


BOOK REVIEW

## The Philosophical Foundations of Labour Law

by H Collins, G Lester and V Mantouvalou (eds). Oxford: Oxford University Press, 2018, 368 pp (£75, hardcover). ISBN: 9780198825272

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In the foreword to *The Philosophical Foundations of Labour Law* Harry Arthurs states that not only is labour law's post-war model no longer effective, but 'subordination, injustice, and indignity are endemic in our society; and not confined to the employment context'.<sup>1</sup> With this opening, Arthurs sets the stage for this ambitious volume. *The Philosophical Foundations of Labour Law* addresses the political philosophical foundations of this field in order to revisit debates about labour law's aim, goal and purpose. This very topical, engaged and complex mandate characterises the book, edited by Hugh Collins, Gillian Lester and Virginia Mantouvalou.

In the introduction, the editors set out the aim of the volume: to interrogate labour law's underlying goal. They ask, is it to achieve equality or liberty? Social inclusion? The promotion of workers' dignity? Questioning labour law's purpose and aim seems to have become somewhat of a formulaic opening for labour law edited collections.<sup>2</sup> However, many of these edited collections (published overwhelmingly by Oxford University Press) agree that the normative foundations of labour law and theories of justice within the ordinary rules of private law (ie the contractual employment relationship) offer inadequate justice for employment relations. An expanded scope of labour law, as this edition proffers by excavating its philosophical foundations through key values, thus suggests that labour law address within its distinct ambit freedom, autonomy, dignity, equality in terms of respect, democracy and social justice. These are themes that go beyond traditional labour law, which by and large is wedded to strong libertarian political philosophies. As a consequence of dominant libertarian ideas, current legislative priorities in labour law are guided towards individual contracts. The standard contractual model for employment law has moved focus away from an awareness that labour relations are based on an asymmetrical labour market relationship, whereby the employer (business) has more market power (ownership) than the employee (worker).

The edited collection is divided into four sections: Freedom, Dignity and Human Rights; Distributive Justice and Exploitation; Workplace Democracy and Self-Determination; and Social Inclusion. Through these sections, the book engages diverse views on the priority of labour law: is it specific to an employment relationship (workplace democracy, freedom within existing employment contracts)? Or, is it broadly about labour and labour relations in society and political economy (social inclusion, distributive justice in non-waged work)? The 17 creative, challenging and thought-provoking chapters do not shy away from disagreeing as to how best respond to these questions. However, the editors identify a consensus emerging throughout the chapters: that labour law needs a normative foundation that addresses, but is not necessarily beholden to, the 'basic building blocks

<sup>1</sup>H Collins et al *The Philosophical Foundations of Labour Law* (Oxford: Oxford University Press, 2018) p vii.

<sup>2</sup>See G Davidov and B Langille (eds) *Idea of Labour Law* (Oxford: Oxford University Press, 2011); A Bogg and T Novitz *Voices at Work* (Oxford: Oxford University Press 2014); C Costello and M Freedland (eds) *Migrants at Work* (Oxford: Oxford University Press 2014).

of division of labour'.<sup>3</sup> The status quo employment contract, derived from contract law principles (libertarian, as above), in contrast does not accommodate key values of labour law.

John Gardner's opening chapter on 'The contractualisation of labour law' explores this by tracing the chronology of contractualisation, obligations in a relational role, into social processes and law. Employment has come to be less about addressing the division of labour and more concerned with freedom of contract. This has the effect of homogenising relationships into contractual terms. Consequently, employment law recognises only the contractual relationship, at the expense of human freedom and non-contractual relationality (in other words, personal autonomy and self-realisation). The first section, to which Gardner's chapter contributes, tackles the negotiation of the contractual model (the dominant legal construction of labour/employment law), with the values known to underpin labour law's existence as a legal field. These values include autonomy, dignity, human rights, freedom from domination and alienation.

The second section, Distributive Justice and Exploitation, explores, as introduced by Arthurs, the connections between employment and the 'subordination, injustice, and indignity endemic in our society'. For example, Mantouvalou's chapter addresses the role of the state, through law, in 'establishing conditions for exploitation'<sup>4</sup> while rhetorically appearing to fight exploitation. The 'structural vulnerability created by law'<sup>5</sup> according to Mantouvalou is a political and interpersonal wrong. Mantouvalou's careful interrogation of 'wrong' in the political and interpersonal sense focuses on the action or inaction of the state and law as a structure that creates and maintains conditions that take advantage of workers' 'special' vulnerability in a sustained and banal way. This is through the exclusion of workers (migrant workers, domestic workers, care workers, prison workers) from legislation and employment laws. Employment law, therefore, can be seen as contributing to, if not creating, vulnerable – exploited – workers. Labour legislation leaves workers unprotected in spite of rhetoric claiming the opposite. This is because the focus in discourses of exploitation is on large scale moral wrongs, not banal or 'subtle forms of injustice at work'.<sup>6</sup> In other words, moral wrong is criminalised, while legally constructed vulnerability remains unexamined.<sup>7</sup> For Mantouvalou, the source of workers' vulnerability is key, whereby exploitation 'occurs when someone takes advantage of a vulnerability and the resulting bargaining weakness that is due to societal structures, rather than personal characteristics'.<sup>8</sup> This is a vital insight with regard to labour law, where the power imbalance between employer and employee/worker is a consistent point of concern for the field as a whole. Mantouvalou's approach to distributive justice and exploitation opens future discussion and critique to expand theories of exploitation to better address the abuse and marginalisation experienced by certain workers and labour sectors.

The third section, Workplace Democracy and Self-Determination, situates workers as actors in political, democratic life both in the workplace and beyond. This is the shortest section, with two chapter contributions. The first, by Bogg and Estlund, explores the right to strike as a 'basic liberty' or a moral right. They draw on examples from the UK, US and Canada to argue for a basic, republican, right to strike that is not necessarily beholden to collective bargaining rights and their institutions (eg trade unions). O'Neill and White, in the second chapter of this section, explore the role of workers' organisations (trade unions) in political organising and accountability.

The final section, Social Inclusion, includes four provocative chapters exploring ideas of, and approaches to, social inclusion. Albin's contribution looks at potentially exclusionary conceptions of social inclusion. Albin, drawing on Fraser and Sen, critically analyses the limited effects of guaranteeing a minimum wage for domestic workers or wages for sex workers to suggest that 'unfavourable' inclusion and welfare can have a dehumanising effect. Social inclusion needs to be addressed in a

<sup>3</sup>H Collins et al 'Introduction: does labour law need philosophical foundations?' in Collins et al, above n 1, p 30.

<sup>4</sup>V Mantouvalou 'Legal construction of structures of exploitation' in Collins et al, above n 1, p 189.

<sup>5</sup>Ibid, p 196.

<sup>6</sup>Ibid, p 188.

<sup>7</sup>Ibid, p 190.

<sup>8</sup>Ibid, p 195.

meaningful, contextualised and non-Eurocentric manner to prevent unfavourable inclusion. Spector's chapter argues that a right to a fair wage is equivalent to a right to address capitalism's risk imbalance, using Marxist theory to examine a very prescient labour law struggle for minimum wage. Tsuruda's exploration of volunteer work in the US, and how minimum wage law shapes ideas of work, cooperation and civic duty in addition to the terms and conditions of jobs, demonstrates a thoughtful new approach to labour law discussions of waged versus unwaged work. And Conaghan explores the foundationally-entrenched marginalisation (or exclusion) of unpaid work from labour law's traditional scope.

By historically contextualising wage labour versus unpaid work, Conaghan explains the philosophical developments (ie enlightenment thought) that shifted labour law to exclusively protect waged, male labour and de-value non-waged 'women's' work. That waged work is the 'measure of success in the policy of social inclusion'<sup>9</sup> is a historically constructed norm. Putting forward not a new, but an important idea that if not included in the edited volume would leave a significant gap, Conaghan argues that 'the feminist foregrounding of unpaid work is equally driven by concerns as to the value and utility of the analytical and conceptual frames through which labour law is commonly apprehended'.<sup>10</sup> In a question that could be a guiding light for the entire volume, Conaghan asks, 'should we be worried that our discipline remains significantly reliant upon a distinction of problematic origins, dubious rationality, and systematically gender-disadvantaging effects?' Yes, she answers. As an example of how conceptual frames can shift, Conaghan refers to social reproductive work as diversifying labour law: for example, proposing caring rights for workers, rather than employments for carers.<sup>11</sup> Conaghan's chapter situates historically the limitations of labour law's philosophical thought (Locke through Blackstone to the emergence of industrial capitalism) and its embeddedness in current labour law structures, structures which sustain exploitative labour practices. This contribution challenges us to consider, as Ruth Dukes has written elsewhere, whether the methodology of labour law is what needs to be examined or re-thought in order for labour law to be able to speak to current conditions of work.<sup>12</sup>

The editors claim in the introduction that excavating the philosophical foundations of labour law is a 'new field of scholarship' concerned with 'the central moral and political principles that go to the core of the existence of labour law as a field of legal practice and scholarship'.<sup>13</sup> When 'teasing out contrasting normative foundations',<sup>14</sup> yes, traditional or unacknowledged assumptions are challenged, but is this a call towards a new field of scholarship? As the introduction acknowledges, most of the contributions refer to political philosophy for their inspiration and reflection. The epistemological confines of political philosophy nevertheless, as Conaghan's chapter illustrates, may prevent forward looking philosophical proposals from presenting anything but a repetition of these same normative foundations. The editors and contributors agree that 'labour law does need philosophical foundations'<sup>15</sup> – moreover it has them, whether we like it or not. However, if we were to broaden our definition of philosophy beyond political philosophy and theory, more radical alternatives that are grounded, future-oriented and forward-looking would appear. Within this collection, there are glimpses opening onto such perspectives, not only feminist, but socio-legal, ethnographically-informed work. Further diversifying labour law's methodologies and theoretical vocabularies would potentially offer alternative conceptual platforms for the paradigm shifting, creative thinking needed to respond to our present global economic (social, political, capital) circumstances and the people working within them.

<sup>9</sup>Collins et al, above n 1, p 28.

<sup>10</sup>J Conaghan 'Gender and the labour of law' in Collins et al, above n 1, p 272.

<sup>11</sup>Ibid, p 285 referring to N Busby *A Right to Care?* (Oxford: Oxford University Press, 2011).

<sup>12</sup>R Dukes 'Introduction to special issue, labour laws and labour markets: new methodologies' (2018) 27(4) *Social & Legal Studies* 407 at 408.

<sup>13</sup>Collins et al, above n 1, p 2.

<sup>14</sup>Ibid, p 10.

<sup>15</sup>Collins et al, above n 1, p 30.

As for readership of this volume, a familiarity with labour law debates and discussions would help the reader think through these chapters, but a pre-existing specialised knowledge of (political) philosophy is not necessary. Thus, readers would primarily be labour law and legal theory scholars and postgraduate students, especially those with an interest in underlying, epistemological foundations to modern legal systems.