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**WHERE ARE WE GOING IN LABOUR LAW?
SOME THOUGHTS ON A FIELD OF SCHOLARSHIP AND POLICY
IN PROCESS OF CHANGE**

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The Workplace and Corporate Law Research Group (WCLRG) is a research concentration within the Department of Business Law & Taxation, Faculty of Business & Economics, at Monash University. It has been in operation since March 2008, having previously operated as the Corporate Law and Accountability Research Group (CLARG) since November 2005.

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WHERE ARE WE GOING IN LABOUR LAW?
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‘Frontier’ *noun*: the limit of what is known about a subject or area of activity

1. Introduction

I have been asked to say something about ‘The Frontiers of Labour Law Today’. This is an interesting and challenging task, but certainly not as straightforward as it once might have seemed. Perhaps in the past we might have spoken about the need for new protections for workers, or controls over trade unions. We might have spoken about new forms of ‘employee voice’ at the place of work, or the need for more flexible contracts of employment. But as we will see I no longer think that this sort of discussion is pivotal to our most pressing concerns. I think that labour law itself is the central concern and I am sure that this concern is shared by numbers of my labour law colleagues.

I want to start by noting that over the past two decades I have engaged in several projects which have focussed on industrial relations and labour law systems in Asia¹ as well as those of my own country, Australia.² In this process I have come to question various

* Paper presented to the Employment Law Conference, ‘Employment Law in the 21st Century - Challenges and New Horizons’, Industrial Court Practice Committee, Bar Council Malaysia, Kuala Lumpur, January 2010.

¹ S. Deery and R. Mitchell (eds.), *Labour Law and Industrial Relations in Asia*, Longman Cheshire, Melbourne, 1993; R. Mitchell and J. Min Aun Wu (eds.), *Facing the Challenge in the Asia Pacific Region: Contemporary Themes and Issues in Labour Law*, Occasional Monograph No. 3, Centre for Employment and Labour Relations Law, The University of Melbourne, 1997; S. Cooney, T. Lindsey, R. Mitchell and Y. Zhu (eds.), *Law and Labour Market Regulation in East Asia*, Routledge, London, 2002.

² W. Creighton, W. Ford and R. Mitchell, *Labour Law: Materials and Commentary*, Law Book Company, Sydney, 1983; W. Creighton, W. Ford and R. Mitchell, *Labour Law: Text and Materials*, Law Book Company, Sydney, 2nd ed. 1993.

assumptions about what labour law means, and does, in countries with diverse political, economic and cultural settings. Indeed, I have come to question the supposed values of labour law itself.

This very topic, then, in my opinion presents us with a challenge of a paradigmatic nature. That is to say, it poses the question ‘what *is* labour law?’, and asks whether it is something which has a timeless, universal character. Up to a point, of course, we can assume a common understanding of what we mean by ‘labour law’. We all share this understanding to a degree. The real question, though, is whether that meaning any longer has coherence and relevance, and if so how far that relevance and coherence reaches. If it is the case that labour law lacks the meaning once attributed to it, or if that meaning only has relevance under certain conditions of political economy, then we are truly at the frontiers of labour law. This gives rise, in turn, to a further core question: where do we go from here?

Let me give you some examples of recent subject matter dealt with in various speculative texts on labour law. We can find discussions on ‘Border/States: Immigration, Citizenship and Community’;³ ‘Beyond Labour Law’s Parochialism: A Re-envisioning of the Discourse of Redistribution’;⁴ ‘Social Rights, Social Citizenship and Transformative Constitutionalism’;⁵ ‘Workers, Finance and Democracy’;⁶ ‘Constituting and Regulating the Labour Market for Social and Economic Purposes’;⁷ ‘The Role of Employment Agencies in Structuring and Regulating Labour Markets’;⁸ ‘Towards Reintegrating the Household into Labour Market Policy’.⁹ Added to these matters we can also note discussions which focus on *regulatory techniques* in ordering labour markets: ‘Corporate Self-regulation’;¹⁰ the

³ See J. Conaghan, R. M. Fischl and K. Klare (eds.), *Labour Law in an Era of Globalisation*, Oxford University Press, Oxford, 2002.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ C. Barnard, S. Deakin and G. S. Morris (eds.), *The Future of Labour Law*, Hart Publishing, Oxford, 2004.

⁷ C. Arup, P. Gahan, J. Howe, R. Johnstone, R. Mitchell and A. O’Donnell (eds.), *Labour Law and Labour Market Regulation*, Federation Press, Sydney, 2006.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ B. Bercusson and C. Estlund (eds.), *Regulating Labour in the Wake of Globalisation*, Hart Publishing, Oxford, 2008.

‘WTO as a Mechanism for Labour Regulation’;¹¹ ‘Government Deployment of Public Wealth as an Instrument of Labour Regulation’.¹²

These far ranging topics are by no means isolated examples. They are typical of modern exploratory collections of essays on what are perceived to be the contemporary problems of labour law. In other words, something serious is going on. The ‘Frontiers’ of labour law have become very blurred, and this calls into question the continued relevance of labour law as we know it, and what we should do about it.

This is not to say that the typical interests of labour lawyers are no longer relevant at all. The protection of labour by the regulation of contracts of employment, terms and conditions of employment, collective bargaining, dispute settlement, trade unions and industrial action and so on are still important components of labour law discussion. But they are no longer seen as definitive, and for some scholars there is a fear that this problem is terminal. As a consequence the ‘death’ of labour law has been widely and frequently proclaimed, or at least foreshadowed.¹³ What is meant by this is that the core ideas inherent in the ‘traditional’ form of labour law, typified in the systems of the developed economies in conditions of emerging social democracy, founded in the contract of employment, and oriented towards protective and redistributive goals benefiting labour, are no longer regarded as exclusively or predominantly constitutive of the subject as once they were.¹⁴ Of course, it has been pointed out that the death of labour law ‘cannot be right’ as ‘[t]here will always be labour law in the sense that, as long as productive human beings exist, some law will regulate their productive efforts...[s]o the issue is the death not of labour law, but of one possible account of it’.¹⁵ Nevertheless, if the field is not yet dead, it now seems widely

¹¹ *Ibid.*

¹² See Arup et al., above n. 7.

¹³ K. Ewing, ‘The Death of Labour Law?’ (1988) 8 *Oxford Journal of Legal Studies* 293; D. Davis, ‘Death of a Labour Lawyer?’ in Conaghan, Fischl and Klare, above n. 3 at p. 159; C. Estlund, ‘The Death of Labour Law?’ (2006) 2 *Annual Review of Law and Social Science* 6.1-6.19; M. Vranken, *Death of Labour Law?*, Melbourne University Press, Melbourne, 2009; P. O’Higgins, ‘The End of Labour Law as we Have Known It?’ in Barnard, Deakin and Morris, above n. 6, 289.

¹⁴ Hence calls by scholars variously to ‘redefine’, ‘reinvent’, ‘transform’, ‘reconceive’ the field and so on: see J. Conaghan, ‘Work, Family and the Discipline of Labour Law’ in J. Conaghan and K. Rittich (eds.), *Labour Law, Work and Family*, Oxford University Press, Oxford, 2005, 19; A. Frazer, ‘Reconceiving Labour Law: The Labour Market Regulation Project’ (2008) 8 *Macquarie Law Journal* 21.

¹⁵ See B. Langille, ‘Labour Law’s Back Pages’ in G. Davidov and B. Langille (eds.), *Boundaries and Frontiers of Labour Law*, Hart Publishing, Oxford, 2006, at p. 30.

accepted that it is in dire need of a reconceptualisation along different boundaries.¹⁶ Perhaps nothing short of ‘A New Paradigm for Labour Law’¹⁷ will do.¹⁸

In the remainder of this paper I intend to develop a discussion around these issues.

2. What Was (Is) Labour Law?

There are many accounts of what labour was (is) and from where and how it evolved. Many of these draw heavily from the contribution to the formation of the subject by the German scholar Hugo Sinzheimer and other national leaders, particularly his pupil Otto Kahn-Freund, the architect of the labour law subject in the UK.¹⁹ In these accounts the evolution of labour law appears historically specific to the late-nineteenth and early-twentieth centuries, and embodied from the outset both a national and international dimension. A most recent and elaborate account of this ‘understanding’ of labour law, its international dimension, and the implications for scholarship, are given by a Canadian colleague Brian Langille, and I am basically summarising the argument set out there.²⁰

As noted, labour lawyers, perhaps universally, perhaps not, have a general understanding of what labour law is for, which is derived from legal education and social policy. An account of the subject is inherently comprised of two components, one conceptual (setting out the latitudes of the subject matter) and the other normative (telling us what the subject is for, or, to put it another way, telling us what labour law is, or at least should be, doing). As both Langille and (earlier) Hugh Collins have pointed out,²¹ ‘labour law’ is the kind of subject which is drawn from different legal sources, and to which coherence is given by a particular social reality – in this case ‘work’ or ‘employment’. The danger in this organisation of

¹⁶ The most recent exploration is in G. Davidov and B. Langille, *ibid.*

¹⁷ S. Deakin, ‘A New Paradigm for Labour Law?’ (2007) 31 *Melbourne University Law Review* 1161.

¹⁸ See also the very interesting contribution by Adrian Goldin, ‘Labour Subordination and the Subjective Weakening of Labour Law’ in Davidov and Langille, above n. 15, at p. 131.

¹⁹ B. Hepple (ed.), *The Making of Labour Law in Europe*, Mansell Publishing, London, 1986; R. Dukes, ‘Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labour Law’ (2008) 35 *Journal of Law and Society* 341; O. Kahn-Freund (Edited and Introduced by R. Lewis and J. Clark), *Labour Law and Politics in the Weimar Republic*, Basil Blackwell, Oxford, 1981; A. Davies, *Perspectives on Labour Law*, Cambridge University Press, Cambridge, 2004.

²⁰ B. Langille, ‘What is International Labor Law For?’ (2009) 3 *Law & Ethics of Human Rights* 47. For an earlier account by the same author see above n. 15.

²¹ Langille, *ibid.*; H. Collins, ‘Labour Law as a Vocation’ (1989) 105 *Law Quarterly Review* 463.

subject matter is that when the particular ‘picture’ of ‘social reality’ that it depends upon changes, the subject may no longer make sense; it may become irrelevant or incoherent. But for reasons which are very easy to understand, our ‘account’ of the subject, once ingrained, taught and learned can be difficult to shift.²² How do we start thinking differently about ideas and values which we are accustomed to assume more or less automatically?

The ‘objective’ of labour law, in our common understanding of the subject, is grounded in securing ‘justice’ for employees (or workers) in their formal working lives. (As an aside we can note that this immediately separates out ‘work’ from ‘life in general’, and paid employment from other forms of social and economic contribution). We begin with the assumption that the employment or work relationship is an unequal one. It is one in which the employer has much greater power than the employee, and thus one in which workers are disadvantaged in their capacity to extract a fair share for their labours. Labour law is a corrective to this disparity, timelessly evoked in Kahn-Freund’s entreaty:

The main object of labour law has always been, and we venture to say always will be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.²³

I suggest that most labour law courses, most labour law texts, most labour law policy, at least in the countries of the democratised/industrialised world can (or at least could) be understood, or at least related to, almost entirely in light of these sentiments.²⁴ As I have noted elsewhere this formulation of labour law had its intellectual origins in earlier European developments, but really flowered in the post-1945 social accord which elevated the interests of labour to new heights. The full employment economy in most industrialised countries, with social commitment to predominantly full-time contracts of indefinite

²² Langille, ‘What is International Labor Law For?’, above n. 20, at p. 52.

²³ O. Kahn-Freund, *Labour and the Law*, Stevens, London, 2nd ed. 1977, at p. 6.

²⁴ A good example of the articulation of this set of ideas, covering both scholarly and legislative traditions is found in P. Davies and M. Freedland, ‘National Styles in Labor Law Scholarship: The United Kingdom’ (2002) 23 *Comparative Labor Law and Policy Journal* 765.

duration, necessitated little or no consideration of the legal position of the unemployed or marginalised (atypical) worker.²⁵

Instead, labour law began from a narrower focus. It began with a study of the existing employment relationship²⁶ – legally embodied in the employment contract – then worked its way out to a treatment of the legal and institutional features of ‘the system’: an analysis of the laws which are put in place to relieve that imbalance of power. This included the establishment and maintenance of collective rights, collective bargaining, other dispute-resolving mechanisms, the rights of trade unions, rights to industrial action and so on. It also included legislation designed to give specific workplace rights to workers under certain types of employment contracts. In jurisdictions where unions were explicitly legally incorporated into the industrial relations system, and were extensively regulated by statute, the analysis could run down into a detailed study of the application of union rules and intra-union disputes.²⁷ As Collins notes,²⁸ other subjects were added in the 1970s and 1980s (including occupational health and safety, and anti-discrimination law) and yet others more recently (human rights and business restructuring for example),²⁹ but it remains essentially the same model, ordered in the same way, in most texts.

As we have noted, the evolution of ‘labour law’ as an idea associated with the protection of working people, designed to some degree to take wages out of competition, had its origins in international developments. Ramm³⁰ has described the importance of various international movements to the development of international ‘protective’ standards in labour law, commencing with European conferences in the late 1800s, the formation of the International Association for Worker’s Statutory Protection in 1901, and the formation of the International Labour Office in the early 1900s. The first international trade union

²⁵ R. Mitchell, ‘Introduction’ in R. Mitchell (ed.), *Redefining Labour Law: New Perspectives on the Future of Teaching and Research*, Occasional Monograph No. 3, Centre for Employment and Labour Relations Law, The University of Melbourne, Melbourne, 1995.

²⁶ As we have noted this was assumed to be an unequal relationship in terms of the power able to be exercised by the parties to it. This inequality of power might have both economic and administrative dimensions and consequences: see H. Collins, ‘Market Power, Bureaucratic Power and the Contract of Employment’ (1986) 15 *Industrial Law Journal* 1.

²⁷ See Creighton, Ford and Mitchell, above n. 2.

²⁸ H. Collins, ‘The Productive Disintegration of Labour Law’ (1997) 26 *Industrial Law Journal* 295.

²⁹ See H. Collins, K. Ewing and A. McColgan, *Labour Law*, Hart Publishing, Oxford, 2005.

³⁰ T. Ramm, ‘Epilogue: The New Ordering of Labour Law 1918-45’ in B. Hepple (ed.), above n. 19 at p.277.

organisations began to be formed about the same time. Eventually the Treaty of Versailles established the International Labour Organisation, with the express purpose of promoting the adoption among member states of certain labour standards, and eliminating or relieving the impact of any ‘race to the bottom’ among industrial nations.³¹

There are several interesting points to note about this essentially twentieth century conception of ‘labour law’ as a field of scholarship and policy activity.

First, university courses and text books on ‘labour law’ seem to have been very thin on the ground until the 1950s, but that doesn’t mean that scholars were not giving the matter some thought. And in seeking to carve out an understanding of what ‘labour law’ might be about, some were interested in the inclusion of radically different subject matter from the contours of what we now know as the traditional subject outlined above.³² These included, for example, such matters as unemployment insurance (more usually now accepted as a ‘close relation’ to labour law than the real thing), industry planning, education and training and labour placement and mobility. Labour law in this type of conception was not just about the employment relationship, trade unions, industrial conflict and the collective regulation of terms and conditions of employment; it was also about the security and welfare of ‘labour’ as a class more broadly. It is also interesting to note that these subjects carry (at least superficially) overtones of state planning, and bear at least some relation to the idea of ‘capabilities’ as developed by Amartya Sen, and worked into a proposal for ‘social rights’ in the Supiot Report.³³

Secondly, this ‘new’ conception of labour law was largely cut off from historical antecedents. Our ‘labour law’ was a new field, consonant with the modern, industrialised, capitalist ordered state. Seen in this light, systems of labour market ordering and regulation which existed in earlier times were not ‘labour law’; they were something else, even though in certain respects they bore similarities with the modern law (for example dependent work relationships, wage fixation, co-relative duties and obligations). In point of fact much of

³¹ See Langille, ‘What is International Labor Law For?’ above n. 20, at p. 61.

³² Perhaps the best example is W. F. Frank’s *The New Industrial Law*, Thames Bank Publishing Co. Ltd., London, 1950.

³³ See S. Deakin and F. Wilkinson, *The Law of the Labour Market*, Oxford University Press, Oxford, 2005, pp. 342-353.

this earlier regulation lingered on and influenced ‘modern’ labour law in numerous respects.³⁴ But these connections were largely regarded as peripheral. Modern understanding of what ‘labour law’ was about stemmed from its inherent purpose to liberate workers from the market, not from the view that it was a contemporary variant of different systems of labour market ordering and regulation. In other words the normative outlook took precedence over the descriptive outlook in the subject’s organisation.

Thus our traditional understanding of labour law is essentially historically specific, and it is this conceptualisation which permits its wholesale demise to be forecast. This is (or might be) the ‘end of labour law as we know it’.³⁵

A third peculiarity about the ‘labour law’ tradition is the fact that it was uncertain to what extent the argument, in terms of the scope of its subject matter and purpose, could be applied globally. A lot was assumed about the role that labour law played, and these assumptions were not always borne out when applied even to countries of similar type. For example it might have seemed reasonable to approach Australian labour law from the same ‘protective’ standpoint as in the UK, but as some authors pointed out in the early 1990s, it was not possible to draw such a strong dividing line between the economic and social purposes of labour law in Australia. Historically Australian labour law had long been an important instrument of economic policy, as well as providing protection for workers engaged under employment contracts.³⁶

Elsewhere, what appeared to be more or less orthodox labour law systems organised around the same basic principles impacted scarcely at all on societies where the rule of law was weak, where the capacity of labour law to influence markets or cultures was poor, or where labour law was intended to play a somewhat different role.³⁷ The study of labour statutes and institutions across many different countries revealed wide variations in the content, objectives and impacts of law. In at least one instance Labour Codes touched upon matters as diverse as family planning. In many of the East and South-East Asian countries law subordinated the labour movement, and ‘sacrificed the social role of labour legislation to

³⁴ See Deakin and Wilkinson, *ibid.*

³⁵ P. O’Higgins, above n. 13.

³⁶ See Creighton, Ford and Mitchell, above n. 2 (2nd ed.).

³⁷ S. Cooney, T. Lindsey, R. Mitchell and Y. Zhu, above n. 1.

the [perceived] imperatives of state economic policy'.³⁸ It is not easy to see why this was not 'labour law'.

3. What Went Wrong?

The standard conception, as I have outlined it, generally acquired acceptance and reiteration from the early years of the twentieth century until the 1970s. In universities across most of the developed and developing world, especially from the 1950s onwards, the subject was organised and taught accordingly, even where, as noted, its impact was slight. My impression is that labour law texts (and hence the 'idea' of labour law) continued to be organised around the accepted 'core principles' (long term employment contracts, collective regulation, trade unions, industrial action and so on) even in countries where unionism and collective bargaining tended to be very poorly developed, and organised industrial action rarely occurred. But whatever was regulating labour markets in these countries it certainly wasn't 'labour law' as we understood it.

However, steadily from the 1980s onwards, and for various reasons, even in the West (or North as it is sometimes expressed)³⁹ doubts began to be raised. Davies and Freedland thought that the association of labour law with anti-inflation economic measures was something of a revolution in British labour law.⁴⁰ Hugh Collins put in a plea for the traditional labour law outlook as a 'vocation',⁴¹ but the doubts persisted:

The most radical implication of the post-industrial era might be that there is no future left for labour law, notably for statutory labour law: business wants to do away with it...and...the new type of worker no longer needs the traditional protection. Moreover, systems of industrial relations and social institutions in the economic field are also under fire...strong pleas are heard for a return to a neo-liberal model with a strong market orientation, rolling back the state and cutting down on wage costs

³⁸ R. Mitchell and J. M. A. Wu (eds.), above n. 1, p. xi.

³⁹ See T. Tekle, 'Introduction - Workers' Protection and Labour Law in the South: An Evolving Tension Between Models and Reality' in T. Tekle (ed.), *Labour Law and Worker Protection in Developing Countries*, Hart Publishing, Oxford, 2010 (forthcoming).

⁴⁰ P. Davies and M. Freedland, *Kahn-Freund's Labour and the Law*, Stevens, London, 2nd ed. 1983, p. 5.

⁴¹ See above n. 21.

in order to compete with the astonishing growth of South-Asian economies.⁴²

In other words the certainty with which we viewed labour law began to unfold as the social and economic reality on which it was based began to decay. Again drawing from Langille:

This received wisdom of labour lawyers did not evolve in some formal legalistic realm. It cohered with and was made possible by the real world of the North American economy [and, of course, that of Europe, Australasia and parts of Asia] for much of the twentieth century...the transaction costs of the time, combined with the then dominant management theory, led to Taylorist modes of production which involved vertical integration, the hiring of large numbers of employees on long-term contracts, the construction of 'internal labor markets', and the rise of the basic understanding of the trade-offs that employees, as opposed to independent contractors, make. [That is]...security and stability in employment through a long-term contract, in return [for] subordination to the control, rules, and directives of the firm...

In this context it was 'natural' that labour law would focus upon regulation of the long-term contract [of] employment, in the name of employees conceived of as those in need of protection, because of inequality of bargaining power, in the ongoing negotiation of those long-term contracts of employment. The contract of employment was the obvious 'platform' for regulation and for the delivery of a social safety net that insured against both employment risks and wider social risks, for both the worker and the family.⁴³

Looked at now, this description seems to paint a picture of working life that has been relatively short-lived in the history of labour market regulation. As Langille notes 'our empirical world has moved on'.⁴⁴ Several points should be noted about these changes.

First, the standard-form employment contract is no longer necessarily the norm, even in industrialised countries. In Australia, for example, less than two in every three employees is engaged under a 'standard' form contract.⁴⁵ A high proportion of these 'irregularly'

⁴² Lord Wedderburn et. al., *Labour Law in the Post-Industrial Era*, Dartmouth, Aldershot, 1994, p.4.

⁴³ Langille, above n 20, pp. 57-58.

⁴⁴ *Ibid.*, p.58. See also K. Stone, 'The Future of Labor and Employment Law in the United States', Research Paper No. 08-11, Law and Economics Research Paper Series, UCLA School of Law, 2008.

⁴⁵ J. C. Tham, 'Towards an Understanding of Standard Employment Relationships under Australian Labour Law' (2007) 20 *Australian Journal of Labour Law* 123.

employed workers are casuals.⁴⁶ Workers are now employed everywhere under many different legal guises, including casual, part-time, fixed term and self- (or independently) employed. This decline has challenged the validity of the protective function of labour law simply because so much 'labour' now falls outside of labour law's protective framework.

Secondly, the globalisation of capital has challenged the capacity of nationally-based regulation to maintain employment standards, and at the same time it is not clear that international labour regulation is an effective antidote to this.

Thirdly, much of labour law is now unambiguously more oriented towards the policy goals of improved efficiency, flexibility and productivity in business, and less towards fairness and protection for employees.⁴⁷

Fourthly, the decline in worker organisation through unions has seen a shift in the style of worker involvement in workplace governance. The organised conflict model of dispute resolution has given way to greater emphasis on 'co-operative' industrial relations.⁴⁸ Managerial prerogative (as opposed to joint regulation) appears to have been greatly strengthened through this process.

Finally, there have been major changes in the structure of society, which have impacted considerably upon the economic, social and domestic contexts of work and work relationships. Class conscious organisation in labour institutions has largely dissipated, and workplaces are far more diverse in gender and racial constitution. The working patterns of the typical household are no longer typified by the full-time working male supporting a non-working wife and children.

This is just to mention a few obvious points. But the central issue is that all of the various 'shifts' (as Harry Arthurs has described them) in Workplace Organisation and Activity, Workplace Population, Worker Identities and Consciousness, Workplace Governance and

⁴⁶ The mismatch between labour law and its social and industrial context is most noticeable in the US: see for example K. Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace*, Cambridge University Press, Cambridge, 2004, and K. Stone, 'Rethinking Labour Law: Employment Protection for Boundaryless Workers' in Davidov and Langille, above. n 15, at p.155.

⁴⁷ See, for example, H. Collins, 'Regulating the Employment Relation for Competitiveness' (2001) 30 *Industrial Law Journal* 17.

⁴⁸ R. Mitchell and A. O'Donnell, 'What is Labour Law Doing About "Partnership at Work"? British and Australian Developments Compared' in S. Marshall, R. Mitchell and I. Ramsay (eds.), *Varieties of Capitalism, Corporate Governance and Employees*, Melbourne University Press, Melbourne, 2008, p. 95.

Public Governance and Discourse⁴⁹ have meant that ‘labour law’ no longer is anchored by a social and economic context in which it was once embedded.

4. What Is Being Done, and What Are the Difficulties?

As I have noted in earlier sections of this paper there is no shortage of new works and projects examining the decline of ‘labour law’ in its traditional sense, and exploring potential avenues for renewal.⁵⁰ Some of these are more far-reaching than others. In some national cases, where the collective institutions of industrial relations and the degree of direct statutory regulation retain relative purchase on labour markets, scholars have evinced an inclination not to depart significantly from the traditional subject.⁵¹ Other projects are in search of better protections for workers in a socially and industrially different world – thus essentially policy-based.⁵² There is a suggestion, perhaps, that the key problem is discovering how to ensure the protection of the subordinate/dependant worker and thus securing the true purpose of labour law through the use of various definitional embellishments on the meaning of ‘employer’, employee, independent contractor and so on.⁵³ Other projects are more far-reaching, with a (perhaps tentative) view of reaching a completely *new* understanding of what labour law is about.⁵⁴

As we have noted in passing this is not a new discussion. It has been underway for close to twenty years. It is principally a debate between academic lawyers though it is clearly of relevance to legal training and ultimately to legal practice (though I am not really concerned with this detail here). However while most labour lawyers seem to recognise that the traditional labour law subject is undergoing a crisis of identity, we still seem stuck in a mire of competing visions and objectives, standards and rules, styles of regulation, and

⁴⁹ See H. Arthurs, ‘What Immortal Hand or Eye? – Who Will Redraw the Boundaries of Labour Law?’, in Davidov and Langille, above n. 15, at p. 389.

⁵⁰ See, for example, the works cited in nn. 2, 5, 6, 9, 13, 14 and 15.

⁵¹ See B. Creighton and A. Stewart, *Labour Law*, Federation Press, Sydney, 4th ed. 2005; H. Collins, K. Ewing and A. McColgan, above n. 29; S. Deakin and G. Morris, *Labour Law*, Hart Publishing, Oxford, 5th ed. 2009.

⁵² For example, the current project by Harry Arthurs and Katherine Stone, ‘Employment Regulation after the Demise of the Standard Employment Contract: The Need for Innovations in Regulatory Design’.

⁵³ See A. Stewart, ‘Redefining Employment? Meeting the Challenge of Contract and Agency Labour’ (2002) 15 *Australian Journal of Labour Law* 235; G. Davidov, ‘The Reports of My Death are Greatly Exaggerated: “Employee” as a Viable (Though Over-used) Legal Concept’ in Davidov and Langille, above n. 15.

⁵⁴ This is particularly so of the Davidov and Langille project, and the project led by Chris Arup and others in Melbourne, Australia.

global and national economic and social contexts. The question is whether there is a way out.

Surveying the present state of the debate, it is not clear that we have made much headway beyond recognising the problem. Nor is it clear that we will be able to arrive at a workable resolution given the differing ideological approaches of the participants in the debate.⁵⁵ One of the central problems in the debate is that we are trying to do at least two different things. Some scholars are trying to map out a territory for labour law inquiry (that is, the scope of the subject matter) without being overly concerned with prioritising the values or norms to which the system should aspire. Rather, this group, which includes a number of Australian labour lawyers,⁵⁶ is primarily interested in exploring labour law as a field of regulation which is historically, economically, politically and socially contingent, and in which various regulatory purposes wax and wane accordingly. Part of this endeavour arises from the very clear apprehension that we need to know more about what is going on in an empirical sense with the operation, application and impact of law and regulation on labour markets in different societies, and fits the increasing interest in more grounded studies of how, and to what extent, labour law applies in particular contexts.

This is not to say that those in this group are not concerned with the promotion of social and economic values (however they may be defined) via labour law, merely that they think it is preferable at the outset to understand more about what is going on – that is, to understand how the state and other actors order and regulate labour markets according to systems of production both within and across different societies. An example here is the work of Hay and Craven and their colleagues on masters and servants statutes, where the key motif seems to be both similarity and diversity in legal design and operation.⁵⁷ Other examples include the work being done on ‘legal origins’ and its association with particular ‘regulatory styles’ within economic systems.⁵⁸

⁵⁵ See, for example, R. McCallum, ‘In Defence of Labour Law’, Industrial Relations Society of Victoria, Melbourne, 2007. Some colleagues in labour law go so far as to suggest that even to concede that ‘labour law’ may at times be a tool of economic policy is giving the game away entirely.

⁵⁶ See Arup et al., above n. 7.

⁵⁷ D. Hay and P. Craven (eds.), *Masters, Servants and Magistrates in Britain & the Empire, 1562-1955*, University of North Carolina Press, Chapel Hill, 2004.

⁵⁸ See, for example, B. Ahlering and S. Deakin, ‘Labour Regulation, Corporate Governance, and Legal Origin: A Case of Institutional Complementarity?’ (2007) 4 *Law and Society Review* 865; S. Deakin, P. Lele

In summary, perhaps the best way of understanding this perspective is that it accepts that there is always labour law in some shape or form according to different stages of historical and economic development and different systems of production. Labour law is simply part of the political economy. Its objectives may vary and oscillate. Indeed they may conflict and give rise to unintended consequences.⁵⁹ Those approaching labour law from this perspective think there is value (and formative value) in trying to understand the complexity of this regulation, and to provide an analysis of how it operates and what impact it has.

Others are taking a somewhat different approach. For this group the principal problem is not so much how to reconceptualise the field, but how to do so whilst ensuring that the core or traditional values of labour law ('as we know or have known it') can be adapted or redeveloped to apply in labour markets and systems of production, and social and economic contexts, which are rapidly (and perhaps endlessly) changing as a matter of fact: substantially, although not merely or inevitably, an issue to do with globalisation.⁶⁰ The general outlook here is that it is the 'normative' vision which holds the field together, and that without it 'labour law' would lack coherence.⁶¹

It is part of this position, as I understand it, to argue that if we open up the field to more positivistic or descriptive empirical approaches without a secure normative footing it would make it too hard to select the appropriate subject matter: we can't simply select all law relevant to 'work' or 'employment'.⁶² There is clear recognition that there needs to be greater attention given to other legal subject matter (social security, tax, corporate law, education law, family law, superannuation law, immigration law and so on are often

and M. Siems, 'The Evolution of Labour Law: Calibrating and Comparing Regulatory Regimes' (2007) 146 *International Labour Review* 133; S. Cooney, P. Gahan, S. Marshall, R. Mitchell and A. Stewart, *Legal Origins and the Evolution of Australian Labour Law, 1970-2010*, Research Report, Workplace and Corporate Law Research Group, Faculty of Business and Economics, Monash University, Melbourne, 2009, available at <http://www.buseco.monash.edu.au/blt/wclrg/legal-origins-australia-labour-law.pdf> (accessed 23rd October 2009).

⁵⁹ See P. Gahan and R. Mitchell, 'The Limits of Labour Law and the Necessity of Interdisciplinary Analysis' in R. Mitchell (ed), above n. 25 at pp. 83-84.

⁶⁰ R. Dukes, above n. 19.

⁶¹ See Deakin, above n. 17 at p.1166. See also, generally Collins, above n. 21, Langille above n. 20.

⁶² Or swimming pools or lawn mowers for that matter: see Langille above n. 20.

mentioned),⁶³ but the problem is exactly what should be added (where do we draw the boundary?) and how do we stitch the material together (what is the narrative?). Both the ‘what’ and the ‘how’ questions are very much reliant on the ‘why’ (for what purpose?) question. This is, clearly, a powerful argument, and considering all of the other difficulties associated with grounding a subject in appropriate economic and social contexts, and the conflicting policy positions of ‘protection’ and ‘competitiveness’, it is unsurprising that some leading scholars doubt the viability of the project.⁶⁴

So let us recap, before I put forward some simple propositions of my own.

Firstly, when we talk about ‘labour law’ in the traditional sense, we know we are speaking in a relatively confined way. This is not an understanding of a field descended from previous systems of labour market regulation, and which is contingent on specific economic, social and cultural variables so much as a completely new field of academic and policy studies constructed around certain institutions, forms and values. It is more or less specific to the political and economic systems of the twentieth century.⁶⁵ Its main purpose is to protect workers against the power of capital.⁶⁶ It is based upon certain truths and values (labour is not a commodity).⁶⁷ It is supported by international conventions, and embodies certain human rights.⁶⁸ It *is* what it *should* be, and it is less important to understand what actually regulates labour, and why that regulation is like it is.

⁶³ See R. Mitchell and C. Arup, ‘Labour Law and Labour Market Regulation’ in Arup et al., above n. 7; H. Arthurs, above n. 47; P. Benjamin, ‘Beyond The Boundaries: Prospects for Expanding Labour Market Regulation in South Africa’ in Davidov and Langille, above n. 15; J-C Javillier, ‘The Employer and the Worker: The Need for a Comparative and International Perspective’ in Davidov and Langille, above n. 15.

⁶⁴ Arthurs, above n. 49. And see the valuable contribution by Alan Hyde, ‘What is Labour Law?’ in Davidov and Langille, above n. 15.

⁶⁵ J. Braithwaite and P. Drahos, *Global Business Regulation*, Cambridge University Press, Cambridge, 2000.

⁶⁶ Kahn-Freund, above n. 23.

⁶⁷ B. Langille, ‘Labour is Not a Commodity’ (1998) 19 *Industrial Law Journal* (Sth. Africa) 1002; P. O’Higgins, ‘“Labour is Not a Commodity”: An Irish Contribution to International Labour Law’ (1997) 26 *Industrial Law Journal* 225.

⁶⁸ P. Alston, *Labour Rights as Human Rights*, Oxford University Press, Oxford, 2005; K. Ewing, ‘Social Rights and Constitutional Law’ [1995] *Public Law* 105

One of the problems of this mismatch of perspectives, in my experience, is that it is often difficult to conduct a genuine and meaningful international discourse in the labour law field. ‘Labour law’ as we have described it here is largely confined to certain areas of the globe which may be described as developed or developing. Even in those areas ‘labour law’ may be in retreat. But importantly the fact is that in much of the developing world ‘labour law’ as we know it simply doesn’t operate in the supposed manner.⁶⁹ To some extent, I think, this is obscured by the application of largely irrelevant core standards and values. Thus, I suggest, we need to know more about what is going on – a ‘reality’ of labour law as well as a theory of labour law. In a recent publication Jean-Claude Javillier has put the point as follows:

From a comparative and international point of view, we need to have real and complete knowledge of what is happening in labour relations and labour law, linking the definitions and methods with contexts and practice...[I]t is not always easy to find a common language and have a clear and objective picture of what is happening in law and practice around the world – or even on one particular continent and region. We need to avoid developing new theories or conclusions, which are linked mainly or only to one specific context such as, for example, developing countries and the post-industrial relations system.⁷⁰

And we might as well add that the same might be said for *within* nation contexts as well.

Secondly, ‘traditional’ labour law is fundamentally grounded in the regulation of ‘employment relationships’ of one sort or another: ‘the law of dependent labour’.⁷¹ More particularly labour law is concerned with the regulation of employment rights and conditions (in both a procedural and substantive sense).⁷² Thus the starting point for analysis in labour law is at, or close to, the fact of engagement or employment. But I wonder if there is not a case to be made out to the effect that the problems of labour are not merely the consequence of dependent employment relations, but stem from the fact that in all societies where property and capital assets are under private or state ownership, labour

⁶⁹ See Cooney et al., above n.1; S. Lee and F. Eyraud (eds.), *Globalization, Flexibilization and Working Conditions in Asia and the Pacific*, Chandos Publishing/International Labour Office, Oxford, 2008; and T. Tekle, above n. 39.

⁷⁰ J-C Javillier, above n.63, at p. 355.

⁷¹ Deakin and Morris, above n. 51, p.1.

⁷² See Langille, above n. 15, at pp. 14-15.

(in all of its forms – dependent or independent) lacks access to a natural means of subsistence. Labour in this sense ultimately is in a dependent relationship with its broader society, not merely with its employers. And if this were to be a legitimate starting point for labour law inquiry, would it not drive the investigation outwards from the employment relationship to a consideration of what ‘justice’ might mean for dependent labour (in this second sense) taken over a life course: i.e. prior to, during and after working life?⁷³

Of course, if we pursued such a line of argument certain implications are clear. To stretch out the boundaries of labour law in this way requires entry into what are now perceived to be other, quite separate, fields of law, each with its own set of values and organising principles. Perhaps it is reasonable to point out that the existing boundaries around these subjects are not sufficiently flexible to facilitate this sort of amalgamation or exchange.⁷⁴ Perhaps also it is asking too much to ask scholars to master so much legal terrain. Yet, on the other hand, some of the early pioneers of international labour regulation clearly had in mind a platform of ‘labour protections’ which were much broader than those included in the traditional labour law subject. They included, for example, accident insurance, sickness, maternity, old age insurance, unemployment insurance, the protection of health and the protection of migrant labour, in addition to more familiar matters of working hours and so on.⁷⁵ There was, apparently, even a call for a minimum standard of economic security.⁷⁶ And at the same time, as we noted earlier, it does seem clear enough that there is some tacit recognition of the broadening subject matter of labour law, even if it is not yet clear where this will take us:

[W]e have to remember that employers and workers have different views and strategies concerning labour law and social security, depending on their country, industry, legal system, culture and economic background. There are clearly different ways of reconciling productivity and protection, freedom and regulation. We can agree on the fact that boundaries between disciplines are either far less important, or far more complex, than

⁷³ See also Goldin, above n. 18, at p. 128.

⁷⁴ See Deakin above n. 17, p. 1168.

⁷⁵ See S. Bauer, *International Labor Legislation and the Society of Nations*, Bulletin No 254 of the United States Bureau of Labor Statistics, Government Printing Office, Washington, 1919; T. Ramm, ‘*Laissez-faire and State Protection of Workers*’ in B. Hepple, above n. 19, at p. 75.

⁷⁶ See Ramm, *ibid.* And from a human rights perspective, see H. Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, Princeton University Press, Princeton, 2nd ed., 1996.

they were [historically]...In other words the links between the different branches of the law must be taken into account more seriously. The interaction between labour and social security law, company law, tax law, environmental law and consumer law seems to be increasing.⁷⁷

There is no obvious solution to these various difficulties in the reconstruction of the labour law field. What we seem to be doing at the moment is recognising interesting and important links between traditional labour law and associated fields of labour market regulation, but without clear goals beyond this point. Some authors recognised more than two decades ago the relevance of broader labour market issues to labour law, but that was with a view to locating the employment relationship in its proper context rather than broadening the field of study generally.⁷⁸ More recently authors of a current leading British labour law text have acknowledged the particular importance of social security law to labour law, and in addition the importance of taxation and company law.⁷⁹ But still these issues are covered not in context of labour's position in society, but in relation to the employment relationship.

What we see then is some general interest in an expanding idea of what the subject matter of labour law might be, but without any strong conviction that we need to move away from the employment relationship (and the legal relation of the contract of employment) as the basic starting point for analysis. At least in part this may have to do with the perceived need to remain relevant to legal practice.⁸⁰ But at the same time there does seem also to be some support for a labour market regulation approach.⁸¹ It is possible perhaps that the process towards a broader analytical framework might be assisted by some recent proposals. Brian Langille, for example, has suggested that a new starting point, speaking normatively, might be the concept of the need to support/facilitate 'human development' or (possibly) 'human freedom'.⁸² Similarly it is suggested that Sen's 'capabilities' approach could, under certain conditions, 'mark the beginning of a new stage in the history of labour market regulation,

⁷⁷ J-C Javillier, above n. 63, at p. 356.

⁷⁸ See P. Davies and M. Freedland, *Labour Law: Text and Materials*, Weidenfeld and Nicolson, London, 2nd ed., 1984.

⁷⁹ Deakin and Morris, above n. 51, p. 2.

⁸⁰ Collins, Ewing and McColgan, above n. 29, at p.2.

⁸¹ S. Deakin and W. Njoya, 'The Legal Framework of Employment Relations', Centre for Business Research, University of Cambridge, 2007.

⁸² 'Labour Law's Back Pages', above n. 15, at pp. 32-35.

namely the emergence of a *law of the labour market*'.⁸³ Then there is the ILO's very broad vision in its *Decent Work* proposal, 'opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity'.⁸⁴

Ultimately, of course, the expanding subject matter of labour law will require recasting and relearning the subject to greater or lesser degree. The critical issue is whether we abandon the 'employment relationship' as the essential launching pad. Does one continue to focus on the details of collective bargaining, trade unions, strike law and so on when these do not reflect the reality of how labour markets are operating? Should we not be studying (also) the legal and regulatory policy which shapes labour's position in society: employment policy, training and education, unemployment and accident insurance, superannuation and pensions and so on? Apart from convenience it is hard to see why not.

5. Conclusion

'Labour law' seems to be in trouble everywhere. In many developed countries it no longer maps onto labour market, economic and social reality. In many developing countries it never functioned as it was supposed that it might (we don't need to go into the reasons why this was so). In many other unregulated areas of the globe, 'labour law' is simply about something else.

Our loyalty is surely to *labour* as a class, not to 'labour law'. Perhaps this requires recognition of the fact, not merely that things have changed (as they surely have), but that 'our' labour law was always too narrowly focussed, in terms of its geographical, temporal and purposive aspects.

⁸³ Deakin and Wilkinson, above n. 33 at p. 353 (emphasis in original).

⁸⁴ International Labour Organisation, *Decent Work*, Report of the Director General of the ILO to the 87th Session of the International Labour Conference, Geneva, 1999. See also A. Sen, 'Work and Rights' (2000) 139 *International Review* 119.