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Labour, Strategy, and the Constitutional Protection of Work: On the Effectiveness of Legal Strategy

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Contemporary labour movements have used litigation to redress grievances and confront a myriad of legal and political challenges that disenfranchise and exploit workers. A number of high-profile litigation campaigns in the so-called ‘gig-economy’ have received significant academic and media attention in the past decade or so, but the strategic use or mobilization of law by trade unions is more diverse and complicated than headlines about employment status cases. There is, of course, a complex relationship between industrial relations in the UK and the legal system. The historic caution about the role of law in industrial relations has been well documented and can be identified in the voluntarist tradition of trade union recognition, collective laissez-faire as a means of labour market regulation, and a deep-seated suspicion of law (particularly the common law) as an instrument that protects and reproduces dominant socio-economic interests. Nonetheless, law has, for a number of reasons, become more prominent in labour market regulation and industrial strategy, as a mechanism for setting minimum legislative standards and presenting new interpretations of the law in court to take just two examples. Moreover, in order to comprehend the strategic use of law in the context of industrial relations today, it is necessary to recognize the decline in traditional forms of trade union representation, the effects of anti-union legislation in the UK, and the fundamental changes to the nature of work and the structure of the labour market.

There are numerous approaches to the strategic use of law in the context of labour, including litigation, legislative campaigns, and the use of law to reframe grievances at work and catalyse organizing campaigns. The approaches identified in this special issue also investigate how trade unions and workers politicize and mobilize law while also rejecting legal determinations at other points in time. There are various fields of research and expertise that conceptualize and facilitate

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such engagements with law; from legal mobilization scholarship which situates the legal tactics deployed by trade unions within their wider political strategies, to doctrinal labour law scholarship which highlights interpretive opportunities within legislative rules and jurisprudence. It is against this backdrop of injustice at work, the complex role of law in industrial strategy, and methodological diversity that the articles in this issue explore the ways that trade unions, workers, lawyers, and others have used and/or engaged with law.

The articles in this special issue are the product of an ESRC-funded¹ workshop on ‘Labour, Strategy, and the Constitutional Protection of Work: On the Effectiveness of Legal Strategy’ hosted by the Centre for Law at Work at the University of Bristol in June 2021. This interdisciplinary project brought scholars in the fields of labour law, legal theory, constitutional law, sociology, and industrial relations in conversation with practising labour lawyers and trade unionists. Each contributor has a shared concern for strategic uses of law in the labour law context, albeit with diverse expertise, experience, and methodological approaches to the question of law’s effectiveness in advancing worker-protective aims and objectives. Drawing on empirical, theoretical, and auto-ethnographic analysis the articles in this issue explore the role of courts and strategic litigation in contemporary labour law, the organizing and litigation strategies of new and traditional trade unions, the trajectory of campaigns for labour legislation, the role of the trade union lawyer, the types of legal participation by workers, employers, and activists, and the factors which shape the effectiveness of strategic litigation. The articles provide specific analysis of these topics in the UK context and generalizable lessons that will be relevant and applicable to scholars and practitioners internationally.

The issue opens with John Hendy’s reflections on the functions of the trade union lawyer. Drawing upon his formidable experience at the employment law Bar, Hendy identifies the skill set of the trade union lawyer – including the mastery of substantive and procedural law and a sensitivity to the politics of labour law – while delivering a realistic assessment of the unfavourable legal conditions in which trade unions and workers operate. This provides a sceptical view not just of the challenges in deploying innovative strategic litigation and the judiciary’s capacity to accept worker-protective claims, but of labour law’s role in disempowering workers by limiting and balancing their rights vis-à-vis the economic interests of employers. These insights acknowledge that strategic opportunities arise for setting precedents that inscribe key individual and collective labour rights into law, but this assessment is qualified by significant concerns about the imbalance of

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power, resource, and legal protections between trade unions and employers when industrial disputes are resolved in court.

Taking up Hendy's reflections and contrasting them with Patrick Elias' judicial perspective, Alan Bogg's contribution returns to canonical debates in British labour law to assess the role of courts today. In response to the question of whether we can trust the courts with labour law, Bogg engages historic and contemporary scepticism alongside careful analysis of the significant contribution of judicial adjudication to the development of worker-protective norms and doctrines. While recognizing the material challenges and ingrained imbalances of power that stymie successful litigation, Bogg's qualified endorsement of the courts is grounded in the critical importance of identifying opportunities in law which can deliver workers from grotesque injustice. This, in turn, serves as a rallying call for doctrinal labour law scholarship to contribute to the incremental development of worker-protective laws.

The next three articles contribute to socio-legal debates about the strategic uses of law by workers and trade unions, exploring the implications of particular litigation strategies, the types of legal engagement deployed by workers, and a theoretical conception of the vexed issue of effectiveness with respect to strategic litigation. Manoj Dias-Abey analyses the role of indie unions in organizing migrant workers and their use of strategic litigation to bring racial discrimination claims. Dias-Abey evaluates the success of litigation brought under the Equality Act in light of unions' wider strategic aims and objectives. In particular, the potentially productive role for strategic litigation in organizing migrant and racialized workers. To rationalize the wider impact of anti-discrimination litigation on broader organizing strategies, the article draws upon theoretical insights to investigate the ways that recognition claims can build bonds of solidarity and collective identity between racialized and non-racialized workers. Cutting through reductive conceptions of the divide between recognition and redistributive claims, on the one hand, and an oversimplified conception of the effects of strategic litigation, on the other, the article identifies the potential synergies between both types of claims where legal tactics are utilized to redress racial injustice and unite diverse groups of workers in their redistributive struggles.

Eleanor Kirk investigates the relationship between law and 'laypeople' to understand the various ways that labour law is mobilized by a range of different actors, from workers to trade unionists and human resources officials. To better understand the process of juridification in labour law and industrial relations, beyond evaluations of positive law, the article conceptualizes three ways that laypeople engage with law at work: Legal participation, legal mobilization, and legal consciousness. This provides a rich picture of the role played by law at work, from formal legal engagements, such as litigation, to the informal processes through

which workers construct and reproduce legal and social norms from their experiences, comprehension, and assumptions about what the law is.

Jack Meakin returns to the question of strategic litigation's effectiveness in the labour law context. This article contributes to socio-legal analysis of legal mobilization strategies by drawing upon legal theoretical insights to analyse three tenets of litigation's effectiveness: The capacity to articulate worker-protective arguments, the institutional capacity of the state legal system, and the relationship between litigation and its wider political objectives. The principal concern of this article is to highlight the ways that litigation strategies negotiate the tension between legal and political rationalities. The first tenet highlights the importance of identifying and evaluating the effects of legal ordering on worker-protective claims. The second highlights the material and symbolic power of state law and the third considers the innovative ways that law can be mobilized in service of worker's political objectives.

Simon Deakin concludes our issue by exploring the mobilization of law for the purpose of legislative reform, taking up the case of the campaign for a British minimum wage. In explaining the provenance of statutory rules setting national minimum and living wages, Deakin charts the role of the 'Cambridge School' of economists in the campaign, and the interaction between their proposals and various competing interests and actors. This case study identifies and highlights the role of trade unions, civil society groups, university-based researchers, business interests, government and many others in the eventual adoption of statutory minimum and living wage policies. The analysis provides critical insights not just into the negotiations and trade-offs that occur between these actors but the ways that legislative campaigns are shaped by the interactions between ideologies, material interests and relations in the political, legal, and economic fields under conditions of capitalism.

The articles in this issue demonstrate that to understand legal mobilization in the field of industrial relations today requires engagement with multi-disciplinary insights and experiences. This special issue brings together a diverse range of perspectives on the strategic use of law for the purposes of reforming labour law and pursuing industrial strategies as well as the ways that legal engagements constitute and reproduce relations at work. It is a testament to the contributors that each of the articles in this issue make important contributions to and significantly enhance this field of study. Finally, it is hoped that this issue will serve as much as a resource for academics, practitioners, and activists as a starting point for new lines of enquiry.