

Book Review: The Future of Labour Law. Liber Amicorum Bob Hepple Q.C., by Catherine Barnard, Simon Deakin and Gillian S. Morris (Eds)

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THE FUTURE OF LABOUR LAW: LIBER AMICORUM BOB HEPPLE Q.C. EDITED BY CATHERINE BARNARD, SIMON DEAKIN & GILLIAN S. MORRIS (OXFORD: HART PUBLISHING, 2004) 320 pages.¹

BY DAVID MANGAN²

I. INTRODUCTION

This book honours one of the pre-eminent labour law scholars, Sir Bob Hepple Q.C., on the occasion of his retirement from Mastership of Clare College, Cambridge. The collection's title recalls Hepple's essay of the same name.³ The contributors are all prominent labour scholars, primarily from the United Kingdom. Against this background, the text provides the kind of coverage and insightful contributions reminiscent of Hepple's own career.

The essayists in *The Future of Labour Law* situate themselves in the labour law framework for the future, premising the need for significant reform of the law as well as its ideological underpinnings on the precarious place in which workers currently reside. The following quotation from Hepple's essay may have anticipated the comments contained in this collection:

But we must remain sceptical about the likely efficacy of new legal frameworks for collective labour relations which do not take account of the real state of power relations, and even more cautious in imposing such a framework upon either side in those relations against their determined opposition.⁴

II. SUMMARY

The collection begins with an intriguing selection, an essay by Sandra Fredman entitled "The Ideology of New Labour Law." Fredman critically engages the emergence of the "Third Way." For Fredman, the "Third Way" falls short of meaningful democratic engagement; instead,

¹ [*The Future of Labour Law*].

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³ Bob Hepple, "The Future of Labour Law" (1995) 24 *Indus. L.J.* 303. This article was subsequently republished in (1996) 17 *Comp. Lab. L.J.* 626. Reference will be to the 1996 version.

⁴ *Ibid.* at 636.

it happily assimilates neo-liberal ideology into its principles with a subtlety that seems to have escaped the attention of labour in the United Kingdom. Recalling Marx and Engels definition of ideology, Fredman notes that Third Way ideology stands out as a “system of ideas which has power to justify and convince: to justify the policies of the ruling group, and to convince the people of its truth.”⁵ With this in mind, the author calls for a taming of neo-liberal ideology in favour of social democracy, “itself a political philosophy in need of development to face modern challenges.”⁶ A “transformative labour law,” then, founds itself on “social democratic debate,” but draws on “Third Way principles without accepting that a ‘Third Way’ is ultimately necessary.”⁷

Simon Deakin’s contribution, “Workers, Finance and Democracy,” delves into the concepts of shareholder value and employee pension plans as they relate to labour law. With the litany of pension cases arising in Canadian labour law, this article is a welcome recognition of the expanding areas of practice upon which labour law trenches. Deakin posits:

At the heart of corporate governance is the question of who exercises power and control in corporations, and the implications of the growing ‘financialisation’ of the economy for notions of democratic participation and accountability. As such, this set of issues is of direct and central concern to labour lawyers.⁸

Infusing democracy and accountability into the corporate realm would occur, in relation to pensions, through the strengthened involvement of employee representatives “in their capacity as trustees of occupational pension funds,”⁹ among other suggested reforms. The challenge for the twenty-first century corporation, as the era of shareholder value and neo-liberalism draws to a close,¹⁰ is to recapture corporations’ prior successes in balancing stable employment, security in personal savings, and risk. Deakin suggests that employees pursue

⁵ Sandra Fredman, “The Ideology of New Labour Law” in Barnard, Deakin & Morris, *supra* note 1, 9 at 9.

⁶ *Ibid.* at 39.

⁷ *Ibid.* at 10.

⁸ Simon Deakin, “Workers, Finance and Democracy” in Barnard, Deakin & Morris, *supra* note 1, 79 at 99.

⁹ *Ibid.* at 98-99.

¹⁰ *Ibid.* Deakin quotes from Allan Kennedy’s book, *The End of Shareholder Value* (Cambridge: Perseus Publishing, 2000).

shareholder activism in an attempt to place their interests on an equal footing with those of shareholders.

Manfred Weiss focuses on the European Union worker. Weiss declares: "There is no longer any doubt that the promotion of workers' participation in company's decision-making has become an essential part of the Community's mainstreaming strategy in its social policy agenda."¹¹ The time has arrived when "countries with a tradition of exclusively adversarial structures" have become part of an antiquated past and must move "towards a concept of partnership and cooperation."¹² At present, Weiss believes that we are working through a nuanced concept of this partnership and cooperation. "[S]takeholder values versus shareholder values" will be "more in the limelight in the future."¹³ There is a hint of optimism in this article as Weiss ends by pointing out that the new pattern that emerges could potentially form a model for other regions in the globe.

Evanca Kalula contributes a distinct piece highlighting labour regulation in South Africa. Kalula asserts that the future of labour law in South Africa requires a break from the cycle of "borrowing and bending,"¹⁴ and the recognition of and commitment to addressing the realities of underdevelopment. This essay allows for a perspective on the future of labour law in a global workplace since underdeveloped countries are greater in number than their more fortunate counterparts. If we are to take seriously the right to work as an international human right,¹⁵ then productive measures attending to the realities of global underdevelopment stand out as an essential element.

Keith Ewing examines the nature of strike laws and concludes that labour legislation has dissuaded collective action, but that human rights law may provide an alternative forum. Ewing notes three implications for constructing a right to strike as a human right: first, a

¹¹ Manfred Weiss, "The Future of Workers' Participation in the EU" in Barnard, Deakin & Morris, *supra* note 1, 229 at 248.

¹² *Ibid.* at 249.

¹³ *Ibid.*

¹⁴ Evanca Kalula, "Beyond Borrowing and Bending: Labour Market Regulation and the Future of Labour Law in Southern Africa" in Barnard, Deakin & Morris, *supra* note 1, 275 at 276.

¹⁵ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, art. 6, Can. T.S. 1976 No. 46, 6 I.L.M. 368 (entered into force 3 January 1976, accession by Canada 19 August 1976); *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038.

human right is an individual right; second, it is a “primary rather than a secondary right, and as such is released from its dependence on collective bargaining”; and finally, the state has an obligation to ensure that “there are no impediments” to the exercise of human rights.¹⁶ There are debatable points in this idea, but the author does well to explore the consequences of this proposal. Contrary to Ewing, William Brown and Sarah Oxenbridge argue that there is “no reason to suppose [strikes] will increase again.”¹⁷ In fact, “little would be gained from new legislation to reinforce the effectiveness of the strike weapon; the economics of the private sector markets have moved irreversibly against it.”¹⁸ In their view, the future of collective bargaining lies in the social role of unions as defenders of the marginalized. The purpose of this shift is to gain public acceptability by “demonstrating a sense of social purpose above and beyond the self-interest of their members.”¹⁹

Taking on one of Hepple’s most prolific areas of writing, Catherine Barnard’s essay reflects on the future of equality law within the context of citizenship law, specifically the concept of solidarity found in the social inclusion of the law of citizenship.²⁰ Barnard’s essay is a distinct contribution because it leads the reader through a conceptual connection between equality law and citizenship which emerges from a careful, concise treatment of citizenship jurisprudence.

Silvana Sciarra uses the “open method of coordination” to “illustrate the struggle between governance by guidelines and labour law’s internal coherence.”²¹ Brian Bercusson examines the work of the Convention on the Future of Europe, particularly the *Charter of Fundamental Rights*.²² Steven Anderman deals with termination at

¹⁶ Keith Ewing, “Laws Against Strikes Revisited” in Barnard, Deakin & Morris, *supra* note 1, 41 at 48-50.

¹⁷ William Brown & Sarah Oxenbridge, “Trade Unions and Collective Bargaining: Law and the Future of Collectivism” in Barnard, Deakin & Morris, *supra* note 1, 63 at 70.

¹⁸ *Ibid.* at 77.

¹⁹ *Ibid.* at 66.

²⁰ Catherine Barnard, “The Future of Equality Law: Equality and Beyond” in Barnard, Deakin & Morris, *supra* note 1, 213.

²¹ Silvana Sciarra, “The ‘Making’ of EU Labour Law and the ‘Future’ of Labour Lawyers” in Barnard, Deakin & Morris, *supra* note 1, 201 at 211.

²² Brian Bercusson, “Episodes on the Path Towards the European Social Model: The EU Charter of Fundamental Rights and the Convention on the Future of Europe” in Barnard, Deakin & Morris, *supra* note 1, 179.

common law and suggests reform in the nature of collective consultation over individual dismissals.²³ Also situated in the individual employment scheme, Paul Davies and Martin Freedland explore the legal definition of the employment relationship to “provide broad support for the hypothesis of the emergence of a kind of new paradigm for the structuring and conduct of employment relations.”²⁴ In part, this new paradigm engages participants in a new manner, regards the employer as a corporate entity, and recognizes the prevalence of outsourcing. Breen Creighton brings some needed analysis of the International Labour Organization. Creighton concludes that the existing system in place to set and enforce international labour standards stands at a precarious place and calls out for transformation.²⁵ Gillian Morris discusses the public/private divide in labour law, contending that despite the frequency of occurrences such as outsourcing in both sectors, the state continues to hold a distinctive position as an employer.²⁶ Paul O’Higgins, in the final contribution to the collection, suggests that U.S. labour law has dominated the international labour agenda. O’Higgins’ final paragraph encapsulates the article:

To put it in perhaps old-fashioned terms, the balance of power between Labour and Capital arrived at in the course of the twentieth century has now been changed to the benefit of Capital as a result of the growing influence of economic liberalism represented in its most powerful form by the USA. There is, however, a growing movement of opposition which has not yet achieved the ability significantly to readjust the balance in favour of Labour.²⁷

The capitalization of “Labour” and “Capital”—recalling the literature of the struggle between workers and businesses—is instructive. O’Higgins suggests that opposition to capital interests, which may also champion labour issues, is in the fledgling moments of existence.

²³ Steve Anderman, “Termination of Employment: Whose Property Rights?” in Barnard, Deakin & Morris, *supra* note 1, 101.

²⁴ Paul Davies & Mark Freedland, “Changing Perspectives Upon the Employment Relationship In British Labour Law” in Barnard, Deakin & Morris, *supra* note 1, 129 at 156.

²⁵ Breen Creighton, “The Future of Labour Law: Is There a Role for International Labour Standards?” in Barnard, Deakin & Morris, *supra* note 1, 253 at 272-73.

²⁶ Gillian S. Morris, “The Future of the Public/Private Labour Law Divide” in Barnard, Deakin & Morris, *supra* note 1, 159.

²⁷ Paul O’Higgins, “The End of Labour Law as We Have Known It?” in Barnard, Deakin & Morris, *supra* note 1, 289 at 301.

III. DISCUSSION

Some of the contributions note a greater role for workers in the corporate decision-making process. This is a significant suggestion, because it would reconfigure the traditional dynamic between worker and employer into one more closely resembling co-operation. One means of focusing on this point is through the topic of pensions, which raises questions about the future of labour law, but also queries the future role of unions. Pension plans have been established through union-management agreement, but the employer has often retained control over the administration. Pensions have long been a central part of the total compensation package of many employees. There have been a number of cases lately (mainly in bankruptcy and insolvency proceedings) which have challenged the form and content of that package as a greater number of employees are set to retire. The social importance of unions in these cases cannot be underestimated: if employees do not get what they bargained for upon retirement, there is a strong potential for adverse societal repercussions such as a greater reliance on government resources. Thus, unions are demanding a more active role in the management of existing plans, thereby forcing their way into an area which has been viewed as the domain of management. This marks a significant departure for unions. Having previously focused on the rights of members in the workplace, the role of unions has expanded to deal with management of assets, with the corollary potential for securing the well-being of employees beyond their working years.

These discussions also casually allude to an underlying theme in these essays: that the future of labour law also depends on union efforts. Take Paul O'Higgins' statement:

The weakening of trade union power is another important feature of recent developments. This is due to many reasons. The concentration of large numbers of workers in single places, shipyards, mines, etc., has ceased to be a major feature of working class organization. An increase in the service and financial sectors and other occupations such as tele-selling, which have no tradition of solidarity or union organization, is significant. Also important is the welcome entry into the labour force of groups of workers such as women, immigrants, etc., which likewise have no tradition of organization. Again, the rising affluence of many workers in the advanced industrial countries has weakened their sense of identity with less well-off groups in the community, and encouraged an apparent community of interest with the better-off. It

was the recognition of the declining significance of the traditional industrial working class that has led to the rise of new political configurations such as New Labour.²⁸

There has been a burgeoning literature generally classed under “union renewal” which refers to the effective and ineffective means that unions have employed to adapt to changing circumstances, with unions in the United States presenting particular examples of failure.²⁹ Legislation that better represents employees may be an outcome of positive change with a reinvigorated union movement. The form of this new union movement is indefinite. Brown and Oxenbridge speak of partnerships, but hedge their viability “unless it embodies a substantial element of mutuality.”³⁰ Conversely, the idea of a partnership may be enticing to some unions: if they gain a larger and more meaningful role in the corporate affairs of an employer, the potential arises for unions to reconnect with members and even expand their ranks.

The contributions in *The Future of Labour Law* push the traditional notions of labour relations, with the goal of precipitating a new configuration. In the breadth of ideas contained in this collection, there is a dual point: labour law is in need of a serious consideration of its future, but many foundations upon which to build this future presently exist.

²⁸ *Ibid.* at 291.

²⁹ For example, Kate Bronfenbrenner’s work has highlighted the decline of union prominence in the United States. For essays of several Anglo-industrial countries, see Peter Fairbrother & Charlotte A.B. Yates, eds., *Trade Unions in Renewal: A Comparative Study* (London: Continuum, 2003). For a Canadian perspective, see Pradeep Kumar & Christopher Schenk, eds., *Paths to Union Renewal: Canadian Experience* (Peterborough: Broadview Press, 2006).

³⁰ *Supra* note 1, 63 at 73.