the implementation of rights. The institutional outlets and forms of expression for such strategies can be thought of as ways to channel solidarity. This volume's reframing fully embraces the need to study, and technically master, the institutional and legal forms taken by labour regulation but it places these phenomena within a multi-actor interactive framework.

Collective bargaining, in our reading, is not an institutionally isolated process limited to the insertion of efficiency into labour markets' regulation. Instead, as both the political theory and sociological approaches to labour relations argue, collective bargaining is embedded in a constellation of collective rights and political processes; its evolution is interrelated with such dynamics and, by extension, forms part of broader patterns of governance. For this reason, a number of key concepts have cross-over relevance for studying multiple collective phenomena including collective bargaining, other labour strategies or labour regulation mechanisms, and the broader contextual forces that shape these phenomena. These concepts include, for example, consensus, discontent, solidarity, disruption and many others that are present in all forms of collective activism. However, many of the relevant concepts involve institutional structures rather than dynamics of protest within the parameters set by such structures. The multilevel nature of the institutions and actors that express and channel conflict – with spillover results – is reflected in regulation of various types, the courts, unions and forms of collective bargaining. We are interested precisely in the interrelations between institutional forms and types of conduct on the one hand and expressions of conflict on the other hand, given our view

[11] See A Bogg, C Costello, ACL Davies and J Prassel (eds), *The Autonomy of Labour Law* (Hart Publishing, 2015).

[12] See RM Fishman, *Democracy's Voices* (Cornell University Press, 2004).

[13] See S Tarrow, *The New Transnational Activism* (Cambridge University Press, 2005).

that these dynamics are interrelated. Indeed, the process of negotiation is called *bargaining* because 'each side is able to apply pressure on the other' – in the case of workers most importantly through strikes.[14]

The starting point for us is to define modes or repertoires of collective action, including collective bargaining, strikes and other forms of activism and protest such as the judicialisation of conflict. All these forms of mobilisation reflect both conflict and some form of institutionalisation of it; they channel dispute management through mechanisms that involve institutional forms of one sort or another – such as collective bargaining or – in the case of judicialisation – the externalisation of the ultimate resolution to a judge. All these forms also involve a process of deliberation, negotiation and ultimately resolution, embedded in labour law regulation. Although these various modes of collective action all involve micro-level dynamics, they are all shaped by macro-level processes that are historical in nature.

The changing historical context has also exerted an important impact on the model of the strike. The growth of de-contractual employment relations because of the increasing incentives to self-employment – very clearly manifested in the European Union in (and following) 'Modernising Labour Law' – has imposed on social actors the need to invent new forms of protest. This dynamic has been reinforced by the evaporation of pre-existing workplace geographies, not only due to the globalisation of production, but also generated by the impact of new technologies. The resulting innovative forms of action have faced the challenge of trying to capture the diverse forms of the employment relation generated in a segmented labour market. The increase of judicialisation of labour disputes responds quite directly to this challenge – and to the new constraints that underpin it.

The judicialisation of labour relations can be specified quantitatively by delineating over time change in the number of cases. This indicator, which can be understood to reflect a form of protest, has increased during the last decade not only at the national level, but also at the supranational one. To fully appreciate the basis for reading judicialisation as reflective of collective activism it is necessary to take into account increasing instances of the repression of strikes and protest not only in non-democratic regimes, but also in democratic ones. Government strategies to cut back social rights – including, in some cases, collective rights relevant for the conduct of strikes and other forms of protest – have often ended up promoting the tendency of actors to channel their actions in new ways, such as judicialisation.

The definition of labour-related collective action as a matter of rights protected in the law has been reinforced by the European Court of Human

[14] H Clegg, *Trade Unionism Under Collective Bargaining. A Theory Based on Comparisons of Six Countries*, Warwick Studies in Industrial Relations (Basil Blackwell, 1976) 5.

Rights' finding in the cases of *Demir and Baykara v Turkey* (2008)[15] and *Enerji-Yapi-Yol Sen v Turkey* (2000).[16] The decision on these cases declares that

> Article 11 of the European Convention on Human Rights includes a right to collectively bargain and precludes a blanket ban on the right to strike. This crucial judicial decision treats both strike activity and collective bargaining as interrelated components of one overarching process that in effect involves the dialectic between consensus and disruption, thereby protecting against the repression of protest.[17]

Collective action, as the different chapters in this volume demonstrate, presents multiple patterns of interaction with regulatory systems. This multiplicity is reflected both in the strategies of the actors and in their impact on individual rights. As Assaf Bondy and Guy Mundlak argue in their chapter, solidarity is a fundamental underpinning of the coordination needed for collective bargaining. In her chapter, Julia López López argues that solidarity informs unions' activism in the judicial arena in the defence of collective rights. Her chapter discusses criticisms of European Court of Justice (ECJ) jurisprudence on the right to strike, arguing for the relevance of this form of protest to the exercise of workers' agency. As Margarita I Ramos Quintana and Dulce María Cairós Barreto show in their chapter, the new tendency towards de-contractualisation of labour law has reshaped how workers pressure for improved labour conditions through protest or strikes. New types of solidarity in collective action are analysed in Katherine Stone's examination of the gig economy and new employment forms. Her chapter shows how new forms of collective action serve to countervail the evaporation of labour rights in emergent types of production systems.

COLLECTIVE ACTION AS AGENCY IN A MULTILEVEL CONTEXT

One of our central concerns in reframing the idea of collective bargaining in this volume is to underline the process of agency that all the forms of conflict which we examine entail for unions and workers. It is crucial to embed our analysis in a historically oriented perspective in which various evolving phenomena – economic crisis, the elimination of social rights and above all the effort of some institutional actors to reduce unions' agency – challenge existing mechanisms for the defence of workers' rights. The global labour market, the initiatives of global actors, the growing gig economy and the political increase of nationalism all stand as major contextual factors conditioning changes in collective action of all sorts.

[15] *Demir and Bakara v Turkey* App no 34503/97 (ECtHR, 12 November 2018).
[16] *Enerji Yapi-Yol Sen v Turkey* App no 68959/01 (ECtHR 21 April 2009).
[17] See KD Ewing, 'The Dramatic Implications of Demir and Baykara' (2010) 39(1) *Industrial Law Journal* 2–51.

The main legal, and rights-based, reference for our subject matter is freedom of association, not only at the national level, but also at the supranational one. Despite the attacks that this right has suffered during the last decade, the right to organise is a fundamental entitlement for workers from the national level to the International Labour Organization (ILO) Convention, the EU's Charter of Fundamental Rights and the European Social Charter. This is a very important point to underline because this collective right serves as a foundation to reconfigure collective strategies in the current economic and political scenario. Indeed, the various forms of conflict and conflict regulation that interest us are reflective not only of economic dynamics and concerns, but also of political ones. This is crucial because political processes involve not only the pursuit of self-interest, but also collective action in the defence of broader principles, especially solidarity. These political processes and the structures in which they are embedded place our subject matter within the broader study of governance.

Models of collective bargaining have experienced an evolution similar in many respects to those of other instruments of regulation. The multiple actors involved in conflict over labour matters – typically interacting through political dynamics and other institutional processes, including those centred in the courts – have created a universe of regulation instruments of varying efficacy. The centralising and decentralising components of the collective bargaining system have been evolving in most national cases towards hybrid systems not only in the combination of firm and sector levels, but also in the level of stability of the relevant instrument – be it a conventional collective contract or some other type of agreement or settlement.

From the perspective of the actors, collective bargaining involves multilevel features both in its process and contents, thereby creating important spillover results linked to the interactions between levels of action and regulation. Agreements reached at one level tend to generate multiple consequences at other levels. The agency of unions and workers' representatives opens a new geography of strategies at the national level. Unions' global federations and supranational or transnational workers' councils are some of the relevant examples. As the chapters in this volume by Sergio Canalda and Tonia Novitz underscore, various transnational negotiations, arrangements and agreements – with transnational actors as the main protagonists, but also involving national level actors – point to the growing relevance of collective action beyond the traditional national level. The combination of levels in collective action has proved highly relevant for the elaboration of the national good practices which some unions have achieved in responding to the new challenges of the gig economy and other processes of change related to economic globalisation. The combination of the local and national levels in labour action facilitates the defence of workers' rights.

The chapters in this volume share the perspective that collective action is integral to both the regulatory process and the conduct of several institutions, such as collective bargaining and the judicial system itself. Our work, as presented in this volume, assumes that protest in its various forms promotes and indeed

reflects workers' agency – both individually and collectively – and that it is intimately related to both the freedom of association and the principle of solidarity. In our view protest does not stand in contradiction to regulatory institutions but instead is intrinsically related to their proper functioning. Indeed, the exercise of solidarity stands at the roots of much that we examine and argue in this volume; its study is interrelated with the other themes emphasised in the book. Solidarity should be read also as emblematic of agency for collective actors in a multilevel scenario. The chapter by Tonia Novitz provides an excellent example of how unions have been able to create an institutional network for exercising agency at the global level in their interactions with multinational firms – a capacity that has generated important consequences in labour rights. Solidarity in multilevel interactions is also manifested in the actions of works councils, supranational structures of workers' representation with increasing importance in information, consultation and the concluding of agreements, as Sergio Canalda shows in his chapter. Consuelo Chacartegui's chapter underlines the important role played by collective bargaining in coping with the failure of the European Union to fulfil obligations to refugees. In all of these instances institutional practice is reflective of solidarity. But solidarity also implies inclusion, and governance can be understood as a platform for pursuit of that objective.

COLLECTIVE ACTION AND INCLUSIONARY GOVERNANCE

The topic of governance in labour relations, understood from a perspective that stresses the principle of solidarity, necessarily leads us to debates on collective action, broadly construed. After all, the concept of governance places institutional practice and decision making within a broader range of interrelated social processes. Bargaining, for us, fits within that broader range of governance-related phenomena. Tensions between political and economic objectives of collective action and between levels of regulation hold great relevance in how governance processes shape labour regulation, as several chapters in the volume underscore.

A fundamental issue concerns the origin of pressures that have led national regulatory systems to weaken labour rights. The chapter by Mia Rönmar raises the question of how pressures exerted by the European Union have impacted the Swedish model of collective bargaining. She shows how this supranational source of influence has tended to undermine the agency of collective actors and the viability of solidarity-oriented outcomes in this case. Social protection for the unemployed as a type of solidarity that is pursued through collective bargaining is discussed by Alexandre de le Court in his chapter analysing the cases of the Netherlands, Sweden, France and Italy.

This volume's approach assumes that labour regulation should be studied and understood from a perspective that incorporates the significance of governance structures and arrangements. Forms of governance hold multiple consequences

for workers' rights. Governance structures are often rooted in international agreements and principles. Governance as a set of rules to orient policies is a main reference for the United Nations, the Universal Declaration of Human Rights, the ILO Conventions, the Decent Work Agenda and the UN Global Compact. These instruments and their preoccupation with governance are crucial for constructing a fair globalisation. Collective action implies the notion of governance through its de facto promotion of deliberation and consultation. Regulation mechanisms that include these components can be understood as forms of governance. The governance side of collective action involves setting the rules that guarantee labour rights and which obviously presuppose freedom of association as a foundation for exercising social agency.[18]

One of the principal debates over governance involves the relation among levels of deliberation, action and regulation. The impact that EU strategies have had at the national level has often been to promote cutbacks in social guarantees although at the same time EU legal structures – such as the ECJ – have often had the reverse effect. In both cases, the role of multilevel dynamics is of central importance. One of the purposes of complex governance structures is to monitor the enforcement of law and regulations; the institutions that play an important role monitoring decent work as part of the broader effort to guarantee fundamental rights[19] include not only structures of workers' representation, but also judges and the overall legal system. Our subject matter constitutes a complex interrelated whole. This perspective is relevant not only for the study of Europe, but indeed for the analysis of the larger worldwide arena. This is underscored by the ILO action of the Committee of Freedom of Association, case number 3018, 11 of June 2016, regarding a complaint against the Government of Pakistan presented by the International Union of Food (IUF) where the Committee urged the government 'to take measures to encourage and promote free and voluntary negotiations between the union and the employer'. Collective bargaining is embedded in a complex transnational system of governance, anchored in a conception of collective rights.

In sum, the structure of the volume is organised around the themes specified above. The chapters by Bogg and Freedland, López López, Ramos Quintana and Cairós Barreto, Bondy and Mundlak, and Stone all conceptualise forms of conflict and labour regulation as modes of collective action. Their studies place the reframing of collective bargaining and related dynamics within the scholarly context of analyses of multiple forms of collective action. The chapters by Novitz, Chacartegui and Canalda emphasise the complexities and the challenge of sustaining labour's agency in an interactive context characterised

[18] See A Bogg and KD Ewing, 'Freedom of Association' in M Finkin and G Mundlak (eds), *Comparative Labor Law* (Edward Elgar, 2015) 329.

[19] See A Stone, 'The European Court of Justice and the Judicialization of EU Governance' (2010) *Faculty Scholarships Series*, Paper 70.

by profoundly multilevel dynamics. Their analyses deepen and elaborate our understanding of the connections between the national and transnational or supranational levels. The chapters by Rönmar and de le Court centre on the possibilities for an inclusive governance in an increasingly globalised order of interactions. Their scholarship provides institutional and case-sensitive substance to our analytical understanding of this terrain.

Taken as a whole, the chapters in these three thematic clusters all contribute to our collective reframing of collective bargaining and other forms of labour conflict and regulation as collective action informed by the principle of solidarity.[20]

[20] S Stjernø, 'The Idea of Solidarity in Europe' (2011) 3 *European Journal of Social Law*.