Guest Editorial

Some Comments on Labour Law as an Academic and Social Discourse

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For the best part of the previous decade, Hugh Collins put the view that labour law as an autonomous subject stood at a crossroad.[1] By this, he meant that it was uncertain how the conception of labour law would respond to the pressures of a changing political and economic mood. For those working within the discipline the uncertainty was largely attributable to the breakdown of long-standing arrangements upon which labour law was based. Labour market behaviour had changed, and so too had industrial relations practices. The social vision of labour law which went with the old-established institutions and practices had thus come under challenge to change or risk irrelevance.

There is no need for me to comment at length upon these developments. But I do propose to make some remarks on the problem of the 'conception' of labour law. I think that most of us would agree that not much has happened in the 1990s to upset the relevance of Collins' essay. Despite the election of one or two labour-friendly governments in Europe, there seems to be no inclination to return to the protectivist patterns of the 1950s and 1960s. Accordingly, I venture to suggest that we have not as a group made a great deal of progress in the search for a conception of labour law which would fit the present conditions. We are still stuck at the crossroads. Perhaps this is by choice.

One of the key problems in coming to grips with the underpinnings of labour law, and its relationship with other disciplines, concerns the inexact use of terminology. We must begin to explain more carefully what we mean by expressions such as 'labour law', 'labour market regulation', 'labour relations laws', and 'laws regulating work relationships'. But, as I have indicated above, the problem is more deep-seated than that. It concerns the underlying spirit or

* I have benefited from discussions with Keith Ewing on these and associated issues. It is necessary for me to record, however, that we are in disagreement on some conclusions arrived at in this editorial.

1. H. Collins, 'Labour Law as a Vocation' (1989) 105 Law Quarterly Review 468.

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principle inherent in labour law as we know it. Was this conception historically accurate ? Is it now mistaken ? Should it be modified or replaced ? Certainly there are challenges,[2] but as yet we have not seen the emergence of an alternative vision for a labour law subject which can equal the unity of the old tradition.[3]

In this short comment I propose to explore briefly some of these issues in the context of Australian labour law, where, despite the continuation of its strong social foundation, there are concerns for the relevance of the subject organised and taught in the old tradition. The discussion is informal, and intended to invite discussion on what are obviously highly contentious issues. From time to time I have made reference in the notes to work being carried out in the Centre for Employment and Labour Relations Law[4] which is of relevance to this discussion.

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The Australian labour law system emerged in a series of statutes introduced by the Federal (national) government, and the six State governments, in the first decade and a half of this century. These provisions introduced a relatively uniform system of labour regulation throughout the country, based upon principles of conciliation and compulsory arbitration. There were, of course, other laws regulating employment and labour markets prior to these conciliation and arbitration statutes. But it was the latter provisions which can be said to have set in place a system which corresponds to the role assumed for labour law in a democratised industrial society (i.e., the protection of employees and the legitimation of trade unions in industrial relations and the regulation of industry).

Australian labour law was, without doubt, pioneering in the extent to which it placed state institutions at the heart of labour market regulation, and for the extensive protections given to trade unions and their members. Not for nothing was it known as 'the workers' paradise'. However, notwithstanding its highly distinctive character, and its centrality in the regulatory concerns of government, for much of the period of its historical development, Australian labour law lacked close scholarly attention in institutions of higher learning. It was not until the post-war period that labour law began to emerge as a separate subject, and the earliest attempt at a complete statement of the field did not appear until 1972. This was followed by several comprehensive treatises published in the late 1970s and the 1980s.

For one reason or another (it is unnecessary to explore these here), despite the profound institutional and textual differences between the labour law of the two countries analyses in the Australian works closely followed that of the British texts. More to the point, the assumptions which informed the organisation and

2. See for example, B. Bercusson *et al., A Manifesto for Social Europe*, European Trade Union Institute, Brussels, 1996, p. 47; and the remarks of M. Biagi and M. Tiraboschi, 'The Management of Human Resources in Emilia Romagna in the Context of the European Market' (1997) 13 Int. J. Comp. L.L.I.R. 19 at p.19.

3. With the possible exception of P. Davies and M. Freedland, *Labour Law: Text and Materials*, Weidenfeld and Nicolson, London, 2nd. ed. 1984.

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presentation of the Australian texts, that is their conception of labour law, also broadly corresponded with the British position.

As we all know, this conception was drawn from Kahn-Freund's view of the field. According to Kahn-Freund, the fundamental purpose or orientation in labour law, in a democratic society, is a protective one. It is to alleviate the position of employees in their subordinate relationship with employers.[5] This social function signifies the founding principle of labour law, from which the organisation of the subject flows. Seen in this light labour law is more than a description of an area of academic study. It becomes a kind of social philosophy, a 'vocation'.[6] Above all, from this perspective, labour law should not be taken to be synonymous with master and servant law, industrial law, employment law and labour market law.[7]

It may be apparent from the way I have led up to this issue that I have some serious reservations about the point at which we have arrived. I do not mean to deny that the 'protective' or 'social' function has an underlying validity in describing the object of labour law. To return to the position of my own country, there is no doubt that in many respects the Australian system represented a high point of achievement in empowering the worker and his/her representative organisations. However, I would also argue that when used as an analytical construct, the emphasis placed on the social purpose of labour law has had the effect of masking or obscuring other focuses and purposes, and thus, ultimately, of distorting the true nature of the Australian system. This is, to be sure, only a question of emphasis, but it is an important emphasis nevertheless.

Critical to an understanding of this point is an appreciation of the role that Australian labour law has played in both macro- and micro-economic management by Federal governments in particular. A strong case might be made that the labour law system has been periodically used in Australia for fundamental purposes not at all associated with worker protection - as a wages policy effecting a redistribution of capital, as a means of controlling inflation, and as means of restoring managerial rights. At the very least, we should have to concede that economic policy and labour law have been closely interwoven in Australian state regulation, yet it has been difficult to locate this interaction through the traditional emphasis on workers' rights.

How, then, should we respond ? Whilst there is nothing definitive to offer at this stage, a project is underway at the Centre for Employment and Labour Relations Law (University of Melbourne), to explore the ways in which Australian governments have ordered the labour market external to the enterprise.[8] The

5. See H. Collins, *op. cit.*, n. 1 at pp. 469-470.

6. This is the label applied by Collins, *op. cit.*, n. 1.

7. See K. Ewing 'Australian and British Labour Law: Differences of Form or Substance?' (1997) 10 Australian Journal of Labour Law (forthcoming). Professor Collins takes the same view as Professor Ewing on this point, see H. Collins, *op. cit.*, n. 1, at p. 469. David M. Beatty treats labour law as synonymous with these and other labels in *Putting the Charter to Work*, McGill-Queen's University Press, Kingston and Montreal, 1987, pp. 15 ff.

8. There is a discussion of these and associated issues in R. Mitchell (ed.) Redefining Labour Law , Centre for Employment and Labour Relations Law, The University of Melbourne, 1995. There is an outline of the topics being covered in the project at pp. 58-61 of this work.

project is historically based, and aims to categorise and evaluate the relevant bodies of regulation. The nature of this inquiry supposes at least a preliminary position on some of the matters raised in the previous discussion. First I think that the purpose of labour law is contingent upon historical, economic, and political circumstances. The purpose may change, but the phenomenon which the subject investigates does not. The phenomenon is the state's ordering of labour supply and demand (otherwise called Labour Market Regulation).[9]

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Therefore, a first key issue for us to address in any re-evaluation of the labour law subject is whether or not the subject serves a particular purpose which dominates its order and the way it is projected, and if so what that is. A second issue of importance, one intricately entwined with the first, concerns the scope of the subject with which we are engaged. What territory do labour lawyers occupy ? Again, this is both a critical and complex issue. It is critical because our recognition of the relevant subject matter of labour law will inevitably stem from the problems which we see at the heart of the inquiry behind the subject. Hugh Collins has persuasively argued that in the case of labour law, it is only by reference to its traditional social vocation that the relevant topics can be identified and ordered into a coherent subject. In the absence of a core purpose, or some other unifying purpose, the subject runs the risk of incoherence.[10]

Thus, as we see, it is difficult to separate content and purpose in labour law. And on the whole,the subject matter of labour law has reflected that fact. The typical array of topics in labour law texts reflects the legal and social subordination of the employee (the employment relationship), and the legal and institutional mechanisms for protecting the employee in that subordinated position (collective bargaining, trade unions, industrial action, discrimination and health and safety laws, and so on). Adjusted to include the constitutional law problems inherent in the overlapping powers of a federal political system, and the dominant mode of dispute settlement by conciliation and arbitration, these, too, are the contents of Australian labour law. The focus, of course, is upon employees as a class, rather than workers as a class. Regulation affecting the ordering of the external labour market is almost always entirely neglected.

Is a concentration on these topics a satisfactory basis for a labour law subject? Again returning to the Australian experience, my view on this would at least be a questioning one. It would not be enough, I think, merely to say that changing labour market and economic circumstances *now* call for a shift to other topics of interest. It is also a question of recognising the contribution made to the protection of employment rights and standards by other areas of law not found within the traditional set of labour law topics (an Australian example being the long-standing role of immigration rules in the maintenance of trade union and labour standards).

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9. As Professor Collins points out, this approach does risk a lack of conceptual unity, see n. 1 at pp. 481-484. On the other hand it permits a broader appreciation of the state's role and enables labour lawyers to deal with many issues excluded in the traditional framework. For another approach see B. Bercusson, 'A New Framework for Labour Law' (1982) 9 Journal of Law and Society 277.

10. *Op. cit.* n. 1, at p. 484.

But aside from that issue, it seems to me that in view of the integrated nature of economic, labour market, and labour law policies in Australia, there has always been scope for a broader approach to labour law than that offered in the traditional conception ; and that therefore aspects of immigration law, training and education law, social security and job creation policies might have formed part of the subject. Whether these issues could,or still can, be incorporated into labour law without destroying its traditional orientation is uncertain in my mind.The position calls possibly for a revised conception of 'subordination', as Collins suggests, although the new conception he proposes[11] does not lead to some shifting of focus to matters external to the enterprise as I have proposed here. Perhaps a conception of 'subordination' as a description of the condition of labour in a private ownership/free-enterprise society (rather than as a description of the condition of employees at work) might present a way forward.

If, however, the regulation of the broader labour market is not labour law, then a new label is needed to describe the content of this larger conception. At this stage, as I've indicated, my preference is for labour market regulation, in which the state's role in regulating labour markets both external and internal to enterprises is accorded relatively equal weight.[12]

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Drawing these brief remarks together in concluding, the direction of the field of labour law seems to me to be quite uncertain. I have proposed that we need to re-think the boundaries and approach to the subject. Perhaps, given the widely differing viewpoints, it might not be possible to arrive at a shared vision which can replace the relative certainty of the old conception of labour law. But it is crucial that we continue to address these problems and issues as *a* (if not *the*) present central concern of our field.

11. *Op. cit.* n.1, at pp. 479-481.

12. See R. Mitchell, 'Introduction: A New Scope and a New Task for Labour Law?' in R. Mitchell (ed.), *op. cit.*, n. 8, pp. vii-xv.