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BOOK REVIEW

The Evolving Project of Labour Law: Foundations, Development & Future Research Directions, (eds John Howe, Anna Chapman & Ingrid Landau). The Federation Press. 2017. 1st edition, Annandale: The Federation Press, pages: 291, international price: \$ 81.78, ISBN: 9781760021313

This is a collection of essays originally presented at a workshop at the beginning of 2016 in celebration of twenty-one years of the Centre for Employment and Labour Relations Law (CELRL) at the University of Melbourne. Most of the authors are or have been members or associates of CELRL, and almost all are Australian scholars. Their contributions deal with the evolution of labour law in Australia and beyond over the past two decades and touch on a range of contemporary labour law themes. The participants were asked to 'reflect on their own perceptions of the nature of labour law and where it is, or should be, going'.¹ As a result, the book might be expected to have much in common with the widely acclaimed study, *The Idea of Labour Law*² and some of the chapters do in fact deal with the foundations of labour law. However, most of the chapters seem to engage more with the question of the effectiveness of existing labour laws in addition to bringing new topics into the debate and broadening the scope of labour law.

A number of chapters focus on enforcement issues: Richard Johnstone provides an interesting account of how the Australian laws on health and safety at work are designed to impose obligations on all firms in 'vertically disintegrated' arrangements as in the case of supply chains.³ Other chapters 'broaden our scope': Hewitt et al. examine the intersection between education and work, with a focus on young people,⁴ whereas Alysia Blackham examines the normative worker in terms of age.⁵ On the other hand, Gaze et al. argue that discrimination and equal treatment should occupy a central place in labour law, rather than being relegated to the margins.⁶

The chapters by Joo-Cheong Tham and K.D. Ewing, and Ingrid Landau are of particular interest. Tham and Ewing's analysis centres on the labour clauses in the Trans-Pacific Partnership Agreement (TPP).⁷ As the editors point out, even

¹ At 1.

² *The Idea of Labour Law* (G. Davidov & B. Langille eds, Oxford: Oxford University Press 2011).

³ Ch. 9.

⁴ Anne Hewitt, Rosemary Owens, Andrew Stewart & Joanna Howe, Ch. 7.

⁵ Ch. 8.

⁶ Beth Gaze, Anna Chapman & Adriana Orifici, Ch. 6.

though the United States' withdrawal from the agreement under President Trump implies that the TPP Agreement will not go ahead in its current form, the chapter remains relevant for the conceptual framework it offers and for its critique of this increasingly prevalent form of transnational labour regulation. Landau on the other hand applies a labour law perspective to the United Nations Guiding Principles on Business and Human Rights.⁸

All the chapters are insightful as they highlight the most pressing challenges for Australian labour law today. Moreover, they show how our Australian colleagues view the trajectory of labour law scholarship and what the future of this trajectory should look like. As a result, the book is a valuable contribution to the existing literature. One of the arguments put forward that many of the authors seem to support is that the 'labour market perspective' is a useful – if not the most useful – framework for the study of labour law, though the authors recognize that this view is contested. Many labour law scholars believe that the labour market perspective is leading to a shift away from the traditional protective function of labour law to a more market-oriented model.⁹ However, the authors remain advocates of this approach and that is one of the main themes in the book.

After the introductory chapter by the editors, Richard Mitchell provides a useful overview of the historical development of labour law as a distinct legal discipline in Australia. He notes that in Australia, the debate over the 'idea' of labour law has been underway since the early-to-mid-1990s and continues today. It deals with questions about 'the purposes in labour law, what might be meant by "law" in labour law and who might be subject to that law'.¹⁰ He adds, however, that we have no clear idea of where the new paradigm of labour law might take us, so the 'conventional approach' is still widely adopted in Australian labour law studies. This means that most textbooks on labour law examine the law applicable to those engaged in paid work under contracts of employment, and the regulation of their individual and collective rights in that capacity.¹¹ Most authors of these textbooks acknowledge and describe the increasing problems confronting the subject from changing socio/economic and industrial factors, but – despite some variations – their work remains fundamentally consistent with the traditional approach, as it has evolved. Mitchell seems to be disappointed by this outcome and speculates about the reasons why most labour law scholars continue to adopt the traditional approach. It might be – according to Mitchell – that the majority of scholars have accepted 'the fact that labour law as a field now plays a less important

⁷ Ch. 17.

⁸ Ch. 18.

⁹ See e.g. the introductory chapter of the book.

¹⁰ At 41.

¹¹ At 37.

role in its supposed socially protective and redistributive functions than it has done in the past'.¹² It might be that for these purposes, other fields of law are gaining importance. For Mitchell, it is understandable and justifiable that some adhere to the conventional approach while hoping that scholars in other fields will fill the gap once filled by labour law. Still, this is less than satisfactory for Mitchell, and he has a suggestion for those scholars in labour law who *do* want to 'reappraise and perhaps reformulate labour law', so it can again serve its purpose for the 'redistribution of resources away from advantaged classes of people (capital) to disadvantaged classes of people (labour)'.¹³ The leading question should be: How are societies regulated to ensure access to the material conditions of life when such conditions are, in most societies, owned or controlled by select groups? This question allows us to draw on legal resources relevant to the question, but also to look beyond the law to other forms of regulation.

Mitchell was the editor of an important collection of papers published in the 1990s, *Redefining Labour Law*, and this provides a starting point for the chapter by Chris Arup.¹⁴ Arup points out that with that project, Mitchell and Arup sought to broaden the study of labour law. Today, Arup seeks to show that the labour market perspective is still valuable. He rightly stresses that the labour market perspective provides topics and methods for our research. It is safe to say that labour law scholars have become familiar with this approach: Arup and Mitchell are not alone in using and discussing it.¹⁵ Arup defends the view that in addition to providing topics and methods, the labour market perspective has a message for the study of labour law as a whole. That message is the re-commodification of labour.¹⁶ Arup calls it 'the big message', but seems to be apologetic about it, since he remarks that 'this perspective revives an arcane notion associated with Marx and Polanyi'. However, it is a development we should be mindful of in our effort to ensure that 'protection remains effective'.¹⁷ By looking beyond employment law to all law regulating the supply and demand for workers, we are better able to approach that task.

While Arup touches briefly on the criticism the labour market perspective has met, Anthony O'Donnell engages with a recent critique of this kind by Ruth Dukes in her influential book *The Labour Constitution*.¹⁸ Dukes explicitly includes

¹² At 41.

¹³ At 42.

¹⁴ *Redefining Labour Law: New Perspectives on the Future of Teaching and Research* (R. Mitchell ed., Centre for Employment and Labour Relations Law, University of Melbourne 1995).

¹⁵ See S. Deakin & F. Wilkinson, *The Law of the Labour Market. Industrialization, Employment, and Legal Evolution* (Oxford University Press 2005).

¹⁶ At 48.

¹⁷ At 51.

¹⁸ R. Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford University Press 2014).

Australian scholars associated with CELRL as part of the shift in labour law scholarship from 'labour law' to the 'law of the labour market'.¹⁹ In contrast, O'Donnell resists the idea of a *shift* in purpose attributed to labour law. He stresses that, from an Australian perspective, labour law was never driven solely by a 'protective impulse'. There have always been multiple purposes including economic ones, such as the need to fight unemployment and to promote productivity. Legislation in this area has always been the result of compromises. Moreover, O'Donnell states that Australian scholars are engaged in a 'normatively agnostic enterprise'.²⁰ Rather than articulating normative goals, they see 'description and mapping the scope' of the subject matter as their task.

In this way, O'Donnell enters the wider debate about legal scholarship. It would be interesting to see where labour law scholarship stands in this broader debate on legal scholarship in particular with regard to the claim that 'the scholarly legal community continues to have difficulties with explaining what they do and how they do it to peers from other disciplines'.²¹ It would be interesting to know whether this attention to the normative foundations is to be found in other legal fields as well. What method do we adopt when we do engage in investigation of these normative foundations and, more importantly, what methods do we use when formulating the purposes of labour law? Does the need to demarcate our field of law from 'normal' private law lead us to over-emphasize the protective nature of labour law? Does the importance of labour law for the competitiveness of the national economy force us – perhaps more than other legal scholars – to engage in multidisciplinary research, such as law and economics? Some of the authors contributing to this book, O'Donnell included, touch on these questions. Arup asserts that 'labour lawyers must rise from their desks and conduct case studies in the field, pursuing empirical qualitative and quantitative methods of research'.²² A number of contributors to this book support this view or have themselves conducted empirical research. In this connection, in her attempt to evaluate the Better Factories Project Cambodia – one of the first projects set up by the International Labour Organization to assist in monitoring labour institutions in a developing country – Shelley Marshall draws extensively on interviews conducted in Cambodia with the relevant actors involved.²³ However, multidisciplinary research seems to be the exception rather than the rule, because the editors

¹⁹ Dukes, 202 (2014).

²⁰ At 67.

²¹ R. van Gestel & H. Micklitz, *Why Methods Matter in European Legal Scholarship*, 20(3) Eur. L.J. 296 (2014).

²² At 55.

²³ Ch. 16.

point out that doctrinal research is still the dominant form of labour law inquiry in Australia. O'Donnell clearly adheres to traditional doctrinal research while at the same time stressing the importance of broadening the scope of research to welfare law, company law and tax law. This would mean expanding the scope of our research to related fields of law while using the same (traditional) method. According to O'Donnell we should not presume a particular normative purpose as the precursor to identifying the relevant field. Even though the authors do not entirely agree on methodology – on the contrary, most of them endorse the diversity on this point that can be found in this book – there is a broad agreement on broadening the scope of research. This may be seen as the second main message of the book.

Broadening the scope of research from 'regulation of employment' to 'regulation of labour'²⁴ can only take us so far when we are confronted with normative questions. How can we answer questions about the need for law reform regarding atypical work when we are only engaged in 'mapping and describing' the law? It may be argued that even interpretation of the law requires us to pay attention to its normative purpose.²⁵ Still, we can clearly see that most authors do not wish to engage in a thorough discussion or investigation of the topic of the purpose of labour law, even though the title of the book would imply otherwise. As the editors point out, 'The chapters have more to say about the subject of labour law than they do about the goals of labour law.'²⁶ The result is that the normative purpose is left implicit. The editors acknowledge that the chapters do not really engage in the debate on the normative framework, but they feel the need to assure us that Australian scholars do not lack 'a concern for social protection and imbalance in bargaining power'.²⁷

Leaving the normative framework mostly untouched in labour law scholarship can also mean that not enough attention is paid to the power imbalance between employers and workers, or to the existence of subordination as an inherent part of the employment contract. This is evident in the chapter by O'Donnell, who addresses the issue of the normative purpose directly. He argues that the purpose of labour law ebbs and flows, according to the politics of the day. Instead of trying to identify more precisely what 'protection of the worker' actually means, his proposal is to centre our inquiry into labour law around four 'regulatory dilemmas'.²⁸ These are: the incorporation of labour (who gets to work and who is excused); the allocation of labour (which workers get matched to which jobs);

²⁴ At 68.

²⁵ As O'Donnell acknowledges, *see* at 67.

²⁶ At 20.

²⁷ At 20.

²⁸ O'Donnell refers to the work of the economic geographer, Jamie Peck, at 68.

the control of labour (the balance of rights and obligations, discipline and incentives, rewards and penalties); and the reproduction of labour (how we make sure there are workers for the future). What is striking is the absence of any reference to a power imbalance or subordination (though maybe that comes under 'control of labour'), but also to human dignity or human freedom. By omitting to mention or discuss these topics, O'Donnell sets up a different normative framework.

An implicit normative framework is also to be found in the chapter by Maria Azzurra Tranfaglia comparing the Australian and the Italian regulation of temporary agency work (or 'labour hire'). In the end, she argues that 'Australia should consider introducing a more sophisticated accountability system aimed at protecting the most vulnerable workers while, at the same time, not discouraging the use of this non-standard form of employment, given its potential benefits for the overall economy.'²⁹ This approach clearly echoes the flexicurity policy adopted by the European Commission,³⁰ a policy not free of controversy.³¹ However, the debate on the normative framework of labour law is very much alive, so all contributions to it are valuable, including those that deny the importance of this very debate.

To sum up, this collection of essays is useful for labour law researchers who are interested in Australian employment and labour law scholarship. It casts light on the progress made by labour law scholarship in recent decades. It also provides insights into the research themes and methods the leading Australian scholars are currently pursuing. The strength of the book is above all that it engages in a series of important contemporary debates, not limited to the debate on the normative framework of labour law. For this reason the book should appeal to a wide audience.

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²⁹ At 219.

³⁰ See e.g. *Common Principles of Flexicurity: More and Better Jobs Through Flexibility and Security*, COM (2007) 359.

³¹ See e.g. P. Auer, *What's in a Name? The Rise (and Fall?) of Flexicurity*, 52(3) *J. Indus. Rel.* 371–386 (2010).