Identifying the Purposes of Labour Law:
Discussion of G Davidov, *A Purposive Approach to Labour Law*

Ruth Dukes*

Introduction

In *A Purposive Approach to Labour Law*, Guy Davidov advocates the development of such an approach as potentially useful to academics, and to legislatures, courts, employees and employers.[1] The task, as he defines it, is both normative and descriptive in nature, directed at achieving a 'clear understanding of what the law is trying to achieve (or *should* try to achieve).'[2] Having diagnosed, in the opening passages of the book, a 'mismatch between goals and means' in the field of labour law, Davidov goes on to utilise his discussion of labour law's purposes as a first step towards restoring the connection between (particular) labour laws and the goals behind them.[3] (His concern, when he talks of a mismatch, is with the 'scope' of labour laws – to whom do they apply – and with questions of compliance, enforcement and obsolescence.) But let us note at the outset that the claim made for the usefulness of the purposive approach is much broader than that: '[whenever] we are confronted with the need to update (or reform) labour laws, interpret specific provisions, or ask whether a law is constitutional', the discussion must start, Davidov asserts, with the identification of the law's purpose.[4]

In my contribution to this volume, my focus lies with the particular way in which Davidov seeks to identify the purposes of labour law. I begin by exploring in greater detail the nature of his project: *why* he wishes to identify labour law's purposes; *how* he sets about doing so. On the basis of that exploration, I raise the question whether Davidov's identification of labour law's purposes is on the face of it sufficiently objective, and therefore authoritative, to be useful in the manner that he would like it to be. The final part of the paper is devoted to a brief discussion of possible alternative methods of identifying labour law's purposes,

* Professor of Labour Law, School of Law, University of Glasgow. ruth.dukes@glasgow.ac.uk I am grateful to Guy Davidov and Einat Albin for comments on an earlier draft.

[1] GUY DAVIDOV, A PURPOSIVE APPROACH TO LABOUR LAW (Oxford University Press 2016).
[2] DAVIDOV, 8
[3] DAVIDOV, 2, 4
[4] DAVIDOV 8

assessed against Davidov's ambition of assisting the legislature, the judiciary, and potential litigants in the interpretation and application of the law.

1. Why and How?

(i) The objective

To Davidov, the importance of identifying the purposes of particular laws is more or less self-evident. 'It may seem obvious', he writes, 'that before doing anything … we must ask ourselves what exactly is the goal of what we do'.[5] According to this straightforward line of reasoning, the identification of the purpose of a law can be understood to be a first step in the process of its interpretation and/or application – and, as such, key to a variety of legal practices: legislation, litigation, law reform, constitutional review.[6] An important task for scholars, then – and the one with which Davidov wishes to engage in this book – is to assist the actors involved directly in these activities by creating a ''toolbox' for performing purposive interpretation in an optimal way'.[7]

By way of underscoring the importance of the development of a 'purposive approach' to labour law scholarship, Davidov cites Nietzsche – 'To forget one's purpose is the commonest form of stupidity' – and Fuller and Perdue's classic text on the reliance interest in contract damages.[8] The relevance of the latter lies with the authors' primary endeavour in that article, which was to establish the significance of the 'reliance interest' as one of the purposes that might be furthered by an award of contractual damages – together with the more commonly recognised 'restitution' and 'expectation' interests. To that end, the authors engaged in an analysis of the then existing case law, highlighting decisions which served to demonstrate that the reliance interest was already widely recognised by courts, to an extent not yet acknowledged by most scholars.[9] As an example of the potential usefulness of the identification of the purposes of a law to its interpretation and application, Fuller and

---

[5] DAVIDOV, 13
[6] DAVIDOV, 8, 13-20
[7] DAVIDOV, 4
[8] DAVIDOV 13, citing LL Fuller and WR Perdue, *The Reliance Interest in Contract Damages: 1* 46 YALE L.J. 52 [1936-37]. He also cites Aharon Barak's work on purposive interpretation: DAVIDOV, 18.
[9] Fuller and Perdue, 53, my emphasis

Perdue's article seems a good choice: to this day, its concepts are incorporated in the most recent *Restatement of Contracts* in the US, and, according to Todd Rakoff, it is often acclaimed still as the best, or the most influential, or the most important contracts article ever written.[10] As to the matter of *how* scholars should best approach the identification of a law's purpose, on the other hand, the article is not so very edifying. For the most part, Fuller and Perdue simply treated the courts' rulings on the matter as decisive. Insofar as they departed from the case law, in order to introduce an element of normativity to their framework – ranking the three types of interest with respect to the strength of the claims they might constitute for judicial relief – their rationale for doing so remained largely unexplained: 'Fuller makes both hypothetical assumptions of value … and bald assertions… And then it is over, and the hierarchy is taken as established.'[11]

How is it, then, that Davidov understands the process of identifying the purpose of a law? Perhaps more enlightening in this respect is his reference to Ronald Dworkin and to Dworkin's exhortation to give the law its *best possible reading*.[12] We saw already in the introduction to this piece that Davidov defined the task of identifying the purposes of a law as a 'decidedly normative' one, directed at achieving a 'clear understanding of what the law is trying to achieve (or *should* try to achieve).'[13] Of itself, this brief description might cause the reader to object that what the law tries to achieve and what the law should try to achieve may, in any given instance, be two quite different things. With reference to Dworkin, however, Davidov later reiterates his belief that the scholar should aim at once both to justify *and* to explain the law: or, using the language of Dworkin, to think about 'normative justifications' and, at the same time, to ensure 'a reasonable degree of 'fit' with actual law'.[14] Normative justifications, Davidov suggests (again with reference to Dworkin), can be uncovered through a process of giving consideration to the surrounding political history of a law and to the 'abstract intent' of the legislature, which is to fulfil fundamental principles of justice, fairness, and procedural due process.[15] When Davidov speaks of identifying labour law's purpose, then, it would seem that he understands there to be both a normative *and* a

[10] TD Rakoff, *Fuller and Perdue's* The Reliance Interest *as a Work of Legal Scholarship* 1991 WIS.L.REV. 203, 204 (1991).
[11] Rakoff, 213
[12] DAVIDOV 26, citing RONALD DWORKIN, LAW'S EMPIRE (Harvard University Press 1986).
[13] DAVIDOV, 8
[14] DAVIDOV, 26 and 18, citing DWORKIN, LAW'S EMPIRE
[15] DAVIDOV 18, citing DWORKIN, LAW'S EMPIRE

descriptive element to the task. His intention, as he states it, is to identify the purposes, or 'normative justifications', that can best explain the law *as it is*.[16]

(ii) The execution

In furtherance of that end, Davidov does not refer primarily, like Fuller and Perdue, to the relevant case law. Indeed, he distances himself somewhat from the terms of particular cases and pieces of legislation with the claim that, at least in developed economies, 'the basic idea behind labour law does not change much as a result of government changes, or between countries'.[17] Following that line of reasoning, he explains that his identification of purposes will not be tied to any particular jurisdiction or body of labour law: the similarities across national systems are great enough to allow for the identification of purposes common to all.[18] When it comes to source materials – those which ought to be examined by scholars in their quest to uncover the purposes of laws – Davidov regards legislative materials and case reports, in any case, as potentially 'useful and important [but] not sufficient'.[19] 'If our aim is to provide the law with the best possible reading … or to suggest well-informed reforms … we will benefit most from theoretical and empirical explorations'.[20] To best understand and articulate the goals of a piece of legislation, then, 'one should look for academic discussions, especially *outside* the confines of doctrinal law – in economics, sociology, psychology, philosophy, political science and more'.[21] As to the matter of how a choice should be reached as to *which* discussions to pay heed to, however – which authors, which kinds of argument – Davidov remains silent, except to emphasise that critiques of the law should also be considered.

When he himself embarks upon the process of identifying the purposes of labour law, the range of materials to which he refers is impressive for its breadth: not only texts by scholars of labour law, as he suggested, but also by legal and political theorists, sociologists and economists – from Marx and Weber, Robert Dahl and Otto Kahn-Freund, to Paul Marginson

[16] DAVIDOV 26
[17] DAVIDOV, 27, 85
[18] DAVIDOV, 27
[19] DAVIDOV, 29, 17
[20] DAVIDOV, 29
[21] DAVIDOV, 29

and Oliver Williamson. He describes his approach here with reference to the identification of 'labour' or 'labour market' problems, casting the purpose of labour law now in terms of providing solutions to those problems. He seeks first to identify the 'overarching "problem" that can explain why we need labour law at the level of the project as a whole', and he does this by considering the nature of the employment relationship and of labour markets, as reflected in a wide variety of scholarly works published across a period of several decades. The primary conclusion that he draws is that the employment relationship may be characterised with reference to a variety of vulnerabilities which it creates for the employee – subordination, economic dependency etc – and that the general goal of labour law can be understood as addressing these vulnerabilities.[22] The concept of 'market failure', in contrast, is rejected by Davidov as having only a very limited explanatory or justificatory power when it comes to identifying the general goals of labour law.[23] The idea of an 'inequality of bargaining power', meanwhile – the 'most common and often-cited rationale for labour law' – is interpreted by him to be a 'shorthand term' referring in fact to two basic characteristics of labour relations: 'first, the prevalence of market failures that give some power to the employer to set the terms of the employment contract unilaterally; and second, the existence of subordination as an inherent part of that contract'.[24] For the most part, he suggests, it will be more useful to refer to these two characteristics directly.

In the following chapter, Davidov sets aside the notion of 'labour problems' to survey the various 'values and interests' that labour laws aim to promote.[25] His method, here, appears to be consistent with his own description of the best way to approach the task of identifying purposes. Again citing sources published across jurisdictions over a number of decades, he lists a number of such values and interests, each of which he discusses quite briefly with reference, primarily, to the 'labour law literature'[26]: democracy, redistribution, human rights/dignity, social inclusion/citizenship, stability/security, efficiency, human freedom/capabilities, emancipation/social equality.[27] His discussion of the purposes of labour law ends with a chapter devoted to the 'goals of specific labour laws'.[28] The focus here is with three examples, each 'fundamental and common throughout the world': minimum wage,

[22] DAVIDOV, 48
[23] DAVIDOV, 51
[24] DAVIDOV, 48 and 54
[25] DAVIDOV, chapter 4
[26] DAVIDOV 55
[27] DAVIDOV, 56-68
[28] DAVIDOV, chapter 5

collective bargaining, and unfair dismissal.[29] Again, his approach involves referring primarily to scholarly literature, rather than to case law or legislation, and he explains this with reference to his wish to keep the discussion 'general' and applicable across jurisdictions. '[W]hen dealing with concrete questions', he clarifies, 'it might be necessary to supplement the analysis with a discussion of more specific purposes of specific arrangements and otherwise refer to the national context'.[30] In the case of collective bargaining, the purposes that he identifies are workplace democracy, redistribution and efficiency. While he notes that each of these potential benefits of collective bargaining is 'fiercely contested', his discussion proceeds on the basis of what he explicitly states, here, to be his own opinion, which is that objections to collective bargaining are 'for the most part misguided'.[31]

2. Purposes of Labour Law According to Whom?

Enough has been said perhaps to demonstrate that there is something strikingly old-fashioned about Davidov's identification of the purposes of labour law. Indeed, he shows his hand, in this respect, at the very beginning of the book: 'the goals of labour law have not changed; … the basic problems that require legal intervention are the same as they have been in the past'.[32] Minimum wage law, he suggests, is a case in point.

> Notwithstanding the dramatic shift from an industrial economy to a service economy, from Fordism to post-Fordism, the feminization of the workforce, the increasing precariousness of employment, the impact of globalization, etc. – the minimum wage is still here, and it is needed for very similar reasons as before.[33]

The same is true for other 'major components of the body of labour laws' – including collective bargaining and unfair dismissal – as he goes on to describe in more detail when investigating the purposes of specific laws in chapter 5.[34] Time and again in the course of the analysis there appears a marked reluctance to admit that changed economic and social circumstances since the postwar decades might have resulted in the development or adoption of labour laws with new and different purposes, to an extent that should cause a re-evaluation

[29] DAVIDOV 85
[30] DAVIDOV 85
[31] DAVIDOV 86
[32] DAVIDOV, 2
[33] DAVIDOV, 27
[34] DAVIDOV, 27

of the 'purposes of labour law'. Discussing the matter of whether labour law can rightfully be understood as a set of exceptions to (pre-existing) private law rules, for example, Davidov characterises 'the employer' as straightforwardly coterminous with the owner of the employing entity, who possesses, by virtue of its ownership, decision-making power.[35] On the basis of his characterisation, he asserts that is 'useful' to understand the managerial prerogative to be based on the laws of contract and property, and labour law, in contrast, as intervening in these rules; placing limitations on the managerial prerogative in line with its 'protective goals'.[36] Little heed has been paid here, it would seem, to empirical studies of the position of managers in today's economy: themselves employees, who may be low paid with very little discretion as to how to manage the organisation – either by reason of an obligation to prioritise shareholder over other interests, or because of direction from above the level of the employing entity, or because of the barely less direct constraints of markets, including the ever-present threat of hostile take-overs.[37] Neither is there explicit acknowledgement of the steps that have been taken quite routinely by legislatures in recent years to implement labour law reforms with the *very goal* of increasing managerial prerogative – or as it is more likely to be expressed, 'flexibility' – for example, by restricting the application of legal protections from unfair dismissal.[38]

Notwithstanding Davidov's extensive use of the first person plural, then, with its gentle suggestion of consensus, the substance of his analysis is in fact rather contentious in places. For those readers who were not predisposed to agree with his premises and conclusions, it seems to me that the manner of his reasoning might raise questions of a chicken and egg nature. For example: could it be the case that he has come to the task of identifying the purposes of labour law with a *pre-formed opinion* that these have not changed; that it was this pre-formed opinion that informed his choice of which materials to refer to when analysing the nature of employment relationships and labour markets, so as then to be able to reach the conclusion that the employment relationship is – still today, as it was already in the nineteenth and twentieth centuries – characterised by particular vulnerabilities? Was it a pre-formed opinion that the purposes of labour law are essentially the same in all countries, or at

[35] DAVIDOV, 21-2
[36] DAVIDOV, 23
[37] See eg SIMON DEAKIN AND FRANK WILKINSON, THE LAW OF THE LABOUR MARKET (Oxford University Press 2004), 336-9; JEREMIAS PRASSL, THE EMPLOYER (Oxford University Press 2015)
[38] For an enlightening discussion of the UK government's casting of protective labour legislation as unnecessary 'red-tape', see Bob Hepple, *Back to the Future: Employment Law under the Coalition Government* 42 IND. LAW J. 203 (2013)

least in all developed countries, that lead him to direct his enquiry at a level of some generality, relying primarily on scholarly literature rather than case-law, legislation and policy documents? Perhaps not: perhaps it was his broad survey of the academic literature that lead to his conclusion that the purposes of labour law have not changed over the course of the past five or six decades. Perhaps it was his detailed knowledge of the labour law in several jurisdictions (which no one who knows his work could doubt) that informed his search for purposes common to them all.

That these questions might even arise in the mind of the reader, however, leads me to my main concern regarding Davidov's chosen means of identification of the purposes of labour law: that it is not, *on the face of it*, sufficiently objective and therefore authoritative to perform the various functions that he wishes it to perform, assisting the judiciary, the legislature, and parties to the employment relationship as they engage in questions of interpretation and application of the law. As it stands, in other words, the charge might reasonably be levelled at Davidov, as it was at Fuller and Perdue, that his identification of the purposes of labour law rests, in places, on personal opinion, or, even, 'bald assertion'. In order to defend himself against this charge, it seems to me that Davidov would have had to provide the reader with a more fully reasoned account of two things: first, the definition ('scope') of labour law as a field, and, secondly, his choice of which scholarly literature to refer to and rely upon.[39] In the absence of such an account, there is no way for the reader to answer for herself the chicken and egg questions that I have described: was this example of labour law, that scholarly account, chosen because it substantiated the author's own pre-existing opinion regarding the purposes of labour law; or was the opinion formed as a result of the analysis, as the author would have us believe?

A second, related, concern raised by Davidov's chosen means of developing a purposive approach is that in aiming to identify purposes common to several jurisdictions across several decades, he pitches his analysis at a level that is too far removed from the terms of the law as it is expressed in the relevant case law and legislation in force today. In an effort to make the case for the kinds of normative justifications that he identifies, in other words, he fails to pay

[39] On the matter of the 'scope' of labour law, Davidov states the opinion that 'it is highly doubtful if a field of study and research has to be 'defined' at all' (p 7). He does clarify, as we have seen, that he prefers to focus his attention on the law of employer-employee relations, strictly understood, and therefore to exclude from consideration the regulation of both other forms of working relationship, and other rights and interests of the employee (eg rights to social welfare) (pp 2, 8).

sufficient attention to the second element of the project: *explaining* or *describing* the law – or, in the terms proposed by Dworkin, ensuring 'a reasonable degree of 'fit''.[40] The danger arises again that the lack of a tight connection with case law and legislation might reinforce the suspicion, in the mind of the sceptical reader, that Davidov's choice of purposes relies, at base, on personal opinion.

Perhaps an example might serve to illustrate these points more clearly. In the UK, in recent years, scholars of labour law have been greatly exercised by the terms of the Trade Union Act 2016 and the Bill that preceded it.[41] In substance, the Act creates significant restrictions on the ability of trade unions to organise industrial action in a way that is lawful. It greatly increases, in other words, the scope of circumstances in which an employer may be able to seek an injunction to prevent the planned industrial action from taking place. According to the Government, the aims behind the Act were essentially two-fold: to strengthen the democratic accountability of decisions taken by trade unions to organise industrial action, and to lessen the impact of industrial action on members of the public.[42] Many critics of the Act have argued that the intention was, in fact, simply to limit the right to strike in the UK, creating a de facto prohibition of industrial action in some contexts.[43] How might a purposive approach of the type developed by Davidov aid in the interpretation or application of this legislation? How would it help the judiciary, or a litigant, to know that the 'rightful' purposes of collective bargaining law, according to some but not all scholars, are the promotion of industrial democracy, the redistribution of power and wealth, and the improvement of efficiency in production? It is unlikely, I think, that a court in the UK would attempt to interpret the Act *contrary to the stated intentions of Government*, so as to give effect (insofar as was possible) to these latter purposes, unless it could point to a more authoritative source of the relevant legal principles: domestic case law, international or European law, the European Convention of Human Rights.[44] This is, after all, by Davidov's own admission, a

[40] DAVIDOV, 26 and 18, citing DWORKIN, LAW'S EMPIRE
[41] See eg the various contributions to the special issue – (2016) 45(3) – of the *Industrial Law Journal*.
[42] See eg DEPARTMENT FOR BUSINESS, INNOVATION AND SKILLS, TRADE UNION BILL: CONSULTATION ON BALLOT THRESHOLDS IN IMPORTANT PUBLIC SERVICES (Department for Business, Innovation and Skills 2015)
[43] See eg Frances O'Grady: BBC News, 7 Sept 2014 cited RALPH DARLINGTON AND JOHN DOBSON, THE CONSERVATIVE GOVERNMENT'S PROPOSED STRIKE BALLOT THRESHOLDS; THE CHALLENGE TO TRADE UNIONS 2 (Institute of Employment Rights 2015).
[44] For an excellent set of proposals regarding inter alia the 'common law fundamental rights' that courts could draw on when adjudicating such matters, see A Bogg, *Common Law and Statute in the Law of Employment* 69(1) C.L.P. 67 (2016)

'fiercely contested' area of the law, and judges would need a good reason to prefer his opinion of its purposes to that of others, the Government included.[45]

3. Alternative Means of Identifying Purposes

In seeking to develop a purposive approach to labour law, Davidov sets himself a difficult task indeed. As the example of the Trade Union Act shows, it is not always easy to provide an account of a field of law that is at once normative and descriptive. On the one hand, as Patrick Macklem remarks in the course of his discussion of international human rights law, 'an account … of the field should not conflate fact and norm by equating legal validity with moral legitimacy… [B]ut nor should it lose sight of the object that it seeks to describe'.[46] Where a particular legal rule is at odds with what has long been understood to be the role or purposes of the law in that field – for example, because it restricts rather than protects the right to strike – the normative and descriptive elements of an account can pull in opposite directions. If we, as scholars, concentrate on the descriptive, on making our account 'fit' with the law as it is, we might significantly limit the kinds of normative argument that we are able to make. If, on the other hand, we continue to offer arguments that are strongly normative, we run the risk of losing sight of the object that we seek to describe, as Macklem puts it. In this final part of the paper, I give brief consideration to possible alternative methods of identifying labour law's purposes, assessing these against Davidov's ambition of assisting the legislature, the judiciary, and potential litigants in the interpretation and application of the law.

(i) A dialectic of legal analysis and political argument

How have other scholars of labour law navigated the line between descriptive and normative accounts of the law? In my commentary on the work of Hugo Sinzheimer and Otto Kahn-

[45] DAVIDOV, 87. Cf the court's reasoning in *Ford Motor Co. v AUEFW* [1969] 2 QB 303. Here the court famously referred to the scholarly analysis of Otto Kahn-Freund in judging the 'dominant climate of opinion'; however, it also referred to a range of materials that it clearly regarded as more authoritative than Kahn-Freund's analysis, including the findings of the 1968 Royal Commission and the evidence given to it by trade unions and employers' associations.

[46] PATRICK MACKLEM, THE SOVEREIGNTY OF HUMAN RIGHTS 13 (Oxford University Press 2015)

Freund, I have suggested that these authors shared an approach to analysis of the field, which closely combined political argument with legal analysis.[47] As each author described a piece of legislation, or court ruling, he had reference to a particular normative framework which he used variously to make sense of the law, to argue for law reform, and to analyse and critique judicial decision-making. Neither author was concerned that his analysis should be politically neutral but, at the same time, neither ignored nor rejected the terms of the law then in force. Each constructed his normative framework with reference to that law, seeking to identify the underlying principles which could be read or abstracted from it, and used, then, as a basis for analysis and commentary. Significantly, each succeeded (in Weimar Germany, or in postwar Britain) in identifying a set of principles in the legislation which aligned closely with his own political convictions.

For Sinzheimer, as for Kahn-Freund, the ultimate purpose of legal scholarship was to influence policy- and law-making.[48] The role of the scholar was not that of the politician, or the electorate, or the legislator; it was categorically not for scholars to 'tell the legislator which decisions to make in individual cases'.[49] Instead, however, the scholar should provide the legislators, 'with those elements of knowledge which they need in order to make decisions'.[50] The 'elements of knowledge' in question, according to Sinzheimer, were partly of a descriptive or positivistic ('black-letter') nature, and partly historical and comparative. Certainly, it was an important part of the work of the scholar to analyse the law as it then was. It was also the case, however, that positivist analysis could only ever be fully adequate 'in calm periods of history when a certain degree of equilibrium is achieved in the relations between the social forces... [I]n times of sudden change, where the old disappears and the new craves recognition, a purely *technical* insight into the existing legal order is not sufficient'.[51] Then, it was absolutely necessary that the scholar should engage in the

[47] ie similar to each other. This part of the paper draws heavily on RUTH DUKES, THE LABOUR CONSTITUTION: THE ENDURING IDEA OF LABOUR LAW (Oxford University Press 2014), chapter 8
[48] 'The ultimate purpose of jurisprudence is legal policy': Hugo Sinzheimer, *The Sociological and Positivistic Method in the Discipline of Labour Law* (1922), cited by Otto Kahn-Freund, *Hugo Sinzheimer*, in LABOUR LAW AND POLITICS IN THE WEIMAR REPUBLIC 100 (Roy Lewis and John Clark eds. 1981). See further, Kahn-Freund, *Hugo Sinzheimer*, 100-4. Kahn-Freund aimed to play 'a significant role in the practical development of labour law ... according to his social ideals': Mark Freedland, *Otto Kahn-Freund* in JURISTS UPROOTED: GERMAN-SPEAKING ÉMIGRÉ LAWYERS IN TWENTIETH CENTURY BRITAIN 304 (Jack Beatson and Reinhard Zimmerman eds. 2004)
[49] Hugo Sinzheimer, *On Formalism in the Philosophy of Law* (1939), cited by Kahn-Freund, *Hugo Sinzheimer*, 100
[50] Ibid.
[51] Hugo Sinzheimer, *The Sociological and Positivistic Method in the Discipline of Labour Law* (1922) cited by Kahn-Freund, *Hugo Sinzheimer*, 101, my emphasis

construction of normative arguments, offering the legislator guidance, more directly, on the question of what the law should be.

To what evidence, or philosophy, should scholars look, in the opinion of Sinzheimer and Kahn-Freund, when constructing normative arguments? Following Kahn-Freund, I have described the methodology adopted by the two scholars as primarily sociological or socio-legal.[52] This label is not intended, of course, to suggest that the scholars engaged themselves extensively in empirical research, but rather that their normative arguments were closely informed by the work of sociologists and political economists, including Marx, who sought to identify and explain the injustices inherent in bourgeois society and 'bourgeois' private law.[53] From this body of work, labour law scholars gleaned the key insight that the equality of all legal actors promised by private law was illusory; behind the facade of formal equality, vast inequalities persisted. Sociological analysis was the primary method chosen to make the case for labour law: to explain why the application of private law rules to working relationships was unjust, and to identify the kinds of laws which might deliver just and equitable outcomes. The sociology of law, wrote Kahn-Freund, established 'the social effect of the norm, ... the way in which it appears in society and ... its social function'.[54] As such it was 'indispensable' to the task of formulating legal policy.[55]

(ii) Labour law 'in context'

In the postwar era, a new generation of scholars emulated the method of their forefathers, looking now to a growing body of work in the field of 'industrial relations' to inform their analysis of the law. From the critical sociological foundations of the discipline was born a tradition of scholarship aimed at analysing the 'law in context' – with data relating to the nature of that context supplied chiefly by colleagues in industrial relations departments.[56] Of course, industrial relations scholarship too was broadly sociological, or 'multi-disciplinary',[57]

[52] DUKES, THE LABOUR CONSTITUTION, chapter 5
[53] Both Sinzheimer and Kahn-Freund devoted some time to the study of the terms of collective agreements and the significance attached to them by the parties to the agreements.
[54] Kahn-Freund, *Hugo Sinzheimer*, 98
[55] Ibid. 100
[56] Bob Simpson, *The Changing Face of British Collective Labour Law* 21(4) O.J.L.S. 705 (2001)
[57] William Brown and Martyn Wright, *The Empirical Tradition in Workplace Bargaining Research* 32(2) B.J.I.R. 153 (1994)

and characterised, above all, by a preference for empirical methods – fieldwork, case studies, observations, interviews.[58] The basic premise of the 'law in context' approach, as expounded by Bob Simpson, was that detailed analysis and explanation of legal provisions ought to be supplemented with an explanation of the history of those provisions and with analysis of empirical research which spoke to the relevant context in industry as a whole, and in particular sectors.[59] It should be supplemented, in other words, with consideration of the two key questions: How did the law develop as it did? What was the impact, if any, of law and legal change on actual behaviour in the world of work?[60] As to the nature of the 'context' – industrial relations practices, union organisation and membership levels, union and employer objectives, changes in the method of production or the provision of services, including technological changes etc – this should be understood with reference to the 'wealth of valuable industrial relations evidence' that continued to be available.[61]

In his elaboration of the 'law in context' approach, then, Simpson emphasised the importance of history, and of understanding laws as evolving institutions. In directing his attentions at the two questions, how did the law develop as it did, and what was the impact of the law on the world of work, he recognised that changes in the law could be influenced by 'context', just as much as 'context' could be shaped by the law. Any assumption was rejected, in other words, of a straightforward uni-directional relationship between the law and the behaviour of actors in the world of work, the former regulating, or guiding, the latter just as had been intended by Parliament.[62] When identifying precisely what to investigate as constitutive of the relevant context, Simpson was guided by the substance of the legal provisions at issue, the policy aims that had informed their adoption, and, above all, by a normative concern with the effectiveness of the protection of workers' rights and interests, especially rights to freedom of association. As to the *source* of this normative concern, there might be something to the argument that it was simply inherited from the forefathers of the discipline of labour law and, in a sense, taken as read. It is certainly the case that for some readers of the work of Simpson,

[58] Peter Ackers and Adrian Wilkinson, *British Industrial Relations Paradigm: a Critical Outline History and Prognosis* 47 J.I.R. 443, 447 (2005)
[59] Simpson, *Changing Face*, 711
[60] Ibid.
[61] Ibid. 713
[62] Jane Elgar and Bob Simpson, *The Influence of the Law on Industrial Disputes in the 1980s* in NEW PERSPECTIVES ON INDUSTRIAL DISPUTES (David Metcalfe and Simon Milner eds. 1993)

and of similarly minded scholars, the normative commitment to freedom of association and the protection of workers' interests remained under-theorised to a fault.[63]

(iii) Labour Law as Labour Market Regulation

Towards the end of the 1980s, the 'traditional', or 'law in context', approach to the study of labour law met with a significant challenge in the form of the supplanting of Keynesianism by neoclassicism throughout the western world as the dominant economic discourse.[64] The headline message for policy makers and politicians was that labour markets ought to be highly flexible: labour market institutions – individual employment rights, trade unions, collective bargaining practices – constituted barriers to flexibility and to optimal market functioning. Unless responding to a defined set of market failures, so the reasoning went, labour market institutions produced a series of inefficiencies likely to generate both higher unemployment, and depressed rates of economic growth.[65]

Recognising the extent to which this type of reasoning influenced the labour legislation and public policy of the Thatcher Governments of 1979 to 1990,[66] Paul Davies and Mark Freedland began gently to express some dissatisfaction with modes of scholarship that remained primarily focused on trade unions and the principle of free collective bargaining, or collective laissez-faire.[67] As time wore on, such a conception of labour law offered an increasingly misleading description of the law then in force. As an alternative approach, Davies and Freedland attempted instead to develop a mode of description and analysis that was, on the face of it, politically neutral, avoiding openly political criticisms of government policy or legislation.[68] In their study of the legislation and policy of the Blair Governments of

[63] Alan Bogg, *The Hero's Journey: Lord Wedderburn and the 'Political Constitution' of Labour Law* 44 IND. LAW J. 299 (2015)
[64] Cynthia Estlund, *Reflections on the Declining Prestige of American Labor Law Scholarship* 23 Comparative Labor Law and Policy Journal 789 (2002)
[65] See for example, Richard Posner, *Some Economics of Labor Law* 51 U.Chi.L.Rev. 988 (1984)
[66] Lord Wedderburn, *Freedom of Association and Philosophies of Labour Law* 18 Ind.L.J. 1 (1989)
[67] Paul Davies and Mark Freedland, *Editors' Introduction* in KAHN-FREUND'S LABOUR AND THE LAW (Paul Davies and Mark Freedland eds. 1983); PAUL DAVIES AND MARK FREEDLAND, LABOUR LAW TEXT AND MATERIALS 2nd ed (Weidenfeld and Nicolson 1984); see also PAUL DAVIES AND MARK FREEDLAND, LABOUR LEGISLATION AND PUBLIC POLICY: A CONTEMPORARY HISTORY (Clarendon Press 1993)
[68] '[T]he enterprise of writing about labour law and politics is made feasible if one realizes that political scientists can write in an acceptably detached way about politics, as their works (or, rather, the best of them) demonstrate.' DAVIES AND FREEDLAND, LABOUR LEGISLATION AND PUBLIC POLICY. 3

1997-2007, they based their evaluation, for the most part, on the question whether the government had achieved its own stated policy objectives: expansion of the productive economy and the promotion of social inclusion.[69] External frames of reference, including those provided by international and human rights law, were not employed to any great extent. That said, the authors were quite clear that part, at least, of the motivation for employing such an approach – politically neutral on the face of it – was the wish to provide a line of analysis and commentary that might have some 'political impact'.[70] The weakness of criticisms based more directly on human rights or worker protective perspectives was that they were unlikely to be heard.[71]

The approach developed by Davies and Freedland was similar, then, in several respects, to that of Kahn-Freund and Sinzheimer. In common with the older generation, Davies and Freedland appear to have been motivated, in large part, by a wish to contribute to policy, as well as to scholarly, debates. During the period in office of the Blair and Brown Governments, they succeeded in identifying in the terms of government policy and legislation a set of objectives which went some way towards offering an alternative to the 'flexibilisation' or 'deregulation' orthodoxy of the neoclassicists, and which they could approve as setting an appropriate agenda for scholarly investigations. Labour law was now defined accordingly, with reference to the market-focused objectives of maximizing social inclusion and improving the competitiveness of the economy. The advocacy by these scholars of a move away from the old paradigmatic objectives of encouraging the collectivisation of labour and the autonomous regulation of terms and conditions through processes of free collective bargaining did not follow from a rejection of those objectives as no longer desirable *in principle*, but rather from a belief that the old paradigms didn't any longer accurately reflect the policy priorities of government, or the terms of the legislation then in force; that the old normative arguments in favour of collectivisation and collective bargaining were unlikely to be heard by policy- and law-makers.

Judged against Davidov's ambition to create an account of labour law's purposes that was at once normative and descriptive, Davies and Freedland's approach fares well. In the opinion

[69] PAUL DAVIES AND MARK FREEDLAND, TOWARDS A FLEXIBLE LABOUR MARKET (Oxford University Press 2007)
[70] DAVIES AND FREEDLAND, TOWARDS, 248
[71] Ibid. 248, 112

of some commentators, however, it carried with it, as a framework for analysis, the danger of placing quite significant limitations on the kind of normative arguments that scholars could make.[72] As viewed through that framework, arguments that did not speak directly to the Government's own policy objectives appeared – bluntly put – to be not immediately relevant, or persuasive. When compared with traditional, or 'law in context' approaches to the study of labour law, then, the exposition offered by Davies and Freedland was 'remarkable for the way in which non-market considerations – such as the question of whether more, or more centralised, collective bargaining might improve working lives, securing more dignity for workers, or more democracy at work – seemed to lose their force'.[73]

4. Conclusion

Read and enjoyed as a general discussion of the many and various purposes that labour laws might have, Davidov's book is full of interest; impressive, in particular, for the richness and variety of the scholarly sources upon which he draws, and a good way into several important, contemporary debates in the field. In terms of its ambition to develop an account of the purposes of labour law with application across jurisdictions, however – to provide a ''toolbox' for performing purposive interpretation in an optimal way' – the book is, in my opinion, not quite so successful.[74]

In the course of this contribution, I have attempted to illustrate the onerous nature of the task that Davidov sets himself, identifying the purposes, or 'normative justifications', of labour law that can best explain the law as it is.[75] Writing during the early years of the Weimar Republic and in 1950s Britain, Hugo Sinzheimer and Otto Kahn-Freund were indeed able to develop definitions of the field of labour law that were at once descriptive of the terms of the legislation then in force and at the same time strongly normative. Even in those exciting eras of discovery,[76] however, labour laws were, in fact, directed at the achievement of a variety of

[72] Hugh Collins, *Book Review: S Deakin and F Wilkinson, The Law of the Labour Market: Industrialization, Employment and Legal Evolution (Oxford: Oxford University Press, 2005)* 35 IND. LAW J. 105 (2006)
[73] DUKES, LABOUR CONSTITUTION, chapter 5
[74] DAVIDOV, 4
[75] DAVIDOV 26
[76] Bob Hepple, *Wedderburn's* The Worker and the Law*: an Appreciation* 34 HISTORICAL STUDIES IN INDUSTRIAL RELATIONS 215, 217-8 (2013)

policy aims,[77] so that the identification of a set of purposes or defining paradigm for the field involved the emphasis of certain aspects of the law and the deemphasis of others.[78] It involved, as I have put it, a dialectical combination of legal analysis and empirically-informed normative argument: normative principles – and an overarching theory or paradigm of labour law – were read both *from* and *into* the statutory provisions currently in force, and in this way a coherent body of law was identified from a collection of otherwise seemingly disparate rules.[79]

Since those times, new rules, informed by the widely differing policy objectives of different governments, have been layered over old, so that a similar exercise has become infinitely more difficult to complete. At different stages in different jurisdictions, meanwhile, and to a greater degree in some than in others, governments of both the left and right have come broadly to accept neoclassical economic dogma regarding the need for flexibility in labour markets, and to orientate their policy and legislative innovations accordingly. This has added a second element of complexity to the task of developing an account of labour law that is at once normative and descriptive, as rules have come into force which are clearly at odds with traditional notions of industrial democracy, freedom of association, and the legal protection of workers' interests. Those who continue to inform their legal analysis with a normative commitment to such ideals find themselves increasingly at risk of the criticism that their analysis no longer offers an adequate description of the law in force. Those who choose to align their analysis more closely with the policy objective of the government of the day face the different charge, that they thereby limit, quite significantly, the range of criticisms that could be brought to bear on the law.

In pursuit of his ambition to develop a purposive approach to labour law, Davidov pitches his analysis at a level of abstraction that is quite removed from the detail of specific cases or pieces of legislation. In doing so, he proceeds upon the basis of his own belief that 'the basic goals [of labour law] are very similar across time and place'.[80] In my short discussion of Davidov's book, I have provided a couple of examples of labour laws intended to illustrate that his belief is a contentious one. To succeed in his ambition, Davidov would have done

[77] Kerry Rittich, *Making natural markets: flexibility as labour market truth* 65 N.I.L.Q. 323 (2014)
[78] Keith Ewing and John Hendy, *New Perspectives on Collective Labour Law – Collective Bargaining and Trade Union Recognition* 46 IND. LAW. J. (2017), forthcoming
[79] DUKES, LABOUR CONSTITUTION, chapter 8
[80] DAVIDOV, 27

better, I suspect, to limit his analysis to one particular jurisdiction. In order for his identification of the purposes of labour law to have been manifestly objective and authoritative (and, as such, helpful to the legislature, the judiciary and litigants as they engaged in the interpretation and application of the law), it should have been tied more closely to the terms of the law currently in force in that jurisdiction. If scholarly analysis of employment relations and labour markets was to provide the source of the element of normativity to be woven into the identification of purposes, then he ought to have developed a more reasoned account of his choice of *which* scholars, *which* works, to rely upon.