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Landscape and Memory: Labour Law, Legal Pluralism and Globalization

Abstract

Labour law and industrial relations confront three crises – the New Economy (globalization, the attack on the activist state, and technological change), a disjuncture in industrial relations theory and practise, and postmodern legal theory. While each emphasizes the declining importance of the state, critical legal pluralism – a new theoretical perspective – shows how non-state and state labour institutions are mutually constitutive.

Introduction

For good reasons, but shamelessly, I have stolen my title from a recent book by Simon Schama (1995).[1] Even more shamelessly, I have turned his title into a pair of metaphors which happen to suit my purpose. 'Landscape' – rocks, water and wood, in Schama's book – I will use to signify the seemingly intractable structures of political economy, of the state and of its legal system. 'Memory' – which, Schama says, is shaped by encounters with landscape, but also endows landscape with meaning and significance – I will press into service as a synonym for the informal, sometimes invisible, norms, institutions and processes which define social relations, whether in the workplace or elsewhere. With Schama (approximately) I will argue that 'landscape' and 'memory', state law and informal normative systems, are mutually constitutive, that each shapes the other, that each is understood in terms of the other.

[1] Schama, who has also written two important histories of the Netherlands, points out that the Dutch word "landschap", was imported into English "along with herring and bleached linen" at the end of the 16th century, at a moment when the Dutch were launching the practice, if not the theory, of globalization. In Dutch, he states, "landschap... signified a unit of human occupation, indeed a jurisdiction" while in modern English it refers more generally to any view, or artistic representation, of terrain. While the formal/informal and physical/representational ambiguities of my title provide fruitful opportunities for reflecting on legal pluralism, its provenance is meant to convey thanks to our hosts, the Royal Netherlands Academy of Arts and Sciences and the Hugo Sinzheimer Institute. Thanks also to the Canadian Institute for Advanced Research and the Social Sciences and Humanities Research Council of Canada for their continuing support of my work.

Landscape: political economy, state and state law

Landscape first. We are experiencing three coinciding, and to some extent related, crises: a crisis brought about by the forces of the new economy, a crisis in the theory and practice of industrial relations, and a crisis of law and legal theory.

(a) The New Economy

By the term 'new economy', I refer – too concisely – to three separate but powerful and interacting phenomena: the transformation of the techno-economic paradigm we know as fordism, a change in the socio-political paradigm – the post-war consensus – caused by the 'hollowing out of the state' (at least in its benign, interventionist form) and by a decline in civic participation and democratic practise, and of course globalization and the ensuing processes of economic restructuring. These phenomena are evident everywhere, but have affected the three main regional economic blocs – Europe, North America and the Asia Pacific region – quite differently, albeit in ways which both reflect and reshape their distinctive forms of capitalism (Hutton, 1995).

I have argued elsewhere that the new economy has profoundly altered the foundations on which post-war industrial relations systems were based (Arthurs, 1996a; Arthurs, 1996b; Arthurs and Kreklewich, 1996). For example, changes in the social organization of production threaten to destabilize the concept of the bargaining unit, fundamental to North American labour law, and the whole edifice of employment-based rights constructed on that fundament; the state's declining commitment to labour market regulation impairs established social welfare, family, education and housing policies, which assumed the widespread availability of relatively long-term and well-paid jobs; and globalization alters corporate structures, cultures and decision-making processes, as well as the dynamic of the relationship between management and other industrial relations actors.

In the context of the present discussion, it is particularly important to note the consequences of globalization. Until now, we imagined that good theory, strong advocacy, and determined political action could bring about changes in national law and policy, and ultimately, therefore, in norms, institutions and behaviours in the labour market. Globalization has radically undercut this assumption, by effectively de-coupling politics and economics. Politics remains national; economics has become global, or at least we have convinced ourselves that it has. And because economic policy is perceived to be beyond the control of any state, globalization has become a 'conditioning device' (Grinspun and Kreklewich, 1994), which habituates us to the notion that the economy is 'the secret police of our desires'. Despite compelling political, social or moral reasons to do so, we cannot – or believe we cannot – pursue labour market policies which might discourage capital investment or cause companies to exit. This constraint – real or self-imposed – implies abandonment of attempts to promote countervailing union power, of Keynesian strategies to stabilize production, consumption and employment, of commitments to an expensive social safety net and civilized employment standards, and especially of corporatist, tripartite or consultative strategies designed to create a 'social market'. There may be much in the

argument that the new economy is not a force of nature, that it is not inevitable in its present virulent form; but this does not detract from the fact that it has so far managed to prevail over governments of all persuasions, corporate cultures of varying degrees of magnanimity, and virtually all manifestations of popular resistance and dismay.

The stern discipline of globalization for millions of people and thousands of communities, has begun belatedly to engender a backlash,[2] although many – from left critics to right-wing populists – dispute that globalization alone is the cause of 'the new, ruthless economy'(Head, 1996). Indeed, some argue that globalization works best for communities which can draw upon institutions and habits of civic solidarity and a culture of trust (Putnam, 1993; Fox, 1974; Fukuyama, 1995). Nonetheless, unless and until globalization is somehow constrained or domesticated, it will continue to strengthen corporate power vis-a-vis that of workers and unions and to deter states from attempting to redress the balance. As a corollary, regimes of state regulation and state-mandated collective bargaining will both continue to erode. And as a further corollary, regimes which do not depend on state legislation will, *faut de mieux*, become relatively more important.

For all of these reasons, it is impossible any longer, to avoid a conclusion which North American industrial relations theorists have often resisted: that domestic labour law and industrial relations issues are implicated in a complex and comprehensive international political economy. But where does such a conclusion take us? It is hard to predict much success for current attempts to construct transnational regulatory regimes without direct state participation (Compa and Hinchliffe-Darricarrere, 1996; Horn, 1980). Nor is there reason for optimism about the prospects of projecting domestic institutions of industrial relations and labour law into this new, global context by recruiting international agencies to act as proxies for the state. Neither the ILO, a pioneering international agency, nor even the EU, that state proxy *par excellence*, can boast great success in industrial relations, whatever their other achievements (Streeck,1996; Hepple,1995). True, as Katherine Stone has shown, less ambitious regimes such as NAFTA may make a contribution, and domestic regimes have some capacity to project themselves into the international sphere; but, as she concludes, 'none of the existing models can satisfy all objectives for transnational labour regulation'(Stone, 1995: 1028). And, to make an obvious point, which 'objectives' one pursues and how much 'satisfaction' one expects is very much determined by where one is situated.

(b) Industrial relations theory and practise

Several generations of North American labour law and industrial relations scholars regarded collective bargaining as the central pillar of industrial relations policy,[3] and 'industrial pluralism' as the dominant theoretical perspective within which collective

[2] See e.g. K. Schwab and C. Smadja, 1996. The authors are the President and Managing Director, respectively, of the prestigious World Economic Forum.

[3] The 'pillar' was erected in the United States by the Wagner Act of 1935, and in Canada by wartime regulations, PC 1003, adopted in 1944.

bargaining was to be understood.[4] This 'mainstream' view was attacked by the left and the right, by recalcitrant employers and exasperated governments, but collective bargaining remained the focus of debate, even for those who wished to resist, radicalize, regulate or restructure it. Thus, until the 1970s, labour law and industrial relations scholarship exhibited a high degree of syndico-centricity.

However, the field began to exhibit signs of heterodoxy. First, as it became clear that workers in particular industries, occupations and regions were unlikely ever to enter the charmed circle of collective bargaining, new strategies had to be devised to address the needs of these vulnerable workers. Second, fault lines of ideology, race, gender, generation and geography began both to fracture the labour movement and to divide it from its traditional political allies; the demise of that alliance effectively ended any prospects for legislative rejuvenation of the collective bargaining system, at least in the United States. Third, the public policy agenda began to be dominated by issues such as health and safety, medical insurance, pensions, labour training and mobility and other concerns not easily resolved within traditional small-scale bargaining units. In consequence, while many scholars continued to believe that collective bargaining was the paradigmatic form of industrial relations, some began to acknowledge the pertinence of other legal regimes. Civil rights litigation, state regulatory intervention and other new legal regimes were invoked to supplement, complement and, occasionally, displace collective bargaining.

More recently, a further and more fundamental shift in theorizing has been prompted by the rapid, uninterrupted and possibly terminal, decline of the North American union movement. (Union membership in the United States has fallen to about 10% of the eligible workforce; Canadian unions represent about 30%, but the trend is downward and accelerating) (Weiler, 1991; Atleson, 1994; Kettler and Warrian, 1994). More to the point, the very industries in which collective bargaining took root most rapidly and deeply are also suffering long-term distress: between about 1950 and 1990, industrial employment in North American fell from 40% to 20% of the workforce (Drucker, 1994; Economic Council of Canada, 1990).

During the past two or three decades, industrial workers' salaries, benefits and job security have declined measurably and, seemingly, irreversibly without being replaced by jobs in either the expanding service sector or even the privileged high tech sector. 'Employment' is increasingly insecure and poorly paid, even for many professionals, managers, members of the technostructure and especially unionized employees in the public and para-public sectors. Those with special skills or entrepreneurial instincts are often 'self-employed', which means that they must subsist on a feast-or-famine diet of transitory contracts, consultancies or franchises. And more and more, those who lack any special advantages are employed under labour contracts which are nasty, brutish, short or all three. Since so many social benefits are directly provided through, or indirectly predicated upon, long-term decently-paid jobs, the changing character of employment has devastating consequences for most participants in the labour market.

[4] For a powerful and persuasive recapitulation of the "original" and subsequent interpretations of the Wagner Act see Barenburg, 1993.

It has equally devastating consequences for labour law scholars. We must now admit, however reluctantly, that collective bargaining is not, and is never likely to become, the central institution of the labour market and that its fail-safe mechanisms have failed. This admission, in turn, implicitly acknowledges the failure of the theoretical project of industrial pluralism which dominated the field for much of the post-war period.

However, industrial pluralism has failed as a predicate for labour law theorizing only in part because it fails to resonate with reality. It has been badly damaged by scholarly critique as well. Despite some valiant rear-guard actions (Weiler, 1980; 1990; Freeman and Medoff, 1979), collective bargaining as we knew and understood it in the hey-day of industrial pluralism has been discredited by critical legal historians (Atleson, 1983; Klare, 1978; Stone, 1981; Hyde, 1990), law and economics scholars (Epstein, 1983; Posner, 1984; Campbell, 1986), devotees of rights discourse (Beatty, 1987), feminist theorists (Fudge, 1991; 1996; Lester, 1991) and students of comparative industrial relations (Adams, 1993; 1995; Summers, 1995) Labour law – once at the cutting edge of progressive legal scholarship – has lost its academic allure.[5]

In consequence, mainstream North American 'industrial pluralist' theory confronts globalization – and the other traumas of the new economy – in the worst possible posture: intellectually destabilized, politically marginalized and operationally dysfunctional. It remains only to ask whether the 'exceptionalism' of North American industrial relations is any longer so exceptional. On the evidence, it may only have prefigured the experience of other industrial relations systems, in societies with paternalistic, solidaristic or social democratic traditions (Stallings and Streeck, 1995).

(c) Law

Law – like most professions, institutions and intellectual disciplines – is experiencing the stress of post-modernity, contestation of its epistemological, ontological, methodological and ideological premises and a contemporaneous crisis of efficacy and legitimacy.

We look to law for so much: for emancipation, empowerment, regulation, loss distribution, social control, dispute resolution, and symbolic reassurance; to promote or protect ideals, interests, institutions, classes of litigants, individual people, animals and trees; and to operate at every level from the family to the community to the nation state to the regional and the universal. Labour law itself has been juridified and deeply implicated in this expansion of law's empire (Adell, 1995; Browne, 1995). But paradoxically we have also learned to expect very little from law. The machinery of law is acknowledged to be inaccessible and inefficient; its institutions, symbols and professional operatives have been ruthlessly demythologized; social scientists routinely explore the 'gap' between law's promises and its performance; and ordinary citizens are alienated because law has either failed them or advantaged their

[5] The evidence is admittedly anecdotal, but student enrolments in labour law are dropping, less scholarly literature is appearing, relatively few young academics are entering the field, and some major US law faculties have no full-time labour specialist.

enemies. International regimes are at least as vulnerable to attack as domestic regimes; private law is impugned as frequently as public law; and labour law is not exempt (Weiler, 1983; LaLonde and Meltzer, 1991; Weiler, 1991; Drache and Glasbeek, 1992).

One important tendency of recent juridical thought requires special mention in the present context. Just as the state's familiar functions have been marginalized in the New Economy, the central role of the state in law and legal theory has been brought into question by several otherwise divergent analyses. Law and economics scholars from the right of the political spectrum have tried to demonstrate how law is shaped by the need for efficient markets, and indeed how markets are able to generate their own law (Ellickson, 1991). Empiricists have documented the 'unkept promises' of judicial activism.(Rosenberg, 1991; Bogart, 1994) Critical scholars on the left have deconstructed the claims of liberal jurisprudence in order to bring into question law's emancipatory and transformative claims.(Barenberg, 1993) And scholars working in the idiom of legal pluralism – 'the key concept in a postmodern view of law') Santos, 1987: 297) – have gone beyond questioning the efficacy of state law: they have challenged its hegemony, arguing that law does not emanate from the state alone, that it is polycentric and polymorphous, that it is immanent in all social relations and all institutions (Galanter, 1981; Griffiths, 1986; Merry, 1988; Tamanaha, 1993; Teubner, 1992; Bourdieu, 1987).

In one sense, labour law might be seen as the precursor of, even the template for, such postmodern theorizing about law. The employment relation – long recognized as one of the most important, and universally experienced, of social relations – has always been governed by norms which are largely distinct from those enacted by the state. In premodern law, employment was deemed a status, like that of marriage, and regulated by domestic 'customs of the trade'. In the early years of industrial capitalism, under cover of contract and backed by state coercion, employers were given considerable latitude to make and enforce special workplace rules. From the 1830s to the 1930s, by dint of considerable struggle, workers and their unions were sometimes able to transform unilateral employer control into something approximating a bilateral regime, although the state legal system not only declined to accept this new regime, but often actively opposed it. Modern collective bargaining legislation built upon this history by mandating employers and unions to create and administer a regime of indigenous workplace law. And, as E.P. Thompson (1963; 1991) so vividly demonstrated, running alongside the formal, visible and 'legal' regulation of employment at every stage was (and is) an informal, invisible and 'moral' regime deeply imbricated in social relations and in the very processes of work.

Two themes recur throughout this barebones account of the evolution of labour law: the importance of power in the employment relationship and the notion that state law at most provides the framework or constitution of a normative regime whose substantive content is then contextually determined. These themes resonate with much postmodern legal theory. It is therefore not surprising that the social relations of production have been closely examined in recent sociological and socio-legal scholarship (Burowoy, 1979; Henry, 1983; Arthurs, 1985), or that labour law frequently appears as a case study in theoretical works on legal pluralism (Moore,

1973), reflexive law (Rogowski and Wilthagen, 1994), and the constitution of 'juridical fields' by professional discourse and practise (Bourdieu, 1987; Dezalay, 1986).

(d) The view from here

This rapid tour of a rather desolate landscape reveals three related phenomena. First, the new economy is profoundly altering the social, political and economic framework of industrial relations everywhere, almost always by reducing the state's benign intervention in economic life. However, the nature and consequences of the state's vestigial labour market role vary from one country to another, reflecting variations amongst and within Anglo-American, European and East Asian capitalisms. Second, collective bargaining – stage centre especially in North American industrial relations policy debates and academic theorizing since the 1930s – may be about to take its last bow. This represents a grievous blow to the interests of working people on the shop floor and in politics, but also a disjuncture in industrial relations theorizing, long dominated by 'industrial pluralism' which hoped to replicate liberal democratic institutions within a system of private, voluntaristic and idiosyncratic employment relations. Third, legal theory generally is experiencing a crisis of post-modernity, which is generating new theoretical perspectives, such as legal pluralism, which emphasize the contingency, variability and polycentricity of legal norms and institutions. In fact, legal pluralism seems to be a particularly appropriate way to describe the construction of social order in the workplace, which is notoriously contingent, variable, and polycentric. However, it can no longer be said – if it ever could – that the legal theory and social relations of production which underpin collective bargaining legislation guarantee workers access to this legal pluralist regime, or to the industrial pluralist vision of countervailing power and due process within it.

Finally, it is important to recall the one critical point on which these three tendencies converge. Each, in its own way, seems to envisage the state in a less active role, or at least a less positive role, in shaping employment relations. Each assumes, for better or worse, that workers will have to find a way, with little or no state assistance, to define their own interests *vis-a-vis* their employers. Each therefore contributes to the importance of what I have metaphorically called memory.

Memory: the indigenous law of the workplace

We have seen that *industrial* pluralism proposes collective bargaining as a means of guaranteeing to citizens at work the familiar democratic values, institutions and processes which they enjoy in the rest of their lives. This view is expressed in an extended metaphor. Collective bargaining itself is treated as a constitutive or legislative process initiated by certification of the union's entitlement to represent workers, based on the principle of majority rule expressed through free, democratic elections; its purpose is to establish a regime of rights for 'industrial citizens'; the collective agreement achieves this by guaranteeing the 'rule of law in the workplace'; the resulting seniority-based entitlements are analogized to 'job property rights'; and

grievance procedures and arbitration guarantee to the holders of those rights a measure of 'industrial justice' administered in accordance with 'the common law of the shop' and with due regard to 'industrial due process'. To this extent, industrial pluralism can fairly be described as landscape – the product of, or an evocation and imitation of, state and state law.

Legal pluralism, for some reason, employs more scientistic metaphors – electromagnetism, biological and neurological systems, artificial intelligence – all, in one way or another, physical approximations of memory. Legal pluralism posits that 'law' is generated by, and imbricated within, all social relations, fields, orders or regimes. It rejects the notion that law has explicit formal institutional or processual characteristics, which necessarily derive from, are modelled on, or respond to state law. Rather, legal pluralism argues that law can exist prior to, apart from – even in opposition to – the state legal system, that law can be implicit and informal.

Thus, for the legal pluralist, labour law may include elements of state law, but only to the extent that state law is incorporated by 'memory' into the actual lived law of the workplace (sometimes with consequences which differ markedly from statutory prescriptions). However, labour law, in the legal pluralist view, derives primarily from other sources: standard operating procedures and production norms promulgated by management (with or without input from workers) and given cogency by promises of job security and advancement or threats of discipline and unemployment; norms of shopfloor behaviour governing degrees of effort, skill and care or gradations of deference and civility, often expressing worker solidarity, whether spontaneous and visceral, or mobilized by union organization and ideology; routines mandated by new technologies and rituals bequeathed by old ones; behaviour at work which is a projection of external patterns of social behaviour rooted in local cultures, ethnicities, gender relations and family structures; odd individualized and pragmatic understandings designed to encourage productivity or avoid conflict by catering to individual talents, needs and preferences; patterned behaviour shaped by encrustations of past workplace custom and practise; and so on.

The ephemeral, but dense, reglementation which legal pluralism perceives in the workplace, as in all complex social settings, may be legitimated, absorbed, marginalized, tolerated or even regenerated by collective bargaining. But it does not depend on collective bargaining, whether based in statute law or otherwise. Consequently, the demise or decline of collective bargaining does not result in a normative vacuum, which management can fill as it pleases. Indeed, legal pluralist analysis would suggest that, in the absence of collective bargaining, informal reglementation may reassert itself, the indigenous growth of memory, as it were, reconstituting the abandoned landscape. This is not to say that nothing changes when collective bargaining disappears. What does change materially, of course, is the balance of power. With a change in the balance of power, comes almost certainly a dilution of economic benefits and diminished protection for workers' dignity, security and equity claims. But still management will have to contend with what remains – memory: a strong, invisible and deeply rooted system of reglementation.

This analysis differentiates *legal* pluralism from *industrial* pluralism in at least three respects. First, legal pluralism does not regard the law of the workplace as

unique; it is simply one manifestation of a ubiquitous social phenomenon. Thus, as several empirical studies demonstrate (Moore, 1973; Henry, 1983; Burowoy, 1979; Selznick, 1969), some form of indigenous law subsists in every workplace prior to, and apart from, the advent of legislation mandating collective bargaining or imposing minimum standards of safety, amenity and wages. Second, because legal pluralism regards the existence of a distinctive 'law of the workplace' as descriptive, rather than prescriptive, it does not assume *a priori* that workers are 'industrial citizens' who enjoy a full range of democratic rights and freedoms – although it obviously does not foreclose such a possibility. Third, legal pluralism, in particular, is willing to acknowledge what industrial pluralism is accused of neglecting: that employment relations are power relations; that the employer's superordinate power is manifest in the form and content of the legal regime of employment; and that claims of the triumph of democracy in the workplace may be not only premature and misleading, but also cooptative and thus disempowering.

Landscape, memory and power

There is nothing very novel or controversial about the proposition that the social relations of production are determined in large measure by the ownership of the means of production. The interesting questions for legal pluralists, however, relate to the processes by which ownership is translated into power, power into law and law into the dynamic of workplace behaviour. Some intriguing possibilities are suggested by social and cultural historians who have traced the shaping of the consciousness of industrial workers, their habituation – and resistance – to the normative standards of the workplace (Thompson, 1991) Equally plausible explanations are found in the classic discourses of industrial sociology and management science. Two brief examples will serve to link these discourses to the analysis of legal pluralism.

Corporate bureaucracies organized on Weberian principles traditionally centralize, professionalize and hierarchically structure authority. There is some indication that in conditions of globalization and with the assistance of communications technology, some transnational corporations are attempting to project Weberian principles worldwide, and to micro-manage their subsidiaries from corporate headquarters. Uniform company-wide rules and engineered systems of social control, however, likely require suppression of local deviations and especially of the indigenous normative systems which are secreted in the interstices of any workplace. The result is likely to be conflict. Conflict may be overt and episodic, and take the form of strikes or lockouts; it may be covert and endemic, and take the form of reduced effort, carelessness, sabotage, or absenteeism. Ultimately, such worker responses are likely to affect productivity and profit which, it turn, may lead to either benign or repressive reactions from management. In the former case, something approximating collective bargaining may reappear; in the latter, a cycle of resistance and repression; but in either case, a new normative regime will have emerged.

By contrast, another contemporary management style purports to celebrate the 'decentralization' of authority, the 'empowerment' of workers and the reflexive

learning capacity of 'smart organizations'. Is such an approach likely to reduce the incidence of conflict or, for that matter, the power of management? Henry, for example, notes that by creating work groups and other employee-based formations and coopting them into the disciplinary process, 'the capitalist rule of law can achieve ... [a] ... most sophisticated and mature form of voluntary, autonomous self-regulation' which brings participants 'not only self-discipline and self-control, but also self-confidence, self-respect and individual, if limited, autonomy' (1982: 380). Perhaps in the short- to mid-term, such strategies will produce normative systems in the workplace whose form and content resemble those which might emerge under more traditional management regimes; but it is by no means clear that 'empowered' or 'self-confident' workers will, over the long-term, be content to exercise 'self-discipline and self-control' if normative outcomes do not differ from those produced by more conventional management structures and strategies.

This notion that the law of the workplace is ultimately shaped by power relations, however overtly or subtly exercised, makes it necessary to move beyond the basic descriptive claims of legal pluralism to a theoretical position with greater explanatory ambitions, a position which might be called *critical* legal pluralism. Such a position begins to ground analyses of future developments in labour law, along the lines of what Hepple has called 'radical pluralism' (Hepple, 1995: 322).

Of course, power relations are no more invariable than the normative systems they produce. To be sure, the power of capital usually results in workplace rules which favour corporate employers over individual employees. Only a small minority of individual 'workers' – senior executives, skilled professionals and high-profile sports or entertainment personalities (and, occasionally, union representatives) (Moore, 1973) – are able to construct by contract or custom a highly advantageous regime of workplace law. Most workers, and especially those with little individual or collective power, are at the other end of the spectrum: their employer can pretty well dictate the rules governing the workplace, and indeed, can even violate those rules with relative impunity. Nonetheless, in given circumstances, despite the employer's superior power, even relatively powerless workers may develop unofficial normative systems to protect their interests 'in the shadow' of the formal system of workplace law decreed by the employer, as Burawoy's study of 'struggles on the shop floor' attests (1979: 161-177).

Finally, power relations between employers and workers are important, but they are not the only forces shaping the law of the workplace. State law, even in the new economy, remains something of a factor, both in terms of direct enforcement and because of the evocative power of concepts such as 'due process' which find their way into normative domains in which they may not technically apply. Further, through their dominance of discourse and practise in the legal field, professionals – lawyers, management consultants and industrial relations experts – may be able to promulgate norms which reinforce or nullify the norms of state law (Edelman, et al., 1992). In doing so, parenthetically, professionals not only influence the content of workplace law, but at the same time advance their own particular interests (Edelman et al., 1992; Dezalay, 1986). And finally, as noted earlier, power relations at work do not exist in isolation from those which prevail in society at large. Indeed, all of the

social and cultural institutions and processes which define society generally may represent important modalities of either domination or resistance within the workplace.

To sum up: industrial pluralism makes a valuable contribution in showing that collective bargaining helps to create a particular legal regime within the workplace; legal pluralism incorporates the normative regimes of workplace law into a general theory which encompasses all sites of social interaction; and critical legal pluralism focuses attention on power relations as a major determinant of the quality and consequence of all legal regimes of employment whether originating in the state, the workplace or elsewhere.

Memory's landscape / Landscape's memory

Memory – the tacit, informal, and reflexive norms, institutions and processes which constitute and interpret social meaning in the workplace and elsewhere – is contingent, variable, pluralistic. Common memories, the perception of participating in a common past and future, can promote solidarity and sharing. However, those who do not share memories are, by definition, 'others'. In this sense, memory promotes solidarity by promoting exclusion. Such, indeed, is the teaching of legal pluralism, and in a sense also of Bourdieu's theory of social fields, of Teubner's autopoesis: law is generated within a bounded social space and consciousness, which it serves both to regulate and to define over and against the rest of the world. Exclusion is therefore, sadly, the fate not just of 'the south' – the third world, which we read out of our consciousness – but of many groups of marginalized workers in 'the north': immigrants, racial minorities, the handicapped, women, the unskilled or illiterate, those in depressed industries or the informal economy (Benton, 1994; Sassen, 1994).

Moreover, by denying or de-emphasizing the possible universal dimension of experiences, referents, assumptions and values, memory also circumscribes the possibility of general explanatory theories. It stands in the way of our seeing that changes in people's working lives, and in labour law and industrial relations more generally, are inescapably embedded in and generated by broader and more complex changes in the landscape of state law, politics, and political economy. To this extent, memory – and legal pluralism, the acknowledgement of memory – also inhibits the development of a broad sense of community and constrains the prospects for popular action.

Landscape – the ineluctable product of political economy, of state and state law – is of course not so ineluctable as all that; it is mediated by memory. State labour law – by itself – had limited power to alter power relations. It could neither prevent children from working in Victorian coal mines nor ensure that women and blacks were afforded equity and dignity in modern workplaces; it could neither wholly suppress unions in the first American age of robber barons nor much sustain them in the second. Only to the extent that memory intervened, to the extent that the workplace norms and institutions which reproduced and reinforced power relations were gradually modified by informal and embedded practice consonant with the expectations of state law, was it possible to say that state law had taken hold. Landscape without memory is almost unthinkable, or at least unintelligible.

But memory can also be solipsistic and therefore misleading. 'Memory' – norms and institutions and embedded practises – from the distant age of New Jerusalems, New Deals and New Frontiers, of union power and industrial justice and the welfare state, may have little salience today in the new economy. Moreover, with the collapse of the project of industrial pluralism, much of memory – collective agreements, grievance procedures and small, subtle claims of customary entitlement – becomes unreliable. And finally, in the spirit of post-modernism, we are invited to take solace in the dismissal of hierarchy, in the celebration of difference, in the infinite joys of deconstruction and reinterpretation. These will doubtless be consoling as we patiently try to reconstruct the landscape of state and painfully recover the memory of work-place normativity.

References

Adams, R., 1995, 'A Pernicious Euphoria: 50 Years of Wagnerism in Canada', 3:3/4. *Canadian Labour and Employment Law Journal* 321-355.

Adams, R., 1993, 'The North American Model of Employee Representational Participation: 'A Hollow Mockery', 15:1. *Comparative Labor Law Journal* 4-14.

Adell, B., 1995, 'Juridification Under Wagnerism: The Need for a Change in Direction' in A. Giles, A.E. Smith & K. Stone (eds.) *Proceedings of the XXXI Conference, Canadian Industrial Relations Association 1994*, Quebec: CIRA.

Arthurs, H.W., 1996a, 'Labour Law Without the State', 46:1. *University of Toronto Law Journal* 1-45.

Arthurs, H.W., 1996b, '"Mechanical Arts and Merchandise": Canadian Public Administration in the New Economy', *McGill Law Journal*, 31-61.

Arthurs, H.W., 1985, 'The Law of the Shop: The Debate over 'Industrial Pluralism'', 38. *Current Legal Problems* 83-116.

Arthurs, H.W. and R. Kreklewich, 1996, 'Law, Legal Institutions and the Legal Profession in the New Economy', 34:1 *Osgoode Hall Law Journal*, 1-60.

Atleson, J., 1994, 'Law and Union Power: Thoughts on the United States and Canada', in: R. Rogowski and T. Wilthagen, eds., *Reflexive Labour Law: Studies in Industrial Relations and Employment Regulation*. Deventer: Kluwer Law and Taxation Publishers, 139-171.

Atleson, J., 1983, *Values and Assumptions in American Labour Law*. Amherst, Massachusetts: University of Massachusetts Press.

Barenberg, M., 1993, 'The Political Economy of the Wagner Act: Power, Symbol and Workplace Cooperation', 106:7 *Harvard Law Review* 1381-1496.

Beatty, D. M., 1987 – *Putting the Charter to Work: Designing a Constitutional Labour Code*. Montreal: McGill-Queen's University Press.

Benton, L., 1994, 'Beyond Legal Pluralism: Towards a New Approach to Law in the Informal Sector', 3. *Social & Legal Studies* 223-242.

Bogart, W. 1994, *Courts and Country: The Limits of Litigation and the Social and Political Life of Canada*. Toronto: Oxford University Press.

Bourdieu, P., 1987, 'The Force of Law: Toward a Sociology of the Juridical Field', 38:5. *Hastings Law Journal* 805-853.

Browne, J., 1994, *The Juridification of the Employment Relationship*. Aldershot: Avebury.

Burawoy, M., 1979, *Manufacturing Consent*. Chicago: University of Chicago Press.

Campbell, T., 1986, 'Labour Law and Economics', 38. *Stanford Law Review* 991-1064.

Compa, L., and T. Hinchcliffe-Darricarrere, 1995, 'Enforcing International Labor Rights through Corporate Codes of Conduct', 33:3 *Columbia Journal of Transnational Law* 663-689.

Dezalay, Y., 1986, 'From Mediation to Pure Law: Practice and Scholarly Representation within the Legal Sphere', in: B. Cleeve, I. Fraser, I Stewart, trans., 14 *International Journal of the Sociology of Law* 89-107.

Drache, D. and Glasbeek, H., 1992, *The Changing Workplace: Reshaping Canada's Industrial Relations System*. Toronto: James Lorimer.

Drucker, P., 1994, 'The Age of Social Transformation', 53, *Atlantic Monthly* 53-80.

Economic Council of Canada, 1990, *Good Jobs, Bad Jobs*, Ottawa: Ministry of Supply and Services.
Edelman, L.B., S.E. Abraham and H.S. Erlanger, 1992, 'The Professional Construction of Law' 26:1. *Law and Society Review* 47-83.
Ellickson, R.C., 1991, *Order Without Law: How Neighbours Settle Disputes*, Cambridge, Mass.: Harvard University Press.
Epstein, R., 1983, 'A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation' 92:8 *Yale Law Journal* 1357-1408.
Fox, A., 1974, *Beyond Contract: Work, Power and Trust Relations*. London: Faber.
Freeman, R.B. and J.L. Medoff, 1979, 'The Two Faces of Unionism' 57. *The Public Interest* 69-93.
Fudge, J., 1991, *Labour Law's Little Sister: The Employment Standards Act and the Feminization of Labour*. Ottawa: Canadian Centre for Policy Alternatives..
Fudge, J., 1996, 'Fragmentation and Feminization: the Challenge of Equity for Labour-Relations Policy', in: J. Brodie, ed., *Women and Canadian Public Policy*. Toronto: Harcourt Brace and Company, 57-87.
Fukuyama, F., 1995, *Trust: The Social Virtues and the Creation of Prosperity*. New York: The Free Press.
Galanter, M., 1981, 'Justice in Many Rooms: Courts, Private Ordering and Indigenous Law' 19, *Journal of Legal Pluralism* 1-47.
Griffiths, J., 1986, 'What is Legal Pluralism?' 24. *Journal of Legal Pluralism* 1-55.
Grinspun, R., and R. Kreklewich, 1994, 'Consolidating Neoliberal Reforms: 'Free Trade' as a Conditioning Framework' 43. *Studies in Political Economy* 33-61.
Head, S., February 29, 1996, 'The New, Ruthless Economy', *New York Review of Books* 47-52.
Henry, S., 1982, 'Factory Law: The Changing Disciplinary Technology of Industrial Social Control' 10, *International Journal of Sociology of Law* 365-383.
Henry, S., 1983, *Private Justice: Towards Integrated Theorizing in the Sociology of Law*. London: Routledge and Kegan Paul.
Hepple, B.A., 1995, 'The Future of Labour Law' 24:4. *Industrial Law Journal* 303-322.
Horn, N., ed., 1980, *Legal Problems of Codes of Conduct for Multinational Enterprises*. Deventer: Kluwer.
Hutton, W., 1995, *The State We're In*. London: Jonathan Cape.
Hyde, A., 1990, 'A Theory of Labor Legislation' 38:2. *Buffalo Law Review* 383-464.
Kettler, D., and P. Warrian, 1994, 'American and Canadian Labor Regimes and the Reflexive Law Approach' R. Rogowski and T. Wilthagen, eds., *Reflexive Labour Law: Studies in Industrial Relations and Employment Regulation*. Deventer: Kluwer Law and Taxation Publishers, 95-137.
Klare, K., 1978, 'Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness', 1937-1941', 62, *Minnesota Law Review* 265-339.
LaLonde, R.J., and B. Meltzer, 1991, 'Hard Times for Unions: Another Look at the Significance of Employer Illegalities' 58:3. *University of Chicago Law Review* 953-1014.
Lester, G., 1991, 'Toward the Feminization of Collective Bargaining Law' 36:4. *McGill Law Journal* 1181-1221.
Merry, S.E., 1988, 'Legal Pluralism' 22:5. *Law and Society Review* 869-896.
Moore, S.F., 1973, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study', 7:4. *Law and Society Review* 719-746.
Posner, R., 1984, 'Some Economics of Labor Law' 51:4. *University of Chicago Law Review* 988-1011.
Putnam, R., 1993, *Making Democracy Work: Civic Traditions in Modern Italy*. Princeton, N.J.: Princeton University Press.
Rogowski, R. and T. Wilthagen, eds., 1994, *Reflexive Labour Law: Studies in Industrial Relations and Employment Regulation*, Deventer: Kluwer Law and Taxation Publishers.
Rosenberg, G., 1991, *The Hollow Hope*. Chicago: University of Chicago.
Santos, B., 1987, 'Law: A Map of Misreading. Toward a Postmodern Conception of Law' 14:3. *Journal of Law and Society* 279-302.
Sassen, S., 1994, 'The Informal Economy: Between New Developments and Old Regulations' 103:8. *Yale Law Journal* 2289-2304.
Schama, S., 1995, *Landscape and Memory*. London: Harper Collins.
Schwab, K. and C. Smadja, February 16, 1996, 'Globalization Backlash is serious' *The Globe and Mail*, B10.
Selznick, P., 1969, *Law, Society and Industrial Justice*. USA: Russel Sage Foundation.
Stallings, B., and W. Streeck, 1995, 'Capitalisms in Conflict? The United States, Europe and Japan in the Post-Cold War World', in: B. Stallings, ed., *Global Change, Regional Response*, Cambridge: Cambridge University Press 67-93.

Stone, K., 1981, 'The Post-War Paradigm in American Labor Law' 90:7. *Yale Law Journal* 1509-1580.
Stone, K., 1995, 'Labor and the Global Economy: Four Approaches to Transnational Labor Regulation' 16:4 *Michigan Journal of International Law* 987-1028.
Streeck, W., 1996, 'Public Power Beyond the Nation-State: The Case of the European Community', in: R. Boyen and D. Drache, ed., *States Against Markets: The Limits of Globalization* New York: Routledge, 299-315.
Summers, C., 1995, 'Worker Dislocation: Who Bears the Burden? A Comparative Study of Social Values in Five Countries' 70:5. *Notre Dame Law Review* 1033-1078.
Tamanaha, B.Z., 1993, 'The Folly of the 'Social Scientific' Concept of Legal Pluralism' 20:2. *Journal of Law and Society* 192-217.
Teubner, G., 1992, 'The Two Faces of Janus: Rethinking Legal Pluralism' 13:5 *Cardozo Law Review* 1443-1462.
Thompson, E.P., 1991, 'Time, Work-Displine and Industrial Capitalism' *Customs in Common*, New York: The New Press.
Thompson, E.P., 1963, *The Making of the English Working Class*. London: V. Gollancz.
Weiler, P., 1991, 'Hard Times for Unions: Challenging Times for Scholars', 58:3. *University of Chicago Law Review* 1015-1032.
Weiler, P., 1990, *Governing the Workplace*. Cambridge: Harvard University Press.
Weiler, P., 1983, 'Promises to Keep: Securing Workers' Rights to Self Organization under the NLRA', 96:8. *Harvard Law Review* 1769-1827.
Weiler, P., 1980, *Reconcilable Differences*. Toronto: Carswell.