

Theories of Domination and Labour Law: A New Conception for Legal Intervention?

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This special edition contains a selection of papers presented at the conference *Theories of Domination and Labour Law: A New Conception for Legal Intervention?*¹ which consider the viability of applying civic republican theories of ‘domination’ to labour law.

1. The Aims of this Special Issue

A number of justifications are cited in the literature in favour of common law and statutory intervention in the field of labour law. The traditional approach has been to stress the role of labour laws in correcting the imbalance in bargaining power inherent within the employment relationship. Thus, in the celebrated words of Kahn-Freund, “the main object of labour law has always been, and [...] will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship”.² Having been constructed on the foundation of contract law in a myriad of jurisdictions, the employment relationship is subject to the doctrine of freedom of contract. But such freedom is generally illusory for workers. Kahn-Freund makes the point that labour legislation has interfered in the employment relationship because of, rather than despite, the operation of freedom of contract, e.g. to regulate terms and conditions of employment, and furnish rules on the hiring and dismissal of employees, as well as police the basic work-wage bargain or the exchange of the worker’s services in return for remuneration. Labour law has also directly and indirectly provided support for the effective functioning of collective bargaining and recognises a right to strike.

However, in the contemporary context, an assortment of scholars have argued that the concern with the correction of inequalities in bargaining power via the prophylactic of labour laws or the social practice of collective bargaining has lost much of its force. Economists have attacked the notion that legal intervention is required to offset the unequal exchange of resources between the employee and the employer. Equally, the ‘inequality of bargaining power’ justification for labour law has been criticised for its lack of normative precision, i.e. that it is unable to determine who should be covered by labour laws, and what subjects ought to fall within its cope. Although it is true up to a point that the correction of imbalances in bargaining strength construct is not an entirely convincing basis for labour law, insofar as it lacks clarity in its nature, or precision as regards the particular types of labour law that it has the capacity to justify, it cannot be claimed to be wrong, or quite so easily dismissed. Nonetheless, two alternative justifications for the subject have been versed. First, a continued focus on the traditional social objectives of labour law has given way to a conception of labour law that seeks to realise social justice through the repulsion of the ‘economic logic of

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¹ As the organisers of the conference and guest editors of this special issue, we are grateful to many: first, for their generous financial support, we thank the Society of Legal Scholars and the Law Schools of the University of Strathclyde and the University of Edinburgh; secondly, the speakers, discussants and attendees at the conference in October 2016; and finally, sincere thanks go to Professor Guy Davidov, editor of this Journal, for the opportunity to publish the following papers. The conference website contains an overview of the conference’s rationale as well as the programme:

<https://www.strath.ac.uk/humanities/lawschool/newsevents/theoriesofdominationandlabourlawnewconceptionorlegalintervention/>

² Davies and Freedland (eds), *Kahn-Freund’s Labour and the Law*, 3rd edition (London, Stevens, 1983).

the commodification of labour'³. Secondly, by linking labour law closely to the functioning of the labour market and thereby anchoring it firmly within a market-driven ideology, there appears a perceived need to adopt labour laws to regulate labour market failures in order to achieve efficient labour markets. Whilst neither of these two justificatory accounts of labour law have lost much of their traction, much like the 'inequality of bargaining power' rationalisation, they are unable to offer an all-encompassing explanation for labour law's interferences in contemporary employment relationships. Moreover, being grounded in economic citizenship and tending to focus on the micro-level, such as the individual employer and employee in their particular social setting, none of the three justifications offers an explanation for legal intervention at a more general plane of abstraction in terms of contemporary political theory. For example, to what extent does the State and the polity have an interest, and a role to play, in securing a measure of equilibrium in relationships of a particular class, such as employer and employee at the macro level? Although it may be conceived as futile to attempt to identify a theory which can justify labour law as a discipline in general terms,⁴ including one which is robust enough to provide normative guidance about the depth and breadth of the subject, it is submitted that this is less of a quest for an unattainable 'holy grail' than something more in the way of an exercise in putting forward a variety of justifications for the field (including the three abovementioned 'inequality of bargaining power', 'social justice and the repulsion of the economic logic of labour commodification' and the 'law of the labour market' accounts), each of which can be invoked to advance the normative claims made by labour depending on their relative strength and purchase in different contexts, i.e. 'horses for courses'. As noted by Bogg in a previous issue of this journal, labour law must remain 'open to a wide range of different methodological approaches' and arguments in advancing its claims, and part of that exercise will involve harnessing philosophical approaches which can assist us in 'understanding...the ways in which labour law is coherent as a field of regulatory activity.'⁵

Against the background of the various existing rationales for labour law, the papers in this special issue consider political theories of social justice and domination as a possible basis for intervention in the employment relationship. In particular, the focus is on politically-driven theoretical accounts of justice based on 'non-domination' in contemporary civic republican theory and associated with scholars such as Pettit⁶ and Lovett.⁷ Both of these thinkers lay down sophisticated accounts of political orders that guarantee (i) freedom and (ii) social justice. In their respective frameworks, (i) freedom, according to Pettit, and (ii) social justice, in Lovett's version of non-domination theory, is secured when laws and policies are introduced to subject private social relationships characterised by dependency and an arbitrary imbalance in social power to a measure of effective external controls. The parallels between the notion of imbalanced private social relationships in the non-domination scheme and the traditional rationales for labour law was so apparent that the guest editors of this special issue decided to group a series of papers together in order to explore these themes in more depth. In particular, the central question that drives these outputs is whether the non-domination model in civic republicanism could supply an alternative conception for labour law as an autonomous discipline.

³ H. Collins, *Employment Law*, 2nd ed. (Oxford, OUP, 2010) 5.

⁴ B. Hepple, 'Factors Influencing the Making of Labour Law' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (Oxford, OUP, 2011) 30.

⁵ A. Bogg, "Labour, Love, and Futility: Philosophical Perspectives on Labour Law" (2017) 33(1) *International Journal of Comparative Labour Law and Industrial Relations* 7.

⁶ P. Pettit, *On the People's Terms: A Republican Theory and Model of Democracy*, (Cambridge, CUP, 2012).

⁷ F. Lovett, *A General Theory of Domination and Justice* (Oxford, OUP, 2010).

The papers thus explore whether the employment relationship should be treated as one of the types of social relationship which is generally characterised by domination by one party (the employer) over another (the employee) in contemporary political philosophy. If so, the issue to be addressed is whether labour law's purpose could be described as rules, principles and doctrines forged by the common law and shaped by domestic legislation and international labour standards which are concerned with the minimisation of the domination exerted by an employer over an employee. Furthermore, in addition to an evaluation of the assertion that domination-based conceptions of justice could offer up an alternative, and additional more general or abstract justification for labour law intervention, the papers also examine the extent to which this novel formulation could be conceived of as a more refined incarnation or amalgam of the traditional inequality of bargaining power and social objective constructs. The papers also consider the extent to which the domination-based conception could offer up a normatively useful account as to how labour laws ought to be conceived and how far they ought to extend, or whether it could account for a more restricted range of labour laws.

2. The Contributions

Cabrelli and Zahn's paper sets the scene for this special issue by summarising the various advantages of non-domination theory as a justification for labour laws before moving on to test rigorously the purchase of this model. By addressing the range of objections that can be levelled at it as a justificatory framework, its strength and relevance for labour law is laid bare in their contribution. Overall, the paper recognises the limits inherent in the application of theories of political philosophy to labour law. First, it does not claim that non-domination provides an exhaustive account so that it ought to be treated as the exclusive value that labour laws ought to promote. Instead, the argument is presented within a spirit favouring the co-existence of different goals for the discipline, whether selective or universal in their nature.⁸ Second, having distilled the key facets of the non-domination theory, explained how it can prima facie account for labour laws, surveyed its merits within that context and comprehensively evaluated the objections, the paper puts forward the general proposition that although Pettit's and Lovett's model is insufficient to act as an abstract justificatory theory for labour laws, it can act as a driver for intervention in specific labour contexts; and more specifically, for a particular conception or form of labour law that promotes a distinctive set of regulatory techniques, and vision of the role and function of the central notion of the contract of employment. The primary significance of this article rests in the insight that domination-based narratives of civic republicanism have the capacity to act as a bridge between existing individual, relational, autonomous, substantive and procedural accounts of the regulation of the law of the contract of employment⁹ and political philosophy: a 'new normativity',¹⁰ albeit one that is restricted in scope. In pursuing this task, the contributors recognise the purchase of the criticism that the paper could have engaged with some of the individual arguments for and against the marshalling of the non-domination theory in a more in-depth and focussed way. However, such a rigorous unpicking of a limited range of the pros and cons of the non-domination model would go against the principal purpose of the paper in

⁸ G. Davidov, *A Purposive Approach to Labour Law* (Oxford, OUP, 2016) 68-71, G. Davidov, 'Setting Labour Law's Coverage: Between Universalism and Selectivity' (2014) 34 *Oxford Journal of Legal Studies* 543 and L. Rodgers, *Labour Law, Vulnerability and the Regulation of Precarious Work* (Cheltenham, Edward Elgar, 2016) 41-45 and 92-93 .

⁹ D. Brodie, "How Relational is the Employment Contract?" (2011) 40 *Industrial Law Journal* 232 and D. Brodie, "Relational Contracts" in M. Freedland et al (eds), *The Contract of Employment* (Oxford, OUP, 2016) 145.

¹⁰ A. Bogg, "Republican Non-Domination and Labour Law: New Normativity or Trojan Horse?" (2017) [x] *International Journal of Comparative Labour Law and Industrial Relations* [xxx].

the context of this special issue: to lay the groundwork and summarise the issues which subsequent papers in this issue subsequently raise, discuss and critique in much greater detail and from different perspectives.

In the first paper on this theme, Davidov assesses the relevance and usefulness of the non-domination concept as a general justification for labour law by contrasting it with the concept of subordination and its different possible conceptions and meanings. Against this background, he examines the different components of the definitions of domination developed by Philip Pettit and by Frank Lovett (with some reference to other scholars), and explores its similarities to the concept of subordination. Davidov concludes that some key parts of the domination architecture — most notably the existence of arbitrary power — are not an optimal fit to describe employment relationships and justify labour law. In this respect, Davidov argues that domination cannot serve as a general theory of labour law. Nonetheless, the point is made that civic republican theories are certainly helpful in providing normative support for *specific* labour laws as well as some other concrete benefits.

Bogg, in his paper, urges caution over the use of non-domination theory as a basis to develop a ‘new normativity’ for labour law. He examines Lovett and Pettit’s labour law proposals and concludes that some of these are problematic from the perspective of worker protection laws. According to Bogg, while republican theories of non-domination provide some deep insights into the nature and regulation of private power in labour markets, labour lawyers must be careful about *which* version of non-domination theory they are signing up for. In his penultimate section, ‘Neo-republicanism at the Crossroads’, Bogg examines the diverse futures of neo-republican labour law. This focuses on the recent work of Robert Taylor and Alex Gourevitch. His article concludes with a plea for caution. While neo-republican theories of non-domination provide some deep insights into the nature of private power in the workplace, at least some of those neo-republican strands have the potential to unleash a process of radical labour market deregulation. In this way, neo-republicanism could end up being a Trojan horse, disguising the neoliberal deregulation of worker-protective labour law in the republican rhetoric of citizenship and emancipation.

Finally, Breen’s paper considers two distinct responses that have emerged within civic republican political theory to the problem of managerial domination in the workplace. He begins by analysing the so-called ‘neo-republican’ theories of Philip Pettit and Frank Lovett, who argue that, in addition to existing regulatory protections, free market exchange supported by an effective right of exit for employees secured through unconditional basic income policies is sufficient to counter employer domination. The second response, advanced by a number of ‘workplace republicans’, challenges the neo-republican understanding of economic domination and the claim that a right of exit secured through basic income policies can sufficiently check managerial power. Under this alternative perspective, what is required is tight regulation of workplace practices and also the institutionalization of worker voice and democratic control within firms. Breen explores the neo-republican argument and strategy for limiting employer domination through an effective right of exit before moving on to question the neo-republican position. He concludes by offering an evaluation and defence of some of the strategies recommended by workplace republicans as a means of tempering managerial authoritarianism by institutionalizing employee voice and control within firms.

3. Conclusions

Engagement with civic republicanism has the capacity to inform and enhance the study of labour law. By approaching labour law from an ‘external’ perspective¹¹ such as political philosophy, this technique follows a well-trodden path insofar as labour law traditionally has always been treated as a ‘contextual field of study’,¹² albeit possessing its own autonomy and internal logic as a legal subject.¹³ That is to say that the tendency in the past has been for labour law to be viewed through a sociological prism as a means of improving our understanding of the subject, thus underscoring its interdisciplinary credentials.¹⁴ In recent years, the sociological and anthropological approach to labour law study exemplified by classic scholars such as Sinzheimer and Kahn-Freund has waned,¹⁵ and been replaced to some extent by other frameworks, e.g. the ‘law of the labour market’ account.¹⁶ This conference and the resulting special issue is partly motivated by a desire to view the subject within an alternative contextual order, namely one that is rooted in a political and democratic frame of reference rather than an anthropological, economic or sociological setting.

In this context, ‘domination’ theory in civic republican thought can supply a link between accounts of the law of the contract of employment¹⁷ and political philosophy. But, notwithstanding some of the strengths and merits of the non-domination strand of civic republican theory, there are a number of powerful objections,¹⁸ which taken cumulatively, suggest that it may be insufficient to act as a general justification for labour laws. Instead, with various caveats and modifications, the proposition is advanced that different strands of non-domination (e.g. including Lovett’s approach) can be adopted to advance a foundation for specific labour laws only. We can also, in this respect, learn from other accounts of republican theories. This new, but restricted ‘normativity’ has the potential to justify labour laws of a particular kind, the shape, nature and character of that set of legal responses and framework amounting to something that could be the subject of future research. But, at the very least, what can be said with a measure of confidence at this stage, is that the various

¹¹ For ‘external’ approaches to legal research, see C. McCrudden, ‘Legal Research and the Social Sciences’ (2006) 122 *Law Quarterly Review* 632, 632-633 and B. Cheffins, “The Trajectory of Corporate Law Scholarship” (2004) 63 *Cambridge Law Journal* 456, 457.

¹² H. Collins, ‘The Productive Disintegration of Labour Law’ (1997) 20 *Industrial Law Journal* 295, 295, H. Collins, ‘Labour Law as Vocation’ (1989) 105 *Law Quarterly Review* 468, 473 and R. Dukes, *The Labour Constitution* (Oxford, OUP, 2015) 106.

¹³ H. Collins, ‘Contractual Autonomy’ in A. Bogg, C. Costello, A. C. L. Davies, J. Prassl (eds), *The Autonomy of Labour Law* (Hart 2015) 45, 50-52 and Lord Wedderburn, “Labour Law; From Here to Autonomy?” (1987) 16 *Industrial Law Journal* 1.

¹⁴ For example, the once-pervasive ‘collective laissez-faire’ paradigm for the discipline in the UK: O. Kahn-Freund, ‘Legal Framework’ in A. Flanders and H. Clegg, *The System of Industrial Relations in Great Britain* (Basil Blackwell, Oxford, 1954) 42, 53 and O. Kahn-Freund, ‘Labour Law’ in *Law and Opinion in England in the 20th Century* (London, Stevens, 1959).

¹⁵ M. Freedland, ‘General Introduction – Aims, Rationale, and Methodology’ in M. Freedland et al (eds), *The Contract of Employment* (Oxford, OUP, 2016) 6-11 and R. Dukes, *The Labour Constitution* (Oxford, OUP, 2015) 104-108.

¹⁶ S. Deakin, ‘A New Paradigm for Labour Law? A Review of C. Arup, P. Gahan, J. Howe, R. Johnstone, R. Mitchell, A. O’Donnell (eds.), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Sydney, The Federation Press, 2006)’ (2007) 31 *Melbourne University Law Review* 1161, 1170-1171 and S. Deakin and F. Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (Oxford, OUP, 2005).

¹⁷ D. Brodie, “How Relational is the Employment Contract?” (2011) 40 *Industrial Law Journal* 232 and D. Brodie, “Relational Contracts” in M. Freedland et al (eds), *The Contract of Employment* (Oxford, OUP, 2016) 145

¹⁸ These include those levelled at the account in the contributions by Bogg, Breen and Davidov in this special issue but also the various criticisms explored by Cabrelli and Zahn in their paper in this special issue.

contributions made to this special issue go a considerable way towards assisting labour lawyers in identifying the various elements, ingredients and factors that can be identified as forming an integral part of such a structure.