A Meditation on Riccardo's *Minimal Remarks on the Concept of Work*

Brian Langille

In this brief paper, I offer a 'reading of' – a 'meditation upon' – Riccardo's very brief paper 'Minimal remarks on the concept of work'[1]. It was the last paper he sent to me. I was in Nova Scotia, and it was mid-summer of 2021. My reply was my last substantive academic exchange with Riccardo. My reply was minimal. But Riccardo's paper never really offered 'minimal remarks». Brief, yes. But minimal? Riccardo? Never. Riccardo's remarks were always learned, rich, full, and provocative. In a word, 'wise'. The opposite of 'minimal'. Here I revisit and try to enlarge and improve upon my initial reading and minimal reply. Riccardo's paper is indeed brief – just over 1,000 words. This allows me to take an academic risk and offer my meditation interstitially. That is, my remarks are in the form of marginalia with my comments interspersed in his text. This has at least the advantage of letting you, the reader, see Riccardo's paper in full.

Riccardo's original paper is set out in full and in bold Italics like this – with my remarks interrupting his text, in this font.[2]

[1] Riccardo del Punta, 'Minimal Thoughts on the Concept of Work', (Labour Law Community) <www.labourlawcommunity.org/international-community/minimal-remarks-on-the-concept-of-work>

[2] And – all footnotes are mine.

Brian Langille, University of Toronto, Canada, brian.langille@utoronto.ca, 0000-0002-8310-3181

Referee List (DOI 10.36253/fup_referee_list)
FUP Best Practice in Scholarly Publishing (DOI 10.36253/fup_best_practice)

We start here:

The literature on the issue of defining the meaning and value of work highlights two main tendencies. Here Riccardo is drawing a large map of the current state of play, the 'tendencies' – to use his term – in the literature about work. He draws a borderline on his map – between writings pointing to the end of work, and writings exploring the expansion of work:

The first tendency is preconizing the end of the work-based society. The most important proposal, in this respect, is that of the Universal Basic Income. But to mention another even more radical one, there is the idea advanced by the Italian philosopher Maurizio Ferraris ('Scienza nuova. Ontologia della trasformazione digitale»), on the basis of which the 'work' of the future should be considered the activity which each of us performs daily by uploading data on the web. According to Ferraris this activity should be remunerated through a 'mobilization salary'.

The second tendency entails the widening of the definition of work, which means that, while work is in danger of being resized from the outside, at the same time it is trying to regain space by expanding conceptually. So, now we have two territories on Riccardo's map clearly set out. But this last sentence is an interesting and complex one. Here the two tendencies (end of work vs. expansion of work) are 'mapped onto' another distinction – the distinction between external 'real world' forces in play (bearing upon, and leading to the end of, work), as opposed to work's internal conceptual space (its 'definition') which opens the door to expansion of work.

Let me focus on this second trend. Here Riccardo drops, or appears to drop, the 'end of work/external forces' story – and moves to the 'expansion of work/internal conceptual' story. This prompts some thoughts and results in some large questions: What is the relationship between the empirical world of work, on the one hand, and our (legal) conceptual understanding of it, on the other? Is it possible to separate the internal and external worlds of work? Or are they joined together? Inevitably intertwined? Or is one 'prior'? If so, how? These are rather important and difficult questions.[3] It will become clear, as we read his 'minimal remarks', that Riccardo offers maximal answers.

These questions turn out to be not only very deep but also pressing and practical. Although perhaps not obvious at first blush, a lot depends on the answers we provide – including much-discussed issues about the 'coverage' or 'scope' of the law of work – and this is the 'direction of travel' of Riccardo's paper.

We can start with some observations about law. Riccardo was both a labour lawyer and a sophisticated legal philosopher. I believe he would agree with the following observations.

In the world, as we find it, and have thought about it for some time, law has to do with legal systems within states which govern the relations between citizens,

[3] I discuss some of them in Langille 2024. As we shall see, Riccardo does not drop the external story altogether – he returns to it in his explication of the history of thinking about the law of work.

as well as between citizens and their government,[4] which reasonably comply with the demands of the rule of law. That is, the legal system is not a set of irrational and arbitrary demands backed simply by brute power but, rather, a human creation which demands and aspires to (and occasionally comes close to achieving at least in part) a fairly generated, knowable, general, rational, reasonably stable, impartially applied, set of structured and authoritative laws which respect, protect, and promote the equal liberty and dignity of all. In this view, law is inherently relational (Ripstein 2019, 15): It is about our relations with each other; it is about how we live together. For the law of work to be law, it must be part of this grand enterprise. And to be so, work law must have a knowable and rational legal structure governing what we, somehow, know is work.

Herein lies the first deep truth implicit, at this point in Riccardo's paper: The knowable and rational legal structure required to have a 'law of work' will not only need to make legal sense of what we already know is work but in so doing also tell us what work legally is. That is, how work is to be carved out as a legal subject matter and made sense of and described in legal terms. In other words, law will not only fit what work is, but also shape and create work.

Simon Deakin and Frank Wilkinson offer an exploration of these basic ideas in their very important book, *The Law of the Labour Market* (Deakin, Wilkinson 2005):

> Legal concepts consist of abstract categories and formulations which make up the building blocks of legal discourse; as such the provide an epistemological frame of reference, a 'cognitive map' of social and economic relationships. (Deakin, Wilkinson 2005, 3)

It is certainly true that other 'cognitive maps' with their conceptual building blocks, been available to enable us to legally describe and capture the situations of workers in their relations with those with whom they interacted – feudal status relations, slavery, authoritarian/military, forced labour, relationships under the English Poor Laws, master and servant law, and so on. With the emergence of industrial societies and markets in labour (the emergence of wage labour), came the law of contract as the new and dominant legal account of many workers and those with whom they interacted. As Deakin and Wilkinson write, 'The idea of a 'labour market' implies not just competition and mobility of resources, but more specifically the institution of 'wage labour' and its legal expression, the contract of employment' (Deakin, Wilkinson 2005, 1).

This is the intellectual terrain Riccardo is traversing in his paper. He is about to unite the legal and the empirical – and to show how a certain morality, inherent in the legal, is the driver of changes in our legal/empirical cognitive maps.

Riccardo continues in his assessment of the second, expansionary/conceptual trend as follows: *It is true that labour law – taken as a cultural discourse – has never really tried to conceptualize work. But this happened simply because it did not need to*

[4] And between governments of different states as well.

do so. In fact, labour law has been, since its origins, the law not of all workers, but of a specific category of worker, the employee of the industrial sector produced by the Industrial Revolution. The worker of Karl Marx, and before him, Adam Smith. This is a broad set of interlocking claims – one to which other scholars may take analytical exception, particularly in its reading of Marx (Perulli 2022, 305). But as a general description of the mindset of labour lawyers, at least in the Global North (*contra* Routh 2023, 177), it resonates deeply. Riccardo is displaying here a deep understanding of the cultural assumptions of labour lawyers – those things which go without saying simply because they are reflecting back the cognitive map which makes it currently possible to say anything at all about the law of work. As I read Riccardo, he is here not making a normative claim about what labour law should be – rather, he is offering an (accurate) empirical observation about the standard understanding shared by practitioners of the discipline. It is a familiar and dominant story about subordinate employees with identifiable employers, and all the rest. On this story, this cognitive map (which I have called elsewhere labour law's 'constituting narrative'; Langille 2006, 13) labour law's empirical reach, its legal/conceptual framework, and its morality are all tied up in a very neat (and, again, familiar, dominant) package. The result of this is that, as Riccardo had just pointed out, the need for further theorizing of work was unnecessary simply because it had already happened. Without thinking about it.

But, in a sense, (does Riccardo mean 'in a sense' or 'in truth'?) *the overlapping between labour law and the area of subordination* (note the ease with which the keyword 'subordination' is inserted here for the first time) *came from even further afar, that is – as Robert Heilbroner wrote in a beautiful paper titled* 'The Act of Work' *– from the original identification between work and submission.'* The word 'beautiful' is a wonderful, unusual, and under-used, academic compliment. Thanks to Riccardo, I have tried to use it since, when warranted. And Riccardo was right – it is, typically of Heilbroner, a beautiful paper. One I had never heard of.[5] Riccardo summarizes Heilbroner as follows

Work, Heilbroner argues, was lacking in primitive societies where there were activities and struggles for survival, but not work as it later became known.[6]

Work was a consequence of property which allowed a minority of people – including the free citizens of Athens and Rome – to restrict free access to natural resources and impose slave labour on others.

Even though work has broken free from the extreme forms of submission that characterized slavery and serfdom in the past, the structuring of work through a relationship of dominion and submission has also remained in the scenario of the first Industrial Revolution, to the point that Marx would have spoken of the proletariat

[5] Perhaps because of its origins as a 'key-note' lecture to, later published as an 'Occasional Paper' by, the Library of Congress, see Heilbroner 1985. I wonder how Riccardo found it. Was he an old fan, as I am, of Heilbroner's deep but very accessible work? It seems so.

[6] See also Hart 1961, 89, making the parallel point about absence of law in such societies. Work and law emerged, and merged, at the same time.

as a 'modern slave'. This is the basic move which Heilbroner makes – 'Work is a consequence of property'. Of course, he was speaking as an economist, and was, and is now, not alone in making it. The ability to exclude others from resources (and thus the opening up of the legal space for inequality in, and of access to, resources) is an idea which lies at the centre of the legal idea of property (Essert 2024) and is also at the heart of the *economic* matter.

As Adam Smith put it:

> It is not, however, difficult to foresee which of the two parties must, upon all ordinary occasions, have the advantage in the dispute, and force the other into a compliance with their terms. The masters, being fewer in number, can combine much more easily; and the law, besides, authorizes, or at least does not prohibit their combinations, while it prohibits those of the workmen. We have no acts of parliament against combining to lower the price of work; but many against combining to raise it. In all such disputes the masters can hold out much longer. A landlord, a farmer, a master manufacturer, a merchant, though they did not employ a single workman, could generally live a year or two upon the stocks which they have already acquired. Many workmen could not subsist a week, few could subsist a month, and scarce any a year without employment. In the long run the workman may be as necessary to his master as his master is to him; but the necessity is not so immediate. (Smith 1976, 74-75)

The important point Heilbroner makes – and Ricardo is bringing into view – is, now at least, also at the heart of the legal account of the role of property in the evolution of modern labour law. While Heilbroner was not a lawyer, he did understand the basic conceptual idea at the core of the private law of property. His economic account can now be seen as parallel to important legal writings which articulate a compelling legal (as opposed to a political/economic/social) story about the emergence of our modern public, largely statutory, law of work. So, as Essert wonderfully shows in his extended treatment of the relationship between the private and public law of property, one result of private property (not a chance or coincidental result – but one brought into the world and made possible by private property) is homelessness (Essert 2024). Homelessness is not possible without private property rights (to exclude others). Homelessness is an internal (to private law) and systematic problem: It is not caused by any particular private property owner legally excluding any particular other person from their property but, rather, a problem caused by the 'normal' and systemic operation of this (our) private law of property. CB MacPherson made this wonderful point in the labour law context in his forceful repudiation of Milton Friedman's defence of markets in labour (Macpherson 1968). Milton Friedman celebrated the freedom that contract made available to all workers because it guaranteed the freedom not to enter any particular contract (with any particular employer). MacPherson exposed this as a very clumsy and obvious sleight of hand. The workers' problem is not that they are forced to enter any particular employment contract with any particular employer; it is that they do have to enter an employment contract with some employer. A very sophisticated and nuanced version

of this line of thinking is, famously, to be found in GA Cohen's 'The Structure of Proletarian Unfreedom' (Cohen 1983). This is just the same problem that Essert's analysis of homelessness reveals. It is the systematic and 'standard' exercise of private law, in this case, contract rights in a world of private property, that is the source of our problem. To this woe, our public law responds.

Now comes Riccardo's critical move – from this point about the link between property and our idea of work – to the dominant but limited view of labour law, which he is bringing into view so that we can see what we need to do – abandon it. The concept of work we have been deploying without thought, driven, and made possible by the legal institution of 'property', is fundamental to our mental picture of the world of labour law – as well as the moral dilemma which is, as a result, seen to lie at the centre of and dominate labour law thinking.

Riccardo puts it this way: *This restricted the cognitive horizon of the rising labour law, whose core mission became that of compensating the inequality of power inherent in the employment relationship, which excluded from the scope of the discipline a number of work activities that could not be traced back to a relationship of dominion and submission. The most evident example is that of self-employed labour.* This is all very familiar (although expressed here in a very compact form.) This is labour law's 'constituting narrative' (Langille 2006). And in my view, and I believe in Riccardo's as well, this familiar narrative is labour law's biggest problem. (It's all about ameliorating power imbalances, made possible by the institution of private property, in the negotiation of contracts of employment.) This narrative is the object of Riccardo's concerns and critique. It is where these 'minimal remarks' arrive – with maximum speed and efficiency.

But look at what follows – a wonderful mental pirouette – to the idea that within the basic logic of bargaining about work in a world of private property, i.e., bargaining about the sale of your labour in conditions of inequality (as Smith described) has, contained within it, the seeds of a challenge, and of its own undoing:

In the meantime, however, the fact that labour was performed under a contract, even though only apparently free, introduced the dimension of freedom and equality into this relationship. An almost non-existent dimension at the beginning, but which has progressively broadened also thanks to the action of labour law, both legal and collective.

And look at what comes next: Riccardo makes a further double leap. He does not content himself with the usual observation that these ideas of freedom and equality must lead to concerns about the content of the contract of employment but goes further and insists that they undermine the very idea of limiting the values of freedom and equality to those who are lucky enough to have such a contract, i.e., employees. That is, these values inherent in our legal account of work also undermine current views of labour law's scope. This is an explosive idea. And Ricccardo is saying that the explosive materials are baked into the familiar narrative which they will destroy. He writes:

This has produced long-term dynamics, which has highlighted, in the eyes of today, a contradiction in the dominant paradigm. This has to do with the growing awareness that limiting the scope of labour law to the employee is not acceptable, as

it contradicts the inspiring values of the discipline which require us to look at whatever work situation which is worthy of protection. This is a vital move – that our concerns about both the content and scope of our labour law sound in the same fundamental values. The ease with which he makes this assertion can only be understood by reading what follows – about the ideas of real human freedom (as articulated by Sen and Nussbaum) being the normative bedrock of our labour law. This, then, is a remarkable paragraph. But we need to read on, to where we can see Riccardo constructing his argument, but coming from the other direction. That is, not from the point of view of the inherent weakness of the standard view of both scope and content, but from the power of the fundament normative values of freedom and equality themselves, which the idea of contract itself introduced, almost without notice, into the basic legal account of labour law.

For Riccardo, the undoing of the standard view, what he has just labelled 'the contradiction in the dominant paradigm' is an 'inside job' – the result of a Trojan Horse which already had entered the walls of the citadel of labour law. Once its contents are deployed, its impact is destructive of both the dominant paradigm's account of labour law's content and scope. And this is all in virtue of its own internal conceptual resources.

Recall where Riccardo started: with his two distinctions which he then mapped onto one another (external/real world + end of work, on the one hand, and the internal/conceptual + expansion of work, on the other). We are now approaching the payoff which flows from these insights. The melding of legal concepts and reality has consequences. Law brings its own, surprising for some, resources to the table.

Riccardo begins, in the next paragraph, with the expression of one the most beautiful of cri de Coeur for the future of labour law:

The need thus emerges to eradicate the exclusive reference to the situations of subordination and get the concept of work back on its feet and centred around the person who works and his/her needs.[7] This is a beautiful bit of writing – the idea of getting the idea of work 'back on its feet' is simply wonderful. But, critically, the way the idea of work 'stays on its feet' is by finding its centre of gravity in 'the person who works and his or her needs'.

We need to pause here and take stock of the vision of labour law Riccardo has seen, and is urging all of us to imagine, as labour law's future. It is very powerful. It is very important. This is a deep version of an idea which is sometimes lightly bandied about in labour law circles of what has been called a human-centred labour law[8]. Riccardo aims to take that notion very seriously indeed. For Riccardo, at the core of labour law are human beings. (This reminds me of Polanyi's insight – 'labour' is just a technical term for human beings'; Polanyi 2001, 79).

[7] (Emphasis added).

[8] See e.g., *Work for a Brighter Future: Global Commission on the Future of Work* (Report of the Global Commission on the Future of Work, ILO 2019) <https://digitallibrary.un.org/record/3827525?ln=en> accessed 23 November 2023

Riccardo then begins his direct and substantial assault on the dominant understanding of labour law. Having used his Trojan Horse to breach the citadel he now unveils the full potential of the intellectual and normative resources which have been smuggled in and waiting to be revealed. He starts with a question and an answer: *But which features and needs of the person must be taken into consideration? In my view, the most complete and flexible instrument of knowledge to answer this question is the capability approach developed by A. Sen and M. Nussbaum*[9].

Riccardo then offers a very compact account of their thinking: *Every person is looked at through this lens in relation to their welfare, but such welfare not only depends on possession of given resources, but essentially on the number and quality of capabilities allowing that person to achieve the sort of functioning they have reason to value*[10]. This is the basic normative move – to the Senian ideas of substantive human freedom and capabilities. And one which I along with Riccardo, endorse (Langille 2019, 122).

The purpose of regulatory action (I return to the significance of this phrase below) *should therefore be that of promoting the greatest development of capabilities – or substantive freedoms – at work, in order to give the largest number of people the chance to live a meaningful work experience.*

In this perspective, which is inspired by the value of impartiality strongly emphasised by Sen, all forms of work are important, simply because all people and all situations of deficiency of capabilities, at work as well as in other contexts, are important.

This premise tends to develop under several lines of reasoning, but which have in common the fact of entailing an expansion of the protective discipline. Here Riccardo returns to his opening words and to his map of the two dominant tendencies in current debates – the end of, or expansion of, work. We are now in a position to understand how expansion does and must occur. Riccardo shows what is at stake using concrete examples of the need for, and (sometimes) reality of, expansion beyond the standard understanding of the scope of labour law:

One of these lines descends from EU law, whose various definitions of worker tend to go beyond subordination in the strict sense. To give a small and very peculiar example, in Italy the honorary judges were not considered workers, but a decision of the EU Court of Justice has stated that the fact that these judges are defined as 'honorary' by law does not rule out that they are, first and foremost, workers, and as such, holders of rights.

Turning to another aspect, in this perspective, the extension of labour law to the area of self-dependent work is out of question. Here is a tricky point of reading – I take Riccardo to be saying that the extension which was impossible on the old view of subordination is now perfectly beyond questioning. That is a rather basic extension – but Riccardo goes further:

But in more general terms, focusing on the person who works leads to a concept of work that goes beyond those activities performed to earn a living. Of course, this kind

[9] (Emphasis added).

[10] (Emphasis added).

of work is the norm, but other activities can be defined as work too, provided they fulfil a condition of social recognition.[11] This is an interesting assertion – what does Riccardo mean? I am uncertain. He is seeking a way of understanding work as a sort of 'activity' – but is looking for a way of limiting or defining it – of carving it off from other 'activities', which might be closely related in some way, but are not work. Further, he seeks a dividing line which does not rest upon a distinction between those activities undertaken 'to earn a living', and those not. Some activities on the far side of that line are within, and some are out of, his zone of concern – 'work'. Perhaps he has in mind other human activities involving exertion of talent and energy but which are not work (writing poetry for one's own enjoyment?). He deploys the idea of 'fulfil(ling) a condition of social recognition' to draw his distinction and he provides a few examples of where this way of thinking and proceeding takes us:

For instance, voluntary work, which is performed for social solidarity, is undoubtedly work and must be treated as such.

The conditions of social recognition are certainly fulfilled by care work too, which has been conceptualised (by Nicole Busby, 'A right to care? Unpaid Work in European Employment Law') just on the basis of the capability approach.

Is this a useful way of proceeding? Or, is this to make an argumentative move we should avoid (an unnecessary methodological move about how to think about the scope of our labour laws)? I think Riccardo could have used more time at this stage – and a longer paper (which he was not writing). Here is the point I am after. (And how I wish Riccardo were still here to discuss it.) Above, I paused briefly to say I would return to Riccardo's words *'the purpose of regulatory action'*. I need to do that now. The point I am after is that these words, especially the word 'purpose', are all we need, and where the action is, in finding the answers Riccardo here seeks. I think he seeks the answer in the wrong place – in the real world. I say we need to seek them not in the world, but in our law – in the purposes of our laws.

My point here is, perhaps, best seen as urging Riccardo to stick with his initial insight that the expansionary movement is a conceptual one, not an empirical one.

But Riccardo then writes as follows: *However, these remarks do not entail any automatic extension of traditional labour law to the other situations of work in a broad sense. Different forms of work require different protections, and therefore different regulatory techniques, which naturally involves the role of the State as well (e.g., as regards an eventual remuneration of care work).* Here I think Riccardo is much closer to the point I am making. We need to disaggregate the various parts of our labour law, with their various purposes, and see that there is no such thing as an 'automatic' extension of it. Scope of application and new extensions are the result of the rational application of our various labour law purposes to the world as find it. The causal arrow flows from the law to the world (Langille,

[11] (Emphasis added).

Mayer-Goodman 2023). Not the other way around. Seeing that is the key to an understanding of the scope of our labour laws.

Does this solve all of our problems? Of course not. But it clears our path of some serious intellectual obstacles which we ourselves had placed there.

Riccardo had it right:

The challenge for labour law is very demanding.

This is true. But, thanks to Riccardo, we now can see, in the world as we now find it, what the demanding challenges really are, and why. I close with the following thought. What Riccardo has accomplished is the opening of a door for labour law and labour lawyers to pass through. If and when they do so they will be in a position to fully understand labour law's role in a grand project, one which is familiar to Italians:

> It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country[12].

I am not a scholar of the Italian Constitution. But I am a labour lawyer who believes, as did Riccardo, that Sen's ideas about human freedom offer a way forward to the construction of a broader and deeper law of work. I read these words as a constitutional endorsement of just this project. It is also beautifully (to echo Riccardo's use of that word) Senian in its articulation of the methodology the project requires – that of 'remov(ing) obstacles'. This is very much Sen's pragmatic way of proceeding. Sen's articulation of our overall goal, and his methodology, offer the best way of seeing, uniting, and advancing all of the purposes of the various elements of our labour law – health and safety, discrimination, freedom of association, and all the rest. What we can then see is a more coherent, more morally salient, and expanded law of work. That is the destination to which Riccardo has taken us in this remarkable, indeed beautiful, little paper.

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