Table of Contents

Introduction

Understanding Labour Law: A Timeless Idea, a Timed-Out Idea, or an Idea Whose Time has Now Come?

*Guy Davidov and Brian Langille**

Labour law is widely considered to be in crisis, at least by scholars of the field. This crisis has an obvious external dimension – labour law is attacked for impeding efficiency, flexibility and development; vilified for reducing employment and for favouring already well-placed employees over less fortunate ones; and discredited for failing to cover the most vulnerable workers and workers in the 'informal sector'. These are just some of the external challenges to labour law. But there is also an internal challenge, as labour lawyers themselves increasingly question whether their discipline is conceptually coherent, relevant to the new empirical realities of the world of work, and normatively salient in the world as we now know it. The goal of this book is to respond to such fundamental challenges by asking the most fundamental questions: What is labour law for? How can it be justified? And what are the normative premises on which reforms should be based? There has been growing interest in such questions in recent years.[1] The current book seeks to take this body of scholarship seriously and take it forward. Its aim is to provide, if

* This book is the result of a workshop we held at St Catharine's College, Cambridge in April 2010. We wish to express our deep gratitude to the Inter-University Research Centre on Globalization and Work (CRIMT) for generously supporting this conference.

[1] See H Collins, 'Justifications and Techniques of Legal Regulation of the Employment Relation' in H Collins et al (eds), *Legal Regulation of the Employment Relation* (Kluwer, 2000) 3; A Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oxford University Press, 2001); B Langille, 'Labour Law's Back Pages' in G Davidov and B Langille (eds), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Hart Publishing, 2006), 13; A Hyde, 'What is Labour Law?' in Davidov and Langille, ibid 37; Christopher Arup et al (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets* (Federation Press, 2006); G Davidov, 'The (Changing?) Idea of Labour Law' (2007) 146 International Labour Review 311; R McCallum, 'In Defence of Labour Law' (Sydney Law School Research Paper No 07/20, available at <http://ssrn.com/abstract=985006>); S Deakin and W Njoya, 'The Legal Framework of Employment Relations' (CBR Working Paper No 349, September 2007, available at <http://www.cbr.cam.ac.uk/pdf/WP349.pdf>); H Spector, 'Philosophical Foundations of Labor Law' (2006) 33 Florida State University Law Review 1119; and R Dukes, 'Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labour Law' (2008) 35 Journal of Law and Society 341.

not answers which satisfy everyone, at least intellectually nourishing food for thought for those interested in understanding, explaining and interpreting labour laws – whether they are scholars, practitioners, judges, policy-makers or workers and employers.

The global economic crisis of 2008 brought these questions even more to the forefront. If nothing else it exposed the dangers of 'deregulation'. As a result it provided a moment for renewed interest around the world in rethinking unconstrained market ordering and in systems that secure less risky processes and more equitable outcomes. But neo-liberal thinkers and neo-classical economists have hardly surrendered intellectually and the debate over how best to govern labour markets continues – only with more urgency. This presents an opportunity for a rethinking of possible and different methods of market regulation. What role should labour law play (alongside other market institutions) in a sustainable and just version of capitalism? The crisis of labour law, both internal and external, which has been widely observed over the past years, has turned into an opportunity for reinvigoration and renewal. The basic notion informing this volume is that this opportunity to re-think labour law will be lost if we do not start from first principles – that is, if we do not focus our thinking on the very idea of labour law.

In an effort to take the opportunity presented by the crisis in labour law, and in the belief that it is only by starting with basic principles that this opportunity can be seized, 29 leading scholars form around the globe have contributed to this book. Each has a different approach; each touches upon a different aspect of the same problem. There are different ways to connect them and we have chosen one option for the structure of this book out of many which were possible and plausible. We elaborate upon that structure below. But we should note that one of the questions that continue to hover in the background throughout most of the book is whether the idea of labour law is constant or changing. Is it different in different countries? Should it change as circumstances change? Is it the same at the national and international level, or for developed and developing economies? Are we looking for new solutions to old problems? Or are perhaps the problems themselves new? Are we trying to provide a better understanding of an existing body of law, or are we searching for a new legal order? Otherwise put, is the idea of labour law a timeless one, an outdated one, or is labour law, better understood, a new idea whose time has now come?

Part I: The idea of labour law in historical context

It is most appropriate to start such inquiries by taking an historical perspective. **Harry Arthurs** argues in his chapter that labour law used to be concerned with 'labour' – as a class and a movement – which is now disappearing. He then puts forward three possible directions which labour law can take 'after labour': labour rights as a subset of human rights; facilitating the accumulation of human capital; and retaining the original idea – enabling workers to mobilize to seek justice in the workplace – but with new structures and forms of mobilization. This analysis is a

prelude (and in some sense, a response) to many of the discussions that appear later in this book.

Like Arthurs, **Bob Hepple** also puts emphasis on the role of broad social and economic developments in shaping labour law. He argues that labour law is best understood as the outcome of struggles between different social groups and competing ideologies. He therefore prefers a descriptive analysis, which seeks to explain changes over time and variations between different legal systems by linking them to particular historical circumstances. Among the factors shaping the making and transformation of labour law, Hepple lists the level of economic development; the changing nature of the state; the character of the employers and labour movements and the growing influence of civil society; and ideology.

Manfred Weiss begins his contribution by putting forward the original idea of labour law as expressed mainly by Hugo Sinzheimer. He then argues that, even though realities in the workplace have changed dramatically, the core assumptions have not disappeared. There is no need for a new paradigm. There is, however, a need to adapt labour laws to new circumstances, and the chapter goes on to discuss a few examples, such as the need to find ways for collective representation of people in new (atypical) work forms; the need to create a closer link between labour law and social security law; and the need to strengthen transnational collective structures and other international standard-setting institutions.

A belief in a basic idea of labour law which has not changed is shared by **Ruth Dukes**, who also relies on the work of Sinzheimer (regarded as the founding father of German labour law). Searching for a core idea which can be generalized and remains valid today, she emphasizes the constitutional function of labour law, in the sense of its role in establishing a social and economic order while taking the humanity of the worker as a 'first reference point'. She then uses this framework to highlight the strains currently put on labour law from supra-national powers.

Adrián Goldin examines directly the question of whether there is a universal idea of labour law by using an historical but also a comparative methodology. He identifies the 'basic' idea of labour law, which is joined by 'particular ideas' adding specific and idiosyncratic elements. Goldin argues that, in the face of the past decades' changes, 'some legal systems have shown a bigger propensity to move away from that basic idea', while others have not. The chapter reviews some significant changes undergone in European labour law, but argues that there was no separation from the basic idea. In common-law countries Goldin finds some divergence from the basic idea, although more so among academics than in practice. And in Latin America, he sees no departing from the basic idea, and criticizes the inability to adapt and the 'freezing' of the traditional order.

The opening part of the book is concluded with the witty critique of **Alan Hyde**, who lists no less than 22 different 'ideas of labour law' that have been put forward over the years. He argues, however, that these lofty ideas have lost contact with what actually happens on the ground – at least in the United States. It is not only that labour unions have weakened dramatically. The fact that, for many years, no significant labour laws have been enacted by Congress or developed by the Labour Board, is equally discouraging for those who believe in the future of labour law.

Hyde concludes that labour law will continue only as a 'technical' branch of regulation; the idea of labour law can no longer realistically continue to provide a source of inspiration.

Part II: Normative foundations of the idea of labour law

The chapters constituting the next part of the book tackle directly the philosophical foundations of the field. **Brian Langille** starts by explaining why labour law *must* have a theory of justice. He then argues that labour law's 'traditional' theory of justice – based on the idea of inequality of bargaining power – is out of date. There is another (better) moral foundation that can justify labour law and at the same time help us to rethink the field – in much broader terms. Following Amartya Sen, Langille argues that our basic goal is 'real, substantive, human freedom – the real capacity to lead a life we have reason to value'. And labour law is needed to structure the creation and deployment of human capital – which is 'at the core of human freedom'. He goes on to provide a detailed response to some of the critiques of this idea.

Judy Fudge examines in her chapter some competing accounts of labour law, including ones that rely on Sen's idea of enhancing people's 'capabilities' to live the kinds of lives that they value.[2] She sees a number of strengths with this approach, but also a few important limitations. She then goes on to suggest a different basis for conceptualizing labour law: the idea that labour is not a commodity but rather a 'fictive commodity'. The unique problems associated with selling labour create 'regulatory dilemmas' – and the role of labour law is to address them. In this context Fudge uses the 'capabilities' approach but supplements it to argue against the exclusion of unpaid care work from the scope of labour law.

Hugh Collins has written before about two prominent strands of justifications for labour law: efficiency/welfare on the one hand and social justice/fair distribution on the other.[3] Aware of the difficulties with both types of justifications, he sets out on a journey, in his chapter, to examine whether some theory of rights can provide the basis for labour rights. He concludes that the case for including labour rights as universal human rights is weak. However, following John Rawls' liberal theory of justice – and rebutting Rawls' reasons for excluding social and economic rights – Collins argues that at least *some* labour rights can be justified as 'fundamental constitutional guarantees'.

In the final chapter of this part, **Simon Deakin** argues that labour law not only 'corrects' the market (when imperfections/failures are present) and 'limits' the

[2] Alongside Langille, she refers here especially to J Brown, S Deakin, and B Wilkinson, 'Capabilities, Social Rights and European Market Integration' in R Salais and R Villeneuve (eds), *Europe and the Politics of Capabilities* (Cambridge University Press, 2004) 205; and to S Deakin and F Wilkinson, *The Law of the Labour Market; Industrialization, Employment, and Legal Evolution* (Oxford University Press, 2005).

[3] Collins, above n 1.

market (when results are not socially acceptable), it also has a 'market constituting' role. That is, labour laws sometimes play an important role in stimulating development. This 'systemic' view can also explain how labour laws have developed over the years alongside other market institutions, and which processes are likely to create pressures to deregulate them. Deakin gives a number of examples from developing and transition systems, but he points out that this analysis is relevant to developed economies as well. Referring not only to economic development but also to human development, he concludes by connecting between his analysis and Sen's 'capabilities' approach.

Part III: Normative foundations and legal ideas: rethinking existing structures

In the next group of chapters, the authors discuss connections between the *goals* and *means* of labour law. In different ways, they consider what a particular understanding of labour law means for the scope or contents of this body of laws, or how legal techniques should be recast to better reflect the idea behind the field. **Guy Davidov** insists that the crisis of labour law is not the result of any change in our goals. It is rather a mismatch between some labour laws (legislation and case law) and these goals, created by changing realities. The idea of labour law can be articulated in different ways and at different levels of generalization.[4] After examining problems with the actual application of labour laws, as encountered by workers in many countries, Davidov argues that for purposes of determining the scope of labour law as well as updating labour laws in light of changing employment practises, it is useful to focus on the characteristics showing the vulnerability of employees vis-à-vis their employers – that is, on the factual situation that labour laws are designed to address.

Mark Freedland and Nicola Kountouris provide some new analytical tools that can assist in understanding and regulating the employment relationship. Focusing in general on 'personal work relations', they classify them into three groups: secure, autonomous, and precarious work. In order to classify particular relations into one of these groups, one should look at the 'personal work profile' of the worker in question. This perspective, they argue, helps to uncover elements that have been traditionally concealed by the binary employee/self-employed divide. The entire context (the work profile) should be taken into account, even aspects that have nothing to do with a specific employer. Freedland and Kountouris further explain that new kinds of personal work relations are being created all the time, but the law usually fails to recognize them. The implications of this 'phenomenon of fully or partly innominate personal work contracts or relations' are discussed in their chapter.

[4] He explored the idea of labour law itself in Davidov, above n 1.

The chapter by **Paul Benjamin** examines the operation of legal techniques and institutions vis-à-vis one of the goals of labour law: protection against unfair and arbitrary dismissals. This is an important reminder that the goals of labour law are often elusive in practice, so it is crucial to examine to what extent – and how – can they be materialized. Benjamin discusses the Commission for Conciliation, Mediation and Arbitration created in South Africa in 1995, which has been successful because of its focus on access to justice instead of the traditional model of rights enforced through conventional litigation. Judicial responses (which sometime have hindered the achievement of labour law's goals) and employer responses (which, as in many other countries, have looked for ways to evade the law) are also discussed.

Another developing economy perspective is offered by **Kamala Sankaran**, who writes from the point of view of India, where 93 per cent of the workforce is considered to be in 'informal' employment. Sankaran discusses the definitions of labour statisticians for 'informal work' and their relation to labour law, including the invisibility of unpaid domestic work on the one hand, and the inclusion of own-account workers who are also employers on the other. She then considers the implications for the future of labour law.

In recent years there have been increasing calls to broaden the scope of labour law to include other relationships involving work. Such calls are echoed and further developed in a number of chapters in this book. **Noah D Zatz** argues that replacing labour and employment law with a broader 'work law' is in fact impossible. Although he shares the view that nonmarket work should be taken more seriously, as an object of study and regulation, and provides a sophisticated critique of existing boundaries based on 'control' and 'exchange', Zatz goes on to argue against an homogenous system of work regulation. He shows how the multiplicity of work relations makes this unwarranted; 'different forms of work must be treated differently'. He nonetheless refuses to retreat to the problematic 'market' boundaries, introducing the idea of 'channelling' work into specific institutional forms as a possible solution.

One of the most salient aspects of the crisis of labour law is its inability in an increasing number of cases to deliver the necessary rights and entitlements to workers. While scholars look for solutions, innovations also emerge from the workers themselves (and their lawyers). The next two chapters discuss new legal means that are being used by workers (or others on their behalf) *outside* of what we traditionally considered labour law, in an attempt to secure the same goals. **Catherine Barnard** analyses the use of procurement law in this context. Can a government spending public money include a 'social clause' in tenders to ensure compliance with labour standards and/or the hiring of local workers? There has been pressure from the bottom up for such clauses. However, as Barnard shows, European Union law as well as international law put various obstacles on their inclusion. She concludes by considering the possibility that a *private* contractor, bowing to pressure from public opinion and relying on a commitment to corporate social responsibility, will demand a social clause from its subcontractors.

Barnard's focus is on Britain, but experiments rising from the bottom up are also flourishing in the United States. **Katherine Stone and Scott Cummings** discuss the

use of Community Benefits Agreements as well as other local initiatives which 'have emerged in the vacuum where labour law has failed'. The new CBAs (which in practice often replace the now-uncommon Collective Bargaining Agreements bearing the same acronym) are negotiated between labour/community groups and developers, to secure (among other things) a certain level of labour standards. The authors analyse the legal and practical challenges faced by these local initiatives of labour and community alliances, and consider whether they can be seen as a new form of unionism, and whether they can offer an adequate substitute for traditional techniques.

Part IV: New labour law ideas: rethinking existing boundaries

The next group of chapters offer new ways of thinking about labour law. None of them aims to contradict or challenge the basic understanding of why labour law is needed. But they all suggest that there are additional aspects that have so far been neglected and should be considered as part of our understanding of the filed. **John Howe** argues that industrial policies (such as tariff protection or industry assistance) should be considered as part of labour law. This chapter has direct connections with the previous two chapters: it also shows how legal issues that appear to be outside the scope of labour law in fact have direct impact on labour standards. But here the focus is different. While the previous chapters discussed new means (legal techniques), Howe makes the point that a broader understanding of labour law should lead to a re-stating of our goals. As part of a 'labour market perspective' (which is broader than traditional labour law, and concerned not only with employees but also with other work arrangements, including unpaid work, as well as transitions between employment and unemployment), labour lawyers should be interested in the role and impact of industrial policies. This view, the chapter argues, recognizes that regulation of the employment relationship has multiple purposes that change over time and place. The idea is not to abandon the familiar 'protective' function of labour law, but rather to supplement it with a broader view that can also help explain why traditional labour law is ineffective.

Guy Mundlak argues that, alongside the 'traditional' functions of labour law, there is another, and often neglected, function: to distribute labour market opportunities among workers. Labour law is not only concerned with distribution between capital and labour, but also between the workers themselves (including those who *can* work but are unemployed). Different workers have different (and clashing) interests, and this chapter argues that these divisions should not be concealed. Rather, we should acknowledge them and 'make labour law accountable to the distributive impact it bears' – always asking ourselves which workers gain and which workers lose from any particular arrangement.

The chapter by **Gillian Lester** also uncovers a neglected part of labour law: labour unions' participation in the civic and political spheres, going beyond the immediate bargaining concerns of their members. Lester justifies this role and advocates its development; she argues that unions can restore their vitality by

'taking leadership in generating broader social solidarity'. She gives examples of two recent trends to support this point: the first is identity-based organizing (in the United States); the second, legal action by unions to enforce employment rights which is used strategically to encourage organizing. If this view of the function of labour unions is accepted, arguably some labour laws will have to change to support this function.

Unions are also the focus of the chapter by **Julia López, Consuelo Chacartegui, and César G Cantón**. Here too, the broader political role played by unions is justified. But while the previous chapter focused on solidarity, the current one is concerned with *conflict*. The authors do not see conflicts as a problem; rather, they celebrate their value in promoting transformation. They thus make the case for 'understanding labour law through the prism provided by strikes and other forms of conflict'. The right to strike (and protest) plays an important role, they argue, in allowing and encouraging divergences, which are healthy for democracy and for society. Conflict, which is often denied, should become more visible, and the right to strike should assume a more explicit and prominent role in labour law.

Part V: New ideas of labour law from an international perspective

The chapters constituting the final part of the book all take an international perspective, using it to explore the goals (and sometimes the means) of labour law. **Leah F Vosko** focuses on migrant workers and their exclusion (or *partial* exclusion) from the 'full range of labour protections', based on citizenship. She identifies four different phases in the development of international regulations concerning migrant workers, concluding with the Non-Binding Multilateral Framework on Migration (MFM) adopted by the ILO on 2006. Vosko finds a continued tension in the MFM between national sovereignty concerns and the need to protect migrant workers. She argues that these tensions highlight the need for 'global labour market membership'[5] to prevent the exclusion of migrant workers from protection due to citizenship boundaries. She puts forward five principles for international action in this regard, that can be seen as routes to achieve the goals of labour law in this context.

The chapter by **Michael Piore** offers an economist's perspective on the future of labour law following the recent financial crisis. He sees renewed interest in enforcing labour standards, which in many countries brought about increased resources to labour inspection. Piore compares the approaches of the United States and France to labour inspection, and argues that – contrary to common beliefs about the rigidity of European systems – the French system is considerably more flexible and able to adjust to variations in economic and social conditions. The fact that inspectors in France – and in other countries that adopted similar systems – hold considerable power and discretion is seen as an advantage by Piore. He uses various

[5] A concept she developed in LF Vosko, *Managing the Margins: Gender, Citizenship and the International Regulation of Precarious Employment* (Oxford University Press, 2010).

strands of socio-economic literature to analyse the work of inspectors. He concludes that the perceived conflict between regulation and flexibility is to a large extent artificial, because as we can learn from the French – using the example of labour inspection – a system of labour market regulation has the potential to include the needed flexibility within it.

Silvana Sciarra also situates her chapter in the context of responding to the recent financial crisis. Rising economic uncertainties – resulting not only from the current crisis but also from long-term processes of globalization – put pressure on traditional (national) labour laws and on accepted hierarchies of legal sources. Sciarra describes some innovative forms of standard-setting at the European level – in particular transnational collective strategies – that mix private and public actors. Special attention is given to agreements signed by European Works Councils. The chapter discusses the relations between such new instruments and the nation state, raising in particular the problem of legitimacy. This chapter as well is useful in analysing new means (in this case, transnational) to achieve the goals of labour law.

In the final chapter of the book, **Adelle Blackett** challenges the common view of labour law, which she sees as being concerned only with developed economies, including boundaries defined 'as after the formation of mature capitalism, in individual nation states of the North, and outside of the domestic household'. Blackett builds instead 'on the experiences of the overwhelming majority of workers who have remained outside of the story of the paradigmatic worker', and offers an alternative narrative, which starts from the idea of *emancipation*. Her story of labour law centres on workers' resistance to commoditization and their struggle for citizenship at work. Like the opening chapters of the book, this chapter takes an historical perspective, but from a global/development angle. Blackett's analysis sheds light on the distributive aspects of labour law beyond borders, arguing that this is – and should be – a necessary part of the story.

The future of the idea of labour law

Roughly a century has passed since the emergence of modern labour law, yet the very idea of the field is still being debated. This is not necessarily a problem. Indeed, perhaps the problem has been that the idea of labour law has not been questioned and examined sufficiently in the past. The 'traditional' story of labour law was important, but in retrospect, always incomplete. The same is true for the traditional economic critique of the field. The chapters of this book show that there is still a reason to treat labour law as an independent and coherent field of law – but it is necessary to continually rethink the goals and means of this field.

Some of the contributors to this book argue that the idea of labour law is unchanged, and offer their own articulation for it, or examine the implications (notably the need to change the law to respond to new realities). Others believe that the idea of labour law should itself be broadened in different ways to respond to new needs. Yet others offer an entirely new way of thinking about the idea of the

field. This is not a book that aims to provide an authoritative conclusion to a problem. Rather, the cumulative effort of the contributors puts forward a rich variety of new ways to think about labour law. These in turn will help thinking about reforms in labour market regulation, about new interpretations to existing laws, about the constitutionality of labour laws, and more.