

**A Purposive Approach to Labour Law. By GUY DAVIDOV [Oxford: Oxford University Press, 2016. xi  
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Labour law has a strong tradition of theoretical scholarship, which remains very much alive today. Recently there has been particular interest in the idea or purpose of labour law, with a divide between those who see the traditional ways of understanding labour law as outdated or increasingly irrelevant, and those who think that it merely needs reinvigorating rather than replacing. Guy Davidov's monograph 'A Purposive Approach to Labour Law' makes an important contribution to this strand of scholarship, taking the side of those attempting to refresh our familiar views of labour law's aims. The book surveys the literature on the purposes of labour law at the same time as setting out Davidov's own perspective on how labour law's goals should be understood. But more than this, by bringing this understanding of labour law's aims to bear on some of the pressing issues currently facing labour law Davidov demonstrates how the gap between theory and practice can be bridged.

The central premise of the book is that the problems facing labour law can and should be resolved through purposive interpretation and reform. The purposive approach could be seen as "trivial" (p.255), but at the same time it is incredibly powerful; the key insight being that when faced with difficult questions we should keep in mind what it is that we are trying to achieve and choose the path that best furthers those goals. Davidov therefore adopts an instrumentalist view of labour law, with regulations and doctrines being judged by how well they advance the normative goals of the discipline. The purposive approach, and the instrumentalist view of labour law that goes with it, is not new in itself. But Davidov makes a significant contribution by expressly arguing for it as a general approach, and demonstrating how it might be applied in a wide variety of circumstances.

Using examples and case studies from Israel, the US, the UK and Canada, Davidov aims "to offer a convincing analysis of labour law's goals and means" (p.256). The book is structured in two parts, and draws together and builds on much of Davidov's writing on labour law over the past 15 years. Part I introduces the purposive approach and develops a multi-levelled theoretical framework setting out the goals of labour law. Part II then uses this framework to analyse several contemporary problems that labour lawyers are grappling with, showing that keeping the aims of labour law in mind points us in the direction of particular responses.

Before exploring the aims of labour law, Part I begins with a discussion about why we should care what these goals are, and how to best go about illuminating them. This is necessary because there is a

suspicion among some labour lawyers that theorising is a distraction from the more important work that needs to be done, perhaps best embodied in Bob Hepple's statement that "Labour law is not an exercise in applied ethics."<sup>1</sup> This is by no means a universally held view,<sup>2</sup> and it is arguable that labour law, by its very nature as law, will be an exercise in applied ethics to some extent. While not expressly entering this debate, it is clear that Davidov he does not regard theorising as a waste of labour lawyers' time. On the contrary, a thorough understanding of labour law's goals is central to the purposive approach that he advocates, under which the goals of labour law are used to guide interpretation and reform.

Chapter two contains an insightful discussion of some key methodological questions, such as the different levels at which labour law's goals can articulated, the possibility for main and ancillary goals, and the need for these goals to be a good explanatory 'fit' with the law. There are a couple of additional issues that it would have been helpful to have covered. For instance, it is not considered what should be done where those making the law have a different view of labour law's purpose than we do as labour lawyers. This has often been the case in the UK,<sup>3</sup> and proponents of the purposive approach must find a way of responding to this if it is to be used by policy makers and courts rather than simply as an internal guide for labour lawyers. Furthermore, it is left unclear how Davidov envisages the goals of labour law being integrated with the other legitimate normative concerns that the law must reflect such as efficiency, freedom of contract, and property rights. Although these matters are discussed in the context of specific regulations it would be useful to include a more general discussion at this early stage.

The remaining chapters in Part I explore the substantive goals of labour law at three different levels, namely the goals of labour law in regulating employment relationships, the abstract values that are furthered by labour law, and the purpose of some particular labour law regulations. In Chapter three Davidov argues that "the overarching 'labour problem' that labour laws are designed to address" (p.48) is the existence of unique and inherent vulnerabilities in the employment relationship. Workers are made vulnerable by the existence of democratic deficits and economic and social dependencies. Democratic deficits create a relationship of control or subordination, and the inability of workers to spread risks makes them dependent on their employers both financially and for important social

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<sup>1</sup> Hepple, 'Factors Influencing the Making and Transformation of Labour Law in Europe' in Guy Davidov and Brian Langille, *The Idea of Labour Law / Editors, Guy Davidov & Brian Langille*. (Oxford University Press 2011) 31.

<sup>2</sup> Brian Langille, 'Labour Law's Theory of Justice' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011).

<sup>3</sup> Lord Wedderburn, 'Freedom of Association and Philosophies of Labour Law' (1989) 18 *Industrial Law Journal* 1; Alan Bogg, 'Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State' (2016) 45 *Industrial Law Journal* 299.

aspects of their lives. Labour law is therefore seen as having the protective, even paternalistic, purpose of ameliorating these vulnerabilities rather than primarily being about efficiency or correcting market failures. This is not dissimilar to Kahn-Freund's classic statement of labour law as being "a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship".<sup>4</sup> However, Davidov chooses to emphasise vulnerabilities rather than the more familiar idea of combatting unequal bargaining power because he sees that term as merely a placeholder for concerns about subordination and market failures.

By describing unequal bargaining power as a "shorthand term" for other concerns (p.54) Davidov appears to think that the concept of unequal bargaining power has no normative content in itself. But there is a danger that the vulnerabilities that Davidov focusses on have the same problem. Further explanation is needed as to precisely why these vulnerabilities are problematic, and why their existence justifies legal intervention. As labour lawyers we clearly think that this intervention is justified, but just as the concept of inequality of bargaining power is in need of further explanation, it is not enough simply to say that the purpose of labour law is ameliorating vulnerabilities. A normative edge could have been introduced more explicitly at this stage, identifying the reasons why the protection of labour law is needed and the substantive values which underpin this vision of labour law.

The substantive values that are supported and furthered by labour law are the subject of chapter Four. These include democracy, redistribution, dignity and human rights, social inclusion and citizenship, capabilities, emancipation, and social equality. Although Davidov acknowledges the relevance of these values to labour law, he cautions against putting too much faith in 'universal' goals that frame labour law as good for employers and society as a whole. These types of arguments are appealing because they frame labour law regulations as win-win, so seem likely to draw wider support than more selective goals that focus on the benefit to workers. But Davidov doubts the ability of universal justifications to support the entirety of labour law, or to actually have the effect of generating wider support. He therefore believes we should concentrate on improving our articulation of traditional goals, and use universal justifications to supplement rather than replace of these ideas.

Many of the abstract values and concepts dealt with in chapter four will be familiar to readers, but Davidov excellently reviews the different perspectives and provides a rare example of these ideas being brought together rather than discussed in isolation. It would have been interesting for Davidov to make the most of this opportunity and to discuss in more depth the links or possible tensions

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<sup>4</sup> Otto Kahn-Freund, *Kahn-Freund's Labour and the Law* (3rd ed / by Paul Davies, Mark Freedland, Stevens 1983) 18.

between the values, as well as evaluate the relevance of each to labour law. On this note Davidov could have expanded upon his view that “in most cases different goals (or articulations) can live side by side with each other” (p.55). With such a large array of values and concepts being relevant to labour law it seems implausible that there will be no instances of conflict between them. When such conflicts do arise the purposive approach requires us to choose which value to pursue at the expense of the other. This in turn requires us to have some principled way of choosing between them. It is understandable that Davidov does not consider these issues given his focus on applying the purposive approach using the idea concrete vulnerabilities, but they nevertheless need to be addressed before we can have a full understanding of labour law’s purposes.

Part I concludes with an analysis of the goals of some central areas of labour law regulation, looking at “why (generally speaking) a society would want to set a minimum wage, to allow and encourage collective bargaining, and to prohibit unjust/unfair dismissals” (p.73). Davidov sets out his view of which goals and values underlie each regulation, these being dignity and redistribution for the minimum wage, democracy, redistribution and efficiency for collective bargaining laws, and security for unfair dismissal protections. This section of the book also contains the most sustained analysis of the economic and efficiency impacts of labour law, with Davidov explaining the arguments made against these regulations by neoclassical economists before examining the extent to which these are actually borne out in the empirical evidence. From this discussion it is clear that Davidov accepts the relevance of economic arguments for the justification of labour law, and that he takes very seriously the charge that these regulations cause inefficiency. However, he concludes that the evidence does not support the view that any of the three labour law regulations he examines have a significant detrimental economic impact.

While Davidov evidently views economic arguments as relevant to the justification of labour law, it is not clear precisely what role he thinks they should play. If collective bargaining laws, or unfair dismissal or minimum wage protections had real and substantial negative impacts on efficiency would this mean they are not justified and have to be abandoned? Davidov argues that there are no such negative effects, but in doing he appears to suggest that demonstrable inefficiency would count against the justification of labour law. For example, arguments relating to litigation and reinstatement costs are used to explain the justifiable exclusion of small businesses from unfair dismissal laws (p.108). Similarly, by stating that collective bargaining laws are justified because “the gains outweigh the costs” (p.97) it sounds as though a significant negative impact on efficiency might shift the balance against their justification. It is certainly important to challenge claims about the supposed economic costs of labour law, and this chapter demonstrates well how we can counter arguments that labour law necessarily involves a trade-off between equity and efficiency. But, as Davidov himself argues, the

goals of labour law are not reducible to economic efficiency, and there are other important values that need to be taken account of. Given this, it would have been useful to have more clarity regarding the relationship between economic arguments and these other values.

In Part II the focus shifts to showing how the vision of labour law's purpose set out in Part I can be utilised to guide reform and interpretation of the law. In addition to critically analysing various problems relating to wages, freedom of association, and dismissal (chapter eight) Davidov uses the purposive approach to make a series of recommendations about the personal scope of labour law (chapter six). If labour law exists to protect workers from democratic deficits and dependencies a purposive approach suggests that workers should have employee status wherever there is more than a negligible presence of these two vulnerabilities. Where economic and social dependencies are present but there are no democratic deficits workers should be categorised under the intermediate category of 'dependent contractor'. This is similar to the 'worker' concept in the UK, but with more extensive rights. The question of who is an employer should also be answered using the concept of vulnerabilities, with the employer being whoever the worker is vulnerable towards in respect of democratic deficits and dependencies. In the context of triangular work relationships, such as those of agency work or subcontracting, Davidov argues for the creation of 'joint employer' status as the best way of realising the protective purposes of labour law.

Whether or not one agrees with the suggested reforms and interpretations in these chapters, they show how the purposive approach can provide a helpful framework for a normative enquiry into what we, as labour lawyers, might want the law to look like. But they also highlight how this enquiry will often lead to conclusions that are unlikely to be adopted by lawmakers. This may well be due to the disconnect between labour lawyers' views on how their discipline should be understood and the view taken by legislatures and courts of the purpose of labour market regulation. Given this, the purposive approach runs the risk of being idealistic and detached from the real world.

That said, Davidov does show a deep concern for how the purposive approach can be made effective in practice. This is evident in chapter seven, where he argues in favour of using open-ended standards to supplement labour law rules because they create the space for the purposive approach to flourish. Davidov convincingly shows how the standards of good faith and proportionality have enabled the courts to implement the purposive approach. Less persuasive is his classification of the managerial prerogative as an open-ended standard (p.172). A more natural interpretation would be to see the prerogative as part of the employer's property rights, their residual liberty regarding the running of the enterprise, which is then limited by behavioural standards. This aside, one weakness of using open-ended standards, at least in the UK context, is that it relies on the courts to appreciate the nature of

the employment relationship and to develop the law accordingly. Davidov acknowledges that broad standards will not help in legal systems where judges have “a strong belief in freedom of contract and the right of property” in the employment context. The extent to which this undermines the case for open-ended standards in English labour law is open to debate; at the very least it is far from clear that the courts would make good use of the discretion it gives them.

A concern for ensuring that labour law’s objectives are realised also underpins the book’s final chapter, which looks at ways of addressing the crisis of compliance and enforcement in labour law at a time when Governments are unwilling to increase spending on these matters. This is perhaps one of the most significant chapters in the book, despite sitting slightly apart from the rest of the analysis. Davidov is right to stress that enforcement and compliance mechanisms should be chosen by reference to what actually works, and that the guidance provided by the purposive approach has little value “if the conclusions remain on paper and are not enforced” (p.224). One interesting prospect that Davidov raises for improving compliance is making companies liable for labour law violations in their subsidiaries or supply chains. English law is yet to take any significant steps in this direction. The Modern Slavery Act 2015 contains an obligation for large companies to publish a report on steps they have taken to tackle slavery and trafficking in their supply chains, but this is a fairly minimal requirement and is not backed up by sanctions. However, this current reluctance does not mean that lead company liability could not be a promising way of improving labour law compliance in the future, especially if the fragmentation of the labour market continues. One example of how this might be done is by using a similar mechanism to that contained in the Bribery Act 2010, making companies liable for failing to prevent acts by people ‘associated’ with them, including subsidiaries and those who perform services on their behalf.

There is only a relatively brief discussion of the various tools that could be used to improve compliance and enforcement but Davidov makes a strong case for continuing to broaden the regulatory horizons of labour law. However, one important aspect that is missing from the chapter, and from the book more generally, is the role that international standards and mechanisms might play in achieving the goals of labour law. This is particularly important if regulation at state level is no longer capable of achieving the goals of labour law.<sup>5</sup> The book as a whole covers a huge amount of ground, and this scope of ambition inevitably leads to some areas of labour law being neglected. But Davidov does not set out to consider every aspect of labour law, and he succeeds admirably in his central aim of demonstrating how the purposive approach can be used to illuminate labour law issues. Whether or

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<sup>5</sup> Dahan et al, ‘Global labor rights as duties of justice’ in Yossi Dahan, Hanna Lerner and Faina Milman-Sivan, *Global Justice and International Labour Rights* (Cambridge University Press 2016).

not one agrees with the particular vision of labour law set out by Davidov, this incredibly readable and thought provoking book deserves to be widely read by labour law scholars, and raises many fascinating issues which merit further research.