

## Arbeidsrettsgruppen

*Stein Evju*

### **Labour is not a commodity**

A Reappraisal

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## **Labour is not a Commodity: A Reappraisal**

Som tittelen sier er dette en *revurdering*. I Arbeidsnotat 2012:1, Labour is not a Commodity : Fra Adam Smith til Philadelphia til idag, knyttet jeg an til Paul O'Higgins artikkel i Industrial Law Journal 1997 og bygget på at hans analyse av den talen/publikasjonen John Kells Ingram leverte i 1880, var korrekt i detaljene. Da jeg omsider fikk fatt i den teksten O'Higgins bygget på, ble min konklusjon en annen. Derfor denne revurderingen. Ellers vil leseren se at denne versjonen, som er skrevet på engelsk med tanke på en mulig internasjonal publisering, i store trekk følger forløperen, men også er litt mer utførlig på noen punkter, spesielt om ILO-utviklingen.

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## Labour is not a Commodity: A Reappraisal

Labour lawyers of today are familiar with the maxim ‘Labour is not a Commodity’ being enshrined in the 1944 Philadelphia Declaration which is an integral part of the Constitution of the International Labour Organisation. The origin of this maxim however is older. Paul O’Higgins in 1997 ascribed fatherhood of the maxim to the Irish sociologist and economist Dr John Kells Ingram (1823–1907),<sup>1</sup> pointing specifically to the address that Ingram gave to the Trades Union Congress meeting in Dublin in September 1880.<sup>2</sup> But as we shall see, the question is rather more complex. The genesis starts with the opposite.

The conception that labour *is* a commodity was effectively expressed by Adam Smith in *The Wealth of Nations* (1776)<sup>3</sup> and echoed by Edmund Burke,<sup>4</sup> whose views on economics Smith fully endorsed.<sup>5</sup> In his 1795 address Burke stated, i.a.

And, first, I premise that labour is, as I have already intimated, a commodity, and as such, an article of trade. ... The rate of wages in truth has no *direct* relation to that price [the market price of provisions]. Labour is a commodity like every other, and rises or falls according to the demand.

This fundamental conception was an integral part of the labour theory of value originating from Adam Smith, and which was predominant in liberalist economic theories for the better part of the 19<sup>th</sup> Century. Friedrich Engels and Karl Marx related

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<sup>1</sup> Paul O’Higgins, ‘‘Labour is not a Commodity’ - an Irish Contribution to International Labour Law’ [1997] 26 *Industrial Law Journal* 225.

<sup>2</sup> John K. Ingram, *Work and the Workman. Being an Address to the Trades Union Congress in Dublin, September 1880* (first published 1880) Reprinted with Introduction by Richard T. Ely (Eason & Son, Ltd. 1928). This is the same publication that was used by O’Higgins. The Preface by Ingram underlines that the text was printed ‘exactly as it was delivered’. Nothing suggests that Ely brought about any changes.

<sup>3</sup> Adam Smith, *The Wealth of Nations Books I–III* (first published 1776, Penguin 1999) Chapter VIII Of the Wages of Labour 134, 167–169.

<sup>4</sup> Edmund Burke, *Thoughts and Details on Scarcity : originally presented to the Right Hon. William Pitt, in the month of November, 1795*. By the late Right Honourable Edmund Burke. Printed [posthumously] for F. and C. Rivington; and J. Hatchard. (Printed by T. Gillet 1800) 6 and 13.

<sup>5</sup> Smith reputedly commented that ‘Burke was ‘the only man I ever knew who thinks on economic subjects exactly as I do, without any previous communications having passed between us’’. Cf. E.G. West, *Adam Smith : the man and his works* (Arlington House 1969) 201.

to those theories in writings in the mid-1800s, Engels at the outset descriptively. Explaining how the Proletariat originated he stated, i.a.

Labor is a commodity, like any other, and its price is therefore determined by exactly the same laws that apply to other commodities. In a regime of big industry or of free competition – as we shall see, the two come to the same thing – the price of a commodity is, on the average, always equal to its cost of production. Hence, the price of labor is also equal to the cost of production of labor.<sup>6</sup>

Marx rested on the same basis when discussing the labour theory of value. In its basic form, as expressed by Adam Smith among others, Marx argued that by equating different kinds of labour to the amount of goods for which they could be exchanged, ‘The social character of this labour thus comes to be seen as a material relationship between things.’<sup>7</sup> This, Marx argued, is however a reduction that does not correspond to reality. The capitalist is not facing labour, but the labourer.

What the holder of capital is directly confronted with in the commodity market is in reality not labour, but the worker. What the latter is selling is labour power.<sup>8</sup>

The very point here is of course that a worker’s labour power cannot be separated from the worker himself, so that the sale of his labour power implies a bond on the worker as a person. This was a point of criticism for Marx in the elaboration of his innovative theory of labour’s surplus value.<sup>9</sup> Marx’ views were echoed by many, of course, among them Karl Renner<sup>10</sup> and partly through him onwards to Sinzheimer and Kahn-Freund.

Marx did not express the aphorism that ‘labour is not a commodity’, although his emphasising that labour cannot be separated from the labourer and this is not just another commodity would seem to invite the antithesis. But Marx’ fundamental approach on this point was subscribed to by many.

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<sup>6</sup> Friedrich Engels, *The Principles of Communism* (first published 1847). *Selected Works, Volume One* (Progress Publishers 1969) 81-97, item 5 (quoted from the text at [www.marxists.org/archive/marx/works/1847/11/prin-com.htm](http://www.marxists.org/archive/marx/works/1847/11/prin-com.htm)).

<sup>7</sup> Cf Karl Marx, *Selected writings* (David McLellan, ed) (2nd edn OUP 2000) 437–438. The passage quoted is from ‘The Fetishism of Commodities’, which is a part of the Introduction to *The Capital*, Vol. 1 (first published 1867), and is a critique of ‘bourgeois’ economic thinking. For the original text in German, see fn. 8 *infra*, 85–98 (Der Fetischcharakter der Ware und sein Geheimnis) at 87–88.

<sup>8</sup> Karl Marx, *Das Kapital*. Band I, Sechster Abschnitt (first published 1867) *Karl Marx - Friedrich Engels – Werke* Band 23 (Dietz Verlag 1968) 557–564, 559. (Author’s translation from the German.)

<sup>9</sup> Adam Smith gave a precursor, see Adam Smith (fn. 3) at 151. Marx’ development of the theory of surplus value nonetheless was original and innovative, and also highly influential.

<sup>10</sup> Cf Karl Renner, *Die Rechtsinstitute des Privatrechts und ihre soziale Funktion* (first published 1904), English edition: *The Institutions of Private Law and their Social Functions*. Ed. and with an Introduction by Otto Kahn-Freund (Routledge 1949).

A first notable example is the catholic priest and active social policy player *Joseph Schings*.<sup>11</sup> In 1873, Schings founded a new journal entitled *Das Arbeitsrecht*, where in the Preface to the first issue he emphatically stated that the title implied an ‘obliterating judgment on the liberalist economic axiom that human labour is a commodity.’<sup>12</sup> This was followed up on but at the same time modified a few years later by the highly influential economist and social policy theorist Lujo Brentano. He is widely credited with having laid the foundation on which labour law as a distinct legal discipline was developed in Germany from the end of the 19<sup>th</sup> century and the following couple of decades. In his seminal work on *The Employment Relationship pursuant to Current German Law* Brentano in 1877 countered the liberalist view that labour is a commodity by emphasising that labour power is nothing but the person itself and hence, labour is essentially different from all other commodities. Labour is not just an ordinary commodity and needs to be treated differently from the latter.<sup>13</sup>

This brings us to Dr John Kells Ingram, whose address to the Trades Union Congress meeting in Dublin was given some three years later.<sup>14</sup> A close reading of Ingram’s text reveals that he did *not* coin the phrase in positive terms. Like his German predecessors Ingram inveighed against the ‘position ... habitually contemplated by the economists’ treating labour as a commodity. Ingram’s position was that by doing so one misses the moral conditions that are inseparably associated with the relation of master and workman. The habitual conception in Ingram’s view was a ‘perverted conception’; he argued in favour of understanding labour in a social context where master and workman ‘fulfil different, but equally necessary, parts in a joint social enterprise’, implying that also the worker is a ‘free man.’<sup>15</sup> The first part of this comes out of the first of two quotes from Ingram in O’Higgins’ 1997 contribution.

Our views of the office of the workman must also be transformed and elevated.  
The way in which his position is habitually contemplated by the economists, and

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<sup>11</sup> On Schings, see H Reusch, ‘Schings, Joseph’, in: *Allgemeine Deutsche Biographie* 31 (1890) 297 [Onlinefassung]; URL: <http://www.deutsche-biographie.de/pnd138147132.-html?anchor=adb>; G.G. Windell, *The Catholics and German Unity: 1866-1871*, Minnesota Archive Editions (University of Minnesota Press 1954) 40; Hubert Jedin, Roger Aubert, John Dolan, *The Church in the industrial age, History of the Church* Vol. IX (Hubert Jedin ed) (first published in German 1973, The Crossroad Publishing Company 1981) 230.

<sup>12</sup> Joseph Schings, ‘Vorwort zur Zeitschrift ”Das Arbeitsrecht”’, *Das Arbeitsrecht* 1873, 5 (author’s translation from the German).

<sup>13</sup> See Lujo [Ludwig Josef] Brentano, *Das Arbeitsverhältnis gemäß dem heutigen Recht : Geschichtliche und ökonomische Studien* Reprint, Hrsg. und eingeleitet von Thilo Ramm (first published 1877, Keip Verlag 1994), 182–216.

<sup>14</sup> In the introductory part of his address Ingram refers to a ‘discourse which I delivered at a recent meeting of the British Society for the Advancement of Science’ and noted that although his views had been met with ‘a remarkable degree of attention’ this was not due to ‘any originality in the conceptions’. See John Kells Ingram (fn. 2), 5. That address was given earlier, in 1878, see O’Higgins (fn. 1), 226.

<sup>15</sup> See Ingram (fn. 2), 8.

indeed by the public, is a very *narrow, and therefore a false*, one. *Labour* is spoken of as if it were an independent entity, separable from the personality of a workman. It *is treated as a commodity*, like corn or cotton — the human agent, his human needs, human nature, and human feelings, being kept almost completely out of view. Now there are, no doubt, if we carry our abstractions far enough certain resemblances between the contract of employer and employed and the sale of a commodity. But by fixing exclusive, or even predominant, attention on these, *we miss the deepest and truly characteristic features of the relation of master and workman* — a relation with which moral conditions are inseparably associated. [As in science it is the method we pursue on which the value of our investigations will in the long run depend, so in matters of conduct the point of view at which we place ourselves tends to determinate the character of our whole procedure.] By *viewing labour as a commodity*, we at once get rid of the moral basis on which the relation of employer and employed should stand, and make the so-called law of the market the sole regulator of that relation.<sup>16</sup>

The second part of the argument appears in the next paragraph in Ingram's text, starting with 'Such a perverted conception arises from the individualistic way of looking at the relation in question, as if it were purely a matter of private concernment. But the entire case receives a different complexion when we place ourselves at the social point of view, from which alone these subjects can be rightly studied' (*ibid.*).

The paragraph quoted above is the only part of Ingram's text in which the words 'labour' and 'commodity' appear together. They do so only twice, in the phrases '[labour] is treated as a commodity' and 'by viewing labour as a commodity'. So, contrary to O'Higgins' assertion Ingram did *not* say 'labour is not a commodity'.<sup>17</sup> What Ingram did was to argue that the opposite position was unacceptable, albeit in less explicit terms than Schings and in particular Brentano before him.

How, then, could Ingram come to be credited with coining the aphorism in positive form? As indicated above, the different critiques of the liberalist axiom that labour is a commodity, calling attention to labour being inseparable from the worker obviously lend themselves to the antithesis that labour is not a commodity or, as held explicitly by Brentano, not an ordinary commodity. Still, it seems that a number of years went by before the positive version of the aphorism became notorious.

The difference between the critical approach and a positive formulation is seen in the Papal encyclicals of Leo XIII, 1891, and Pius XI forty years later. The much-heralded encyclical of Pope Leo XIII, *Rerum Novarum*,<sup>18</sup> certainly expresses the idea that labour

<sup>16</sup> *Ibid.* (emphasis added). The text in square brackets is part of Ingram's text but was left out in the quotation by O'Higgins.

<sup>17</sup> It may be noted that for what he presents as a direct quote O'Higgins did not give a page reference. This is of course explicable by the absence of the very phrase from Ingram's text.

<sup>18</sup> *Rerum Novarum*. On Capital and Labour [On the Conditions of the Working Classes]. Encyclical of Pope Leo XIII May 15, 1891. Quoted from the text in English at the Vatican



is no ordinary object of commerce but nowhere explicitly expresses the maxim that 'labour is not a commodity'. Still, this is how *Rerum Novarum* was construed in the encyclical *Quadragesimo Anno* of Pope Pius XI, celebrating the 40 years anniversary of *Rerum Novarum*.<sup>19</sup> There, Pius XI emphasised, that '*Labor, as Our Predecessor explained well in his Encyclical, is not a mere commodity. On the contrary, the worker's human dignity in it must be recognized. It therefore cannot be bought and sold like a commodity*'.<sup>20</sup>

This was a long time passing, however. It seems that the first time the maxim appeared in positive terms was at the adoption of the US Clayton Antitrust Act 1914. The Clayton Act was an addition to and development of the Sherman Antitrust Act 1890. The American Federation of Labor, AFL, had been pressing for the inclusion of provisions to exclude application of the antitrust legislation to trade unions. A key reason for this was the 'Danbury Hatters Case', where following collective action by his workers the employer sued each worker individually who had gone on strike and boycotted his products.<sup>21</sup> Filing for damages under the Sherman Act the employer eventually was successful in the U.S. Supreme Court, which in a unanimous decision held that trade union activity was within the scope of the Sherman Act and that the boycott across state lines was 'conspiracy in restraint of interstate commerce'.<sup>22</sup> That decisions eroded a key means in the organization work of trade unions.

The subsequent AFL campaign for reform was spearheaded by Samuel Gompers, co-founder of the AFL and its president from the foundation in 1886 until his death in 1924. It may well be that the positive formulation of the maxim, 'labour is not a commodity', was coined during this campaign. There is no straightforward evidence to underpin this, however, but the maxim turned up at a late stage of the adoption process of the Clayton Act. The text first adopted by the House of Representatives included a Section 6 to the effect that trade unions should not be considered as being illegal 'combinations or conspiracies'. The maxim was introduced on the Senate floor by Senator Cummins and was accepted without a roll call. The senator's objective was to safeguard against future developments in case law that might prove hostile to trade

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web site, [www.vatican.va/holy\\_father/leo\\_xiii/encyclicals/documents/hf\\_lxiii\\_enc\\_15051891\\_rerum-novarum\\_en.html](http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_lxiii_enc_15051891_rerum-novarum_en.html).

<sup>19</sup> *Quadragesimo Anno*. Encyclical of Pope Pius XI on Reconstruction of the Social Order. May 15, 1931. Quoted from the text in English at the Vatican web site, [www.vatican.va/holy\\_father/pius\\_xi/encyclicals/documents/hf\\_p-xi\\_enc\\_19310515\\_quadragesimo-anno\\_en.html](http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html).

<sup>20</sup> Para 83, emphasis added.

<sup>21</sup> See Connecticut Judicial Branch Law Libraries, Online, <http://www.jud.ct.gov/lawlib/history/Hatters.htm>, og Answers.com, [www.answers.com/topic/danbury-hatters-case](http://www.answers.com/topic/danbury-hatters-case).

<sup>22</sup> See the U.S. Supreme Court's decisions in *Loewe v. Lawlor*, 208 U.S. 274 (1908) and 235 U.S. 522 (1915).

unions.<sup>23</sup> The maxim was included as a first sentence in Section 6 in the Clayton Act. The section is still on the books and reads

*The labor of a human being is not a commodity or article of commerce.* Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.<sup>24</sup>

Outwardly there is an obvious kinship between the maxim as stated in the first sentence of Section 6 and the views expressed on the European scene from the 1870s onwards. There is no firm evidence, however, to support O'Higgins suggestion that the actual formulation was learned by Gompers from Ingram and through Gompers found its way into the Clayton Act.<sup>25</sup>

Gompers' commitment in the matter was further evidenced five years later when he was part of the U.S. delegation to the Peace Conference and the negotiations drafting the Treaty of Versailles. During those negotiations a Labour Commission was set up on 31 January, 1919, in which Gompers was one of fifteen members and was elected its chairman.<sup>26</sup> During the deliberations of the Commission a subcommittee was appointed with a view to coordinating the various proposals that had been made concerning the Labour Charter which the Commission was charged with drafting. Gompers was not a member of this subcommittee, which reported back to the Commission on 15 March, presenting a list of 'principles'. No. 13 on that list read

The principle that in right and in fact the labor of a human being cannot be treated as merchandise or an article of commerce.<sup>27</sup>

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<sup>23</sup> See Edwin E Witte, 'The Doctrine That Labor Is a Commodity', *Annals of the American Academy of Political and Social Science*, Vol 69 (Jan 1917), 133-139, 133-134.

<sup>24</sup> 38 Stat 730 (731) = The Statutes at Large of the United States of America from March, 1913, to March, 1915, Vol. XXXVIII, Part I. Washington 1915, 730 ff: Chapter 323. Act To supplement existing laws against unlawful restraints and monopolies, and for other purposes (emphasis added).

<sup>25</sup> See O'Higgins (fn. 1), footnote 20 at 229. While Gompers was active, perhaps instrumental, in the inclusion of the maxim in Section 6 of the Clayton Act, he could not very well have 'learned the phrase from Ingram' inasmuch as Ingram in fact had not expressed the phrase in positive terms.

<sup>26</sup> See Antony Alcock, *History of the International Labour Organisation*. (Macmillan 1971), 25 *et seq.* Edward J. Phelan, referred to by O'Higgins, at 230, was not a member of the Labour Commission.

<sup>27</sup> See James T Shotwell (ed) *The Origins of the International Labor Organization Vol 1 History*. (Columbia University Press 1934) 185-187; the quote is from p. 187.

This was among the points adopted by the Commission, perhaps, however, with a modified wording. At the close of the Labour Commission's work it adopted a proposal for a preamble and declaration of principles which were put to the Plenary Conference on 28 April, 1919. A British member of the Commission, Sir Robert Borden, moved for a number of amendments and with those amendments the preamble and declaration were unanimously approved by the Plenary Conference. As a part of the preamble and the first principles was stated

The guiding principle above enunciated that labour should not be regarded merely as a commodity or article of commerce.<sup>28</sup>

There is a difference from the wording that appears to have been adopted by the Labour Commission in March. The difference lies in the word 'merely' included in the final text, which subsequently was part of Article 427 of the Treaty of Versailles.

Samuel Gompers did not attend the final session of the Labour Commission or the subsequent Plenary Conference, having been obliged to return to the U.S. in late March.<sup>29</sup> Principle 13, quoted above, was one on which Gompers had laid special stress.<sup>30</sup> At the June 1919 Annual Convention of the AFL Gompers expressed his strong dissatisfaction with the amendments to the Labour Charter that had been made after his departure, as proposed by Sir Robert Borden. The labour provisions, in his words, 'had been weakened and materially emasculated'.<sup>31</sup> Still, he defended the inclusion in his absence of the word 'merely' into the final formulation of the first principle, against criticism from Andrew Furuseth,<sup>32</sup> by emphasizing that this clause must be interpreted in context with the preamble to the declaration on labour principles.<sup>33</sup>

Thus the saga ended with a relative version of the maxim that labour is not a commodity. In the ILO context it was not until the Philadelphia Declaration that it was stated in its unconditional form. That is however a separate account.

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<sup>28</sup> *Ibid.*, 216-218; the quote is from p. 217.

<sup>29</sup> *Ibid.*, 199, and also James T Shotwell (ed) (fn 27), Vol 2 *Documents*, Document 56, *Speech by Mr. Samuel Gompers Defending the League of Nations and the International Labor Organization, at the Annual Convention of the American Federation of Labor, June 1919*, 430-440, at 432, 437. Gompers had suffered a serious accident, cf. *ibid.*, 437.

<sup>30</sup> Shotwell (ed) fn 27), 189.

<sup>31</sup> Shotwell, ed. (fn 29), at 437.

<sup>32</sup> Furuseth was President of the American Seamen's Union and had also attended the Versailles Conference. For his critique, see Shotwell, ed. (fn 29), Document 55, *Speech by Mr. Andrew Furuseth, Attacking Part XIII of the Treaty of Versailles, Reply by Mr. Matthew Woll, Annual Convention, American Federation of Labor, June 1919*, 421-429, at 425.

<sup>33</sup> *Ibid.*, 439-440.