§ Law in Context

A. C. L. DAVIES

Perspectives on Labour Law

Second Edition

CAMBRIDGE

Perspectives on Labour Law

Policy discussions play an important role in labour law, and labour lawyers draw on a wide range of disciplines and approaches in order to construct their arguments. This overview of the basic principles of labour law and the related policy arguments introduces two of the main perspectives used in the analysis of labour law today: human rights and economics. It offers a brief history of the influence of human rights and economics on labour law from the 1950s to the present day, explains neoclassical and new institutional economics and summarises the historical development of international human rights law. The insights of rights theorists and economists are then applied to a selection of topics in labour law, including anti-discrimination law, dismissal, working time, pay, consultation and collective bargaining, trade union membership and industrial action, in order to demonstrate the interplay between the two perspectives.

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For my parents

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Preface

For many students, the first few weeks of a course in labour law can seem rather daunting. Many of the subject's main principles are derived from statute, rather than case law, so there is less room for the kind of detailed case analysis familiar from core subjects like contract and tort. Policy discussions also play a much greater role in labour law than they do in, say, land law or trusts. When writing about anti-discrimination law, for example, labour lawyers think about whether positive discrimination should be permitted, or whether employers should be allowed to say that 'market forces' led them to pay men more than they pay women doing equal work.

The subject's emphasis on legislation and on policy arguments is confusing enough. But life gets even more difficult when we look at the way in which labour lawyers construct their policy arguments. In what Hugh Collins has termed the 'productive disintegration' of labour law, writers now draw on a wide range of other disciplines and approaches in order to make sense of the law.[1] As Chapter 1 will show, labour lawyers have traditionally used industrial relations, a branch of sociology, as a frame of reference. But this discipline has been joined by various kinds of economic analysis, arguments from social justice and the discourse of fundamental human rights.

This array of perspectives on labour law is what gives the subject its fascination. But for newcomers it can seem bewildering. Each perspective has its own methodology and its own set of internal problems. To understand a piece of labour law writing which draws on economic arguments, it is necessary to understand how economists think: the methods they use and the assumptions they make. To understand a piece of labour law writing which draws on human rights arguments, it is helpful to understand some of the more theoretical debates about what it means to say that someone has a 'right'. And all this must be done while students are trying to absorb the basic rules and principles of a large and highly complex body of law.

This book is here to help. Its aim is to introduce two of the main perspectives used in the analysis of labour law today – human rights and economics

1 H. Collins, 'The productive disintegration of labour law' (1997) 26 *ILJ* 295.

– and to show how they play out in some of the key areas of the law. It will not be argued that either perspective is 'correct' or preferable to the other. Each perspective offers different insights. If we work from a single perspective, there is a danger that we will blind ourselves to initiatives that do not fit with our view of the world. Collins argues that this is what happened to many labour lawyers in the 1960s and 1970s who continued to analyse the law using an outdated sociological model.[2] Equally, however, it is important to remember that the perspectives themselves are far from being one-dimensional. There are different schools of thought in economics and in the literature on human rights. There is no single 'economists' view' on the national minimum wage, for example. So we need to develop a nuanced understanding of the perspectives themselves.

Part I of this book introduces the two perspectives. Chapter 1 offers a brief history of labour law from 1945 to the present, showing how labour lawyers' arguments have changed over time. At first, the subject was dominated by sociological analysis. But as government policies changed, particularly from the 1970s onwards, rights and economics became increasingly relevant to labour lawyers' thinking. Indeed, since 1997, the government has explicitly sought to strike a balance between workers' rights and business efficiency. Chapter 2 introduces the economics perspective. It explains economists' methodology and identifies two competing schools of thought: neoclassical economics, which tends to be hostile to labour law, and new institutional economics, which suggests that legal regulation can be beneficial. Chapter 3 introduces the rights perspective. It explains the historical development of international human rights law and discusses some of the complex issues that arise when we try to interpret rights and to apply them to particular situations. Chapter 4 looks at the way in which labour law is created and applied: at the layers of international, regional and domestic regulation that make up the subject. This is essential because labour law cannot be understood as a purely 'domestic' subject. The rights and economics arguments play out in different ways at the different levels, often leading to conflicts between them. Part II of the book applies the insights of rights theorists and economists to a selection of topics in labour law. The aim is to provide an accessible introduction to each topic, and to demonstrate the interplay between the rights and economics perspectives.

This book is intended to be read at least twice. The first time you read it, use it as an introduction to the basic principles of labour law and to the policy arguments surrounding the subject. Once you have studied labour law in detail and looked at the cases and statutes for yourself, I hope you will return to this book, perhaps as part of your revision. The second time you read it, try to use it to develop your own perspective on labour law, and to think about how you might defend that perspective against the arguments of others. Each chapter concludes with suggestions for further reading, and questions to consider while you do the

2 Ibid.

reading. Part of the point of the further reading is to give you more detail about the law, and a more in-depth account of the perspectives, than can be provided in a relatively short introductory book. But do not be surprised if some of the reading challenges the arguments described in the relevant chapter. One writer might argue that one of the perspectives used does not offer any valid insights into the law. Another writer might argue that two of the perspectives need to be combined in order to understand the law properly. Yet another writer might argue that the law is best explained and developed using an entirely different approach, not considered in this book at all. This might seem a bit unsettling at first. But if you persevere, you will find that the further reading gives you a much richer understanding of labour law.

This edition incorporates developments up to the end of September 2008, though I am grateful to the publisher for allowing me to incorporate references to the Employment Act 2008 during the production process.

Anne Davies
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