The Principles of Unemployment Law*

Rohan Price

Richard Haigh**

As a result of long periods of unemployment and scarcity in England, Queen Elizabeth I enacted the first Poor Law Acts in 1598 and 1601. For the first time, poverty was recognised as a State concern and, under these laws, the poor, sick and unemployed were taken care of by local governments. This relief was also supplemented by charitable organisations, which remained the primary benefactors of the unemployed until the 20th century.

The administration of relief for most of this period was simple and communal. The Poor Laws gave responsibility for caring for the unemployed, sick or ill to the parish where they had been born. This meant that persons could be deported back to their own parish if they were not productive in another location. The Poor Laws also gave the community the power to force people to work if it was available. Those in need were often known by the locals, and it was easy to keep track of who did, and who did not, have employment. Family and parish responsibilities were strong which meant that nationalised institutions for welfare were unnecessary.

Relief specific to the unemployed was first established in the 20th century, in Britain and Germany, in selected industrial sectors. In Britain, the *Unemployed Workmen Act* 1905 acknowledged that unemployment was something more than a purely personal problem to be overcome by an individual's adaptability or thrift. Contrary to the original philosophy of the Poor Laws, underlying this 1905 statute was a governmental understanding that the problem was social, and one that should be dealt with through social and political action.

A truly national unemployment insurance scheme first appeared in England as part of the project of great social reforms, instituted by the *National*

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* Price, R., 1996, *The Principles of Unemployment Law*, The Law Book Company, Sydney: 168pp.

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Insurance Act 1911. The idea came partly from German investigations that suggested the feasibility of a compulsory, State-organised system. The British scheme required weekly contributions from employers, employees and the State into a centralised fund. This was the first compulsory system of insurance for workers on a large scale. By the middle of the 1950s, most western nations had adopted some form of insurance for the temporarily unemployed, as well as long-term care for the chronically unemployed or unemployable.

Such legislation was never intended to address the problem of unemployment in its entirety, being merely a strand in the web of broad social legislation for the unemployed. The original drafters of the legislation understood that any systematic attack on social problems, such as widespread unemployment, required a commitment of the State to ensure full employment or sustenance.[1]

Most unemployment insurance schemes were initially designed to bridge the period between jobs for workers unable to immediately procure suitable employment. In order to qualify, claimants generally needed to show that they had been employed for a specified minimum period prior to the date of unemployment. Because of this underlying rationale, the total amount of benefits allowed, and their duration, were also regulated.

Financial stability of these types of programs depended to a large extent on a secure labour market and low unemployment rates. This ideal was short-lived, however, as rates of employment became unstable during the 1970s. During this time, most countries were forced to reduce benefit periods or increase contribution rates in order to maintain their programs. Government awareness of so-called 'malingerers' or 'welfare bludgers' led to the creation of conditional benefits, contingent upon recipients showing they were making reasonable attempts to obtain employment.

More recently, most industrial nations have retrenched many of the earlier benefits, as unemployment insurance is perceived as an unaffordable luxury in times of fiscal restraint. In many countries, unemployed but able workers

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[1] See Bruce, M., 1972, *The Coming of the Welfare State*, BT Batsford, London, 199-200.

are now forced to undergo retraining programs, or even forms of government 'work-to-earn' programs, where in order to qualify for entitlements, they must perform some type of community service work. All this stems from a legacy of lessened government intervention and greater individual accountability, largely established during the Reagan and Thatcher years.

Current official Australian statistics show that almost 10% of the population is unemployed. Many contend that these figures grossly misrepresent the true picture by ignoring the numbers of chronically unemployed, the underemployed,[2] and those working in households[3] and raising families, who do not figure in government calculations. Realistically, over two million Australians are today affected by laws relating to the unemployed.

With numbers so high, one would expect courses on unemployment law in the law schools of the country, but very few faculties in Australia offer such a program, and none of them are mandatory. Compare that to the numbers of individuals in society directly affected by contract law, tort law or equity and trust law - all mandatory courses which a law school must provide in order to qualify for status with state law societies. Simple arithmetic alone should convince most that this area deserves to be included in a law school curriculum.

There is also a need for legal academics to develop expertise in this area, to understand the impact of the wide variety of legislative programs enacted, and to understand the theory and principles behind the treatment of the unemployed.

Rohan Price's book, *The Principles of Unemployment Law,* is an attempt to appraise the current state of the Australian legal system as it relates to the unemployed. The book traverses a number of areas including the origins of unemployment law, the criteria of entitlement in Australia, the formation and application of the laws under the Administrative Appeals Tribunal, recent regulatory changes in dealing with the unemployed (such as case

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2 Meaning those working at part-time jobs, or jobs for which they are over-qualified, due to the lack of available work at their level of skill.

3 The vast majority of these being women.

management) and the theory of unemployment laws. Unfortunately, the book provides neither a comprehensive overview nor a thorough critique of this area of the law.

Two of the main complaints are the book's organisation and writing. As a whole, it seems to be in preliminary draft form. It is in need of a thorough review and edit, for which the publishers must take some of the blame. Price uses headings and subheadings throughout, which should guide the reader through the text. In many cases, however, the headings have no relation to the idea being conveyed. This problem is carried through to a more basic level, where paragraphs often have no unifying idea or are not given topic or thesis sentences. In addition, there are many errors of grammar, syntax and spelling that detract tremendously from the presentation of the argument. Price also has a habit of using colloquial language, or employing reductionist arguments that would offend most sceptical readers. This polemical style works in some areas, but not in a serious academic work, especially without appropriate referencing. Following are a few of the many examples where the language is unclear or colloquial, statements are inadequately referenced, or arguments are poorly reasoned:

> Members of our society are encouraged by the process of government to identify with their particular interests of gender, age, race or ethnicity and to form a group which engages in competition with other interest groups for the law's protection, compensation and deliverance. Governmental altruism in areas outside social security is in decline, as the government itself is increasingly organised and justified by the "bottom line" concerns of capital.[4]

> The public service role of government, and the equality of access it allowed, is in decline. It can be added, with irony, that the bus is not late. It just is not coming, because only three people wanted go [sic] to utopia.[5]

> Even the most dubious aspects of Australian industrial relations have only been given a minimum of critical regard ...

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4 Price, R., 1996, *The Principles of Unemployment Law*, The Law Book Company, Sydney, pp. 18-19.

5 Id at 130.

> Encouraging the non-recognition of collective interests and their representation is also a typical ploy [of employers]. A strike is met by the employer's acceptance that the workers are repudiating their contracts, the strike becomes the gravest and most dysfunctional misconduct imaginable. The employer's termination of employment is accompanied by their replacement with more pliant workers. These workers have not been chilled in the dole queue, as they were in the 1930s, but numbed by the endless accountancy of their unemployment.[6]

Although Price recognises that a theory of unemployment is ultimately tied to a theory of employment, he does not provide a basic assessment of Australian laws governing employment. There is no logical structure to the book, and therefore no systematic description or assessment of the laws that affect the unemployed.

Determining where responsibility for the unemployed lies depends on how one characterises the relationship between the State and its employees, and particularly on whom the burden of worker dislocation should fall. If it rests with the employer, a different conclusion will be reached than if it is on the employee or the State. Statutory provisions governing termination of employees therefore shape the form of unemployment. As an example, if an employer were required by statute to give one year's notice for each year of employment, the unemployment landscape would be vastly different. The prevailing ideology thus determines the substance of laws enacted.

The methods by which unemployment schemes are funded can also vary. Plans can be administered out of general income and other taxation revenues; they can be created out of employer or joint employer/employee payroll tax contributions; or they may be a hybrid of the two. As most worker-contributed funds are capped at some maximum, funding formulas that utilise general revenues or are linked to employer contributions are more progressive than those requiring employee contribution.

Given the obvious relation between Marx and labour, the absence of a Marxist analysis of unemployment law is a glaring omission in this book.

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6 Id at 132-133

The Marxist notion that our relations of production constitute the real foundation of society, and thus derive our cultural and institutional forms, should inform any analysis of the principles of unemployment law. Less complex societies have always had to endure poverty, but the paradox of poverty in the midst of plenty is unique to the industrial age, and the idea of individual responsibility for unemployment, running throughout the concept of our unemployment laws, necessitates some form of critique along these lines. In addition, there is ample evidence that work and, by implication, its absence, are crucial elements in determining the general degree of social cohesion, the nature of state ideology, the state of health, the condition of family life and the forms of social control employed in modern society.[7] None of these connections are discussed or referenced to the current state of the law in Australia.

Deferment or disqualification of benefits is another major issue, but one that is only touched on in Price's book. There is no analysis of the use of deferment rules as another form of exploitation of the unemployed. Other commentators have argued, persuasively, that the concept of deferral should be abolished because existing external sanctions, such as the criminal law, already act to dissuade workers from engaging in behaviour covered by the deferment provisions. In addition, the lack of principled decision making in this area makes the concept too plastic to provide proper guidance.

In the final chapter of the book, Price attempts to develop a unifying theory or philosophy of unemployment law. The idea is challenging; unfortunately, it is not as fully realised here as it could be. Price seems to be attempting to create a link between society's treatment of prisoners convicted of a criminal offence, and the 'entrapment' or 'ghettoisation' of the unemployed. This notion was expressly fostered by the State during the time of the Elizabethan Poor Laws and the forced location doctrine. Arguably, many of our present-day laws continue this tradition, both overtly and covertly. Examples include so-called 'status' offences in many criminal codes, property offences such as theft and trespass, laws of defamation, intellectual property rights and police and prosecutorial discretion which is exercised overwhelmingly against certain classes, including the unemployed.

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7 See Windschuttle, K., 1979, *Unemployment: A Social and Political Analysis of the Economic Crisis in Australia*, Pelican.

However, Price is guilty of the most blatant reductionism in this section. In two paragraphs he determines that post-modernists have nothing to add to the understanding of unemployment, stating:

> Post-modernism, considering its emphasis on paternal power relations, the media, the centrality of citizenship and social control, does not possess an explicit framework for reasoning. Artfully explaining obvious terrain seems to be post-modernism's stock in trade.[8]

Even the most sceptical non-believer in post-modernist theory deserves a more fully reasoned, and referenced, critique. Another two paragraphs outline all of feminist analysis in this area, and a further two paragraphs provide the Aboriginal perspective on unemployment law. Simplification of this sort does a disservice to the complexity of legal analysis from any perspective.

In the same chapter, the argument is made that no system of unemployment insurance should be fault-based. The argument proceeds along similar lines to those used to promote no-fault accident insurance schemes - that it is not fair or just to disentangle the individual from the myriad causes that lead to an accident, including the proliferation of technologies, machines and societal pressures that all impact upon the individual. Price reasons that unemployment laws should be modelled along similar lines. He leaves open the issue of how to reconcile this concept with his earlier analysis of unemployment in terms of criminal law concepts, where fault has long been necessary to establish criminal liability. It is not clear whether he is simply describing an alternative mode of analysis, or whether he is advocating abolishing fault-based determination as a means of assessing qualification for unemployment benefits; if the latter is the case, this is a welcome development.

The book is also deficient in failing to address hard issues surrounding unemployment. For instance, what should a legal system do with those who do not live up to the expectations generated by government welfare? Why are stay-at-home mothers not entitled to unemployment benefits, or even a guaranteed government salary for 'working' to raise a family? Or more

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[8] Fn. 4 at 116.

generally, does the classification and characterisation of the unemployed under our system relate to the economic rules used to analyse the marketplace?[9] Or how, as Price argues, can we create more interesting jobs that will sustain productivity?

The consequences of technological developments both on levels of unemployment and the desirability or interest of a job is another area where the law can play a role. We should not automatically accept that mechanisation and automation, usually considered signs of progress, are net benefits to society. They are also real causes of unemployment, impacting greater on lower skilled workers in both the manufacturing and service sectors. For example, the retailing and insurance industries once recruited young and minimally qualified persons, trained them and set them on lifelong careers. Now computerisation allows companies to take in a smaller number of the top graduates from universities, and create many menial white collar positions with little prospect of longevity or career advancement. How should our legal system develop in response to these concerns? The book is silent in this area.

In the end, it is hard to recommend this book. This area of law is in drastic need of serious research and inventive ideas, if only to guide governments toward a greater understanding of the consequences of current strategies for the unemployed and outline the availability of constructive alternatives. *The Principles of Unemployment Law* is a small first step in conceptualising some of the legal and policy areas that affect the unemployed, but its journalistic style, corrupted and at times incomprehensible prose, and simplistic analysis, leave much to be desired.

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[9] This view has been detailed by the New Zealand economist, Marilyn Waring, whose ideas are notably absent from this book.