

Preface

Withhold not good from them to whom it is due, when it is in
the power of thine hand to do it.¹

As part of our wider enquiry into socio-economic sustainability and regulatory principle, this book continues our anthropology of embeddedness,² with particular attention to law and private property relations. Specifically, the legal regulation of private property rights (see Chapter 3) is analysed as supporting or subverting market embeddedness and consequent social sustainability. The policy reach of this exercise enables testing which regulatory interests external and internal to market economies, work favouring or against sustainable market conditions in the context of positive social bonding. The special relevance for market economies not currently prioritising sustainability as essential regulatory principle is revealed through laying bare law's discriminatory role in crucial private property arrangements (see chapters 4 and 5).

As with our earlier thinking³ about the social dislocation of market economies, Polanyi's theorising of embeddedness remains the backdrop for our investigation of legal regulation and sustainability. Regina Kreide rehearses Polanyi's explanation of how the market sphere ceased to be embedded in the life of society, and market economies no longer function to serve the people, but instead social processes and institutions have been shaped to meet market requirements. Central among these is law. We join her in questioning what are the mechanics and instruments that allow for the social reembedding of global markets. Beyond economic musing, the answer to this concern has important ramifications for global governance, which is another significant regulatory arena beyond

¹ Bible (KJV), 'Proverbs', 3; 27.

² For a helpful discussion of embeddedness in many contemporary regulatory contexts see Joerges and Falke (2011).

³ Findlay and Lim (2014a).

individual wealth creation and nation state economic growth that we challenge as the book evolves.⁴

The underlying assumption is that legitimate global governance focuses on the inclusion of citizens into law-making processes on a national, as well as a transnational level, while at the same time it tries to place the expanding markets under the control of popular sovereignty ... Law alone does not possess the substance to determine [such systematic social integration] and because of this it has to rely on external normative factors. Law's very own normative character, however, lies in its self-dedication to the processes of law-making and justification, which expresses justice within law. It is precisely this law-immanent normativity which allows it to spell out what legitimate law-making should look like ... [for more democratic global governance] minority positions must obtain actual access to the negotiations [of market benefit] and must have the possibility of influencing the decision-making process there.⁵

In a market sense, law has become a major instrument of disembedding, in action and in absence. By seeking out law's negative influence over social sustainability, through orchestrating exclusionist private property arrangements, our argument attempts to close the gaps between the forces of rule setting, and those who are genuinely affected by them (not just those for whose benefit rules are directed). In terms of market governance at least, law must be repositioned in the wider regulatory mission, acting towards rather than against social bonding for the *general good*⁶ if market sustainability is to complement broader social sustainability. It is not enough to accuse law of failing to protect the marginalised in either institutional or process settings. The following analysis demands more original and equitable logic of the law in its predetermination of private property arrangements that at present destructively separate economic from social relations, and the disadvantaged in its wake.

The *global/social* is the preferred context for our discussion of legal regulation and private property arrangements, despite our empirical focus on nation states and regional alliances. As we have indicated previously,⁷

⁴ Throughout the book our interest in globalised migrant labour flows and the markets they facilitate represent important regulatory contexts beyond the limits of international human rights and humanitarian laws.

⁵ Kreide (2011), pp. 43, 55, 59.

⁶ Without unduly constraining the conceptualisation of general goods, throughout the book we focus on correcting the disenfranchising of labour force and value in migrant labour markets, and the social positives above and beyond fairer labour pricing, that such correction would ensure.

⁷ Findlay and Lim (2014b).

too much energy in regulatory scholarship has been directed towards refining the potency of the regulatory state, and the public law that is said to empower its regulatory objectives. Private law is easily uncoupled from the *dysfunctionalities* of market economies and its regulatory responsibilities are left unscathed beyond even the more critical investigations of how private law might be implicated in market failing.⁸

A more incisive range of speculation about legal regulation looks at private law as making and remaking excluded, marginalised minorities that cannot be rehabilitated into some form of market presence when law's *ring-fencing* of private property arrangements itself resists regulatory efforts at greater integration and accountability through public law. We disagree that *hard law* can call a halt to this process of law as a social problem. The answer to law's unbalanced market discrimination through property enunciation and enforcement, lies more effectively in the reconstructing (or perhaps in a normative or expressive sense, resurrecting) law's regulatory role from exclusion to a more communitarian and pluralist recognition of the social obligations of the market. We endeavour to deconstruct and rebuild particular legal instrumentalities and arrangements as offering practical pathways to market sustainability, beyond critique and hope.

In his discussion of the market's failure to protect public interest, under the larger rubric of responsible enterprise, Philip Selznick observes that despite the many rules designed to off-set the dangers of short-term gain motivation:

An especially insidious market failure occurs when a product or service that directly affects the quality of public life is degraded, killed or unborn ... As pressure rises for wider markets and higher profits, precarious values are displaced or eroded.⁹

In part this corrosive process can be put down to the manner in which the 'idols of the market', such as private property and investment, are justified by the wealth that they have offered even greater populations than just the wealthy.

This legacy is troubling, however, insofar as it encourages misplaced enthusiasm for applying free market principles to all spheres of life while ignoring the social and political frameworks on which economic life depends ... The

⁸ Bridge and Braithwaite (2013).

⁹ Selznick (2002), p. 104.

temptation is to transfer an idea made reasonable by a tacit understanding of its limits into an idea corrupted by a lost sense of connectedness and restraint.¹⁰

Selznick identifies one of the inappropriately worshipped market idols being *property*, individualised and market-centred as it has become in the ages of unfettered exchange since the seventeenth century in Europe. Part of this idolatry is the law's function in protecting property rights and their transference to the heirs of capitalist exchange. Along with this process have emerged such socially problematic trends as the undervalued commodification of wage labour to feed the fetishism of commodities. Despite the selective attempts of private law to rein in the excesses of capitalist market flow, the 'sibling idols of private property and free exchange exert a powerful influence on public policy, and frustrate the protection of important values from market forces'.¹¹

As a plus for market certainty, a market-centred notion of property and the legally endorsed rights pertaining to it has done much to encourage investment and the free flow of capital. However, it is this impersonal and non-situated conception of property which has alleviated enterprise responsibility. The shareholder is distanced from that which gives her shares value. The relationship between ownership and control, such a feature of Fordist capitalism, and the essence of person-centred private property, has retained its purchase on the legal imagination despite the corporate personality, and the fluidity of the market in corporate equities.

At the heart of our challenge for a new relationship between law and private property arrangements is the responsabilisation of property as a market entity. This endeavour at fundamental regulatory transition is not advantaged by the burgeoning of law that limits obligations and depersonalises choice. Selznick argues, along with a more sustainably redistributive invocation of property as a responsible market force, regulation needs reinventing so that it becomes the people's business. The analysis to follow takes the understanding of social equity beyond artificial redistribution regimes, preferring to focus on dignity rather than property as the currency produced from markets in which law's normative principles translate into more inclusive social orders.

Much of the empirical content of this book concentrates on markets for migrant labour. It is no accident that we have selected a disembedded market context which so starkly exhibits relationships of vulnerability created by externalised dependencies which reek of unsustainability. If

¹⁰ Selznick (2002), p. 95.

¹¹ Selznick (2002), p. 96.

we are to imagine the process of disembedding as a continuum, migrant labour markets are the remotest from the social bonds of *general good* even recognising the short-term (but deeply problematic) benefits of wage repatriation. The analysis to follow invites an understanding of law as now profligate but potentially proactive in re-embedding the value of labour, both within its home and host societies. Law becomes a candidate to assist in repositioning labour markets (and other market settings which they benefit) to more socially embedded locations. The sustainability of labour power and pricing then acts as a fillip to the greater project of returning market economies to the service of the social.

In his introduction to the economic work of the decade Thomas Piketty reflects on the Declaration of the Rights of Man and the Citizen (1789) article 1:

Social distinctions can be based only on common utility.¹²

Our book draws the inevitable conclusion that law's constituency is to the dignity of the individual and not to their degradation within disembedded market economies. The migrant labourer is not an opportunity for capital exploitation but is gravely in need of the legal re-regulation of her labour pricing. Fair value of labour is not some vague right. Re-enfranchising the worker to the value of their labour in a social as well as a market setting takes law's regulatory potential outside processes of commodification, and on to the recognition that occupation is a vitally valuable social bond in which all workers should choose participation rather than suffer exploitation. This incarnation of labour as more than property ensures the priority of individual dignity through actual and informed choice facilitated by law. And this is law's project in a more sustainable and social market world.

Indeed the distribution of wealth is too important an issue to be left to economists, sociologists, historians and philosophers. It is of interest to everyone, and that is a good thing. The concrete physical reality of inequality is visible to the naked eye and naturally inspires sharp but contradictory political judgements. Peasant and noble, worker and factory owner, waiter and banker: each has his or her unique vantage point and sees important aspects of how other people live and what relations of power and domination exist between social groups, and these observations shape each person's judgement of what is and is not just.¹³

¹² Piketty (2014), p. 1.

¹³ Piketty (2014), p. 2.

The arguments to follow explore the subjective and psychological dimensions to inequality, not with the end-game alone of a fairer sharing of the fruits of labour. On top of the recognition that we are, in the North World recurrently, experiencing a rate of return on capital that exceeds the rate of growth of output and income, the consequent generation of arbitrary and unsustainable inequalities Piketty reveals are radically undermining the meritocratic values from which liberal democracies claim economic and social legitimacy. The challenge therefore is for the normative and functional foundations of democratic governance (not to mention of sustainable economic models) to regain control over the market, ensuring general goods take precedence over socially destructive private property arrangements. Law, we argue, is at the centre of this regulatory repositioning. In the grand sense, law is now faced with fundamentally assisting, not fragmenting, the viability of the planet and ensuring its relevance in that project.