Global Workplace Law & Policy

Climate change and labour law: a methodological warming-up

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Policy actors and broad societal and scientific movements from around the world call for action in order to address the problem of climate change. The urgency is beyond doubt. But labour law scholarship, so far and largely speaking, still ignores or barely touches the subject. Furthermore, labour law has not yet developed a real strategy to deal with the issue. The purpose of this contribution is to find out how labour law can contribute to the climate change debate, and vice versa.

This note is based on my presentation given during the Second Roger Blanpain conference that we organized at KU Leuven (Belgium) on 18-19 November 2019.

Responsive labour law

It is important to accept that labour law is responsive to societal change. I have developed the idea of responsive labour law in earlier work (*cf. F. Hendrickx, Flexicurity and the Lisbon Agenda, Intersentia, 2008*). It is based on the idea of responsive law itself, as it has been forwarded by Nonet and Selznick (*Law and society in transition: toward responsive law*, London, Harper and Row, 1978). Responsive law arises in order to make law more responsive to social needs, to make it responsive to adaptation. Responsive law aims at ‘enablement and facilitation’.

Responsive *labour law* means that the sphere of labour law should be addressing major challenges that individuals and societies face. It can be seen as offering solutions which are adapted to the rights and needs of individual labour market participants. But responsive labour law could also be seen as guaranteeing social justice for people in times of change (instead of protecting workers by avoiding market driven change). Labour law is thus not only to be seen as a countervailing force to the employer’s stronger bargaining position or contractual authority, but would also be focused on the worker as an individual, or within a group, confronted with a changing economic or labour market environment, or with new societal perspectives.

What if the world changes?

With the above in mind, it may become easier to accept the following question for labour law: what if the world changes? Labour law scholars have become quite familiar with the modernization of labour labour law debate. It relates to the question on whether and how existing laws or legal strategies on labour and employment relations should be modified and adapted.

In this situation, the new world of work is often indicated as a reason for further reflection. For example, labour law came in a sort of regulatory problem, faced with the fading away of the traditional socio-economic regulatory model behind work, which was dependent on a standardized form of work, with strong elements of subordination and the institutionalization of collective parties and collective bargaining. This 'industrial' period of labour law has evolved and increasingly becomes something of the past, with more flexibility arising as well as non-standard, new forms of work.

Taking these perspectives into account, the labour law (modernization) approaches and evaluation is often related to recommendations about future directions of labour law, or with the impact that labour law rules have on our labour markets or even our lives. Good examples are the role of labour market flexibility, or work-life balance, for labour law.

But what if not just the world of work, but – much broader – the world itself is changing? Against such wider horizon, it may be a less easy to discuss the implications for labour law. We may think about broader issues, such as demographic changes, ageing societies, the progress of medical science, or the improvement of health care. We would still try to see a connection with labour markets, although the reflection may be somewhat more difficult. Climate change would also appear against this broader societal horizon about which the question arises what it means for labour law. It makes the reflection more complicated, somewhat less evident. But it is still doable and also logical in a responsive labour law context.

Methodology in (labour) law

The approach may be found in the methodological aspects of the legal discipline. Labour law is part of this legal discipline. Much of the existing labour law scholarship is of an interdisciplinary nature and shows to be very flexible and open towards other scientific areas. But labour law also shares the problem of legal science: there is no single, uniform scientific method.

In our general and common understanding, science is about generating 'scientific knowledge'. We would require 'scientific' evidence or justification. Some would argue that we need 'validity' for our statements. Law is an argumentative discipline (*cf. Jan Smits, "Redefining normative legal science: towards an argumentative discipline", in F. Coomans, F. Grünfeld, M. Kamminga, Methods of human rights research, Antwerp-Oxford, Intersentia, 2009*). The question arises how better arguments can be found and arranged. How do we frame labour law in a system of evaluations and recommendations?

The point is probably to pay attention to two major issues. First, we have to accept that 'outside' perspectives (perspectives that are external to labour law) can be used in a normative labour law discourse. Examples are flexicurity, a work-life balance approach, a capabilities approach, etc. Second, we need to look into the foundations of labour law in order to make sure that evaluations or recommendations about labour law remain in line with the 'value system' of labour law itself. This includes, for example, accepted considerations about the principle that labour is not a commodity, or that labour law contributes to social justice. It makes sure that approaches of labour law are not merely subject to instrumental reasoning.

However, the 'outside' perspective on labour law is not only interesting to the extent that it provides a way through which climate change debate can be integrated in the labour law discourse. It also may give rise to reflection about new goals and functions of labour law.

Issue spotting

Some of the labour law discussions in the context of climate debate seem evident. Health and safety and working in extreme climate conditions will certain be an important issue. Climate induced migration may be another one. And business restructuring due to a shift to the green economy will also entail labour market and labour law consequences. But there may be less evident subjects. For example, how do we see ‘climate strike action’ by trade unions in light of the existing principles of the right to strike ? Would this be a political strike, meaning that such activities may lack protection under normal strike law? Or is such action sufficiently connected with the socio-economic context for which strike action should be accepted? It seems to be an open question and the answer may be dependent on whether one sticks to the traditional legal views on strike action versus a more developed, although less certain, climate friendly oriented argumentation. On the other hand, institutions such as the ILO call for social dialogue to be involved with climate change subjects. Many other legal issues may still come to the fore: what with the rewarding of workers with ‘climate friendly’ benefits (such as, for example, vouchers to buy ‘green’ products) in light of the principle that workers should keep their freedom over the spending of their wages.

In other words, labour lawyers may need to be sufficiently creative to spot the climate change issues in their disciplinary field and to translate them to a useful discussion.

Freedom and responsibility

Labour law would, furthermore, need to undertake a discourse in correspondence with other disciplines. Labour law has often been seen as a discipline that came as a response to civil law, where the party’s autonomy and the theoretical equality of bargaining power prevailed. It has become clear that bargaining power in labour relations is different. Furthermore, labour law, for example in the debate about the gig economy or in EU law, is seen in relation – sometimes in conflict – with principles of economic law. In the future, one may consider to connect the labour law debate with environmental law, a field in which also some reflection goes on, for example about the role of private property, the market principles and the manner in which these influence the broader environment. The collective dimension and the value of solidarity, proper to labour law, may be helpful to strengthen environmental law. On the other hand, labour law could learn from environmental law through some other values. On the basis of both disciplines and further interdisciplinary experience, perhaps enriched with further foundational reflection, we might realize that the core values in our future labour law discourse are very responsive to the ones needed in climate change debate: freedom and responsibility.

This entry was posted on Wednesday, November 27th, 2019 at 5:32 pm and is filed under Labor Law
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